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THE
ATLANTIC REPORTER,
VOLUME 54.

CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Supreme Court, Court of Chancery,
Superior Court, Court of General Sessions, and
Court of Oyer and Terminer of DELAWARE;
and Court of Appeals of MARYLAND.

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ALSO, ADDITIONAL TABLES FOR VOLS. 74, CONNECTICUT REPORTS; 95, MARYLAND REPORTS; 71, NEW HAMPSHIRE REPORTS; 68, NEW JERSEY EQUITY (18 DICK.) REPORTS; 203, PENNSYLVANIA REPORTS; 23, RHODE ISLAND REPORTS; 74, VERMONT REPORTS.

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JUDGES

OF THE

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¹ Resigned July 1, 1902.

² Became Chief Justice July 1, 1902.

² Appointed July 1, 1902.

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WILLIAM S. GUMMERE, CHIEF JUSTICE.

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CLARKE H. JOHNSON. [†]	

* Resigned January 13, 1903.

† Appointed January 20, 1903.

* Resigned February 17, 1903.

† Became Judge April 30, 1903.

JUDGES OF THE COURTS.

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ASSOCIATE JUDGES.

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LOVELAND MUNSON.
HENRY R. START.**

**JOHN HENRY WATSON.
WENDELL P. STAFFORD.
SENECA HASELTON.**

•

COURT RULES.

SUPREME COURT OF NEW HAMPSHIRE.

May Session, 1901.

TERMS AND SESSIONS.

1. After 1901, the general term will begin on the first Tuesday of January in each year.

2. Upon the first day of each monthly session the court will come in at 11 a. m.; upon subsequent days at 10 a. m., unless otherwise ordered.

ENTRY OF ACTIONS.

3. No case will be entered until fifteen printed copies of the reserved case, bill of exceptions, petition, or appeal, shall have been filed with the clerk and the entry fee paid him.

The case should state succinctly all facts necessary for a decision of the questions of law transferred. All documents, records and notes of testimony made a part of a case should be printed, and copies of all plans referred to in the case should be annexed thereto, unless the presiding justice, for good cause shown, otherwise orders. Stenographer's notes of testimony should not be made a part of the case unless there is special necessity for it.

COPIES, BRIEFS, ETC.

4. Said copies and all briefs, copies, and other papers furnished to the court by counsel shall be printed on one side only of half sheets of paper, as near as conveniently may be 8x10 inches in size, with a filing stating the case, the nature of the paper, and the party and counsel furnishing the same.

5. The clerk will enter upon the copies the date of the entry of the case and its number, and will distribute them to the justices, counsel, state reporter, and state librarian.

6. Briefs, to be of service, should be furnished in thirty and forty-five days after the case is entered—the party moving the transfer, or in case of a transfer without a ruling, the plaintiff furnishing his brief first. A copy should be sent to each justice of the court, each of the opposing counsel, the state reporter, and the state librarian, and five copies should be filed with the clerk of court, together with a certificate showing what copies were sent as above stated and when.

ORAL ARGUMENT.

7. At the first monthly session of the court held after the expiration of fifty days from the entry of the case, it will be in order for oral argument. If neither party appears to be heard at that session, the case will be regarded as submitted. A party who has not filed a brief will not be heard orally.

8. The periods mentioned in rules 6 and 7 will not run during the months of July and August.

9. Oral arguments will be limited to one hour and a half on a side, to be divided as counsel may elect, unless before beginning the arguments the court shall grant further time. The party having the opening also has the close.

REHEARINGS.

10. Motions for rehearing will not be entertained unless made in writing, briefly stating the points upon which a rehearing is desired, and filed with the clerk within ten days after he notifies the parties of the order in the case, as required by law.

SPECIAL ORDERS.

11. A party desiring a special order shall file a motion therefor with the clerk and give the opposite party notice thereof, and of the time when he will ask to be heard upon it, a reasonable length of time before the day of hearing.

BILLS OF COSTS.

12. The clerk will audit and allow bills of costs accruing in this court, and certify the same to the superior court with the order made in the case.

ADMISSION TO THE BAR.

13. A committee consisting of three members of the bar of the state will be appointed from time to time to examine persons desiring to be admitted to the bar.

14. There will be two examinations annually, at the court room in Concord, beginning on the third Tuesday of June and the third Tuesday of December respectively, at 11 o'clock in the forenoon.

15. The term of study with special reference to the practice of law, required for admission to the bar, is three years. The study may be pursued in the office and under the direction of a member of the bar in good standing, or in a reputable law school.

16. A person proposing to study law with a view of applying for admission to the bar shall, within fourteen days after he commences the study, file with the clerk of this court a certificate stating his age, his residence, what preparatory education he has had, the name and residence of the person with whom he is studying, and the date when he commenced the study; and also a certificate of the person with whom he is studying, stating the fact and when the study begun.

17. A person wishing to be examined shall file with the clerk of this court, fourteen days at least before the regular June or December session, a petition stating his residence, the date and place of his birth, the term during which he has studied law, and the name and residence of the person with whom he studied; and he shall file therewith cer-

tificates showing that he is of good moral character and that he has studied law as set forth in the petition. If the papers so filed show that he is entitled to be examined, he will be allowed to take the examination at the next meeting of the committee.

18. A person who fails in an examination for admission to the bar will not be admitted to another examination until the court, upon special consideration of the case, make an order to that effect.

19. The court will be in session on the Thursday following the third Tuesday of June and December, when persons found to be qualified may be admitted to the bar and take the oaths of office.

20. A person, who has been admitted to the bar of the highest court of another state, may be admitted to the bar of this state, without examination as to his knowledge of the law, upon furnishing satisfactory evidence that he was so admitted in the other state, that he practiced law there one year at least, that he is of good moral character, and that he is a resident of this state at the time of his application.

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THE
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HODGE et al. v. UNITED STATES STEEL CORP. et al.

(Court of Errors and Appeals of New Jersey.
Feb. 18, 1903.)

**CORPORATIONS — STOCKHOLDERS' MEETING —
CONTRACTS — NOTICE — DIRECTORS — POW-
ERS — RATIFICATION — PREFERRED STOCK —
DIVIDENDS.**

1. At a meeting of the stockholders of a corporation, owners of shares are under no disability to vote because they are also directors of the corporation. They do not vote in their fiduciary capacity, but, like other stockholders, in the right of the shares held by them.

2. At a duly convened meeting of stockholders they may lawfully enter into or authorize a contract between the company and a third party, in which directors are personally interested, if it is done by them with notice of such interest.

3. The general doctrine is well established in this state that facts known, which are sufficient to put a party upon inquiry, are sufficient to charge him with all knowledge he would have acquired by a proper inquiry in the ordinary course of business.

4. The rule that directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders, is the settled law of this state.

5. Such a contract is voidable at the option of the corporation, but is not void per se. When the facts are disclosed to the stockholders, it may be subsequently ratified by them.

6. When the by-laws of a corporation, adopted by the stockholders in pursuance of authority given by the act of incorporation, provide that a majority vote at a stockholders' meeting shall be binding on the corporation, every shareholder will be bound by all acts and proceedings within the scope of the power and authority conferred by the charter, which shall be approved or sanctioned by the vote of a majority of such shareholders, duly taken and ascertained according to law.

7. The act of incorporation of the United States Steel Corporation requires the corporation to pay to the preferred shareholders a yearly dividend at the rate of 7 per cent. per annum in quarterly payments. By the terms of the act of 1902 said corporation cannot take advantage of its provisions, unless it shall have continuously declared and paid dividends at the rate of 7 per cent. on the preferred stock for the period of at least one year next preceding a meeting called to avail itself of the act. The meeting was held May 19, 1902. A dividend of 1½ per cent. was declared and paid for the quarter ending July 1, 1901, and a like dividend for each of the quarters ending October 1, 1901,

January 1, 1902, and April 1, 1902. *Held*, that this was a compliance with the act of 1902. (Syllabus by the Court.)

Appeal from court of chancery.

Bill by J. A. Hodge and others against the United States Steel Corporation and others. From an order granting an injunction (58 Atl. 601), defendants appeal. *Reversed*.

Charles L. Corbin, Richard V. Lindabury, Francis Lynde Stetson, and William D. Guthrie, for appellants. McCarter, Williamson & McCarter, Abm. I. Elkus, Joseph M. Proskauer, Alan H. Strong, Frank Bergen, and Edward B. Whitney, for respondents.

VAN SYCKEL, J. The subject-matter of this appeal is an order granted by the court of chancery at the instance of the complainants restraining the defendants from executing, issuing, delivering, or receiving any bond or mortgage, under certain resolutions of the stockholders of the United States Steel Corporation, passed May 19, 1902, providing for the reduction of \$200,000,000 of its preferred stock, and the retirement thereof out of bonds or the proceeds of bonds. Three of the complainants in the bill as originally filed voluntarily withdrew from the suit. The remaining complainants are Hodge, Smith, and Curtis. Hodge owns 100 shares, acquired by him before the contract in question was made. Smith owns 200 shares acquired since that time from a holder who assented to the contract. Curtis, so far as appears, owns no stock. The vice chancellor properly held that the case must be considered as based wholly upon the rights of Hodge as a shareholder. The steel corporation was organized under the general corporation act of this state (Revision 1896) on the 25th day of February, 1901, and the certificate of incorporation was filed on that day. On the 1st day of April, 1901, an amended certificate of incorporation was filed, which provided, among other things, for an authorized capital of \$1,100,000,000, of which \$550,000,000 was to be preferred stock, divided into 5,500,000 shares of the par value of \$100 each, and a like number of shares of common stock of the par value of \$100 each. As required by section 18 of the general corporation act, the amended certificate of incorporation stated that: "The holders of the preferred stock

¹ See Corporations, vol. 12, Cent. Dig. §§ 1396, 1401, 1402.

shall be entitled to receive when and as declared from the surplus or net profits of the corporation yearly dividends, at the rate of seven per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws." The by-laws of the company provide as follows: Article 5, § 5: "The dates for the declaration of dividends upon the preferred, and upon the common stock of the company shall be the days by these by-laws fixed for the regular monthly meetings of the board of directors in the months of April, July, October and January in each year, on which days the board of directors shall declare what, if any, dividends shall be declared upon the preferred stock and the common stock or either of such stocks. The dividends on the preferred stock shall be payable quarterly on the sixth Wednesday next after the several dates of the declaration thereof."

The board of directors of said corporation, having resolved that it would be advisable to decrease the capital stock of the corporation to the extent of 2,000,000 shares, and to retire them by means of an issue of bonds, called a meeting of the stockholders to be held on the 19th day of May, 1902, in pursuance of and as required by section 27 of the general corporation law and by the act of 1902, for the purpose of voting upon the proposed plan for the purchase and retirement of that amount of preferred stock and the issue of 5 per cent. bonds. Prior to the notice of this meeting the directors had entered into a tentative contract with Messrs. J. P. Morgan & Co., bankers, under date of April 1, 1902, by which said bankers agreed with the steel corporation that \$100,000,000 face value of the new bonds would be taken and paid for, of which \$80,000,000 would be paid for by a like amount of preferred stock taken at par, and \$20,000,000 would be paid in cash. To guaranty the performance of this contract, a syndicate was formed by J. P. Morgan & Co., the members of which actually deposited with that firm \$80,000,000 of preferred stock to be used in the performance of the contract. The effect and purport of this agreement is that the bankers agreed to buy from the steel corporation at least \$100,000,000 of 5 per cent. bonds, and to pay therefor \$20,000,000 in cash and \$80,000,000 in preferred stock at par, with an option to purchase the remaining bonds if the stockholders did not do so; and in consideration of this undertaking the bankers were to receive a commission of 4 per cent. on \$100,000,000, and contingently a commission of 4 per cent. on any additional amount that might be taken at par by the stockholders or the bankers. This contract with the bankers was to be subject to the approval of the stockholders. At the stockholders' meeting on the 19th of May, 1902, duly convened, the resolution to retire the preferred stock and the resolution to adopt the bankers' contract were separate and distinct, and were voted

upon and passed as separate and distinct resolutions. The shareholders could have adopted the first and rejected the latter. There was in attendance at the meeting in person or by proxy over 73 per cent. of the outstanding preferred stock, and over 78 per cent. of the outstanding common stock. More than 99.83 per cent. of the stockholders at such meeting, present either in person or by proxy, voted in favor of both resolutions, and only $\frac{17}{100}$ of 1 per cent. voted against them.

The by-laws of the corporation contained the following provision: "The board of directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders, or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any act or contract that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting: provided that a lawful quorum of stockholders be there represented in person or by proxy, shall be as valid and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation." This by-law cannot amplify the powers of the corporation, or operate to validate any act ultra vires of the corporation, but it enabled the stockholders by a majority vote to ratify any contract which the entire body of stockholders or the corporation might lawfully make. Both resolutions therefore received more than the vote required by the twenty-seventh section of the corporation act and by the by-law of the company. If all the shareholders had intended to convert their preferred shares into 5 per cent. bonds, they would, of course, have voted for the conversion resolution, and have rejected the bankers' contract. In a scheme involving such an enormous amount of capital, and affecting thousands of shareholders, it could not reasonably have been supposed that all would prefer to accept the 5 per cent. bonds, and it was, therefore, the exercise of a prudent foresight that prompted them, in order to assure the successful execution of the plan, to secure the co-operation of bankers who could command millions of capital. When the subject-matter of this litigation was before this court at the June term, 1902, in the case of *Berger v. The United States Steel Corporation*, 53 Atl. 68, it was expressly declared: First. That the act concerning corporations, as revised in 1896, authorizes corporations formed under it to retire shares of its preferred stock purchased with bonds or the proceeds of bonds issued for that purpose, the provisions of sections 27 and 29 being complied with. Second. The manner in which a duly authorized plan is to be carried through is part of the business of the corporation, and, in the absence of fraud or bad faith, is not the subject of

judicial control to any greater extent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders, and say that a less expensive plan could be successfully adopted. These questions, therefore, are not open to controversy in this case, in so far as the cost or wisdom of the plan is concerned.

There is an entire absence in the case of anything to show a taint of fraud, or an attempt to conceal from the shareholders any fact which should have influenced their action. That the entire proceeding was conducted with good faith, without concealment, and with fairness to both parties, is evinced by the fact that during all the litigation which has ensued, under the promotion of a share owner who did not attend the meeting, not one of the vast number of shareholders who were present in person or by proxy, comprising men of great business capacity, interested to the extent of millions of dollars in the conversion plan, has questioned its propriety, or expressed a desire, so far as appears, to recede from it. The contract with the bankers was submitted to the stockholders without comment, and, as stated in the resolutions, of which a copy was tendered to the stockholders, "was not finally to become or to be operative until after approval thereof by the stockholders in special meeting assembled."

The first reason to be considered, upon which the complainants rely to maintain their injunction, is that the action of the directors in passing the resolutions for the plan of conversion and approving the bankers' contract was fraudulent and void, because 15 or more of the 24 members of the board of directors were interested in the syndicate which was formed to assist in carrying out the bankers' contract, and to share its profits; and that the plan was never properly and legally ratified by the two-thirds vote of the stockholders required by the corporation act, inasmuch as the votes upon the stock held or controlled by the bankers' firm and members of the syndicate must be counted to make up the necessary two-thirds, and without those votes the requisite number did not approve the reduction of stock. The insistence that the votes of members of the syndicate who were also directors of the company cannot be lawfully counted in order to constitute a two-thirds vote in favor of the resolution to reduce the amount of preferred stock is without any foundation in reason or in law. They voted upon that resolution, not as directors, not in their fiduciary capacity, but solely in the right of the shares of stock held by them. A most valuable privilege, which attaches to the ownership of stock in a corporation, is the right to vote upon it at any meeting of stockholders. As to that resolution, considered by itself, as stockholders, they owed no greater duty to their co-stockholders than those stockholders

owed to them. Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company. With respect to the bankers' contract a very different rule applies. The rule that directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders is so firmly entrenched in our jurisprudence that it is not open to debate. It is emphasized and enforced in the following, among many other cases: *Staats v. Bergen*, 17 N. J. Eq. 554; *Winans v. Crane*, 36 N. J. Law, 394; *Stroud v. Consumers' Water Co.*, 56 N. J. Law, 422, 28 Atl. 578; *Gardner v. Butler*, 30 N. J. Eq. 702; *Guild v. Parker*, 43 N. J. Law, 430; *Stewart v. Lehigh Valley R. Rd.*, 38 N. J. Law, 505; *Traction Co. v. Board of Works*, 56 N. J. Law, 431, 29 Atl. 163. The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too vigorously applied. But in the cases cited the contract was made by the trustee without the knowledge or consent of the cestui que trust, and without subsequent ratification or adoption by which the vice in it could be cured. The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts. In *Stewart v. Lehigh Valley R. R. Co.*, supra, Mr. Justice Dixon, in delivering the opinion of this court, says: "After an examination of all the cases cited, as also such others as I have found, and a careful consideration of the principle, and the results of regarding and disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the cestui que trust, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this." It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void per se. Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but, if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors becomes so changed that it would be inequitable to vacate the engagement, equity would refuse to interpose. A fortiori, when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, when the stockholders have notice of the directors' interest, the agreement will be

unassailable in the absence of actual fraud or want of power in the corporation. In this case, not only was the bankers' contract made with J. P. Morgan & Co., and approved by a two-thirds vote of the shareholders, with knowledge that J. P. Morgan was one of the directors of the steel corporation,—a fact which they may be presumed to have known,—but also in the circular letter accompanying the call of the stockholders' meeting to be held on the 19th of May, it was expressly stated as follows: "To further the success of the plan, there has been formed a syndicate, including some directors, which will receive four-fifths of the four per cent. compensation to be paid under the contract with Messrs J. P. Morgan & Company, mentioned in the notice of stockholders' meeting." The deliverance of this court with respect to the sufficiency of notice in *Gale v. Morris*, 30 N. J. Eq. 285, is as follows: "If the party notified make reasonable investigation, he obtains actual knowledge of these facts; if he chose not to make it, he is charged constructively with knowledge of them. The rule merely prohibits him from taking advantage of his own imprudence to the detriment of another. But as to the matters that lie within the notice, the principle assumes another form. It charges the party with knowledge of those matters so far as reasonable inquiry has not dissipated their credibility. If he is unwilling to act upon the facts as the notice presents them, then the law demands that he shall make proper examination, and upon the result of that examination he may safely stand. *Williamson v. Brown*, 15 N. Y. 354. But if he prefer not to examine, it must be because he is satisfied to act as if the matters disclosed in the notice were true; and he cannot afterwards complain if his rights are made to rest upon them so far as they are true. The information given by the notice is equivalent to that obtained by inquiry." In *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498, Vice Chancellor Pitney said: "For these reasons I think that the facts above stated, which were clearly within defendant's knowledge, were sufficient to put him upon inquiry. The general doctrine that facts which are sufficient to put a party upon inquiry are sufficient to charge him with all such knowledge as he would have acquired by a proper inquiry in the ordinary course of business is, as I take it, thoroughly established in this state. It was so held in the court of appeals in the case just cited [*Power Co. v. Veghte*, 21 N. J. Eq. 463], and that case followed *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687, in the same court. The doctrine of these cases has always been followed in New Jersey." The cases in England are to the like effect. *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *May v. Chapman*, 16 Mees. & W. 355. The stockholders of the company are, therefore, chargeable with express notice that some

directors were interested in the bankers' contract, and by reasonable inquiry at the meeting of May 19th they could have ascertained the names and number of such directors. They signified by their votes that they approved the contract with such full knowledge.

In *Durfee v. Old Colony R. Co.*, 5 Allen, 230, Chief Justice Bigelow says: "It may be stated as an indisputable proposition that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by the vote of the majority of the shareholders of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter." In the case of the steel corporation the right of the majority does not rest upon implication. In the by-laws adopted by the stockholders, in pursuance of authority given by the act of incorporation, such power is expressly given to the majority. In *Leavenworth Co. v. Chicago Railway Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064, it was held that the action of the stockholders validated the contract where 9 out of 13 directors were personally interested. In the cases of *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders. The like view is expressed by the court of appeals of Maryland in *Shaw v. Davis*, 28 Atl. 619, 23 L. R. A. 294, as follows: "It may be stated, as the result of all the authorities, that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither ultra vires, fraudulent, or illegal, the court will refuse its intervention, because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interest may dictate; and their action will be binding on all, whether approved of by the minority or not." The healing effect of the ratification by stockholders upon a voidable contract entered into by directors is fully recognized in *Grant v. United Kingdom Switchback Rys. Co.*, 40 Ch. Div. 135. In the case sub judice the contract was, in effect, made between the stockholders themselves and J. P. Morgan & Co., and it cannot be successfully assailed, without maintaining that stockholders are without capacity to make a valid contract with the directors of their company. It would be manifestly contrary to fair dealing

and good faith to permit stockholders to invite directors to enter into an engagement, and, after the directors had put themselves in a position in which the contract could be enforced against them, to permit the stockholders to deprive them of the benefits of it. In my investigation no case has been found which will justify such a result. In the proper application of a legal rule, it cannot be necessary, in order to do justice to one party, to do manifest injustice to the other. Such inequity would condemn the application of the rule, not the rule itself.

On the ground which has been discussed, upon the facts presented, the complainant's case is without support in law. He made no inquiry, did not attend the meeting, and now attempts to deprive the two-thirds of the stockholders who did attend the May meeting of the benefit of a contract which they then approved, and which, as has been held in the Berger Case, the corporation had power to make. As was declared in that case (*cf.* *Ellerman v. Chicago Junction Co.*, 49 N. J. Eq. 217, 23 Atl. 287), individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation, and in furtherance of its purposes, are not unlawful or against good morals, are done in good faith and in the exercise of an honest judgment. Much less can a shareholder challenge like action taken by a majority of his co-stockholders.

The remaining grounds upon which the complainant rests his claim to relief relate to the act of 1902. This act, as this court adjudged in the Berger Case, is a restraining act, and required a due observance of its provisions by the steel company as a condition precedent to the right to enter into the conversion scheme. The first alleged infirmity relied upon by the complainant is that dividends were not made in conformity with the requirement of the act of 1902, which is a supplement to the general corporation act. The language of the act with respect to this condition is: "Every corporation organized under this act * * * that shall have issued preferred stock entitling the holders thereof to receive dividends at a rate exceeding five per centum per annum, and that shall have continuously declared and paid dividends at such rate, on such preferred stock, for the period of at least one year next preceding the meeting." The amended certificate of incorporation of the company provided that "the holders of the preferred stock shall be entitled to receive, when and as declared, yearly dividends at the rate of seven per cent. per annum, payable quarterly on dates to be fixed by the by-laws." It is admitted that a dividend of 1½ per cent. was declared by the company for the three months beginning on the 1st of April, 1901, and ending on the 1st of July, 1901; that a like dividend was declared for the three months beginning July 1, 1901, and ending October

1, 1901; that a like dividend was declared for the three months beginning October 1, 1901, and ending January 1, 1902, and that a like dividend was declared for the three months beginning January 1, 1902, and ending April 1, 1902,—all of which dividends were paid by the company to the stockholders within the time fixed by the by-laws and before the meeting of May 19, 1902. This provision in the act of 1902 was drafted in contemplation of the eighteenth section of the corporation act of 1896, giving power to create preferred stock, and prescribing that "the holders thereof shall be entitled to receive and the corporation shall be bound to pay thereon, a fixed yearly dividend to be expressed in the certificate not exceeding eight per centum payable quarterly, half yearly or yearly, before any dividends shall be set apart or paid on the common stock, and such dividends may be made cumulative." The dividends on the preferred stock were, by the amended certificate of incorporation of the steel company and the by-laws, made payable quarterly, were cumulative, and to be paid before any dividend was paid on the common stock. A dividend on the preferred stock might have been passed, and it was, therefore, intended by the act of 1902 to require, in compliance with section 18, that, before its provisions could be taken advantage of, the company must have paid a dividend at the rate of 7 per cent. for the full year next preceding the meeting to retire the preferred stock; and it was a compliance with that section whether the dividend was paid quarterly, half-yearly, or at the end of the year. The dividend required by the eighteenth section is a yearly dividend of 7 per cent., and it was paid in four quarterly payments.

The vice chancellor held, in construing this legislation, that, if the dividend had been paid annually, there must have been two dividends of 7 per cent. each, covering two previous years, to make the payment continuous; that, if the dividends were paid half-yearly, there must have been three payments of 3½ per cent. each, covering 18 months, in order to make the payment continuous; that, if paid quarterly, as in this case, there must have been five payments of 1½ per cent. each, covering 15 months, to satisfy the statute; and so, if the dividends had been paid monthly, there must have been 13 dividends covering a period of 13 months. The mere statement of this view is destructive of it. Thus interpreted, the law would provide no fixed, determinate, uniform time during which dividends must be paid, but would leave it optional with the corporation to get the benefit of the law by making dividends so payable that a period either of 2 years or only 13 months need be covered. As to a corporation making dividends payable annually, one rule would prevail, while to a corporation paying quarterly a different rule would apply. The very essence of a

law is that it is uniform and universal within the territory to which it relates. It must apply in the same way to every one. It cannot be varied at the will of the corporation. The construction adopted in the court below is clearly erroneous, and gives a meaning to the word "continuous" which is wholly unwarranted. It, of course, must not be given its strictest meaning, which would require a never-ceasing payment of dividends, like the continuous flow of water. Applied to dividends, it means, "during one year," which is equivalent to the words of the act "for the period of at least one year." The act does not prescribe that 7 per cent. dividends shall have been continuously declared and paid for the period of at least one year next preceding the meeting, but that dividends at the rate of 7 per cent. shall be paid. The force of the word "continuously" evidently is that dividends at the rate of 7 per cent. must be paid for a continuous period of one year, so that, where dividends are paid quarterly, a quarterly dividend cannot be passed without losing the benefit of the act. The payment of dividends is to be for the period of one year. The dividends are to be paid out of surplus over and above the amount of the capital stock and outstanding indebtedness, and are to be made for the "period." When a dividend is made, it is made as a dividend for the period of three months then previously elapsed. A dividend for a future period has not been known in the business history of corporations. When a dividend is paid, it is paid for the period then elapsed. In this case a dividend at the rate of 7 per cent. was paid for the first quarter, and a like dividend for the second, third, and fourth quarters of the year next preceding the meeting of the stockholders. If that was not a payment continuously at the rate of 7 per cent. for one year next preceding the meeting, for what year was it a continuous payment? The meaning of the draftsman of this provision may be further elucidated by dropping out of it the words "for the period of at least one year next preceding the meeting." The act will then read: "A corporation that shall have continuously declared and paid dividends at the rate of seven per cent. on such preferred stock." This language is ambiguous. It might be construed to mean a corporation that had paid three consecutive dividends at the rate of 7 per cent. that would be a continuous payment. It might also be held to mean a corporation that had continuously declared and paid dividends during the entire period of its corporate existence. To exclude this uncertainty, the words were added, "for the period of at least one year next preceding the meeting." The dividend was required to extend over the entire preceding year, and the failure to pay the dividend for any one of the quarters would break the continuity, and require the company thereafter to make four consecutive

quarterly dividends of 1% per cent. each to make the act of 1902 available.

The cases as to publications in newspapers, cited and relied on by the vice chancellor as his only authority, are not in point. Our laws require publication of notice of sale "at least four weeks successively, once a week, next preceding the time of sale." It has been uniformly and properly held to require a publication for four full weeks once a week, and that the publication must begin four weeks next before the day of sale, and that four full weeks must elapse between the first publication and the day of sale. The statute requires that there shall be four weeks' notice of sale, and, if sale can be made after four weekly publications, it might be made after the expiration of only 22 days. A publication has no relation to a previously elapsed period. It is a publication only on the very day it is made, while a dividend relates to and is for a time previously run. All that the act of 1902 requires with respect to payment of dividends is that the provision of section 18 of the general corporation law shall be complied with.

The other objections urged as to the want of conformity by the defendant corporation with the requirements of the act of 1902 have been duly considered, and are deemed to be without merit. There is no ground presented by the case or agitated in the briefs of counsel which will justify the interposition of a court of equity to arrest the proposed action of the defendants.

The decree below should be reversed, and the injunction dissolved, with costs in this court and in the court below.

KENNEBEC WATER DIST. v. CITY OF WATERTVILLE et al.

(Supreme Judicial Court of Maine. Dec. 27, 1902.)

WATER COMPANY — EMINENT DOMAIN — INSTRUCTIONS TO APPRAISERS — FRANCHISE — VALUATION — DAMAGES — EVIDENCE.

An act incorporating the plaintiff district authorized it to acquire, by the exercise of the right of eminent domain, "the entire plant, property and franchises, rights and privileges now held by the Maine Water Company within said district and the towns of Benton and Winslow." The act further provides that appraisers appointed by the court, "shall, upon hearing, fix the valuation of said plant, property and franchises at what they are fairly and equitably worth, so that said Maine Water Company shall receive just compensation for all the same," but that, "before a commission is issued to the appraisers, either party may ask for instructions to the appraisers." Both parties having asked for instructions, and the questions of law arising thereon having been reported to the law court, the court is of opinion that the appraisers should be instructed in accordance with the following principles:

1. The plaintiff, if it takes anything, must take all the property held by the Maine Water Company in the Kennebec water district and in Benton and Winslow, whether specifically named in the act or not. This includes the

real estate or other property, if any, not connected with the water system; it includes the plant or physical system; and it includes all franchises, rights, and privileges held by the water company, exercised or capable of being exercised.

2. The Maine Water Company is a quasi public, or public service, corporation, and is entitled to charge reasonable rates for its services, and no more.

3. The basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public.

4. At the same time, the public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals.

5. Summarized, these elemental principles are the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses, and the right of the public to have no more exacted than the services in themselves are worth.

6. The reasonableness of the rate may also be affected, for a time, by the degree of hazard to which the original enterprise was naturally subjected; that is, such hazard only as may have been justly contemplated by those who made the original investment, but not unforeseen or emergent risks. And such allowance may be made as is demanded by an ample and fair public policy. If allowance be sought on account of this element, it would be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this hazard.

7. The franchises granted to the Waterville Water Company by chapter 141, Priv. & Sp. Laws 1881, as amended by chapter 59, Priv. & Sp. Laws 1887, and chapter 14, Priv. & Sp. Laws 1891, and to the Maine Water Company by chapter 352, Priv. & Sp. Laws 1893, are not exclusive. Neither are they perpetual and irrevocable. They are subject to legislative repeal. In fixing the value of the franchises, both of these considerations are entitled to their just weight. If the business of the company is now practically exclusive, in that it has no competitor, that fact, also, may and should be considered by the appraisers when they fix the value of the property of the company as a going concern.

8. In determining the present value of the company's plant, the actual construction cost thereof, with proper allowances for depreciation, is legal and competent evidence, but it is not conclusive or controlling.

9. The request that "under no circumstances can the value of the plant be held to exceed the cost of producing at the present time a plant of equal capacity and modern design" should not be given. Among other things, it leaves out of account the fact that it is the plant of a going concern, and seeks to substitute one of the elements of value for the measure of value itself.

10. The actual rates which may have been charged heretofore, and the actual earnings, are both admissible and material in determining the value of the plant. The value of the evidence, however, will depend upon whether the appraisers shall find that the rates charged have been reasonable.

11. The quality of water furnished and of the service rendered, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and future, are material upon the question of present value.

12. The appraisers should regard the franchises of the company as entitling it to continue business as a going concern, but subject to all proper legal duties governing public service companies.

13. Faithfulness or unfaithfulness shown by the water company in the past in the performance of public duty to furnish pure water at reasonable rates is not a proper matter for consideration. It is the franchise as it now exists which is to be taken and paid for.

14. The liability of the company to legal forfeiture of its franchises on account of past unfaithfulness and misbehavior is not to be considered.

15. If the water company and its predecessors have actually received more than reasonable rates hitherto, the excess cannot be deducted from the amount to which the company would otherwise be entitled.

16. No compensation can be allowed to the Maine Water Company for incidental damages to its other property having no physical connection with or contiguity to that taken, and having no relations with it except those which grow out of common ownership, nor for the impairment of the economy and efficiency of administration which are obtained by the combination of many water systems under one management.

17. The real estate or other outside property not directly connected with the water system should be appraised at its fair market value, not at forced sale, but at what it is fairly worth to the seller, under considerations permitting a prudent and beneficial sale thereof.

18. The appraisers may properly consider what the existing system can be reproduced for. But the cost of reproduction will not be conclusive. It will be evidence having some tendency to prove present value. The inquiry along the line of reproduction should be limited to the replacing of the present system by one substantially like it.

19. In estimating even the structure value of the plant, allowance should be made for the fact, if proved, that the company's water system is a going concern, with a profitable business established, and with a present income assured and now being earned.

20. So far as the water system is practically exclusive, the element of good will should not be considered.

21. In fixing structure value, while considering the fact that the system is a going concern, the appraisers should also consider, among other things, the present efficiency of the system, the length of time necessary to construct the same de novo, and the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net income and profits, if any, which by its acquirement would accrue to a purchaser during the time required for such new construction, and for such development of business and income. But these are to be considered "among other things." They are not controlling. Their weight and value must depend upon the varying circumstances of each particular case.

22. In addition to structure values, the appraisers should allow just compensation for all the franchises, rights, and privileges to be taken.

23. The value of the franchise depends upon its net earning power, present and prospective, developed and capable of development, at reasonable rates; and the value to be assessed is the value to the seller, and not to the buyer.

24. In considering prospective development of the use of a franchise, consideration must also be had of the fact that further investment may be necessary to develop the use, and of the further fact that at any stage of development the owner of the franchise will be entitled to

charge only reasonable rates under the conditions then existing.

25. Subject to all the foregoing limitations, the owner is entitled to any appreciation due to natural causes.

26. The fact that the franchises are to be taken in no respect impairs their value for the purposes of appraisal.

27. As to the property to be taken, both plant and franchises are to be appraised, having in view their value as property in itself, and their value as a source of income. There are these elements of value, but only one value of one entire property is to be appraised in the end. These elements necessarily shade into each other.

28. The capitalization of income, even at reasonable rates, cannot be adopted as a sufficient or satisfactory test of present value. But while not a test, present and probable future earnings at reasonable rates are properly to be considered in determining the present value of the system.

29. The appraisers should be instructed to receive and consider all evidence offered, so far as admissible under the general rules of law, which is pertinent under the rules stated in the requests of the parties, so far as they have been approved, and as limited or explained, in the opinion of the court.

(Official.)

Report from supreme judicial court, Kennebec county.

Action by the Kennebec water district against the city of Waterville and others. Case reported. Instructions to appraisers given.

On report. Instructions to appraisers given by the court to determine the valuation of property of the Maine Water Company, and acquired by the plaintiff by the exercise of the right of eminent domain.

In this court below, the parties, in accordance with the provisions of the act of the legislature authorizing the water district to take over the property, filed written requests for instructions which they desired, and contended ought to be given by the court to the appraisers, to guide them in determining the valuation of the property to be taken over. The case was then reported; the bill, answer, replication, and docket entries making part of the case, with a stipulation that all legislation of Maine relating to the Maine Water Company and the Waterville Water Company is to be referred to by either party in argument.

The Kennebec water district requested the court to instruct the appraisers as follows:

(1) The appraisers are directed to state separately in their report what part of the amount fixed by them as the valuation of the plant, property, and franchises of the Waterville Water Company and the Maine Water Company is fixed as the value of the plant and property, and what part is fixed as the value of the franchises, and further to state what property and what franchises they have considered in fixing these values.

(2) Upon the question of the value of the companies' plant and property, the actual cost of said plant and property, together with proper allowances for depreciation, is legal and competent evidence; and for the purpose

of fixing this actual cost the companies are directed to produce before the appraisers all book accounts and documents containing entries which bear on the subject.

(3) Under no circumstances can the value of the plant of the companies be held to exceed the cost of producing at the present time a plant of equal capacity and modern design.

(4) The Waterville Water Company and the Maine Water Company are public service corporations, and, as such, have the right to charge reasonable rates only. What would be reasonable rates can be determined only after and by means of a valuation of the companies' property. Accordingly, the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and are immaterial.

(5) The selling value of the capital stock in the companies has no bearing on the valuation of the companies' plant, property, or franchises, and is immaterial.

(6) The quality of the water furnished by the companies, and of the service rendered by them, and the fitness of their plant to meet the reasonable requirements of consumers in the present and the future, are material questions in fixing the valuation of the companies' plant and property.

(7) The franchises of the Waterville Water Company are fixed by chapter 141, Priv. & Sp. Laws 1881, as amended by chapter 59, Priv. & Sp. Laws 1887, and chapter 14, Priv. & Sp. Laws 1891.

(8) The franchises of the Maine Water Company material to these proceedings are those of the Waterville Water Company, and those granted by Priv. & Sp. Laws 1893, c. 352, and no others.

(9) The appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal rules governing public service companies; it being further understood that said franchises are in no way exclusive. The franchises shall not be otherwise appraised or valued.

(10) Upon the question of the value of the companies' franchises, the question of the fitness of the source of supply granted by these franchises with reference to the reasonable requirements of the consumers in the present and the future is material and competent.

(11) In fixing the value of the companies' franchises, the appraisers may give such regard as is demanded by ample and fair public policy to the past investment, risks, and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing, and also to the faithfulness or unfaithfulness shown by the companies in the performance of their public duty and obligation to furnish pure water at reasonable rates.

(12) Competent evidence may be received by the appraisers, tending to prove or refute the allegations contained in paragraph 13 of plaintiff's bill; and, in case said allegations are found to be true in whole or in part, said facts are to be considered as bearing on the value of the companies' franchises.

(13) Competent evidence may be received by the appraisers, tending to prove or refute the allegations contained in paragraph 14 of plaintiff's bill; and, in case it is found that said companies have actually received more than reasonable rates for the services rendered since operations begun, then the amount of such excess shall be deducted from the amount to which the companies would otherwise be entitled.

(14) The appraisers may view the premises, so far as they see fit.

(15) They shall procure a stenographer to be in attendance, who shall take notes of all testimony, and furnish transcripts thereof.

(16) They shall make a report showing their doings and findings under each branch of the instructions above given, and also the date as of which the valuation was fixed.

The defendants requested the court to instruct the appraisers as follows:

(1) If the court shall be of the opinion that either party at this stage of the case is entitled to instructions under the eighth section of the act above mentioned, the defendants respectfully ask the court for the following instructions to said appraisers: the defendants understanding that preliminary requests for instructions are authorized by said eighth section, and that they will be asked for on the part of the plaintiff, and not deeming it right that requests should be presented and considered by the court on the one part, and not on the other.

(2) That by the terms of chapter 200 of the Private and Special Laws of 1899, every item of property within the limits of the Kennebec water district, and of the towns of Benton and Winslow, included in the water system of the Maine Water Company at the date selected for appraisal, or then used or usable in connection therewith, whether specifically enumerated in said act or not, together with all real estate within said district then held by said Maine Water Company, is to be taken from said water company, and every such item, and every valuable contract, right, privilege, or franchise exercised or capable of being exercised within the territory above named, must be considered and allowed for by the appraisers, separately or otherwise.

(3) That any increase of pecuniary obligation or burden or duty, or any damage to or impairment of the value of its remaining property or franchises, in any way resulting to said Maine Water Company by reason of the exercise of the right of eminent domain contemplated by said act of 1899, should be

considered by said appraisers, and just compensation therefor should be included in their award.

(4) That the real estate or other outside property not directly connected with the water system, so far as included in the taking contemplated by this act, should be appraised at its fair market value, not at forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale thereof.

(5) That as to the remaining property constituting the water system to be taken, and the franchises, rights, and privileges connected therewith, neither the total construction cost of the entire water system, measured at the date selected for valuation, nor such construction cost less wear and tear and depreciation, nor such construction cost, thus reduced, and afterwards increased by any adjudged percentage or bonus of profit thereon, can constitute the legal criterion of the total values to be awarded under the terms of this act.

(6) That neither can the reproduction cost thereof, at the date thus selected, either new or in its then condition, constitute the legal criterion of said total values.

(7) That the cost, at the date thus selected, of replacing said entire water system by a new one, differently constructed, but equal or even superior in efficiency to the one now existing, is not the legal criterion of said total values.

(8) That in order to determine even the structure value of said water system, and to award just compensation to said Maine Water Company therefor, under the terms of this act, a proper sum must be allowed by the appraisers, in their sound judgment, separately or otherwise, in addition to its value as otherwise established, for the fact, if proved, that such water system is not merely an aggregate of materials fitted for use, without actual business, service, connections, takers, or income, but a going concern, with a profitable business and good will already established, and with a present income assured and now being earned.

(9) That in determining the amount thus to be added to measure adequately even the structure value of said water system, the appraisers should consider, among other things, the present efficiency of said system, the length of time necessary to construct the same de novo, the time and cost needed, after construction, to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction, and for such development of business and income.

(10) That in addition to the items to be valued under request 4, and all the structure values of said water system to be determined in accordance with requests 8 and 9,

the appraisers, under the terms of this act, must consider and allow for, as a material and necessary element of value, by separate item or otherwise, all and several, the franchises, rights, and privileges, whether now used or capable of being used, of the Maine Water Company, so far as they relate in any manner to the territory included within the Kennebec water district and the towns of Benton and Winslow, including specifically all the rights of said company to supply water to municipalities and to all the inhabitants within the entire territory above named, all rights incidental thereto or connected therewith, and the right to receive and appropriate the net incomes and revenues from its business enterprise or undertaking, considered as a whole.

(11) That the value of a franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking; that whenever net earning power, or net incomes and revenues, is to be determined under this act, it is to be so determined under reasonable water rates, after due allowance for operating expense and maintenance or depreciation; that the value of all franchises, rights, and privileges to be taken is their full value, not to the taker, but to the seller; that "just compensation," under this act, means full compensation for everything or element of value taken; and that nothing less than such full compensation can be legally awarded, either under the terms of this act, or under the requirements of the constitution of this state and of the United States.

(12) That the fact that the franchises, rights, and privileges of said Maine Water Company are to be taken under this act in no respect destroys or impairs their value to said water company, and cannot diminish or affect the amount to be awarded as just compensation therefor.

(13) That in estimating said franchises, and the present and future net earning power included therein, the appraisers should duly weigh the nature and extent of these franchises, rights, and privileges, whether the same are perpetual or otherwise; also, so far as proved, the rights of the Maine Water Company under all existing contracts, and the value thereof; the extent of existing business, and of the net incomes or revenues now derived or derivable therefrom; the existing demand for new and additional services, and for the development and increase of said business, incomes, and revenues; the past and probable future growth or decay of the territory now served, or capable of being served, under said franchises, in population, in wealth, and in needs and uses for water to be supplied by some water system, and the past and probable future increase or decrease in said net incomes and revenues, as affected by these or other surrounding conditions; also the fact that by said taking said water

company will be wholly and forever deprived of all said franchises, rights, privileges, earning power, incomes, and revenues; and that it is the duty of said appraisers to make, in their sound judgment, just and full compensation to said water company for all the same.

(14) That the true measure of value, under the terms of this act, and under the requirements of the constitutions of this state and of the United States, is just and full compensation to said water company for each and every thing of value of which it is to be deprived by this taking; that, in addition to the special property covered by request 4, the plant, property, franchises, rights, and privileges now held by said water company within the territory embraced by this act contain distinct elements of value—First, as an asset; and, second, as a source of income, having, or not, present and prospective net earning power; that by the taking under this act said water company will be deprived, wholly and forever, both of said asset and of said source of income; that just compensation to said company for what is thus compulsorily taken from it requires that the sum to be awarded as a substitute therefor shall be the full equivalent of everything taken, both in value as an asset, and in net earning power, and such a sum as, in the sound judgment of the appraisers, will be the full money equivalent of all the plant, property, franchises, rights, and privileges aforesaid, and at the same time, if prudently invested at fair current rates of interest, will yield to said company the same net incomes and revenues, and for the same term, that it will be deprived of by this taking; the net earning power, incomes, and revenues aforesaid to be determined under reasonable water rates, after due allowance, on the one hand, for operating expense and maintenance or depreciation, and, on the other hand, with due regard to the probable future increase or decrease thereof under all conditions affecting the same.

(15) That the constitution of the United States, independent of the terms of this act, requires that just compensation should be made to said water company for all its plant, property, franchises, rights, privileges, good will, incomes, and revenues to be taken under this act, at their full value, not to the taker, but to the seller; and, to secure just and full compensation for all the same, the defendants are entitled, under the constitution of the United States, to have the court give, and the appraisers follow, as legal rules and material elements of value, in language or in substance, the several foregoing requests; and this request applies to each of said foregoing requests, separately and without reference to any other.

(16) All legal evidence pertinent under either of the foregoing requests, or tending to show the fair market value, of the property, rights, privileges, and franchises taken, so

far as admissible upon general rules of law, shall be received by said appraisers at the hearing before them.

Paragraphs 13 and 14 of the plaintiff's bill, upon which requests 12 and 13 of the plaintiff seemed in part to be based, were as follows:

"(13) Your complainant alleges that, in spite of the duty imposed upon said Waterville Water Company by its charter to supply pure water, it has constantly, from the commencement of its operations to the time of the conveyance and surrender of its property and powers to the Maine Water Company, and said Maine Water Company from that time until now, furnished water so polluted, foul, unclean, impure, and unwholesome as to be utterly unfit for drinking purposes or general domestic use, and a constant menace to the health and lives of the people using the same, whereby said Waterville Water Company and said Maine Water Company have utterly forfeited their rights and franchises to operate as water companies within said Kennebec water district, and the towns of Benton and Winslow, and have rendered themselves liable to such processes as are appropriate to work legal forfeiture of said rights and franchises.

"(14) Your complainant further alleges that, in spite of the duty of said water companies to render service at reasonable rates, said companies established and have always maintained, and are now maintaining, a schedule of rates or charges for services utterly disproportionate to the cost of the plant and the expense of maintaining the same, and so unreasonable, excessive, and extortionate that said companies have for this reason utterly forfeited their rights and franchises to operate as water companies within said Kennebec water district and the towns of Benton and Winslow, and have rendered themselves liable to such processes as are appropriate to work legal forfeiture of said rights and franchises."

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

H. D. Eaton, G. K. Boutelle, and E. R. Thayer, for plaintiff. O. D. Baker, J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson, and H. M. Heath, for defendants.

SAVAGE, J. By chapter 200 of the Private and Special Laws of 1890, the Kennebec water district was incorporated; and by section 6 it was empowered to acquire, by the exercise of the right of eminent domain, "the entire plant, property and franchises, rights and privileges now held by the Maine Water Company within said district and said towns of Benton and Winslow, including all lands, waters, water rights, dams, reservoirs, pipes, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said com-

pany and used in supplying water in said district and towns, and any other real estate in said district." This act was held constitutional and valid in *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774. The act further provides that, in the process of the condemnation proceedings, the court shall appoint three appraisers for the purpose of fixing the valuation of the property mentioned in section 6; that the "appraisers shall, upon hearing, fix the valuation of said plant, property and franchises at what they are fairly and equitably worth, so that said Maine Water Company shall receive just compensation for all the same"; and that "upon payment or tender by said district of the amount fixed, and the performance of all other terms and conditions imposed by the court, said entire plant, property, franchises, rights, and privileges shall become vested in said water district."

It is further provided that, "before a commission is issued to the appraisers, either party may ask for instructions to the appraisers, and all questions of law arising upon said requests or upon any other matters in issue may be reported to the law court for determination before the appraisers proceed to fix the valuation of the property." And it is at this last stage that the proceedings have now arrived. The bill in equity for the judicial appraisal and condemnation of the property having been sustained (*Kennebec Water District v. Waterville*, supra), both parties have asked for instructions to the appraisers, and the questions of law arising upon the requests for instructions have been reported to this court for its determination.

To say the least, the method thus authorized and adopted is an anomalous one. The questions before the court, which are comprehensive in scope and minute in detail, in effect relate to the admissibility of evidence; and yet they must be decided before the court knows or can know what specific evidence will be offered or relied upon, or to what conditions the evidence will be applicable. In such case, it is evident that the answers must be general in character. The conditions surrounding properties like the one here proposed to be taken are so variant that it is difficult, and in some particulars impossible, to lay down rules of value which will properly apply to all cases without modification. It was intimated in *Ames v. Un. Pac. Ry. Co.* (C. C.) 64 Fed., at page 178, that no hard and fast rule could be made applicable to all properties under all conditions.

And it may be said further that owing to this fact, and to the fact that in scarcely any two cases are the statutes authorizing condemnation proceedings alike, so far as they provide for an estimate of the different elements of value, the expressions of other courts, and results arrived at by them, are frequently of less authority than they otherwise would be.

It should be noticed that this is a bill in

equity, to be heard and determined, except as otherwise provided, according to the practice in equity. The hearings, except upon questions of law reserved upon report or exceptions, are to be before a single justice. A single justice is to make all necessary orders and decrees. And the act contemplates that the justice who directs the issuing of a commission to the appraisers may instruct them in regard to the manner of the performance of their duties. The requests for such instructions can be considered by this court only when they raise questions of law. So we construe the act in question. In this view, plaintiff's requests 1, 14, and 15 are not open for consideration by this court. They relate to details of procedure, and raise no questions of law. They relate to questions concerning which the sitting justice may, in his discretion, give or withhold instructions, according as he may think they are, or are not, practicable, and useful to the parties, the appraisers, and the court. The same remarks apply to plaintiff's request 16, in part. Of course, the appraisers must make a report of their doings, and the statute requires that in their report they shall state the date as of which the valuation is fixed. But beyond this, it is for the sitting justice below to pass upon this request, and not for this court.

Before entering upon a consideration of the requests *seriatim*, we think it will be expedient to discuss certain general propositions which concern and must qualify or limit the answers to be given to many or all of the requests.

First, as to the subjects of valuation: In substance, it is claimed by the defendants (request 2), and conceded by the plaintiff, that the latter, if it takes anything, must take every item of property held by the Maine Water Company in the Kennebec water district (the city of Waterville and the Fairfield village corporation), and in Benton and Winslow, at the date of the appraisal, whether specifically named in the act or not. We think it must be so held. And for every such item of value the Maine Water Company is entitled to "just compensation." This includes the real estate or other property, if any, not connected with the water system. It includes the plant, or physical system; real and personal. It includes all the franchises, rights, and privileges held by the Maine Water Company in the territory described, except the franchise to be a corporation. It is unnecessary to particularize further. The plaintiff criticises the use of the phrase "capable of being exercised," in speaking of franchises in request 2. But we think it is unobjectionable. Whatever franchise the Maine Water Company holds in this territory is to be taken from it, and must be paid for. Its existence is the criterion, not whether it is being exercised or not. *Joy v. Grindstone Neck Water Co.*, 85 Me. 109, 26 Atl. 1052. It may be doubted wheth-

er the Maine Water Company has any franchise in this territory which it is not now exercising. It has some franchises which undoubtedly will be more fully exercised than at present, in the course of the development of its system, if it is allowed to continue in possession of it. It would be, however, rather the extension of the use or exercise of a franchise, than the exercise of an unused franchise.

Secondly, as to reasonable rates: We think it is clear that the pecuniary value of the property of the Maine Water Company, both plant and franchises, depends, to a considerable extent, upon the financial returns it can be made to yield to the stockholders; that is, upon its net income. The franchise or right to do business, if unproductive, is of little value; and it stands to reason that the plant, as a structure, irrespective of franchise, if the business were profitable, would be worth more, and would sell for more, than if the business were unprofitable. The basis of income, of course, is the tolls charged and received. If the Maine Water Company were doing a private business, knowing its present net income, and the facts tending to show a probable increase in the future or otherwise, it would be comparatively easy to approximate the present value of its plant and franchises. But it is not doing a private business. It is not a private corporation. The value of its property cannot be appraised as if it were a private corporation, doing a private business. *Cotting v. Kansas City Stock Yards Co.* (C. C.) 82 Fed. 850. It is a quasi public, or public service, corporation. In pursuit of legitimate gain, it has devoted its property to a public use. In that way the public have acquired an interest in the use of the property. The company owes a duty to the public as well as to its stockholders. It must serve the public faithfully and impartially, and must charge no more than reasonable rates for service. *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385. The legislature may limit the tolls of such a corporation so that they shall be reasonable. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Unreasonable charges may be reached by the restraining hand of the court. Thus far the parties agree. And it may be said that the fair and equitable value of the system of the Maine Water Company, as a whole, may, in a large sense, be measured by its net income at reasonable rates, taking into account future probabilities. But the plaintiff (request 4) asks us to say that "what would be reasonable rates can be determined only after and by means of a valuation of the companies' property," and that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and

are immaterial." On the other hand, the defendants state their proposition in these words (request 11): "That the value of a franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking; that whenever net earning power, or net incomes and revenues, is to be determined under this act, it is to be so determined under reasonable water rates, after due allowance for operating expense and maintenance or depreciation."

Waiving other questions for the time being, it will be seen that "reasonable water rates" lie at the foundation of this proposition. But so far we are not in any way aided in determining how they should be ascertained. The differing forms in which the parties have presented their requests upon this subject have given rise, in argument, to the question whether the reasonableness of the rates depends upon the value of the property, or whether the value of the property depends upon the income derived at reasonable rates. But the requests do not present the question in this form. The plaintiff asks that reasonable rates be made to depend upon the value of the property, and we think this is correct, as far as it goes, as we shall have occasion to show hereafter. The defendants say that the value of the franchise (that is, of the right to do the business), depends upon the net income at reasonable rates. And this is also correct, as far as it goes. *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. One refers to the value of the property in gross; the other, to the value of the franchise. But the value of the property is not the only element to be considered in determining what are reasonable rates. As declared in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public. Yet while the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public (that is, the customers) may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be consonant with reason. They are also established by the highest judicial authority in our country. X

In *Smyth v. Ames*, 169 U. S. 466, at page 554, 169 U. S., page 433, 18 Sup. Ct., 42 L. Ed. 819, the court said: "Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental

control, though such control must be exercised with due regard to the constitutional guaranties for the protection of its property. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." Again, at page 547, 169 U. S., page 434, 18 Sup. Ct., 42 L. Ed. 819: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted for the use of a public highway than the services rendered by it are reasonably worth." Of course, the same principles apply to the water rates as to railroad rates. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154. In the case last cited it was claimed by the appellant, as bearing upon just or reasonable rates for water service, that the court should take into consideration the cost; the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair net profit. The court said, at page 757, 174 U. S., page 811, 19 Sup. Ct., 43 L. Ed. 1154: "Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as, under all the circumstances, will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective, in not requiring the real value of the property, and the fair value in themselves of the services rendered, to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

In *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, it was held that the nature and value of the service rendered by a turnpike company bear upon the reasonableness of rates charged. And in the same case it was held that other considerations were involved, such as "the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

In *Cotting v. Kansas City Stockyards Company*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, decided since these proceedings were be-

gun, Mr. Justice Brewer declared (page 91, 183 U. S., page 35, 22 Sup. Ct., 46 L. Ed. 92), that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered.

In the same case, at page 96, 183 U. S., page 37, 22 Sup. Ct., 46 L. Ed. 92, the case of *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. 723, was cited with approval to the point that the question is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. And Mr. Justice Brewer adds: "The question is, always, not what does he make, as the aggregate of his profits? but, what is the value of the services which he renders to the one seeking and receiving such services? Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges; but it is only one factor, and it is not that which finally determines the question of reasonableness."

We deem the principles established by the supreme court of the United States as affecting the reasonableness of rates of public service corporations to be authoritative. The rates of such corporations are within the protection of the fourteenth amendment to the federal constitution. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Covington & Lexington Turnpike Road Co. v. Sanford*, supra; *Smyth v. Ames*, supra; *San Diego Land Co. v. National City*, supra. And the declarations of the highest federal court thereon are of controlling force.

The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.

In some of the cases to which we have referred, it is suggested that there may be instances where these two principles will clash,—where public service rendered at rates not higher than the service in itself is worth may produce less than a fair income, or no net income at all. But we assume that it is unnecessary to discuss this question here, for neither upon the face of the bill and answer, nor in the requests for instructions, nor in the arguments of counsel, is there any suggestion that what will be reasonable rates for the public in this case will not also be reasonable rates for the company.

There is another matter which we think may fairly be considered in connection with

the reasonableness of rates. We think something may be allowed in this respect for the risks of the original enterprise, if there were any. It is common sense that they who invest their money in hazardous enterprises may reasonably be entitled, for a time, at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning. The plaintiff, in request 11, concedes that such risks may be considered in valuing the franchise. But inasmuch as the value of the franchise depends chiefly upon the net income which may be produced by its exercise at reasonable rates, as has already been stated, it follows, we think, that the reasonableness of the rate may be affected by the degree of risk to which the original enterprise was naturally subjected. This does not mean unforeseen or emergent risks, but such as may have been justly contemplated by those who made the original investment. We use the word "chiefly," because we apprehend that a franchise, even of an unprofitable business, might have a temporary value for some purposes. But that condition does not seem to exist in this case. The element of risk, however, is not controlling. It is only one element. It is to be fairly considered in connection with the other elements named. To say just how much allowance should be made, and for how long a period, requires the exercise of a careful, conservative, and discriminating judgment. If allowance be sought on account of this element of original risk, we think it will be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this risk. This latter inquiry should be limited to this specific purpose, and is not open, as we shall hold, under plaintiff's request 13.

Thirdly, as to the character and duration of the franchises: It must be evident that the value of the plant and the franchises themselves, whether taken separately or as a whole, is affected by the character and duration of the franchises. *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740; *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 28 L. R. A. 270. An exclusive franchise to do a profitable business is worth more than one, which is not exclusive. A perpetual franchise to do a profitable business is, or may be, worth more than one which is subject to repeal.

The plaintiff (request 9) asks an instruction that the franchises now held by the Maine Water Company are in no way exclusive. The defendants suggest that whether the franchises are exclusive, or not, is a question for the appraisers to answer after the charters have been put in evidence, and not for the court, in the first instance, at least. We do not think so. Certain acts incorporating the Waterville Water Company

and the Maine Water Company, and granting to them powers and franchises, are referred to in the bill and are admitted by the answer. They are necessarily in the case without further proof. The plaintiff may properly ask for a construction of the franchises granted by those acts. Such construction is a matter of law.

We have not searched for other grants of franchises than those contained in plaintiff's requests 7 and 8. It is not our duty to do so. But we have no hesitation in saying, that so far as the franchises granted by those acts are concerned, they are not exclusive. The legislature may at any time, according to its own wisdom, grant to the municipalities within which this water system is situated franchises similar to the ones in question. It may grant similar franchises to one or more corporations like the Waterville Water Company or the Maine Water Company. In *re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; *Long Island Water Supply Company v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165. It has granted similar franchises to this plaintiff, a municipal district, and has even authorized it to take away from the defendant water company all the franchises it holds within the district and Benton and Winslow. *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774. But the defendants say that the Maine Water Company was "practically in the enjoyment of an exclusive franchise," because it had no competitor, although its franchise may not be legally an exclusive one; citing *Gloucester Water Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977. And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. That fact is one of the characteristics of the going business, and may enhance its value. We are considering now only the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a difference between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value. Of how much or how little importance it is can only be estimated by the appraisers after hearing the evidence.

Again, the charters under which the company operates are subject to repeal by the legislature. Rev. St. c. 46, § 23. The franchises are not perpetual and irrevocable. It may be that it is extremely unlikely that the legislature would repeal the charters without providing for compensation in some way. The probabilities are fairly open to consideration. But the legal condition exists. It is a factor to be considered for what it is worth.

Having considered these general propositions, which are far-reaching, and which af-

fect substantially all of the requested instructions, it will now be comparatively easy to pass upon the several requests in the form in which they are presented.

(1) Plaintiff's Requests.

The plaintiff, in request 2, asks that the actual cost of the plant and property, together with proper allowances for depreciation, be declared to be legal and competent evidence upon the question of the present value of the same. We so hold. It is competent evidence, but it is not conclusive. It is not a controlling criterion of value, but it is evidence. *National Waterworks Co. v. Kansas City*, 10 O. C. A. 653, 62 Fed. 853, 27 L. R. A. 827; *Smyth v. Ames*, supra; *San Diego Land Co. v. National City*, supra; *Cotting v. Kansas City Stockyards Co.*, supra; *Westchester Turnpike v. Westchester County*, 182 Pa. 40, 37 Atl. 905; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240. Of course, this element is subject to inquiry as to whether the works were built prudently, and whether they were built when prevailing prices were high, so that actual cost, in such respects, may exceed present value. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

The remainder of plaintiff's request 2 asks that the companies be directed to produce their book accounts and other documentary evidence bearing upon the question of cost before the appraisers. This request raises no question of law, and cannot be considered by us.

Plaintiff's request 3 ought not to be given in the form in which it is presented, which is that "under no circumstances can the value of the plant of the companies be held to exceed the cost of producing at the present time a plant of equal capacity and modern design." Among other things, it leaves out of account the fact that it is the plant of a "going concern," and it seeks to substitute one of the elements of value for the measure of value itself. *Montgomery County v. Bridge Company*, 110 Pa. 54, 20 Atl. 407. We shall discuss further the competency of the cost of reproduction when we consider defendants' requests 6 and 7.

We have already discussed sufficiently the first two propositions of plaintiff's request 4. The deduction sought to be established by the third proposition is that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and are immaterial." We cannot say this as a matter of law. As a matter of proof, we think the evidence of such facts is admissible and material. The value of the evidence, however, depends upon whether the appraisers shall find that the rates charged

have been reasonable or not. If reasonable, these facts furnish one important test, but not the only one, in fixing the present value of plant and franchises. *Monongahela Co. v. United States*, supra. But if the charges have been excessive, past receipts should not be regarded by the appraisers as a proper test of value. *Cotting v. Kansas City Stockyards Co. (C. C.)* 82 Fed. 850.

We omit plaintiff's request 5. In argument, the counsel on both sides seem to agree that the selling price of the capital stock of the water company is not to be considered as affecting the valuation of the property. The plaintiff does so in part on general principles; the defendant, because of the special circumstances of this particular case; and it is immaterial to the present discussion which is right. If the claim of the defendants that the entire capital stock of the Waterville Water Company is owned by the Maine Water Company, and that the capital stock of the Maine Water Company represents not only the property in the Waterville system, but also of many others in other towns and cities of the state, is found to be correct, certainly the selling price of capital stock will afford no aid in fixing the value of the Waterville system.

We think the appraisers should be instructed in accordance with plaintiff's requests 6 and 10, without any qualification. They ask that the quality of the water furnished and of the service rendered, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and future, be deemed material upon the question of present value.

We have already discussed sufficiently plaintiff's requests 7 and 8, and to some extent its request 9. This last request is that "the appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal duties governing public service companies." So far, we think the instruction should be given. *National Waterworks Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853, 27 L. R. A. 827; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. The matter of exclusive franchise referred to in this request has already been disposed of. The remainder of the request is that "the franchise shall not be otherwise appraised or valued." In its present form, this is not approved. It is, to say the least, likely to be misleading. If it means to include all of the franchises of the companies, so far as they have been disclosed to us, it is unobjectionable. But if it is intended to include all franchises not now exercised by the going concern, or future extensions of the use of franchises now exercised, it is objectionable. The plaintiff will take all of the franchises of the companies, except the franchise to be a corporation, and for all of these franchises of which it will

be deprived the Maine Water Company will be entitled to just compensation.

Plaintiff's request 11, in so far as it says that "in fixing the value of the companies' franchises the appraisers may give such regard as is demanded by ample and fair public policy to the past investment, risks, and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing," is approved. We have already discussed this proposition in a former part of this opinion, relating to reasonable rates, to which we think it properly relates.

The remainder of request 11 is not approved. It is that in fixing the value of the companies' franchises the appraisers may give regard "to the faithfulness or unfaithfulness shown by the companies in the performance of their public duty and obligation to furnish pure water at reasonable rates." We do not think that past faithfulness or unfaithfulness in the exercise of a franchise bears any such relation to the present value of it as to make it a proper matter for consideration. It is the franchise as it now exists which is to be taken and paid for. It is the right to do business now, under and within the charter, which must be appraised, irrespective of the past use of that right. If past misconduct has incidentally resulted in lessened business, that matter will have due consideration under other heads. But in this process of condemnation of property, the owner is not to be punished for past misuse of it.

Requests 12 and 13 may be considered together. They seem to imply that the companies in the past have been unfaithful in the performance of their public duties, both by furnishing impure water and by charging excessive rates, and by reason thereof it is claimed that the companies "have rendered themselves liable to such processes as are appropriate to work legal forfeiture" of their rights and franchises, and that this liability to forfeiture is to be considered in fixing the value of the property. We cannot give our assent to this doctrine. If these franchises have become forfeitable for misbehavior of the companies, the remedy is found in quo warranto brought by the state, and only by the state. Any individual affected by the wrongful conduct of the companies might have invoked the intervention of the state. But this does not seem to have been done. On the contrary, it is proposed to take these franchises as they are. Even if forfeitable, they have not been forfeited. They are in full force and vigor. They must be valued as living franchises, not as dead or moribund. Whether the state would ever institute process for forfeiture, and, if it did, whether the court would find the facts as the appraisers might, are questions so very uncertain that an inquiry concerning them must be purely speculative and unfruitful.

To permit this inquiry would be to permit the appraisers to speculate upon what the judgment of the court might be at another trial, under other conditions. We think the franchisees must be appraised as they are now held and used by the companies. Whatever the past misconduct may have been, we do not see how it can affect the value of the present right and ability to exercise the franchises. We think, however, that this liability to forfeiture arising from misconduct is to be distinguished from liability to legislative repeal to which we have already alluded. The latter is a limitation of the franchise which inheres in the franchise itself, from its creation. There is no franchise, except as so limited. It is the only kind of a franchise the companies ever held.

Plaintiff's request 13 asks that, if it be found that the companies have actually received more than reasonable rates for the services rendered since operations began, then the amount of such excess shall be deducted from the amount to which the companies would otherwise be entitled. It is not approved. It is sufficient to say that this is not a process of accounting, but one of condemnation of property, for which the owner is entitled by statute and constitution to just compensation at its present value, without any deduction.

(2) Defendants' Requests.

The first paragraph of the defendants' requests presents no question of law, and the second request has already been considered.

Their request 3 is "that any increase of pecuniary obligation or burden or duty, or any damage to or impairment of the value of its remaining property or franchises, in any way resulting to said Maine Water Company by reason of the exercise of the right of eminent domain contemplated by said act of 1899, should be considered by said appraisers, and just compensation therefor should be included." It seems to be assumed in argument, and we assume, that this request is based upon the fact that the Maine Water Company is the owner of other water systems situated at other places. Of course, it cannot refer to any remaining property at Waterville, for there will be none. The argument is that, by depriving the company of its Waterville plant, the general expense of supervision and management will still remain practically unchanged, and will be a proportionately heavier burden upon the remaining property. The language of counsel is that "the economy and efficiency of administration which are sought and obtained by the combination are inevitably more or less impaired by breaking it up, either in whole or in part." The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with or contiguity to that taken, and having no relations whatsoever with the property taken,

except those which grow out of common ownership. The defendants rest their claim upon the familiar doctrine of damages for severance, namely, that, when a portion of a property is taken, the impaired value of the remainder, by reason of the severance, may and should be considered, and compensation awarded therefor. But we think this case cannot be brought within that rule. That rule applies only when the property taken and the property left may fairly be considered one property, and not when they are separate and distinct. In *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290, Kent, J., after stating the reasons for allowance of damages for severance, uses this language: "The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, peculiarly, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot * * * worth * * * than the whole lot, intact, was the day before such taking?" The implication of this language clearly is that the parcels must be of the same property,—in that case, the same lot. In 10 Am. & Eng. Ency. of Law (2d Ed.) p. 1168, tit. "Eminent Domain," it is said that: "To entitle an owner to recover damages to the whole tract when a part of his lands have been taken, there must have been a unity of contiguous parcels. The land must have been together. All of it must have been used as a single tract." In 3 Sedgwick on Damages (8th Ed.) at p. 413, the rule is laid down that: "In assessing damages or benefits, the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose. * * * When land is divided into blocks by the owner, and dealt with as such by himself and purchasers, it is held that each block is to be considered as a separate tract, in assessing damages." *Lafin v. Chicago, etc., Ry.* (C. C.) 33 Fed. 415. Nor are the two cases which the learned counsel for the defendants say are the only ones found, in which the question of damages for the dismemberment of a public service corporation by a compulsory taking has been raised, opposed to this doctrine. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, the general government was proceeding to condemn, under the power of eminent domain, one of the seven locks and dams owned by the navigation company. The court, calling attention to the doctrine of damages by severance, said: "This is a question which may arise, possibly, in this case,

if the seven locks and dams belonging to the navigation company are so situated as to be fairly considered one property,—a matter in which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by itself constitutes a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case." The other case so cited and referred to by counsel is *U. S. v. Gettysburg Electric Ry. Co.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. But this case seems rather to be within the rule of the "single tract" cases. The court simply says: "If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded." It was alleged by the company that the effect of the condemnation of the strip of land in question would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity, and prevent its construction. It seems to us clear that the several parts of an electric railway system may properly be regarded as a single property. No other authority cited by the defendants upon this point aids them. The damages occasioned to the company by the taking of the Waterville property, considered with respect to its other and distinct property, if any, will be incidental and consequential. And such damages are not within the statutory and constitutional requirements of "just compensation." *Cushman v. Smith*, 34 Me. 247; *Brooks v. Cedar Brook Imp., etc., Co.*, 82 Me. 17, 19 Atl. 87, 17 Am. St. Rep. 459, 7 L. R. A. 460.

The defendants' request 4 should be given. It relates to property not directly connected with the water system or plant. It should be appraised "at its fair market value, not at a forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale." *Chase v. Portland*, 86 Me. 367, 29 Atl. 1104; *Doughty v. Somerville R. R. Co.*, 22 N. J. Law, 495; 10 Am. & Eng. Ency. of Law (2d Ed.) 1152; *Monongahela Navigation Co. v. United States*, supra; *Montgomery County v. Bridge Co.*, supra; *Westchester Turnpike v. Westchester Co.*, 182 Pa. 40, 37 Atl. 905. In *Chase v. Portland*, our own court quoted with approval from *Lawrence v. Boston*, 119 Mass. 126, the following: "'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not value obtained from the necessities of another. It is what it would bring at a fair public sale, when one party wanted to sell, and the other to buy." *Palmer v. Penobscot Lumbering Association*, 90 Me. 193, 38 Atl. 108. The statute provides for fixing the "just compensation" for the

property taken at its fair and equitable value, but it does not provide for compensation for consequential damages.

Defendants' request 5 has already been discussed. It should not be given, except as already qualified. We hold that the construction cost is admissible, but not controlling, on the question of present value. It must be borne in mind, as said by Mr. Justice Brewer in *National Waterworks Co. v. Kansas City*, supra, that "'original cost' and 'present value' are not equivalent terms," and that besides the elements of wear and tear, and depreciation in physical structure or in value, the property may have cost more than it ought to have cost. *San Diego Land Co. v. National City*, supra.

Defendants' requests 6 and 7, as limited in their brief, are that neither the reproduction cost of the existing plant, nor the cost at present of a new one differently constructed, but equal or even superior in efficiency to the one now existing, is the legal criterion of the total values to be awarded, or even of the plant or structure value. This is undoubtedly true, if by "criterion" is meant a sole or controlling test of present value. There are other elements besides cost of reproduction or replacement which affect present value. The present value of the property is of vital importance, for, as we have seen, the value of the property at the time it is being used for the public is one of the elements essential in determining what are then reasonable rates, and question of franchise value depends upon the rates which may reasonably be charged. *San Diego Land Co. v. National City*, supra. We think it will be proper for the appraisers to consider what the existing system can be reproduced or replaced for, because evidence of cost of reproduction will have some tendency to show what is the present value. Such cost will not, however, be conclusive. There are other elements, still to be noticed, which should be considered in fixing present value. In *Newburyport Water Co. v. Newburyport*, the cost of the reproduction of all of that part of the physical plant used in pumping and delivering water, less any depreciation, was considered without objection, and seems to have been approved by the court. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Smyth v. Ames*, supra. But the mere cost of reproduction is not enough. Judge Brewer, in *National Waterworks v. Kansas City*, supra, calls attention to two additional elements,—one, that it is a completed structure, connected with buildings prepared for use; and the other, that the company is a going concern. He says (page 665, 10 C. C. A., page 865, 62 Fed., 27 L. R. A. 827): "Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land,

constructing the buildings, putting in the machinery, and laying the pipes in the streets,—in other words, the cost of reproduction,—does not give the value of the property as it is to-day. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that the 'fair and equitable value' is something in excess of the cost of reproduction."

The court, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460, holds that the method of fixing present value by ascertaining cost of replacement is not applicable to property of this character, because, chiefly, the construction and development of waterworks is a matter of growth. At the outset the company owning them is a pioneer. It must keep pace with or anticipate municipal growth. The works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the meantime, as the city grows, the facilities of building such works are increased, and the cost of construction thereby diminished. But we think that, at the most, these considerations suggest only that other elements are also taken into account in fixing present value. So far as they relate to the original hazard, we have discussed them in an earlier part of this opinion. We think the inquiry along the line of reproduction should, however, be limited to the replacing of the present system by one substantially like it. To enter upon a comparison of the merits of different systems—to compare this one with more modern systems—would be to open a wide door to speculative inquiry, and lead to discussions not germane to the subject. It is this system that is to be appraised, in its present condition and with its present efficiency.

X Defendants' request 8 is, in effect, that, in estimating even the structure value of the plant, allowance should be made, in addition to the value as otherwise established, for the fact, if proved, that the water system is a going concern, with a profitable business and good will already established, and with a present income assured and now being earned. We think this instruction, with a modification to be noted, should be given. X *Newburyport Water Co. v. Newburyport*, supra; *National Waterworks Co. v. Kansas City*, supra; *Gloucester Water Supply Co. v. Gloucester*, supra; *Bristol v. Waterworks*, 23 R. I. 274, 49 Atl. 974. But the term "good will" may be misleading. Lord Eldon said that good will is nothing more than the probability that

the old customers will resort to the old place. *Crutwell v. Lye*, 17 Ves. Jr. 335. See *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667. Under any possible definition, it involves an element of personal choice. This phrase is inappropriate where there can be no choice. So far as the defendants' system is "practically exclusive," the element of good will should not be considered. *Bristol v. Waterworks*, supra.

X The defendants, in request 9, ask that in determining the amount to be added to structure value, in consideration of the fact that the system is a going concern, the appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same de novo, the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction, and for such development of business and income. We think this instruction should be given. These are all proper matters for consideration "among other things." They are not controlling. Their weight and value depend upon the varying circumstances of each particular case. Of course a plant, as such, already equipped for business, is worth more, if the business be a profitable one, than the mere cost of construction. X

The defendants' request 10 should also be given. It asks, in effect, that, in addition to structure values already considered, the appraisers should consider all the franchises, rights, and privileges now held by the Maine Water Company within the Kennebec water district and Benton and Winslow, and allow just compensation for them as such. This valuation, however, must be made with reference to the character and duration of the franchises. So far as appears, they are not exclusive, and they are subject to repeal. This we have already discussed. A franchise is property, and it has value. In this case the franchises have value in themselves, inasmuch as they give the owner the privilege of doing what is called a "profitable business." We have already shown that the existence of such franchises may also enhance the value of the plant by which they are exercised. It should be remembered, however, that a franchise has only one appraisable value, and care should be taken that that value is appraised only once.

The defendants' request 11 should be given in this case. It has been given in part already. It is that the value of a franchise depends upon its net earning power, present and prospective, developed and capable of development, at reasonable rates; that the value to be assessed is the value to the seller, and not to the buyer; and that "just compensation" means full compensation for everything or element of value taken. Monon-

gabeha Nav. Co. v. United States, *supra*. The appraisal must be made, having in mind what we have already said concerning the character and duration of the franchises and the reasonableness of rates. While, with these limitations, the owner is entitled to receive the value of the franchises, having reference to their prospective use as now developed, and to the future development of their use, consideration must also be had of the fact that further investment may be necessary to develop the use, and of the further fact that at any stage of development the owner of the franchise will be entitled to charge only reasonable rates under the conditions then existing. But subject to such limitations, we think it should be said that the owner is entitled to any appreciation due to natural causes,—such as, for instance, the growth of the cities or towns in which the plant is situated. *Cotting v. Kansas City Stockyards Co. (C. C.)* 82 Fed. 850.

Defendants' request 12, "that the fact that the franchises, rights, and privileges of said Maine Water Company are to be taken under this act in no respect destroys or impairs their value to said water company, and cannot diminish or affect the amount to be awarded as just compensation therefor," is approved, and the instruction should be given.

Subject to the suggestions we have made under defendants' request 11, their request 13 is approved, and the instruction should be given. It is as follows: "That in estimating said franchises, and the present and future net earning power included therein, the appraisers should duly weigh the nature and extent of these franchises, rights, and privileges, whether the same are perpetual or otherwise; also, so far as proved, the rights of the Maine Water Company under all existing contracts, and the value thereof; the extent of existing business, and of the net incomes or revenues now derived or derivable therefrom; the existing demand for new and additional services, and for the development and increase of said business, incomes, and revenues; the past and probable future growth or decay of the territory now served, or capable of being served, under said franchises, in population, in wealth, and in needs and uses for water to be supplied by some water system; and the past and probable future increase or decrease in said net incomes and revenues as affected by these or other surrounding conditions; also the fact that by said taking said water company will be wholly and forever deprived of all said franchises, rights, privileges, earning power, incomes, and revenues, and that it is the duty of said appraisers to make, in their sound judgment, just and full compensation to said water company for all the same."

Defendants' request 14, is as follows: "That the true measure of value, under the terms of this act, and under the requirements of the constitutions of this state and of the

United States, is just and full compensation to said water company for each and every thing of value of which it is to be deprived by this taking; that, in addition to the special property covered by request 4, the plant, property, franchises, rights, and privileges now held by said water company within the territory embraced by this act contain distinct elements of value—First, as an asset; and, second, as a source of income, having, or not, present and prospective net earning power; that by the taking under this act said water company will be deprived, wholly and forever, both of said asset and of said source of income; that just compensation to said company for what is thus compulsorily taken from it requires that the sum to be awarded as a substitute therefor shall be the full equivalent of everything taken, both in value as an asset, and in net earning power, and such a sum as, in the sound judgment of the appraisers, will be the full money equivalent of all the plant, property, franchises, rights, and privileges aforesaid, and at the same time, if prudently invested at fair current rates of interest, will yield to said company the same net incomes and revenues, and for the same term, that it will be deprived of by this taking; the net earning power, incomes, and revenues aforesaid to be determined under reasonable water rates, after due allowance, on the one hand, for operating expense and maintenance or depreciation, and, on the other hand, with due regard to the probable future increase or decrease thereof under all conditions affecting the same."

Some portions of this request have already been considered so fully that it is unnecessary to repeat. It is doubtless true that the property to be taken, both plant and franchises, are to be appraised, having in view their value as property in itself, and their value as a source of income. The physical property has value irrespective of the franchise, and the franchise without reference to the physical property. But these two kinds of value practically shade into each other. The value of the physical property is enhanced by the existence of franchises which make it usable. The value of franchises is enhanced by the existence of physical property by which they may be profitably exercised. There are these items of property, but only one entire system. There are all of these elements of value, from which is to be estimated the value of the entire property, tangible and intangible, as a whole. The plaintiff is not to take the physical property without the franchises, nor the franchises without the physical property. It will pay one gross sum as an entire value, and take all the property. The consideration of the elements will be useful only as it will enable the appraisers to fix the just compensation to be paid for the entire property as a whole.

But we cannot assent to the proposition that the capitalization of income even at rea-

sonable rates can be adopted as a sufficient or satisfactory test of present value. Such a capitalization would fix at the present time a specific value which would continue for all time to come, as a fixed and unvarying source of income, no matter how conditions may be changed.

Our attention has been called to no case, resting on the same principles as this one does, where the capitalization of profits has been adopted as the test of present value,—certainly not in this country. Take, for instance, the case of *Edinburgh Street Tramway Co. v. Lord Provost*, App. Cas. 1894, p. 456, cited by defendants. It does not support the doctrine. In that case the arbitrator declined to value the tramway lines by capitalizing the rental, and upon appeal his assessment was affirmed, and the appeal dismissed. It was held that the statute under which the proceedings were had limited the appraisal to construction value, which the arbitrator had considered in the light of the fact that the tramways were then successfully constructed and in complete working condition; in other words, that the company was a going concern. Lord Watson, in the same case, at page 475, said that valuation by rental "is not a satisfactory method in the case of a tramway line which has never been let, and has no competing line within its district." How much importance is attributed to the last suggestion, is not stated. See *National Waterworks Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853, 27 L. R. A. 827; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. If the franchises were exclusive, if they were perpetual, and if it could be known that what are reasonable rates now would continue to be reasonable, there would be more ground for sustaining such a test. But the franchises are not exclusive. Competition is possible,—even, as the event has shown, more than probable. They are not perpetual, but may be repealed. And what may be reasonable rates at any given time will depend upon conditions which not only may vary, but are likely to vary. Therefore the basis for capitalization is too uncertain to afford a satisfactory test of value. By this we do not mean to say that, while not a test, present and probable future earnings at reasonable rates are not properly to be considered in determining value. We have already stated that they are.

Defendants' request 15 raises no new question of law. It is sufficient to say the constitution of the United States requires that just compensation should be made to said water company for all its property, of every nature, taken under the act in question, at its full value, not to the taker, but to the seller.

To conclude: The appraisers should be instructed to receive and consider all evidence offered, so far as admissible under the general rules of law, which is pertinent under the

rules stated in these requests, so far as they have been approved by this court, and as limited or explained in this opinion.

So ordered.

BOYER v. WEIMER et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

FRAUDULENT CONVEYANCES — BONA FIDE GRANTEE—RIGHTS ACQUIRED—EVIDENCE—DECLARATIONS OF GRANTOR.

1. Under St. 18 Eliz. c. 5, bona fide purchasers from a fraudulent grantor are protected, and such protection extends to a purchaser from a fraudulent grantee.

2. In ejectment defendant claimed title as purchaser at a sheriff's sale on a judgment rendered several months after defendant in execution had conveyed the property to plaintiff's grantor. There was no evidence of fraud in such conveyance. Held error for the court to charge that, if the conveyance by defendant in execution was fraudulent as to creditors, it was void, and plaintiff's grantor acquired no title, and could convey none to plaintiff.

3. Where the good faith of a transfer has been attacked by creditors of the grantor, and some evidence has been introduced of an intent to hinder or delay creditors, subsequent declarations by the grantor are admissible.

Appeal from court of common pleas, Cambria county.

Action by Harry Boyer against S. A. Weimer and A. L. Keagy. Judgment for defendants, and plaintiff appeals. Reversed.

At the trial it appeared that the title to the land in controversy was originally in Annie D. Keck. On January 21, 1895, Mrs. Keck and her husband conveyed the land to Savilla Allison. On November 29, 1900, Savilla Allison conveyed the land to the plaintiff, Harry Boyer. Both conveyances were by deeds of general warranty. On December 12, 1895, S. A. Weimer secured a judgment against Annie D. Keck, and on execution under said judgment bought in the property at sheriff's sale. Weimer secured possession of the premises from a tenant. Under objection and exception the court admitted evidence of declarations made by Mrs. Keck after the execution of the deed from her to Mrs. Allison. The court also admitted under objection and exception the record in the case of *Weimer v. Keck*.

The court charged in part as follows: "There is one thing in passing that we want to call your attention to (we believe the record will show some little evidence on this question), namely, if there is any evidence to satisfy the jury that Savilla Allison was a married woman at the time she made the deed, the title of the plaintiff in this case would not be perfect; in other words, his title would not be good. Savilla Allison, if she were a married woman, could not convey a good title without her husband join-

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 620.

ing in the conveyance. On the other hand, she could transfer title if she were not a married woman at the time of the transfer.

* * * We have permitted counsel for defendants to call, as if upon cross-examination, Annie D. Keck, who made that transfer, and we permitted them to call her because she was an interested person. If the transfer was not a bona fide one, then the plaintiff in this case was misled, and he, having a warranty deed, as shown by the evidence, might recover his purchase money. * * * We submit all the evidence to you, and advise you that you can pass upon that evidence. If it satisfies you that the transfer from Mrs. Annie D. Keck to Savilla Allison was made for the purpose we have stated, and was a fraudulent transfer, then, on the principle that fraud vitiates all contracts, that contract would be void, and would pass no title to Savilla Allison, and, having no title, she could not convey any to the plaintiff in this case. Now, gentlemen, it narrows down to that."

Verdict and judgment for defendants. Plaintiff appealed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. L. Reed, for appellant. Robert S. Murphy, Thomas E. Murphy, D. P. Welmer, G. C. Keim, H. E. Baumer, and R. E. Creswell, for appellees.

FELL, J. Apparently there was much merit in the defense, but the case was submitted to the jury on grounds that are untenable. The real estate for which ejectment was brought was conveyed in January, 1895, by Annie D. Keck to Savilla Allison, who, in March, 1900, conveyed it to Henry Boyer, the plaintiff. In December, 1895, more than 11 months after Mrs. Keck had parted with her title, a judgment was obtained against her, and in September, 1897, the real estate was sold by the sheriff, under proceedings under the judgment, as her property. The defendant was the purchaser at the sheriff's sale, and obtained possession of the property from the tenant who occupied it. It will be seen that the plaintiff had a perfect record title. The defendant had none, as the judgment under which the sale was made was not a lien. The defendant, therefore, could succeed only by showing that both of the transfers by which the title was vested in the plaintiff were collusive and fraudulent. He succeeded in showing circumstances connected with the transfer from Mrs. Keck to Savilla Allison that cast doubt on the good faith of the parties to that transfer; but there was not a word of competent testimony that tended to impeach the conveyance to the plaintiff. As the case stood at the close of the testimony, the plaintiff was

entitled to a peremptory direction in his favor. The court, however, instructed the jury that, if the transfer by Mrs. Keck was made not in good faith, but for the purpose of defrauding her creditors, it was void, and that Savilla Allison acquired no title, and had none to convey to the plaintiff, whose only remedy, if he was misled, was by an action on a warranty in the deed to recover back the purchase money. This is not the law. It is true that, as against creditors defrauded, Savilla Allison's title was invalid, if she had notice or knowledge of the fraud of her grantor; but the title of the plaintiff could be impeached only by proof of notice affecting him, or of his knowledge of the fraud. Bona fide purchasers from a fraudulent grantor are protected by the statute of 13 Eliz. c. 5, and it is a settled rule that the protection extends to a purchaser from a fraudulent grantee. *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489. The deed of a fraudulent grantor is not a nullity, nor ineffective to divest his title as against the paramount interest of a bona fide purchaser.

As the case goes back for trial, the exceptions to the admission of declarations made by Mrs. Keck after she had parted with the title require notice. The general rule that the declarations of a grantor made after the execution of a grant cannot be used to impeach it has been so far modified that, when the good faith of a transfer has been attacked by creditors, and some evidence has been advanced to show a common purpose or design by the parties to hinder, delay, or defraud creditors, subsequent declarations by the grantor are admissible. *Hartman v. Diller*, 62 Pa. 37; *Souder v. Schechterly*, 91 Pa. 83. The vital question in this case was whether the plaintiff had notice or knowledge of a fraud on the creditors of Mrs. Keck. Until there was some testimony tending to show knowledge on his part, the testimony objected to was inadmissible. As the record of the trial then stood, there was nothing to impeach his good faith as a purchaser for value, and the testimony should have been excluded.

The suggestion in the charge that, if Savilla Allison was a married woman at the time of her transfer to the plaintiff, she still held the title, as her deed was ineffective without the joinder of her husband, was not warranted by the testimony, even were it competent for a third party to question the conveyance on that ground.

To what extent the possession of the defendant was notice to the plaintiff when he acquired title, and whether the burden was on the plaintiff after notice to prove the payment of the purchase money, are matters not raised by the exceptions, and do not at this time call for decision.

The judgment is reversed, and a venire facias de novo awarded.

ULLOM v. HUGHES.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

QUIETING TITLE—EXCLUSIVE REMEDY—REMOVING CLOUD—OPTION TO PURCHASE.

1. Act June 10, 1893 (P. L. 415), entitled "An act to provide for the quieting of title to lands," does not provide an exclusive remedy, but merely a cumulative one, and either party may go into equity for the rescission of a contract or for specific performance thereof, and a vendee has the further choice of ejectment or an action for damages for breach of the contract.

2. Where an owner of land has given an option thereon, and claims that such option has not been fully exercised, he is entitled, under Act June 10, 1893, providing for the quieting of titles to land, to sue to remove the cloud from his title.

3. In an action to quiet title under Act June 10, 1893, where plaintiff claims a failure by defendant to exercise option to purchase land, defendant may disclaim as directly provided in the act, or may deny default on his part, and ask for a conditional verdict as in ejectment, or may set up a default on the part of the vendor, and recover damages for breach of contract.

Appeal from court of common pleas, Greene county; Taylor, Judge.

Action by Harrison Ullom against William T. Hughes to quiet title. From an order refusing an issue, plaintiff appeals. Reversed.

From the record it appeared that on August 9, 1899, Harrison Ullom, an owner of lands in Greene county, gave to William T. Hughes an option in writing to purchase the coal under the said lands and a portion of the surface. The option ran until December 1, 1899. Hughes assigned his interest in the option to one Slease. Slease, on November 30, 1899, caused a notice of acceptance to be served on Ullom. The agreement or option was subsequently recorded. Each party denied that the other had performed the covenants undertaken in the agreement.

Taylor, P. J., filed an opinion, in which, after reciting the agreement, he found as follows:

"The terms of the agreement or option contained therein, as above set out, are not in dispute between the parties. The only question arising under this agreement or option being whether or not the parties to it and their assignees have complied with its terms, on the one hand, to be entitled to a decree of specific performance, and, on the other hand, to a decree of cancellation of the contract. Under the undisputed facts of the case as disclosed by the petition and answer, does the act of June 10, 1893 (P. L. 415) apply? The respondent makes no denial of petitioner's title or possession of the coal as described in said agreement, except in so far as the same are affected by the terms of said agreement and notice of acceptance, or that he has ever paid the purchase money so as to divest petitioner's title, but that the petitioner and his wife contracted to convey the same to him, which contract he asks be enforced

by a chancellor in a court of equity. The petitioner alleges that respondent's rights under said agreement or option have been lost by his failure to perform his part of the agreement. Under the act of June 10, 1893 (P. L. 415), and the authorities of Del. & Hudson Canal Co. v. Genet, 169 Pa. 343, 32 Atl. 559, and McGarry v. McGarry, 9 Pa. Super. Ct. 71, the court of common pleas is required to find two facts to be true from the petition before said act is mandatory of an issue. They are the facts of the petitioner's possession and the (respondent's) or adversary's denial of the title. Of the fact of the petitioner's possession there is no denial, and we so find the fact of the petitioner's possession in this case; but we do not find as a fact the denial by this adversary of the petitioner's title, but an affirmation of the petitioner's title by his adversary to said coal and mining rights. By the agreement, notice of acceptance, and a tender of the purchase money, as set up by respondent, he has but an equity in the coal and mining rights, of which the legal title and possession are both in the petitioner, and which, the respondent contends, under a contract between them, should be conveyed to the lessee's assignees. If it can be held under the undisputed facts of this case that the act of June 10, 1893 (P. L. 415), applies, on a trial on an issue framed, before the respondent could recover, if the facts found by a jury were with him, he would have to tender the purchase money, and this would be, in effect, turning an action of ejectment into a proceeding for specific performance of a contract, an existing remedy for the enforcement and determination of contracts that the act of June 10, 1893, was never intended and does not supersede; nor does said act provide a new remedy to settle and adjudicate questions arising out of contract, nor a new remedy for the specific performance or cancellation of contracts relating to the sale of real estate."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. H. Sayers and Joseph Patton, for appellant. D. C. Cumpston, A. F. Silveus, and M. R. Travis, for appellee.

MITCHELL, J. The plaintiff, being the owner of land, gave an option to the assignor of the present defendant to purchase the coal and part of the surface upon notice of acceptance before a certain date, payment, etc., the plaintiff covenanting on his part to furnish a survey, abstract of title, and general warranty deed, clear of incumbrances. As to these facts there is no dispute between the parties, but each charges the other with subsequent default in the performance of his covenants. The learned judge below held that there was no denial of plaintiff's title, but that defendant's claim was in affirmation

of it, and an assertion of a mere equity in subordination, and dependent upon it under the contract. He held, therefore, that the case was not within the statute. This view was erroneous, in taking too narrow a definition of a denial of title. The defendant here, it is true, does not deny the plaintiff's former title, or assert in himself a title paramount; but he does deny the plaintiff's present title and right of possession by a claim that it has passed out of plaintiff to himself under the agreement. This is exactly the kind of denial of title that is involved in an equitable ejectment on the contract of sale,—denial of present title by affirming prior title, but averring that it has passed to the vendee. It is conceded on all hands that such an ejectment would lie here, and the statute expressly gives the verdict in an issue under the present rule the same force and effect as in an ejectment on an equitable title. The act of June 10, 1893 (P. L. 415), is entitled "An act to provide for the quieting of titles to land," and provides that any person in possession of land and claiming to hold or own possession by any right or title whatsoever, whose "right or title or right of possession shall be disputed or denied," may apply by bill or petition and obtain a rule, etc. The intent of the act is to give an owner in possession an additional, speedy, and convenient remedy for immediate trial and adjudication of any claim of adverse title to part or the whole of his land. It tends to equalize and assimilate the position of claimants of title, whether in or out of possession. As was pointed out in *Del. & Hudson Canal Co. v. Genet*, 169 Pa. 343, 32 Atl. 559, it is another step in the same direction as the enlargement of equitable remedies,—the Acts of May 21, 1881 (P. L. 24) March 8, 1889 (P. L. 10), and May 25, 1893 (P. L. 131, etc.), which have relieved the owner in possession from the common-law necessity of inactive waiting for an attack on his title, and have enabled him to force an immediate contest and settlement. That case logically determines this.

The consequences deprecated by the court below do not follow. The act of March 21, 1806, has no bearing on the case, for the act of 1893 does not give a new right enforceable only in the prescribed way, but merely a new remedy for a right always existing to defend title and possession. And the new remedy is plainly intended to be cumulative only. All the old remedies remain unaffected. Either party may go into equity,—the vendor for rescission or cancellation of the contract, and the vendee for specific performance. And the vendee still has the further choice of an ejectment, or an action for damages for breach of the contract. In either of these ways he can have his case tried by a jury. But formerly the vendor had no such remedy. On a mere option, which he did not admit had been accepted, as in the present case, he could not sue at law, and could only

get rid of the cloud on his title by going into equity. Under this act he may have the facts of acceptance or default determined by a jury. The act expressly assimilates the proceeding to an equitable ejectment, and there is no valid reason why the remedy should not have a liberal construction in furtherance of the expressed purpose. If the plaintiff is in possession under claim of title, and the defendant makes an adverse claim, whether by title paramount or title dependent by contract on his own, the dispute or denial within the contemplation of the act exists, and a case for an issue is made out. The control of the court over both the form and the substance of the issue is ample, and should be exercised to fit the requirements of the real controversy between the parties. The defendant, on coming in to answer the rule, may disclaim, as provided in the act, or he may deny default on his part, and ask for a conditional verdict, as if in ejectment; or he may set up a default by the plaintiff, and elect to recover damages under a plea of set-off, as in an action for breach of contract. The court should mold the issue according to the circumstances, so as to reach a trial on the merits.

Judgment reversed, and an issue directed to be awarded.

SHROYER v. SMITH.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EJECTMENT—EVIDENCE—PAROL GIFT—STATUTE OF FRAUDS—WITNESS—COMPETENCY.

1. Plaintiff in ejectment claimed by deed from his father. Defendant, who was a nephew of plaintiff, claimed under a parol contract with plaintiff's father before the deed to plaintiff, under which contract he took possession. The mother of defendant testified that after he became of age his grandfather, in presence of witnesses, agreed that, if defendant would give up his trade and live with him, he would leave him the farm in controversy. There was evidence of declarations by the grandfather confirming such promise, and a paper signed by the grandfather was introduced, purporting to be a will, leaving the land in question to defendant. Held, that the evidence was sufficient to sustain a verdict for defendant.

2. An instrument purporting to be a will, leaving land which had been given to another by parol to such person, was a sufficient memorandum in writing, within the meaning of the statute of frauds.

3. Where defendant in ejectment claimed under an alleged promise of his grandfather to convey the property to him by will, he was incompetent to testify as to such agreement after the death of his grandfather.

Appeal from court of common pleas, Greene county; Crawford, Judge.

Action by David Shroyer and George B. Shroyer against William D. Smith. Judgment for defendant, and, on death of David Shroyer, plaintiff G. B. Shroyer appeals. Reversed.

Argued before McCOLLUM, O. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. F. Downey and James E. Sayers, for appellant. J. B. Donley, T. S. Crago, and D. S. Walton, for appellee.

MESTREZAT, J. This was an action of ejectment brought April 1, 1898, by David Shroyer and George B. Shroyer against William D. Smith for (quoting from *præcipe*) "a tract of land situate in Cumberland township, Greene county, Pennsylvania, adjoining lands of J. H. Rea on the south and west, lands of Thomas Hawkins on the west and north, lands of W. C. Huston on the north and east, and land formerly owned by Barnhart; containing seventy-three acres, more or less." Before the trial of the case, in November, 1901, David Shroyer died, and his name was stricken from the record as a party plaintiff. Both parties to the record, as thus amended, claimed title to the premises in dispute through David Shroyer, the father of the plaintiff and the grandfather of the defendant, to whom the land was conveyed by Johnson Waycott by deed dated September 20, 1884, and duly recorded in the recorder's office of Greene county. The plaintiff's title is founded upon a deed from his father to him dated November 4, 1897, and duly recorded, by which the land in controversy was conveyed "to the said George B. Shroyer for life, and at his death to his wife, Elizabeth Shroyer, if she survive him and remains his widow, to her for life, and at her death, or upon her remarriage, then the reversion and remainder to the use of Edward C. Shroyer and John Shroyer, children of the said George B. Shroyer and Elizabeth Shroyer, in equal shares in fee, to them, their heirs and assigns, forever." The plaintiff put in evidence the record of the deed, and relied upon it as his right to recover in this action. The defendant, William D. Smith, claimed the premises by virtue of an alleged parol contract entered into between himself and David Shroyer just before or about the time he was of age, in 1884, by the terms of which Shroyer was to purchase a farm and devise it to Smith, in consideration of which the latter was to give up his trade of blacksmith, remove to the farm with his grandparents, and care for them, and work and manage the farm, until their death, or they were done with the farm. It is alleged by the defendant that, in pursuance of said contract, Shroyer purchased the farm in dispute, known as the "Harper Farm," in 1884, and executed a will, dated March 16, 1887, by which he devised said farm to Smith; that the latter removed to the farm with his grandparents, and took possession of it, and has fully and faithfully complied with all the stipulations of the contract to be performed by him. It is claimed by the defendant, and his evidence tended to show, that at the age of 13 months he became a member of his grandfather's family, and that, when he was between 10 and 11 years of age, his parents

(about removing West) permitted him to remain with his grandparents in consideration of the latter agreeing to give him \$4,000 and certain personal property when he became of age. It further appears from the testimony that Smith continued to reside on the Harper farm with his grandparents until the death of his grandmother, in 1897, and that he still remains in possession of the farm. Prior to the removal of the parties to the farm, at the suggestion of his grandfather, Smith learned the blacksmith trade. The right of the plaintiff to recover was also resisted by defendant on the ground that David Shroyer, at the time he executed and delivered the deed to his son, the plaintiff, did not have sufficient mental capacity to execute the deed, and that it was procured through the undue influence of his son. Mr. Shroyer's wife died September 2, 1897. He left his grandson's home September 6th, and has since resided with the plaintiff. The two questions thus raised by the defense, to wit, the mental incapacity of David Shroyer at the time he executed the deed to his son, as well as the undue influence exercised upon him by the latter at that time, and the existence and sufficiency of the contract between David Shroyer and his grandson, and the fulfillment of its terms by the latter, were submitted to the jury by the learned trial judge in a clear and adequate charge. The verdict was in favor of the defendant, and, a new trial having been refused, judgment was entered on the finding of the jury. The plaintiff appealed.

The assignments of error suggest two propositions for consideration: (1) Was the evidence, if believed by the jury, sufficient to establish the alleged agreement between David Shroyer and his grandson, and, if so, was the contract within the statute of frauds? (2) Was the defendant a competent witness, under the act of June 11, 1891 (P. L. 287), to testify to matters occurring in the lifetime of David Shroyer?

The principal and only witnesses on the part of the defendant who were present at the time the agreement was made were the defendant and Mrs. Coll, his mother. The latter testified at some length, giving the arrangement under which the defendant, as an infant, was taken to his grandfather's home, and detailing various conversations between her father and her son, leading up to and terminating in the contract which is set up here as a defense to this action. She testified that under the agreement the defendant "was to live with them [his grandparents], and farm and work for them, and, when they were gone, they would give him the farm"; that he was to get the farm by will; that he was then living with his grandfather, in Carmichaels, and the latter requested him to leave his trade, and go with his grandparents to the Harper farm, which he did. The date of the contract, as fixed by the witness, was in 1884, at or about the time the defendant

arrived at the age of 21 years. She also testified that her father told her in the presence of her son that, in compliance with the contract, he had made a will, and devised the farm to the defendant, and that he would get it when he (her father) was gone. The defendant, in his deposition, taken under a rule before the death of his grandfather, substantially corroborates his mother as to the terms of the contract between him and his grandfather. He says that at the time the agreement was made, and he entered upon the performance of it, he had acquired the blacksmith trade; that the inducement to leave his trade was the farm which he was to get by will. He further says that his grandfather told him "he had willed the farm to me, and I would get it. He would see that I got it." The witness speaks of the several efforts made by his grandfather to purchase a farm before he bought the Harper farm, to which he removed with his grandparents in pursuance of the agreement. Smith also testifies that he performed his part of the contract faithfully; that his grandfather resided with him until after the death of his grandmother, in 1897, when he left without cause, and went to the home of the plaintiff, where he lived until his death. In addition to this testimony, other witnesses were called who testified to frequent conversations with David Shroyer in which he admitted the contract between him and his grandson, and his intention to carry out its terms. If the testimony is believed, the jury was fully warranted in finding that the contract between David Shroyer and the defendant was established in all its terms. The parties were brought face to face, and the evidence disclosed a complete contract made by them. It also authorized the finding that the defendant had performed his part of the agreement. It is true that David Shroyer left the home of his grandson and resided with the plaintiff during the last four years of his life, but there was no sufficient reason, in the judgment of the jury, for his action in doing so. It clearly appears, if the witnesses are credible, that David Shroyer had frequently admitted making the contract with his grandson, and that in pursuance thereof he had made a will devising the Harper farm to the defendant. This testimony is supplemented by a paper in evidence, purporting to be the last will of "David Shroyer, of Cumberland township, Greene county, Pa.," dated March 16, 1887, in which he devises "to William D. Smith the farm that I live on, and is known as the 'Harper Farm,' adjoining lands of T. H. Hawkins, Wilson Huston, and others; also all my personal property that is thereon at my decease." The paper was in proper form as a testamentary disposition of property.

It is contended by the learned counsel for the appellant that the will is not a sufficient writing to take the contract out of the statute of frauds; that it "says nothing about

the possession of any prior contract relating to the same; it does not define the quantity of land; it is entirely deficient without parol testimony to take it out of the statute of frauds"; and that the description is not sufficient to locate the land. It is not necessary that the will should set forth the possession of the premises by the devisees, or that there was a contract. These facts must appear, but may be shown by parol proof. Testimony was introduced to establish the contract, and to show that the devisee took such possession of the land as the agreement required in 1884, and has since continued such possession of it till the present time. This was followed by testimony, believed by the jury, that the will was made pursuant to and in conformity with the terms of the contract. The will therefore became a writing embracing the terms of the agreement, and satisfied the statute of frauds. *Brinker v. Brinker*, 7 Pa. 53; *Smith v. Tuit*, 127 Pa. 341, 17 Atl. 995, 14 Am. St. Rep. 851.

We do not agree with appellant's counsel that the will is not sufficiently definite as to the quantity of the land, or as to description of the locality of the premises. It will be observed that it was similar to, and about as definite as, the description in the præcipe in this case. The will recites the fact that David Shroyer is "of Cumberland township, Greene county, Pa.," and devises "the farm that I live on, and is known as the 'Harper Farm,' adjoining lands of T. H. Hawkins, Wilson Huston, and others." So far as the will discloses the fact, this is the only real estate Shroyer possessed.

It follows from what has been said that the court below committed no error in submitting to the jury the evidence introduced to establish the contract, and in sustaining the verdict on that branch of the case.

The defendant was offered as a witness in his own behalf. His competency being objected to, the court below ruled as follows: "I will rule he is competent to testify to any facts occurring in the lifetime of David Shroyer in presence of George Shroyer." From this ruling it is evident that the learned trial judge thought the defendant was made competent by the act of June 11, 1891. Both parties claim title under David Shroyer, who was dead at the time of the trial. The plaintiff claimed by deed, and the right of David Shroyer to make that deed was the matter in controversy. Shroyer was dead, and the defendant, whose interest is adverse to Shroyer's right to grant the premises, was offered as a witness in the case. His interest was adverse to the right of Shroyer to convey, and he was therefore incompetent to testify, under clause "e" of section 5 of the act of May 23, 1887 (Purd. Dig. 817). *Baldwin v. Stier*, 191 Pa. 432, 43 Atl. 326; *Myers v. Litts*, 195 Pa. 595, 46 Atl. 131. His incompetency to testify, under the facts disclosed by the record, was not removed by the act of 1891. The defendant, under this

act could testify to any relevant matter occurring before the death of David Shroyer, only if such matter occurred between himself and another person, or in the presence or hearing of another person, who had been called and testified to such matter against the defendant. Under such circumstances, the act very properly permits the surviving party to testify. The inequality of the parties created by the death of one of them seals the lips of the other; but when that inequality has been removed by a living and competent witness, who testifies against the surviving party to any relevant matter occurring in the lifetime of the deceased, between the witness and the deceased or in the presence of the witness, the competency of the other and remaining party to the transaction is restored by the act of 1891, to the extent of permitting him to protect himself against the testimony of his adversary's witness. Here, however, when the defendant testified, his incompetency had not been removed by the testimony of any witness called by the plaintiff to testify to any matter occurring between the defendant and the witness, or in the presence of the latter, and which had occurred before the death of David Shroyer. The defendant was therefore clearly excluded as a witness by the act of 1887, and was not made competent to testify under the act of 1891. Nor was the error in admitting him to testify cured by the admission of the defendant's deposition, which was clearly competent. It is conceded by the appellee's counsel that Smith's "testimony itself was very material to the defendant's case." We therefore cannot assume that its admission was "harmless error," or that it did not injuriously affect the plaintiff's case.

If the defendant's title to the premises is sustained, the question of undue influence exercised by the plaintiff upon David Shroyer, and the condition of the latter's mind when he executed and delivered the deed to his son, become immaterial. These matters were properly disposed of by the learned trial judge.

The tenth assignment of error is the only one having any merit, and, for the reasons stated, it is sustained, and the judgment is reversed, with a *venire facias de novo*.

COMMONWEALTH *ex rel.* McENTIRE *et al.*
v. SUMMERVILLE *et al.*, County
Commissioners.

(Supreme Court of Pennsylvania. Jan. 5,
1903.)

STATUTES—REPEAL—RELIEF OF POOR—LOCAL
ACTS.

1. Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities, and, if the general and special acts can stand, they will be construed accordingly.

2. Act June 4, 1879 (P. L. 78), being an act to create poor districts, and to authorize erection of buildings for the relief of the poor, was

intended to establish a general system for the relief of the poor throughout the state, and repealed Local Acts March 21, 1865 (P. L. 501), April 11, 1866 (P. L. 608), and April 10, 1873 (P. L. 763), giving the commissioners of Clarion county authority to act as directors of the poor of such county, and providing for the erection by them of necessary buildings for the reception and employment of the poor.

3. Act June 4, 1879 (P. L. 78), being an act to establish a general system for the relief of the poor, does not exempt from repeal the local acts relating to the care of the poor in Clarion county by section 21, providing that the act shall not repeal any local act under which poorhouses have been erected, where at the time of its passage no poorhouse had been erected under such local act, nor had any lands been purchased, or poorhouses commenced to be built.

Appeal from court of common pleas, Clarion county.

Petition by the commonwealth, on the relation of W. J. McEntire and others, for a writ of mandamus to J. A. Summerville and others, county commissioners. From an order refusing the writ, relators appeal. Reversed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Harry M. Rimer, Harry E. Rugh, and Don C. Corbett, for appellants. George F. Whitmer, for appellees.

BROWN, J. The appellants were the petitioners below for a writ of mandamus to compel the appellees, commissioners of the county of Clarion, to purchase real estate and erect buildings for the accommodation of the poor of that county, and to furnish them relief and give them employment, in accordance with the provisions of the act of June 4, 1879 (P. L. 78). The writ was denied for the reason that local acts relating to the erection of a poorhouse in the county had not, in the judgment of the court below, been repealed at the time proceedings were instituted under the act of 1879, which was on June 20, 1898. On that day a petition, as required by the act, was presented to the court of quarter sessions of the county, in pursuance of which an election was ordered, resulting in a vote in favor of purchasing real estate, and erecting buildings thereon, that the design and purpose of the act might be carried out. The commissioners, however, refused to act; alleging that the act of 1879 was not in force in their county, in which view, as just stated, they were sustained by the court below.

The local acts held by the court below to have been in force were: Act of March 21, 1865 (P. L. 501); act of April 11, 1866 (P. L. 608); and act of April 10, 1873 (P. L. 763). By the first, the commissioners of Clarion county were authorized to "exercise and perform all the duties of directors of the poor of the said county," and to select and purchase such real estate as they might deem proper and necessary for the support and employment of the poor of the county, and take conveyance of the same, in the name

and for the use of the said county; and they were directed to proceed to build such buildings as might become necessary for the reception and employment of such persons as might be a public charge on the townships of the said county, and to increase and enlarge said buildings and accommodations as the same might become necessary. To enable them to do these things, they were authorized to increase the county taxes. The act of April 11, 1866, which was a supplement to that of 1865, provided for the appointment, first, and then the election, of three suitable persons, to be directors of the poor of the county, who were "created and constituted a body politic and corporate, by the name, style, and title of the directors of the poor of Clarion county," and upon whom were imposed all of the duties that the act of 1865 had directed the county commissioners to perform. The act of 1873 was for the erection of a poorhouse in the township of Piney, in the county of Clarion, with a provision that it might be lawful for any township or borough in the said county to accept its liabilities and privileges. Nothing, so far as is disclosed by the record, was ever done under this last act; and the admission of the appellees is "that at the date of the passage of the act of June 4, 1879, there had not been erected poorhouse or home for the relief of the destitute, nor were there at that time any controlled or managed, nor had lands been purchased or poorhouse commenced to be built, within the said county of Clarion or said poor district."

The act of June 4, 1879, is entitled "An act to create poor districts, and to authorize purchase of lands and erection of buildings to furnish relief and give employment to the destitute, poor and paupers in this commonwealth." Its first section is "that for the purpose of furnishing relief to the poor, destitute and paupers, giving them employment, and carrying out the provisions of this act, each county of this commonwealth is hereby created a district, to be known as * * * County Poor District." It places the management of the poorhouse in the hands of the county commissioners, instead of the directors of the poor of Clarion county. The commissioners cannot purchase real estate and erect buildings until authorized to do so by a popular vote, but by the acts of 1865 and 1866 no such popular approval was required. The conveyance and title for the real estate to be acquired for the use of the county poor district are to be made and taken in the name and for the use of the poor district. By the local acts, the money for the purchase of the land and the erection of the buildings, and the expenses of maintaining them, was to be provided for by a county tax, while under the act of 1879 there is to be a taxation for poor purposes; and, to enable the commissioners to carry out the provisions of the act, they are authorized to issue bonds to be payable by the poor district. "The

act of June 4, 1879," as was said in *Jenks Township Poor District v. Sheffield Township Poor District*, 185 Pa. 400, 19 Atl. 1004, "was intended to establish a general system for the relief and employment of the destitute poor throughout the state. The general plan or purpose of the act is that each county shall be or become a single poor district." Contrasting the provisions of the acts of 1865 and 1866 with those of 1879, it is most manifest that the legislative intent was that those of the latter were intended as a substitute for the former; and in such case, although the later act contains no express words to that effect, it must, on principle, as well as in reason and common sense, operate to repeal the former. *Johnston's Estate*, 33 Pa. 511; *Best v. Baumgardner*, 122 Pa. 17, 15 Atl. 691, 1 L. R. A. 356. "The rule of construction on this subject has been stated in *Johnston's Estate*, 33 Pa. 511, where it is held that (following *Harcourt v. Fox*, 1 Show. 506) an affirmative statute introductive of a new law on the same subject does imply a negative of the former law, if they are repugnant; or, as stated in *Dillon on Municipal Corporations* (section 87), for which he cites cases in our own and many other states: 'It is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities, but they do so when this appears to have been the purpose of the legislature. If both the general and the special acts can stand, they will be construed accordingly. If one must give way, it will depend upon the supposed intention of the lawmaker, to be collected from the entire course of legislation.'" *McCleary v. Allegheny Co.*, 163 Pa. 578, 30 Atl. 120.

That the legislature intended the act of 1879 to be not only a substitute for prior local acts upon the same subject-matter, but that it should operate as a repeal of them, is most manifest from the twenty-first section, which is: "This act shall not be construed to repeal any local act or acts under which poorhouses or homes for relief of the destitute have been erected or are now managed or controlled, nor repeal any general law under which lands have been purchased or poorhouses have been commenced to be built." So clearly did the legislative mind think it had expressed itself in the first 20 sections as intending to repeal all local acts, and that its intention would be so understood, that it inserted the last and saving clause, where, if the appellants cannot find their exemption from the act, there is none for them. When the legislature declared what local acts alone should be saved from repeal by this substitutionary act, those not within the exception were without it. What was not saved by the act fell under it, and the legislative intent cannot be understood otherwise. On June 4, 1879, no poorhouse and home for the relief of the destitute had

been erected or was managed or controlled under any local act in Clarion county, nor had lands been purchased or poorhouses commenced to be built; and the county is not within the saving clause of the act. "Expressio unius est exclusio alterius." "The exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made." Marshall, C. J., in *Brown v. Maryland*, 15 Wheat. 419, 438, 6 L. Ed. 678.

Whether the acts of May 8, 1876 (P. L. 149), March 24, 1877 (P. L. 40), and May 18, 1878 (P. L. 63), repealed the local acts of 1865, 1866, and 1873, we need not decide, in view of what we have said as to the effect of the act of 1879. Its constitutionality does not seem to be questioned by the appellees; and, though referred to in a passing way by counsel for the appellants, we need not consider it here.

The order of the court below, dismissing the petition of the appellants, is reversed, and the record remitted, with direction that a writ of peremptory mandamus issue, as prayed for in the petition; the costs below and on this appeal to be paid by the appellees.

REILLY v. MOUNTAIN COAL CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

PUBLIC RECORDS — DEPUTY SURVEYOR'S BOOKS—WARRANTS—RETURN OF SURVEY—DEED FROM STATE—ACKNOWLEDGMENT.

1. Under Act 1785, directing that every deputy surveyor shall make fair and clean entries of all warrants put into his hands, the book provided by him for that purpose is a public record.

2. Where a deputy surveyor entered into the book which he was directed to keep under the act of 1785 a warrant, as well as a plot of the survey made by him under the warrant, but made no return of the survey, and another deputy surveyor returned the survey more than 50 years thereafter, after having examined it on the ground, and found it to be correct, the title remained good in the original warrantee or his successors, where the rights of no third parties have intervened.

3. As prior to Act March 14, 1846, no law required that patents or deeds from the commonwealth should be acknowledged before any officer, to entitle them to record, a deed by the commonwealth for land owned by it, executed in the name of the commonwealth, and under its great seal, before that date, could be recorded without acknowledgment.

Appeal from court of common pleas, Cambria county; Barker, Judge.

Action by John Reilly against the Mountain Coal Company, in ejectment. Judgment for defendant, and plaintiff appeals. Reversed.

The court refused to admit in evidence a deed in the name of the commonwealth, under its great seal, to Dorothea Brien, recorded in 1844, in Cambria county, but not acknowledged.

Plaintiff presented these points:

"(1) As against the alleged title of the defendant, which had its inception by warrant dated March 19, 1880, on which patent was issued on August 18, 1890, the sale to Brien & Coleman of March 11, 1808; the power of attorney from Dorothea Brien to Abraham Morrison, dated August 8, 1845, and recorded June 26, 1847; the deed of Dorothea Brien, by her attorney in fact, Abraham Morrison, to Henry McKenzie, dated December 31, 1849, and recorded May 24, 1880, with the recital therein of conveyance by 'secretary of commonwealth of Pennsylvania, by deed dated January 4, 1843, to Dorothea Brien, in fee'; the last will and testament of Henry McKenzie, dated February 23, 1850; the petition of the executor of the last will and testament of Henry McKenzie, deceased, to sell the land claimed by the plaintiff in this action, with the order of the court, under date of September 13, 1853; the sale of the land as confirmed by the court on December 5, 1853; the deed from Sylvester McKenzie, executor, to Bernard McColgan, dated December 22, 1853, and recorded November 20, 1854, with the recitals therein; the deed of Bernard McColgan to John Reilly, dated March 21, 1871, and recorded April 22, 1880, for the land claimed in this case by the plaintiff, with a recital therein as follows: 'Being the same tract of land, inter alia, which the secretary of the commonwealth of Pennsylvania, by deed dated January 4, 1843, and recorded in recorder's office of Cambria county, in Record Book, vol. 7, page 357, etc., conveyed to Dorothea Brien, and Abraham Morrison, attorney in fact of Dorothea Brien, by deed dated December 3, 1849, conveyed to Henry McKenzie, and Sylvester McKenzie, executor of the last will and testament of Henry McKenzie, by deed dated December 22, 1853, and recorded in recorder's office of Cambria county, in Record Book, vol. 13, page 201, sold and conveyed, by virtue of an order of the orphans' court of Cambria county, to Bernard McColgan, party hereto'; the deed of F. H. Barker, treasurer of Cambria county, to S. W. Davis, dated June 8, 1896, recorded July 9, 1898: 'All that certain tract of land held in the name of John Reilly, in Summerhill township, Cambria county, containing four hundred and thirty-nine acres'; deed of assignment of S. W. Davis and Sarah J. Davis, his wife, to John Reilly, dated July 8, 1898, and recorded July 9, 1898; assessment of the land claimed by the plaintiff to John Reilly from the year 1880 continuously to this date,—the jury may find a good title vested in John Reilly; and if the jury find in addition thereto, from the evidence, that the location contended for by the plaintiff under the warrant and survey of John Nicholson is the true location of the land claimed by the plaintiff, the jury may find a verdict in favor of the plaintiff." Not answered.

"(4) If the jury find that the Mitchell warrant, under the date of March 19, 1889, and the return of survey made thereunder, were located upon the lands surveyed under the John Nicholson warrant of August 8, 1793, which survey was accepted by the commonwealth September 15, 1847, and if the jury further find that the plaintiff is the successor in title to John Nicholson under his said warrant, their verdict should be for the plaintiff for the land described in the writ." Not answered.

Defendant presented these points:

"(6) The record of the return of survey of John Nicholson tract, of August 8, 1793, shows that George Woods, and he alone, made the survey in 1793. The tract must be located by evidence of marks of such survey in 1793, and, failing in such evidence, then it must be located by 'adjoiners.' Answer. Affirmed."

"(8) The jury must not consider the evidence of J. Murray Africa as to the Cadwallader Evans tract being a John Musser tract, as his evidence is based upon his recollection of the contents of papers which were not produced, and is therefore incompetent. Answer. Affirmed."

"(9) Where, as in this case, it appears from the return of survey that the surveyor, in locating the tract, went upon the ground and made the survey, calls for streams and other natural monuments are of great weight in determining the location of the tract. Answer. Affirmed."

The court charged, in part, as follows:

"You will have nothing to do with anything in this case, except to determine this one question, if you can: Where did George Woods survey this piece of land in 1793? In other words, did he survey the land where the plaintiff in this case claims he did; that is, as shown on his map by the red lines? If he did not survey and locate that piece of land where the plaintiff claims he did, as shown on that map by the red lines, then, of course, the plaintiff has nothing to do with the land covered by that survey, and claimed by the defendant, and cannot recover. The only questions of law in the case are those which we shall give you to guide you in your deliberations in determining that question,—as to where George Woods did locate this tract of land."

"It very frequently occurs, as in the past, —not so much now, since land titles have been better settled,—that these controversies arise between two persons, each of whom owns warrants, surveys, and patents out of the commonwealth, and it is claimed one interferes with the other, that one is laid partially on top of the other; and certain rules have been laid down, and, mainly, the rules that have been laid down are in relation to cases of that kind. There are two warrants, surveys, and patents here that interfere, but these rules do not apply in this case, because it is a question here of the actual location

on the ground of the John Nicholson warrant, as claimed by the plaintiff.

"The presumption is that Mageehan merely returned to the land office a copy of the survey, out of the book, made by Woods, but he states in his return that it was examined by him and found correct. Now, of course, if it were proven as an absolute fact in this case, that Mageehan made a survey on the ground, and it differed from that made by Woods, the Woods survey would prevail. He would have no authority to change the survey made by Woods. He would only have authority to report to the land office what survey was made by Woods."

"But the land office has accepted the return of the survey made by Woods, in the handwriting of Mageehan, in which he states that he examined it and found it correct; and we feel that if there was absolute proof here that Mageehan had marked a line on the ground on the date when he says he examined this, and marked it as shown on the draft introduced in evidence, that while it is not evidence in itself alone, and could not be, if there was nothing else in the case, of the true location of this, yet, if it throws any light on the location made by Woods originally, then it is evidence in this case, and not otherwise."

"Now, independent of any bearing that this survey, alleged to have been made by Mageehan, has upon the question as to whether or not Woods made such a survey, it is valueless as evidence, for the reason, if he was not going over the ground that George Woods went over, then his survey is valueless. He had no authority to make other lines. He had no authority to make new lines. The plaintiff's title must rest upon the survey made by George Woods."

"We simply instruct you that your duty is, from the evidence in the case, to follow the footsteps, if you can, of George Woods, in 1793, and see whether or not he located this land as claimed by the plaintiff. If you find, from the weight of the evidence, that he did, under our instructions as to the way in which you shall apply that evidence, then render a verdict for the plaintiff. If you find that he did not locate it there, and it matters not where else he may have located it, then your verdict would be for the defendant."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Geo. A. Jenks, W. Horace Rose, and Chas. Corbet, for appellant. P. J. Little, S. M. Jack, D. B. Taylor, Alvin Evans, J. W. Leech, John E. Evans, Mathiot Reade, and M. D. Kittell, for appellee.

DEAN, J. Plaintiff brought ejectment to recover from defendant possession of about 307 acres and 112 perches of land in Summerhill township, Cambria county, warrant-

ed in the name of John Nicholson, August 3, 1793. The warrant was put into the hands of George Woods, at that time deputy surveyor for Bedford county, within whose territory the vacant land described in the warrant was at that time situated. He made survey of the land to satisfy the warrant, and entered the plot or draft of his survey in a survey book kept by authority of law for that purpose in his office. Cambria county was organized in 1804, and its territory included that part of Bedford county in which this land lay. The records, including this survey of the deputy surveyor of Bedford, so far as they affected the land in the new county, went into the hands of the deputy surveyor of Cambria. This book containing copies of the surveys was not a mere private memorandum of the surveyor. It was much more than that. It was a book which the law directed him to keep,—therefore was a public and official record. The act of 1785 (2 Smith's Laws, p. 319) directs "that every deputy surveyor who shall receive any such warrant, shall make fair and clean entries of all warrants put into his hands in a book provided by him for that purpose." Section 9 of the same act directs how the warrant shall be executed: "By actually going upon and measuring off the land and marking the lines to be returned upon such warrant." And it was further directed that such surveys should be returned into the land office by the deputy surveyor, "as soon as conveniently may be after such survey shall be made upon the payment or tender of the fees to which such deputy surveyor shall be legally entitled for his services therein." It is then provided that if the survey be not made before December 31st, in the year the warrant came to hand, and returned into the land office before the last day of March in the next year, it shall be void as to future surveys of the same land returned before any return of the first survey. Then follow heavy penalties on the deputy for neglect of duty, and a formal official oath to perform his duty with impartiality and fidelity. The warrant was applied for by John Nicholson on August 3, 1793, and issued to George Woods, the deputy surveyor of Bedford county, August 8, 1793. It was duly entered by him in his book, as well as a plot of the survey made by him in pursuance of the warrant. A mere glance at this plot shows that Woods, in substance, asserts that it was made upon the ground. The corners are indicated by trees of different species, and adjoiners on three sides are marked. Why the survey was not returned, does not appear from any of the records in evidence. Whether the deputy was not paid or tendered his fees which the warrantee was bound to pay before return, or for some reason other than neglect, can now be only a matter of conjecture. There was subsequent legislation in 1792, 1793, and 1794 in reference to deputy surveyors, but no sub-

stantial change was made, prescribing his duties in the particulars noticed. In 1804, as before noticed, the territory for which this warrant called became part of Cambria county, and Woods' official book of warrants and surveys went into the hands of James Mageehan, deputy surveyor for Cambria county. Still, for years no return was made of the Nicholson survey, but in 1847 Mageehan returned it into the land office, with this certificate appended to the plot: "Situate on one of the South branches of the Conemaugh, Summerhill township, Cambria county and surveys joins, in pursuance of a warrant granted to John Nicholson dated the 8th of August, 1793, surveyed by George Woods, deputy surveyor of Bedford county, in 1793, in pursuance of said warrant and examined by me the 10th day of July, 1842, and found correct. James Mageehan, D. S. of Cambria County." Unquestionably, this was a lawful return of Woods' survey by his successor having authority as to this part of the territory theretofore Bedford county. Up to the date of it, no intervening right had been asserted. If the land was vacant in 1793, it continued vacant, as to all persons except Nicholson or those claiming under him, down to 1847. It should be noted here that certain proceedings had been had with reference to this land between 1793 and 1847. The commonwealth claimed an indebtedness from Nicholson. Proceedings were had under the act of 1807 to adjust and fix the indebtedness and make sale of his lands. To that end, commissioners were appointed, who certified they had on March 11, 1808, made sale of his lands,—among others, this tract warranted August 8, 1793, to Edward Brien and Robert Coleman for the sum of \$301.94,—and that the purchasers had given bond, with security, conditioned for the payment of the purchase money to the commonwealth. Afterwards, both purchasers having died, the widow and heirs of Coleman conveyed all their interest in the land to Dorothea Brien, widow and sole heir of Edward Brien, and she paid the full amount of the bond to the commonwealth. In consideration, the commonwealth, under its seal on January 24, 1843, conveyed to her the Nicholson tract, here in dispute. Under the law and usage of the land office, the owner of the Nicholson warrant had no right to claim the issue of a patent, for his survey had not been returned, nor had the purchase money been paid; but the commonwealth, treating him as the equitable owner, sold the land for his debt, accepted the full purchase money from the purchaser, and delivered to his widow a deed therefor; then, four years after, accepted Mageehan's return of the Woods survey. These are, in substance, the material facts of the case.

If the result of the issue depended on the exact date of plaintiff's inception of title, as between him and defendant, it might become important to inquire just what title

Nicholson had acquired by his warrant and survey before the return of Mageehan, which was the question in *Drinker v. Holliday*, 2 Yeates, 87,—and like old cases. But here defendant claims no title prior to 1889, more than 40 years after Mageehan's return. The commonwealth then grants the land to defendant's grantor, Robert Mitchell. Was the land still hers to convey? That depends on whether it had been appropriated before under the Woods survey, either in 1793, or by Mageehan's verification and return in 1847 on the Nicholson warrant. It seems to be conceded that Woods' marks, if he had made them on the ground, have now disappeared. At the time of the trial the survey had been made 107 years before; but, leaving out of view for the present the survey of 1793, what about the return of Mageehan in 1847? In his certificate he does not say he resurveyed the tract or remarked its lines, but he says it was surveyed by Woods in 1793, and "examined by me the 10th day of July, 1842, and found correct." The learned judge seems to have assumed that Mageehan's sole duty was to copy Woods' survey from his book, and return it to the land office, and that it is improbable he went upon the ground. We do not think the facts warrant such inference. If, as argued, the words "examined by me and found correct" mean only that he examined the plot or plan of survey in the book, and that he found it correct, it may well be asked, how could he find a survey correct by a mere examination of the book? That showed nothing but the warrant and plot. Whether correct or incorrect, there was in the book no means of ascertaining. Mageehan's duty was precisely what Woods' would have been, had the land remained undetached from Bedford county, and Woods had survived and held office in 1842. He would have then known that for nearly 50 years the survey had remained in his office, not returned. Whether the land, or any part of it, had been appropriated under later warrants, he could not tell. He might have been familiar with other and adjoining surveys in that region. It would have been not only his right, but his duty, as a conscientious public officer, to again go upon the ground and re-examine the survey, not for the purpose of changing its location, but for the purpose of ascertaining whether junior rights had, in this lapse of time, intervened, which affected the old survey. If any had, it was his duty to note them in his return to the land office. What it would have been Woods' duty to do, was just as plainly that of Mageehan. Our inference from the wording of the certificate is that he examined the survey on the ground, and found the map of it correct. It needed verification, which could only be had by going upon the ground, and this, in all probability, he did. And this view is corroborated by the testimony of Africa and Mitchell, experienced surveyors. Africa tes-

tifies he first went on the ground, having with him a copy of the original survey in 1896. Found a birch corner, which counted to 1842, ran east 218 perches on line marked 1842. He then ran north from the birch and found a well-marked line of 1842 and along the eastern line of the Nicholson found marks of 1842. He also testified to other marks of that year. William P. Mitchell, a surveyor of long experience, testifies to the same effect. Neither their credibility nor their capability is questioned. Some one in 1842 ran and re-marked the lines of 1793. It is highly probable that at that date, 50 years after they were made, not all the marks made by Woods had been obliterated, and Mageehan could follow with reasonable certainty his footsteps. The early surveyors made but few monuments on the ground, compared with the later ones, and were very inexact in their measurements. This land was then worth only 20 cents an acre, and they were not particular. Therefore, from the certificate itself, and the evidence tending to show the lines of 1842, we think the evidence was very significant that Woods in 1793 actually ran this survey on the ground. Mageehan followed him in 1842, and, from his own observations on the ground, verified the correctness of Woods' plot. Consequently, from his own examination, he certified to its correctness.

The learned judge of the court below seems to have tried the case throughout on a wrong theory; that is, that 107 years after the Nicholson survey the plaintiff must locate his land by visible marks on the ground; failing in that, he must locate it by adjoiners; that he could not locate the survey by evidence clearly tending to show that it had been located by marks on the ground; and that if they had disappeared, and after this lapse of time there was no living witness who could testify he had ever seen them, then, such being the case, he, in effect, held that plaintiff must prove the location by adjoiners. This second kind of evidence was somewhat doubtful. Two of the adjoiners marked on the plot were pretty clearly proven. The others, if not mistakes, were at least doubtful. Woods may have been wholly mistaken as to the warrantee of several of the adjoining tracts, or the warrantee name of them may have been changed in the surveys, but he could not have been mistaken as to what he did on his own survey. The result was to confine the attention of the jury to the one method of proof,—that by adjoiners,—the evidence bearing on which was conflicting and doubtful. This, in effect, made the plaintiff's case turn on its weakest point. The appearance of the map, with its four distinctly named corners, the certificate of Mageehan, his apparent work on the ground to verify Woods' plot or map, were very significant facts pointing to an actual location on the ground in 1793 by Woods, and the jury should have been so instructed.

It would be impossible to locate many, perhaps a majority, of the older surveys, by the rigid rule of evidence adopted here. Nearly all the lands described in our old acts of assembly as "within the limits of the late purchase from the Indians," or as lands lying east of Allegheny river and Cone-wago creek," were, when warranted, unbroken forest. A very large part was taken up by tracts and blocks, and the surveys indicated by but few marks on the ground. Many of these marks, sometimes all of them, are obliterated by time, the elements, or the hand of man, so that it is, after the lapse of more than a century, impossible to locate them by marks on the ground to-day visible; but it is possible to prove by unbroken recognition of their boundaries through generations their original location. As the years pass, and the dates of the original monuments become still more remote, not a vestige of them will remain, so that the next best evidence of where the original marks were when made is proof of where they were recognized to be while still in existence. This testimony is, in effect, that of a sworn officer, as to the 1793 location on the ground, by his own marks on the boundaries verifying the map. It is the strongest kind of evidence as to the original location by Woods.

A very brief glance at the undisputed facts here shows the grievous weight of the burden placed upon the plaintiff at the trial. The deputy surveyor of the commonwealth was bound by his official oath to go upon the ground and execute this warrant. He in substance, by his plot recorded in his book, says he did go upon the ground, measure the land, and mark the corners. Fifty years afterwards, his successor verifies his work, and makes return of the survey, although other vacant land was taken up all around the region about that time, and subsequently no one attempts to appropriate this tract. Ninety-six years afterwards, defendant's predecessor in title, Mitchell, covers it with another warrant and survey, alleging it to be vacant. On his nominal possession he stands, and says to plaintiff: "Prove your title by showing marks on the ground made 107 years ago, or prove that your surveyor made no mistakes in naming his adjoiners. True, my title is only ten years old, but I can point to marked trees of that age, and locate my survey by visible marks on the ground. Therefore my title must prevail."

What we have said, in effect, sustains appellant's fifth assignment of error.

The defendant's sixth written prayer for instructions was as follows: "The record of the return of survey of the John Nicholson tract of August 8, 1793, shows that George Woods, and he alone, made the survey of 1793. The tract must be located by evidence of marks of such survey in 1793; and, failing in such evidence, then it must be located by adjoiners." This point was affirmed, with

this explanation: "We have already instructed you to this effect, with the additional instructions as to the weight you must give to the evidence regarding the line alleged to have been run in 1842." In the general charge the learned judge says: "The warrant is to be located according to the survey made by Woods. If you do not find any marks on the ground, and we do not here, you must locate it by adjoiners. But the land office has accepted the return of survey made by Woods in the handwriting of Mageehan, in which he states he examined it and found it correct; and we feel that if there was absolute proof here that Mageehan had marked a line upon the ground at the date when he says he examined it, and marked it as shown in the draft introduced in evidence, that while it is not evidence in itself alone, and could not be if there was nothing else in the case of the true location of this, yet, if it throws any light on the location made by Woods originally, then it is evidence in this case, and not otherwise." This explanation, when considered in connection with the affirmation of the point, wholly fails to give any proper significance to the fact adverted to. The return, with the certificate, followed by the evidence of Africa and Mitchell, if they were believed, tended strongly to establish a fact which, if established, was of itself sufficient to warrant a verdict that Woods had made and marked his survey on the ground. It more than threw light on the location by Woods. It proved it. The learned judge not only belittles the evidence, but wholly neutralizes the effect it was entitled to with the jury. If the weight of the evidence established the fact of location in 1793, then *Ormsby v. Ihmsen*, 34 Pa. 462, squarely rules the case in favor of plaintiff. The return made by Mageehan in 1847 remained unchallenged for 42 years,—just twice 21 years. In the case cited we said, as to the presumption of the correctness of a return into the land office after 21 years: "It is more than a mere probability. It is *presumptio juris et de jure*,—a legal conclusion. The marks which it is the duty of the surveyor to make on the ground cannot be permanent. Posts and stones may be removed, either accidentally or by design; trees may be cut down, or decay; the progress of cultivation and improvement tends to obliterate them; and, just in proportion as the land increases in value, do the evidences of title furnished by the surveyor's marks disappear. Where lands have been improved, it would seem more reasonable to expect that no traces of the surveyor's lines should be found after twenty-one years, than that any should remain. Titles would be insecure, indeed, if after such a period the absence of visible marks were held sufficient to invalidate a returned survey. Time also removes living witnesses; the surveyor and his assistants may die; and necessarily, therefore, resort must be had to the return itself, as evidence

furnished by the officer of the law of what he has done." While the language in *Ormsby v. Ihmsen* would seem to indicate that after 21 years the return is absolutely conclusive, both as to the facts of location on the ground and its boundaries, this has been explained in subsequent rulings. In *Malone et al. v. Sallada et al.*, 48 Pa. 419, Justice Agnew, in his concurring opinion, says it (*Ormsby v. Ihmsen*) does not change the law as theretofore held, but merely furnishes us with the elements of an additional rule; "that is, where, from the return of the survey itself, we can discover that the call for an adjoiner is a mistake, even though no line can be found upon the ground corresponding to the line in the return, the call may be controlled by the line as returned, and the other evidences of location contradictory to the call." In *Packer v. Schrader Mining, etc., Co.*, 97 Pa. 379, the case, on its facts, was held to be ruled by *Ormsby v. Ihmsen*, in these words: "The regularity of the survey being thus legally fixed and absolute, it but remains for a jury to determine whether, upon the ground, such lines, adjoiners, or other marks can be found, as will, to a reasonable certainty, determine the location of plaintiff's claim." It was held in this case that the only question was, was there a corner or line found on the ground, which was a corner or line of this tract in dispute? If so, the question was solved, for the survey must then be made by the courses and distances in the return. To the same effect are *Grier v. Penna. Coal Co.*, 128 Pa. 79, 18 Atl. 79, and *Bushey v. South Mountain Mining & Iron Co.*, 136 Pa. 541, 20 Atl. 549. In the last case it is held that "the rule that after the lapse of twenty-one years the law presumes that a survey regularly returned was made as returned, cannot locate a survey until some monument of it can be found upon the ground. If one or more such marks be found, the law will locate the survey by the aid of legal presumption." It follows, then, that while the rule in *Ormsby v. Ihmsen* would not authorize Mageehan to go into the woods in 1842 and run the courses and distances of Woods' plot, and then return it into the land office, yet, if he found a single one of Woods' marks, he could, from that mark, by courses and distances, run the survey on the ground, and return it into the land office. That return, unquestioned for 21 years, would be conclusive as to the location of the Nicholson warrant. Where, as here, the defendant denies that either Woods or Mageehan was upon the ground, the return would only be prima facie evidence in plaintiff's favor, but, as we have before noticed, the decided weight of the evidence shows that Mageehan did go upon the ground in 1842, found marks of Woods sufficient to identify the location, and then re-ran the lines of Woods, and made return thereof in 1847. To the same effect

are *Glass v. Gilbert*, 58 Pa. 266, 292, and *Mock v. Astley*, 13 Serg. & R. 382.

What we have said, in substance, sustains appellant's eighth, tenth, eleventh, twelfth, and thirteenth assignments. The others, except the first and second, become unimportant on a retrial.

As to the first and second, they have as their foundation the rejection, as evidence, of a deed offered by the plaintiff. As before noticed, Nicholson had become indebted to the commonwealth for lands purchased by him. He had formerly been controller general of the state, and was one of the prominent land speculators of that day, and a large purchaser of land from the commonwealth by warrant and survey; was also a large debtor to her. By special act of March 31, 1806, Nicholson being then dead, the governor was empowered to appoint three commissioners to ascertain, settle, and adjust the amount of his indebtedness, and ascertain the quantity and quality of his lands in each county subject to lien for unpaid purchase money to the commonwealth. For this purpose they were given access to the land office, with the right to inspect all necessary papers. As a supplement to this act, that of March 19, 1807, was passed, authorizing the commissioners to make public sale of Nicholson's lands after due notice in a newspaper printed in the county, or nearest to it, and in Philadelphia, and make report to the governor. He appointed Helster, Evans, and Lyon commissioners, who afterwards reported that they had on March 11, 1808, at Sowers Tavern, in the borough of Lancaster, after due notice, sold, among other tracts, one on the head waters of the Little Conemaugh, between Allegheny Hill and Conemaugh Old Town, held by John Nicholson under warrant of August 8, 1793, containing 439 acres and 112 perches, to Edward Brien and Robert Coleman, and that the commissioners had taken bond, with good security, for the payment of the purchase money for all the land sold that day (\$891.94) to the same purchasers. Between that date and January 4, 1843, both Brien and Coleman having died, the widow and heirs of Coleman conveyed all their interest in the land to Dorothea Brien, widow and sole heir of Edward Brien. She paid and had satisfied in full the bond given by Coleman and her husband to the commonwealth. The commonwealth then conveyed to her on January 24, 1843, among other lands, all the estate of Nicholson in the tract warranted August 8, 1793,—the land in dispute. The deed is signed, "A. V. Parsons, Secretary of the Commonwealth," with the great seal of the commonwealth affixed. On June 8, 1844, this deed, without acknowledgment, was duly recorded in the office for the recording of deeds in Cambria county. Afterwards Dorothea Brien sold and conveyed this tract to one McKenzie, and from him, by a reg-

ular series of conveyances, the plaintiff in this suit became the owner. The plaintiff offered to read from the record this deed, as proof of title. Defendant objected because it was not acknowledged before an officer having authority to take acknowledgments of deeds. The court sustained the objection, and excluded the deed. Was this ruling correct? Unquestionably, the deed was executed and delivered by the commonwealth to Dorothea Brien, plaintiff's predecessor in title. If accepted, for what on its face it purports to be, it put in the purchaser whatever title the commonwealth had acquired by the commissioner's sale. By the second section of the act of 1807, the secretary of the commonwealth, on certificate of the state treasurer that the purchase money of the John Nicholson land, as fixed by the sale and report of the commissioners, had been paid, was directed to make and deliver to the purchaser a deed for such estate as Nicholson had in the land. Therefore, by the authority of the supreme law of the land, the sovereign, with the great seal of the commonwealth affixed, executed and delivered the deed. In the very nature of our government, there could be no higher civil authority. A patent from the commonwealth is simply a deed of land by her to a purchaser from her. The term, although seldom used, except in grants from the state to individual purchasers, under the land laws, is just as applicable to any grant of land by the commonwealth under any other laws. This instrument is a deed or a patent, just as one chooses to call it. The act of 1781 prescribes the form of a patent or deed issued under the general laws regulating the grant of vacant lands by the state. The acts of 1806 and 1807 prescribe the form of the deeds to be executed for a grant of the "Nicholson court" lands. The latter are, to all intents and purposes, just as much patents as the former. There is not a word in any of the acts of assembly, or in any of the cases construing them, that restricts the word "patent" alone to grants of unappropriated vacant land purchased by warrant and survey.

Our recording acts were intended to provide for the proper authentication of deeds, that they might be placed of record within the county where the land lay. The record then, or an exemplification of it, became evidence, the same as the original. The record preserved by authorized copy the original instrument. Prior to the act of March 14, 1846, no law required that patents or deeds from the commonwealth, to entitle them to record in the counties where the land lay, should be acknowledged before any officer. The deed of the sovereign, with the seal of the commonwealth, was considered sufficient authentication to entitle them to record, and there are thousands of patents throughout the state issued and recorded before the act of 1846 without acknowledgment. Nor is the reason very obvious why the act of 1846 in-

cluded deeds from the commonwealth, as instruments requiring acknowledgment to entitle them to record. Why the commonwealth should appear before a justice of the peace, and acknowledge her deed, with her great seal affixed, to be her act and deed, when the only evidence of her subordinate's authority was her deed (his commission), with her seal affixed, is not clear. Why go to the creature, that he may certify to the identity of and genuineness of the act of his creator? But the act of 1846 so provides. This deed, however, was recorded June 8, 1844, and the first section of the act of 1846 (P. L. 124) expressly validates the record by enacting that "where any of the deeds aforesaid have heretofore been recorded in the office for recording deeds in the county where the lands lie * * * the records thereof, or duly certified copies thereof, shall be as good evidence as if the same had been recorded under the provisions of this act."

We think the deed was properly recorded when presented for record, although not formally acknowledged, and the validity of its record is expressly ratified by the saving provision of the act of 1846. The record should have been admitted as an evidence of title on the part of plaintiff, for it tended to show an express recognition by the commonwealth of at least an equitable title in John Nicholson at the date of the sale of this tract by the commissioners directed to be appointed by the acts of 1806 and 1807. Appellant's first and second assignments of error are also sustained.

The judgment is reversed, and a v. f. d. n. awarded.

DAVIS et al. v. BEERS et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

TAXATION—COLLECTOR'S RETURN—INSUFFICIENCY OF PERSONALTY.

1. Under Tax Acts 1834, 1860, 1869, the duties of tax collector in Cambria county devolve on three different collectors—one for the state, county, and poor tax; another for the school tax; and another for the road tax. Acts 1844, § 41 (P. L. 501), provides that where personal property cannot be found, sufficient to pay the taxes assessed, the collectors shall return the same to the commissioners of the several counties, and the lands of the delinquent shall be sold in satisfaction thereof. The evidence showed that there was on the land of a delinquent a considerable amount of property, sufficient to pay either of the collectors, though not all. Each collector returned that he could not find sufficient property by levy on which the taxes could have been collected. *Held* erroneous, in that, if there was sufficient personal property on the premises to pay any one tax, it should have been collected, and a return of "No property found," because there was not sufficient to pay all the taxes, was bad.

Appeal from court of common pleas, Cambria county.

Action by S. W. Davis and another against W. M. Beers and others. Judgment for plaintiffs, and defendants appeal. **Reversed.**

Defendants presented these points:

"(2) The court is respectfully requested to instruct the jury that the tax sale is null and void, if there had been sufficient personal property on the premises at the time of the return of taxes from which the collector of school tax could have made the amount on his duplicate, or from which the collector of county tax could have collected the amount on his duplicate, or from which the collector of road tax could have made the amount on his duplicate. It is not necessary that there should be personal property on the premises sufficient to have paid the sum total of all the taxes assessed against this land for that year. Answer. This point is denied.

"(3) That the collector of school tax did not make a proper return if there was sufficient personal property on the premises from which the school tax could have been collected, and therefore a sale for school tax would be void. Answer. So far as the first part of the proposition is concerned, it is probably true that the return was not a proper return, but, as already instructed in our general charge, that would not be conclusive on the question, and warrant us in declaring that a tax sale for school, road, and county taxes for that year would be void.

"(4) That the supervisors did not make a proper return if there was sufficient personal property on the premises from which the road tax could have been collected, and therefore a sale for such tax is void. Answer. We make the same answer to this point, with the substitution of the word 'road' for 'school.'

"(5) That the collector of county tax did not make a proper return if there was sufficient personal property on the premises from which the county tax could have been collected, and therefore the sale for such tax is void. Answer. We make the same answer to this point, with the substitution of the word 'county' for 'school.'

"(6) The uncontradicted testimony of the defendants showing that there was personal property on the premises during the year for which taxes were unpaid, and the supervisors and the collector of school tax and county tax not having exhausted said personal property by a sale of the same prior to making his return, the returns of these officers are invalid, and your verdict must be for the defendants. Answer. This point is denied. While we find no decision on the subject, we cannot conceive it to be the law in a given case, where the jury find from the evidence that there was not sufficient personal property on the land to pay the taxes assessed, that a sale made for non-payment of those taxes would be void because the collector did not exhaust such personal property as there was on the land before making his return."

The court reserved the following question

of law: "That the plaintiffs have not shown any title to the land described in the writ in this case, for the reason that it is admitted that the county commissioners did not petition the court of common pleas of Cambria county, setting forth a description of the property to be sold, and the reasons therefor, and the court did not fix a day for a hearing, and give notice in at least two newspapers in Cambria county once a week for three consecutive weeks, and that the court did not have a hearing and did not make an order and decree in the premises, and that no return to the commissioners' sales was made to the court, the same as returns to orphans' court sales are now returned, and the court did not confirm the said sale."

Verdict for plaintiffs, upon which judgment was entered. Errors assigned were above instructions, quoting them; in entering judgment for plaintiffs on the verdict.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

P. J. Little, A. V. Dively, and M. D. Kittell, for appellants. Alvin Evans, J. W. Leech, and John E. Evans, for appellees.

DEAN, J. The case below was an ejectment brought by plaintiffs against defendants to recover possession of a tract of land, containing about 79 acres, in Reade township, Cambria county. Plaintiffs claimed title by a county commissioners' sale, and deed in pursuance thereof. The commissioners took their title by deed of the county treasurer on a sale for unpaid taxes; deed being dated December 28, 1894. The land had belonged to F. A. Shoemaker, who mortgaged it to the Equitable Loan & Building Association of Altoona to secure a loan. The lender foreclosed the mortgage, and, on the judgment obtained, the property was advertised for sale by the sheriff and sold, but before delivery of his deed the sale was made to plaintiffs by the commissioners. Both parties therefore claim under the same source of title—F. A. Shoemaker. If the tax sale by the county treasurer, under the law and facts, vested a good title in the commissioners, then Shoemaker had no estate in the land which passed by the sheriff's sale on the mortgage. The taxes for which the land was sold by the treasurer were assessed for the years 1891 and 1892. The property was assessed, as 80 acres and 7 houses, to Shoemaker. The tax assessed for 1891 was: County, \$15.75; school, \$18. For 1902: County, \$8.51; road, \$7.20; school, \$14.40.

The defendants offered considerable evidence going to show that there was personal property on the premises out of which the taxes could have been made if the collector had levied upon and sold it. The duties of tax collector devolve upon three different collectors in Cambria county, under

the acts of 1834, 1860, and 1869. One collects county, state, and poor tax; another, school tax; and still another, road tax. To subject this land to sale by the county treasurer for unpaid taxes, each collector made affidavit, and filed the same with the county commissioners: "That after a proper effort at the proper time, he could not find sufficient personal property, by a legal sale of which the taxes on the land, or any portion of said taxes, could have been collected." On this return of the collectors the land was turned over to the county treasurer for sale. The defendants averred that these affidavits and the returns were false, and this made up the first issue of fact for the jury, and the principal one of law for the court. The instructions of the court on the evidence bearing on this fact are the subject of complaint in appellants' third assignment of error, which specifies as erroneous the court's answer to appellants' second written prayer for instructions, as follows: "That the collector of school tax did not make a proper return, if there was sufficient personal property on the premises from which the school tax could have been collected, and therefore a sale for school tax would be void." To this the court answered: "So far as the first part of the proposition is concerned, it is probably true that the return was not a proper return, but, as already instructed in our general charge, that would not be conclusive on the question, and warrant us in declaring that a tax sale for school, road, and county taxes for that year would be void." The only instruction on this subject in the general charge is as follows: "If sufficient property could have been found thereon to pay the taxes assessed thereon for that year [meaning 1891], the sale for taxes that year would be void." In view of the evidence and the substance of the written point, we think this answer was error, because it did not clearly declare to the jury the law bearing on the evidence. As we read the evidence, it pretty plainly showed that there was personal property on the premises in both of the years to answer the demand of either one of the collectors for that year.

The act of 1844, § 41 (P. L. 501) provides that "all real estate within this commonwealth, on which personal property cannot be found sufficient to pay the taxes assessed thereon, and where the owner or owners thereof neglect or refuse to pay the said taxes, the collectors of the township in which the said lands lie, shall return the same to the commissioners of the several counties; and the said lands shall be sold as unseated lands are now sold, in satisfaction of the taxes due by the said owner or owners: provided, that no sale shall be made of such lands for the purpose aforesaid, until the owner or owners thereof shall have refused or neglected to pay the taxes aforesaid, for the space of two years." As the learned judge of the court below rightly said,

the act of 1879 (P. L. 55), which enacts that "it shall not be so construed as to prevent the original owner or owners from showing that there was sufficient personal property on the real estate sold to pay all taxes assessed thereon which might have been seized by the collector if he had used due diligence," added nothing to the scope or force of the act of 1844. But the palpable meaning of the answer to the point, taken in connection with the general charge, is that if there was not sufficient personal property on the land to pay the whole of the taxes assessed, adding together the taxes in the three duplicates in the hands of the three collectors, then there was not sufficient personal property to pay the taxes assessed on the land, within the meaning of the act. Such is not our interpretation. Here was a small farm; a farmhouse, with a tenant; a small barn; seven houses, some of them occupied. The different kinds of taxes were small in amount. The owner was a nonresident of the township. It cannot be doubted, from the evidence, that there was considerable personal property on the premises in the year it was the collector's duty to collect. It belonged to the tenants who were in possession. Every tenant knows that while in possession his personal property is subject to seizure for taxes. Payment by him may have been part of his rent. It is the duty of the collector, in case the owner be a nonresident, to make demand upon the tenant for the taxes in his duplicate to which is appended his warrant, and, on his refusal to pay, to seize and sell the personal property subject to seizure and sale for taxes. He has no authority to make demand for taxes for which other collectors have warrants. He is not responsible for them, and is not presumed to know the amount. If he makes demand, with an exhibition of his warrant to seize and sell, the tenant may pay. If he do not, it is the duty of the collector to seize and sell. So far as the evidence shows, there was here no demand nor threat of seizure. If the tenant paid the first collector, who can say he would not have paid the others? The kind and value of the personal property on the premises would, to some extent, have been ascertained by the seizure and sale of it. If a sale did not satisfy the taxes, then a return of the amount not reached would have fixed the liability of the land for that amount, and that the owner would have been bound to pay to the county treasurer. In substance, the return of each collector is that there was not sufficient personal property on the premises to pay all the taxes (that is, \$66.48); but one (the collector of road tax) admits that he saw property there worth twice the amount of road tax (\$7.20) he had against the land. It was not his duty to know that two other collectors had each certain taxes to collect. It was his duty to collect the \$7.20 road tax which was intrusted to him to collect. Not

one of these three collectors made a correct return when he averred "that, after a proper effort at the proper time, he could not find sufficient personal property, by a legal sale of which the taxes on the land, or any portion of said taxes, could have been collected." They could not ascertain the facts without the exercise of due diligence. In this, from their admissions and the undisputed testimony, they wholly failed, and the court should have so instructed the jury.

These acts of assembly and the duties of tax collectors were fully considered by Justice Mitchell in *Kean v. Kinnear*, 171 Pa. 639; and, although that was an action of trespass by the owner against the collector for a false return, the same questions arose as those before us. After noticing the different acts of assembly, he says: "From these statutory provisions, it is clear that the law has established the order for liability for taxes to be, first, the personal property on the premises; second, demand on the owner individually; and, lastly, the land itself; and it is only on failure to collect by the first two methods that resort can be had to the third, and the land be legally sold or returned for sale. The collector, proceeding directly against the land, except under the prescribed conditions, is without warrant of law, and he is liable as a trespasser." The return of the collector in that case was precisely the same as in this one. Appellants' third assignment of error is therefore sustained.

What we have said, in effect, sustains appellants' second assignment, which is based on the court's denial of their second written prayer for instruction. It should have been affirmed.

We do not find any error in the court's opinion on the reserved points. Lest we be misunderstood, however, we say that the deed to the commissioners, while admissible as a properly authenticated instrument in plaintiffs' chain of title, the recitals in the body of it do not prove the facts set forth in such recitals. Whether the tax sale is void because of noncompliance by the collectors with the provisions of the tax laws still remains as a question of fact to be determined by a jury under correct instructions by the court.

The judgment is reversed, and a v. f. d. n. is awarded.

STATE v. GREENLEAF.

(Supreme Court of New Hampshire. Belknap. Dec. 30, 1902.)

CRIMINAL LAW—TRIAL—LIST OF WITNESSES—FURNISHING TO DEFENDANT—OBJECTION—MURDER—MANSLAUGHTER—ELEMENTS OF OFFENSES—MALICE—PREMEDITATION—EVIDENCE—EXPERT TESTIMONY—REMARKS OF COUNSEL.

1. A motion for a discharge on the ground that defendant had not been furnished with a list of the state's witnesses and the abode of each 24 hours before the trial was untenable

where the list was seasonably furnished, and that it omitted to tell the place of abode of each was known to defendant's counsel when the drawing of the jury began.

2. On a prosecution for murder, counsel for the state, in opening the case, stated that he thought that accused, in order to escape the conclusion that he committed the deed, must show what he did with a certain pair of overalls, how human blood became spattered over his clothing, and where he was on the afternoon of the crime. *Held*, that such language did not involve a declaration that accused was bound to become a witness, but merely meant that the facts, unless met by a defense, would constitute proof of guilt.

3. Where counsel for the state, in opening the case, uses language which might, unexplained, be understood to mean that accused must become a witness, and answer certain evidence, or stand convicted, but the court immediately instructs the jury that such is not the case, there is no error.

4. On a prosecution for murder, deceased having been struck on the head with a blunt instrument, the force of one blow on the side of the head in comparison with the other blows, and the number of blows necessary to cause the cuts on the top of the head, being only determinable by the appearance of the wounds, viewed with a knowledge of the structure of the skull, it was proper to permit a physician, called as an expert, to testify that the blow on the side of the skull was light in comparison with the others, and that the appearance of the wounds in the tissues indicated that the fractures resulted from more than one blow.

5. It was a question whether fractures on the top of deceased's skull were caused by blows inflicted by accused or by contact with a stone while accidentally falling from her carriage. The state claimed that, if the impact had been the result of a fall, it would not have crushed the skull at the top, and that the fracture would have been at the base of the skull. *Held*, that it was competent for the state's medical expert to illustrate the relative thickness of the different parts, and to testify that from his experience and observation in many hospitals, when a body falls from a height, and strikes on the head, the fracture is generally at the base of the skull.

6. On a criminal prosecution, a remark of the solicitor for the state, after one of his questions had been objected to and ruled out, that he thought the witness "had made that sufficiently clear," if open to any objection, was an irregularity not warranting a new trial.

7. Gen. Laws, c. 282, § 7, provided that manslaughter without a design to effect death, not being murder nor excusable or justifiable homicide, should be of the first degree when perpetrated by one engaged in the commission of any offense, or by persons bearing a deadly weapon, etc. Pub. St. c. 278, § 7, amended the former by removing the clause "without a design to effect death," and inserting "when perpetrated with a design to effect death." Before the amendment manslaughter "with design," if provided for at all, was included in the classification of manslaughter in the second degree, and punished less severely than manslaughter without design. *Held*, that the amendment did not abolish the distinction between murder and manslaughter, inasmuch as homicide with design does not necessarily imply murder.

8. Pub. St. c. 278, § 1, enacts that murder in the first degree consists of homicide by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate certain felonies, and that other murder is in the second degree. *Held*, that the distinction between the degrees does not consist in the presence or absence of malice, but depends on whether the killing is deliberate, or done in the perpetration of any of the felonies.

9. In order to convict of murder in the first degree, the state must show not only malice, but a deliberate killing, unless the crime was committed in an attempt to perpetrate one of the felonies enumerated in the statute.

10. The malice requisite to the crime of murder is not an inference of law from the act of killing, but must be found by the jury on competent evidence.

11. Pub. St. c. 278, § 1, enacts that murder in the first degree consists of homicide by deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate certain felonies, and that other murder is in the second degree. *Held* that, in order to constitute murder in the first degree, the design to kill must precede the killing by some appreciable space of time, and, if it be not done with design, though the killing was done purposely, it is murder in the second degree.

12. Under Pub. St. c. 278, § 1, making murder committed in an attempt to commit rape murder in the first degree, that the attempt was not far advanced does not lessen the offense.

13. On a prosecution for murder in the first degree, the killing being alleged to have been done in an attempt to commit rape, such killing constituting murder in the first degree under Pub. St. c. 278, § 1, the state must establish the fact that accused attempted the felony, and that death occurred as a means or outcome of such attempt.

14. Under Pub. St. c. 278, § 1, making deliberate and premeditated killing murder in the first degree, on a prosecution for murder there can be no conviction in the first degree unless malice and deliberation be shown beyond a reasonable doubt.

15. Malice and deliberation may be shown by circumstantial evidence, such as the character of the weapon employed, number of blows inflicted, place of the crime, previous conduct, etc.

16. On a prosecution for murder, evidence held sufficient to warrant submission to the jury of the question whether accused killed deceased, whether it was done with malice and premeditation, and whether it was done in an attempt to commit rape.

17. On a prosecution for murder, the attorney general, after a certain witness for defendant had testified, remarked that such testimony did not contradict the testimony of a certain witness for the state, but confirmed it, and in connection with the cross-examination of one of the defendant's witnesses he remarked: "I don't know about this stump speech business. I object to his making a stump speech here to display his knowledge." *Held*, that such remarks, if objectionable, were irregularities, not warranting the granting of a new trial.

18. Where, on a criminal prosecution, medical experts had testified for the state and defense, respectively, and drawn opposite conclusions, it was competent for the state, on the cross-examination of the defendant's expert, to ask him if he had known the state's expert for some time, and if the latter was regarded as an eminent authority, the questions being competent as cross-examination for the purpose of discrediting the defendant's expert on the points at issue between him and the other.

19. On a prosecution for murder, counsel for the state, in closing to the jury, said, "Why, it seems that for some reason or other, when this affair * * * came out, everybody went down there to see about G.," naming defendant. The remark was not contradicted, nor did the court order it stricken out. *Held*, that inasmuch as the remark was calculated to convey to the jury that defendant was such a character that all eyes turned to him as the perpetrator of the crime, it was prejudicial error.

20. On a prosecution for murder, counsel for the state, in closing, said, "This statement was taken right off the very next day after the affair happened," referring to a portion of the testimony of a state's witness. There was no evidence that such witness had ever given a statement prior to his testimony. *Held* that, as the assertion was unsupported by evidence, and calculated to prejudice accused by securing for a vital statement a higher degree of credit than authorized, it was reversible error.

21. An objection that the exception taken to such remark was too general to warrant its review was untenable where the purpose and application of the exception were obvious from the connection in which it was made.

Exceptions from superior court; Wallace and Pike, Judges.

George H. Greenleaf was convicted of murder in the first degree, and excepts. Exceptions sustained.

Indictment charging the defendant with the murder of Nancy J. Folsom. The defendant was indicted in Merrimack county. On his motion the venue was changed to Belknap county, where the trial took place at the November term, 1901, of the superior court, Wallace, C. J., and Pike, J., presiding. The jury returned a verdict of guilty of murder in the first degree. Judgment was ordered on the verdict, and the defendant filed a bill of exceptions, which was allowed. After the jury were impaneled, and issue was joined, and as counsel was about to make an opening statement, the defendant moved for his discharge on the ground that he had not been furnished with a list of the state's witnesses, and the place of abode of each, 24 hours before the trial. A list of the witnesses had been seasonably furnished, but it omitted to state the place of abode of each, and this fact was known to the defendant's counsel when the drawing of the jury began. The motion was denied, and the defendant excepted. In opening, counsel detailed the facts which the state expected to prove, and said: "We think, if we show this array of facts, that Greenleaf, in order to escape the conclusion that he committed this deed, must show you what he did with that pair of overalls, how this human blood became spattered over his clothing, and where he was on the afternoon of the crime." Exception being taken to the language quoted, counsel expressed a willingness to withdraw any objectionable remark, and stated that he meant to say that, if the facts detailed were proved, there could be only one conclusion from them. The court thereupon stated to the jury that the defendant was not obliged to answer, nor to testify, nor to explain anything, and instructed them to disregard any remark of counsel conveying a contrary impression. Dr. Beaton, an expert witness called by the state, testified subject to exception that the blow which caused the fracture upon the side of the skull was light in comparison with the other blows inflicted, and that the appearance of the wounds in the soft and

bony tissues indicated that the fracture resulted from more than one blow. Lafayette, a witness for the state, whose abode was set out in the witness list as Haverhill, Mass., was in Laconia when the list was furnished to the defendant. Stetson, a witness for the state, who had been living for eight days at the county farm in Boscawen, and whose abode was so set out, testified that his home was in Concord. The testimony of these witnesses was admitted subject to exception. The court found that the list correctly stated their places of abode. The facts relating to other exceptions taken to rulings of the court and remarks of counsel are stated in the opinion.

The state's evidence tended to prove the following facts: The Cat Hole Road, so called, is a highway running from the Merrimack county buildings in Boscawen to High street in the same town. There are no dwellings on the road. Shortly before 3 o'clock in the afternoon of October 23, 1901, Mrs. Folsom started from her home, located on High street in Boscawen, to drive with a horse and buggy to North Boscawen, by way of the Cat Hole Road. About 15 minutes past 4 she was found lying beside the road in an unconscious condition, her skull having been beaten in by three or more blows with some blunt instrument. She died from these injuries in the evening of the same day. An examination showed that there had been no rape, nor was the underclothing upon the body torn or disarranged. The place of the crime was distant 5,271 feet from the county buildings. It was Mrs. Folsom's custom to drive over the Cat Hole Road at about the same time each day, to meet her daughter, who usually came from Concord by an afternoon train. This was known to the defendant, who was a convict at the county farm. He had frequently been in the vicinity where the crime was committed, was there the day before, and on more than one occasion had spoken to Mrs. Folsom. About 10 days before the crime he said to a witness that he would like to have sexual intercourse with Mrs. Folsom, and repeated the remark the following day, adding that he "stood pretty well" with her. He told another witness that he had a "chewing match" with Mrs. Folsom, and two or three days before the crime he said to a third witness that he would have sexual intercourse with her, dead or alive. The day of the crime was the first on which Mrs. Folsom had driven over the Cat Hole Road alone, when there were no persons in the vicinity, after these remarks were made by the defendant. About half past 2 o'clock in the afternoon of October 23, 1901, the defendant was seen to leave the county buildings and go toward the place of the crime. He was not seen again until about half past 4 o'clock, when he came from that direction behind the cows. Prior to that time he had worn two pairs of parti-colored prison overalls,

the outside pair being the shorter by about two inches. On the morning after the crime the defendant was locked up, and his clothing was taken from him: He then wore a duck jacket, blouse, one pair of overalls, shoes, stockings, shirt, and hat. An examination disclosed stains of human blood on the jacket, blouse, and shoes, and also on a towel which was found in his possession. The overalls taken from him had been worn since October 12th, but underneath another pair. The defendant had lost his right arm, and the right-hand pocket of the overalls taken from him showed that it had not been used. When the defendant was ordered to remove his clothing, he trembled violently; and, when asked if it was not too cold to go without drawers, he replied that he had worn an extra pair of overalls, but had torn them, and had left them at the bathroom door. On the following Sunday a pair of overalls were found hidden in a heap of brush in the vicinity of the pasture from which the defendant drove cows at a point 1,873 feet from the Cat Hole Road and 2,751 feet from the place of the crime. These had a rent in the leg near the crotch, as had also the outside pair worn by the defendant a day or two before the crime. They appeared to have been somewhat soiled by wear, and were spattered with blood. The right-hand pocket had not been used. The overalls taken from the defendant on the morning after the crime measured 31½ inches in the leg, and had a total length of 52 inches; the pair found measured 30 inches in the leg, and had a total length of 49½ inches. Footprints made on the day of the crime by a person wearing shoes like those of the defendant were found going in both directions over the Cat Hole Road from a point near the place of the crime towards the county buildings. On the morning after the crime the defendant said that on the day before he went on the Cat Hole Road only as far as a reservoir, visible from the county buildings. He afterwards stated that he might have been as far as some chestnut trees, which were well over a hill toward the scene of the crime.

Edwin G. Eastman, Atty. Gen., and David F. Dudley, for the State. Nathaniel E. Martin and Charles F. Flanders, for defendant.

REMICK, J. 1. The exceptions relating to the sufficiency of the witness list and to the time of furnishing the same are overruled, for reasons well expressed in *Lord v. State*, 18 N. H. 173, 176.

2. The statement of the solicitor in opening, to which exception has been taken, does not, upon any fair construction, involve a declaration that the respondent was personally bound to become a witness, and answer the state's evidence, or stand convicted; but means only that the facts proposed to be shown, unless in some way met in defense,

would constitute indubitable proof of guilt. If the language used might, unexplained, be understood in the objectionable sense, such misunderstanding was made impossible by the immediate instruction of the court.

3. The force of the blow on the side of the head, in comparison with the other blows, and the number of blows necessary to cause the cuts on the top of the head, in the absence of direct evidence, could only be determined by the appearance of the wounds, viewed with a knowledge of the structure of the skull and its capacity for resistance at the points of impact. As the significance of the wounds might not be as apparent to a jurymen as to one having technical training and professional experience in such matters, we think the evidence of Dr. Beaton was competent. *State v. Knight*, 43 Me. 11, 130; *State v. Pike*, 65 Me. 111; *Commonwealth v. Piper*, 120 Mass. 185; *Colt v. People*, 1 Parker, Cr. R. 611, 620; *Gardiner v. People*, 6 Parker, Cr. R. 155; *People v. Schmidt*, 168 N. Y. 568, 569, 578, 61 N. E. 907; *Davis v. State*, 38 Md. 15, 37; *State v. Clark*, 34 N. C. 151; *State v. Morphy*, 33 Iowa, 270, 272, 11 Am. Rep. 122; *State v. Porter*, 34 Iowa, 131.

4. The objection to each witness for the government as offered, upon the ground of the insufficiency of the list, like the objection to the list itself, is overruled, and upon the same authority and for the same reasons.

5. It was a vital question in the case whether certain fractures of the top of Mrs. Folsom's skull were caused by blows inflicted by the respondent, or by contact with a stone in the ground while accidentally falling from her carriage. The state claimed that, if the impact had been the result of a fall, as contended by the respondent, it would not have crushed the skull at the top in the way it appeared; that the thickness of the skull at that point would have protected it; and that the fracture would have been at the base of the skull, where it is comparatively thin. In this view, we think, it was competent for the state's medical expert to illustrate by means of a candle inside the skull the relative thickness of its different parts, and to testify: "From my experience and observation of many cases in hospitals, I have learned that when a body falls from a height, and strikes on the head, the most usual place of fracture is at the base of the skull." See authorities collected under division 3.

6. The remark of the solicitor, after one of his questions had been objected to and ruled out, "I think the witness has made that sufficiently clear," if open to objection at all, "belongs at most to that class of irregularities not so inconsistent with legal fairness as to require the granting of a new trial." *Guertin v. Hudson*, 71 N. H. 505, 53 Atl. 736; *Gilman v. Laconia*, 71 N. H. 212, 51 Atl. 631.

7. It is found that the abodes of Lafayette

and Stetson were stated in the witness list in accordance with the fact. The exceptions based upon the ground that they were not correctly stated are therefore overruled.

8. "At the close of the evidence for the state, the state claiming that the evidence proved murder in the first degree, and not in any other degree of murder or manslaughter, the defendant moved that he be discharged, upon the ground that there was not sufficient evidence to be submitted to the jury to justify their finding him guilty of murder in the first degree. The court denied the motion, and the defendant excepted." In this connection it is contended by the respondent that the amendment of section 7, c. 282, of the General Laws, by inserting the words "with a design to effect death" (*Com'rs Rep. Pub. St. c. 277, § 7; Pub. St. c. 278, § 7*), as descriptive of one kind of manslaughter in the first degree, has made a higher measure of proof necessary to establish murder, unless distinction between that crime and manslaughter is to be obliterated. The fallacy of this contention is in the assumption underlying it that the words "with a design to effect death" necessarily imply murder, and are inconsistent with manslaughter, as those crimes were known at common law. At common law, killing with design might be either murder or manslaughter. Malice was the distinguishing element. Without malice, killing with design was only manslaughter, as killing in passion under provocation. With malice, killing with design was murder, as killing in obedience to "the dictate of a wicked, depraved, and malignant heart." *State v. Pike*, 49 N. H. 899, 404, 6 Am. Rep. 533. This court has said: "It is not true that manslaughter is necessarily killing without a design to effect death. Some cases of manslaughter are of this kind. But there are other cases where, notwithstanding the intention clearly was to take life, the offense is reduced to manslaughter by circumstances of great and sudden provocation, or the like." *State v. Butman*, 42 N. H. 490, 492. The authorities "clearly show that the crime of manslaughter may be intentionally committed," and independently of statute. *State v. Calligan*, 17 N. H. 253, 255; *Rex v. Taylor*, 5 Burrow, 2793; *State v. McDonnell*, 32 Vt. 491, 492; *Gann v. State*, 30 Ga. 67; *Hornsby v. State*, 94 Ala. 55, 10 South. 522; *Dennison v. State*, 13 Ind. 510; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *Nye v. People*, 35 Mich. 166; *People v. Freel*, 48 Cal. 436; 4 Bl. Com. 436; 1 Whart. Cr. L. § 304; 2 Bish. Cr. L. (7th Ed.) § 676; 21 Am. & Eng. Enc. Law, 172. As the statute stood before the amendment in question, manslaughter "with design," of the character illustrated by the foregoing cases, if provided for at all, was included in the classification of manslaughter in the second degree, and punished less severely than manslaughter without design, under circumstances otherwise the same. To correct this absurdity, not to change the

common-law distinction between murder and manslaughter, or the rules of proof relating to the same, was the evident and only purpose of the amendment. It may be said now as truly as before the amendment that sections 1 and 7, c. 278, of the Public Statutes, and associated sections, make nothing murder which was not murder at common law, and nothing manslaughter which was not manslaughter at common law, but merely divide each into two degrees, and provide punishment variable according to the degree. *State v. Pike*, 49 N. H. 399, 403, 6 Am. Rep. 533; *State v. Almy*, 67 N. H. 274, 275, 28 Atl. 372, 22 L. R. A. 744; *State v. Carr*, 53 Vt. 37, 45; *State v. Dowd*, 19 Conn. 388, 392; *Nye v. People*, 35 Mich. 16, 17, 19; 1 Whart. Cr. L. § 377. In dividing murder into degrees, our legislature has provided: "All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all murder not of the first degree is of the second degree." Pub. St. c. 278, § 1. The distinction between the degrees thus created lies not in the presence or absence of malice, as in case of murder and manslaughter, for malice is indispensable to both degrees, but it depends upon whether the killing is with deliberation and premeditation or otherwise, excepting murder accomplished in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary; and that is made murder in the first degree regardless of intent to kill because of the peculiarly vicious character of the collateral offenses. It follows that, to warrant conviction of murder in the first degree, the state must show beyond a reasonable doubt not only killing with malice, but must go further, and show that the killing was deliberate and premeditated, unless done in perpetrating or attempting to perpetrate one of the collateral felonies named in the statute. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Buel v. People*, 78 N. Y. 492, 499, 34 Am. Rep. 555; *People v. Schmidt*, 168 N. Y. 568, 574, 575, 576, 61 N. E. 907; *Nye v. People*, 35 Mich. 16, 17, 19; 21 Am. & Eng. Enc. Law, 145, 167. Malice is not an inference of law from the act of killing, but, like any other fact in issue, it must be found by the jury upon competent evidence. See Review of Trial of Prof. Webster, by Joel Parker, 72 North Amer. Rev. 178; 2 Cool. Black. (3d Ed.) 395, note; Whart. Cr. Ev. (9th Ed.) § 738; 2 Bish. Cr. L. (7th Ed.) § 673; 21 Am. & Eng. Enc. Law, 139. In this view, the argument of the respondent's counsel, based upon the doctrine of implied malice, would seem to be irrelevant.

As to the element of deliberation and premeditation, while it need not be shown that the killing was deliberated and premeditated for any particular length of time (*State v. Carr*, 53 Vt. 37, 46, 47; *Walk. Am. Law*, 538, 539; 2 Bish. New Cr. L. § 723; 1 Whart.

Cr. L. § 380), yet we think it is quite evident from the kinds of murder which the statute specifically designates as deliberate and premeditated—namely, murder by poison, starving, and torture—followed as those terms are by the words "or other deliberate and premeditated killing," that the legislature used the words "deliberate and premeditated" in no narrow or technical, but in their natural and ordinary, sense, and intending to exclude from the operation of the death penalty murder committed on the impulse of the moment, without actual deliberation and premeditation, unless committed in perpetrating arson, rape, robbery, and burglary. They were "meant to distinguish between an act done with murderous intent, with a purpose of mind to kill, and an act done upon sudden impulse, without meditation or murderous intent." *State v. Carr*, 53 Vt. 37, 47. "It was rightly considered that what is done against life deliberately, indicates a much more depraved character and purpose than what is done hastily, or without contrivance. But it is a perversion of terms to apply the term 'deliberate' to any act which is done on a sudden impulse." *Nye v. People*, 35 Mich. 16, 17, 19. "There must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure; and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." *People v. Majone*, 91 N. Y. 211, 212. "The questions for the jury are: Had the slayer space and opportunity for reflection? Did he think over what he was about to do? Did he coolly form a settled purpose? Was his mind sedately and considerably made up to take life? If these questions be answered in the affirmative, the verdict must be murder in the first degree. If not, and yet the killing was done purposely and maliciously, it must be murder in the second degree,"—unless committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary. *Walk. Am. Law* (7th Ed.) 538, 539. The contention that, even if the respondent murdered Mrs. Folsom in attempting to commit rape, it was not an attempt within the meaning of the statute, because not far enough advanced toward consummation, is contrary to reason and authority. *Lewis v. State*, 35 Ala. 380, 388; *Taylor v. State*, 50 Ga. 79; 1 Bish. Cr. L. (7th Ed.) § 733. That the respondent actually attempted rape, and killed Mrs. Folsom as a means or outcome of such attempt, were, however facts which the state was bound to establish

beyond a reasonable doubt to warrant conviction of murder in the first degree upon that ground. *Kelly v. Commonwealth*, 1 Grant, Cas. 484; *Plleming v. State*, 46 Wis. 516, 1 N. W. 278. The state was also bound to establish beyond a reasonable doubt the malice and deliberation essential to convict in the first degree upon the other ground. In short, "no man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499. But while malice and deliberation, when essential to murder in the first degree, like the attempt to perpetrate rape, when that is relied upon to bring killing within the capital classification, must be established beyond a reasonable doubt, direct evidence is not necessary for this purpose. The character of the weapon employed, the force and number of blows inflicted, the location and severity of the wounds, the place of the crime, previous remarks and conduct indicating preparation, subsequent acts and statements, and every circumstance having a legitimate bearing upon the subject, may be considered by the jury. *People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907; *Whart. Cr. Ev.* (9th Ed.) § 738; 1 *Whart. Cr. L.* § 381; 21 *Am. & Eng. Enc. Law*, 161. The evidence in the present case is too voluminous to reproduce or satisfactorily epitomize. Suffice it to say, we have examined it in its length and breadth, and applied to it the legal tests already indicated. While the evidence is circumstantial, conflicting, and unsatisfactory, and, unaided by the appearance of the witnesses and other legitimate advantages of presence at the trial and scene of the alleged killing, not such as to remove doubt from the judicial mind, yet the court are of the opinion that it was sufficient to warrant its submission to the jury upon the material questions (1) whether the respondent killed Mrs. Folsom, (2) whether he did it with malice, deliberation, and premeditation, (3) whether he did it in attempting to perpetrate rape. The motion to discharge was therefore properly denied.

9. The remark of the attorney general, after the defendant's witness Lawson had testified, to the effect that his testimony did not contradict the testimony of the state's witness Hamilton, as claimed by the defense, but confirmed it; and the remark of the attorney general in connection with the cross-examination of the defendant's witness Angell, "I don't know about this stump speech business; I object to his making a stump speech here to display his knowledge,"—stand like the remark of the solicitor covered by exception 6, and, if open to objection at all, belong "to that class of irregularities not so inconsistent with legal fairness as to require the granting

of a new trial." *Guertin v. Hudson*, 71 N. H. 505, 53 Atl. 736.

10. Prof. Wood and Prof. Angell having testified for the state and defense, respectively, drawing opposite conclusions, we think it was competent for the state in the cross-examination of Angell to ask him if he had known of Prof. Wood some time, and if the latter was regarded as an eminent authority in these matters; not for the purpose of showing as affirmative evidence the ability and standing of Prof. Wood, but merely by way of cross-examination, for the purpose of discrediting and weakening his testimony before the jury upon the points at issue between him and Prof. Wood.

11. The remark of the state's counsel in the course of his closing argument to the jury, "Why, it seems that for some reason or other, when this affair in regard to Mrs. Folsom came out, everybody went down there to see about Greenleaf," was calculated to convey to the jury the idea that Greenleaf was such a character that all eyes immediately turned toward him as the perpetrator of the crime. That it was improper and prejudicial does not admit of doubt. When objected to, it was not retracted, but persisted in. The court did not order it stricken out, nor is it found that it did not prejudice the jury. Verdicts in civil cases without number have been set aside because of remarks of counsel no more prejudicial. *Hilliard v. Beattie*, 59 N. H. 462; *Perkins v. Burley*, 64 N. H. 524, 15 Atl. 21; *Jordon v. Wallace*, 67 N. H. 175, 32 Atl. 174; *Heald v. Railroad*, 68 N. H. 49, 44 Atl. 77; *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233. *Greenfield v. Kennett*, supra, was an action in assumpsit for lumber sold. The plaintiff's counsel, in his closing argument, said that he "should be willing to try this case before a jury composed of parties with whom he [the defendant] had dealt." The defendant objecting, the plaintiff withdrew the remark, and asked the jury not to consider it. The court at the time, and again in the charge, instructed the jury to disregard it. Nevertheless the verdict was set aside. Manifestly, the remark in that case was no more prejudicial than the remark now under consideration. Furthermore, in that case counsel who made the remark withdrew it, and asked the jury not to consider it, and the court repeatedly instructed the jury not to regard it; while in the present case the remark was persisted in after objection, and it does not appear that the jury were instructed to disregard. *Greenfield v. Kennett* presents no extreme illustration of the principle. In the mass of authorities upon this subject in this jurisdiction, well collected in *Story v. Railroad*, 70 N. H. 364, 48 Atl. 288, may be found other cases quite as much in point. If the opinion anywhere exists that the rule established in this jurisdiction is too strict for the practical administration of justice, all must nevertheless agree that, such being the rule in the most petty civil case,

it would be absurdly inconsistent, and bring both the rule and the court into contempt, to suspend or juggle with it in a case involving human life, however dastardly the alleged crime, disreputable the accused, or clamorous the public. "A highly-wrought condition of the public mind, the popular horror and indignation that arise upon the commission of a dreadful crime, are not favorable to the calm and dispassionate application of a just and humane law. They do not always leave the vision clear. But popular clamor, however loud, cannot be permitted to invade this place without imperiling the most sacred rights of the innocent as well as the guilty. The rule which we apply in the trial of a wretch who has ravished and killed an innocent girl, and then, with the incarnate spirit of a fiend, torn and cut and mutilated her body in a way that causes the blood to curdle and the heart to rise in almost uncontrollable rage, is the same rule which we must apply to the trial of the innocent victim of a wicked and audacious conspiracy, or of one who, without fault, has become entangled in a mesh of circumstances which threaten an innocent life." Ladd, J., in *State v. Lapage*, 57 N. H. 245, 301, 24 Am. Rep. 69.

12. The remark of counsel for the prosecution in closing argument, "This statement was taken right off the very next day after the affair happened," referring to a portion of the testimony of the government's witness Graney, was manifestly intended to persuade the jury that his testimony was true because he had stated the same thing in the same way immediately after the alleged crime. There was no evidence that Graney had ever given a statement prior to testifying on the stand, and there was nothing in the record from which such an inference could be legitimately drawn. As the assertion was wholly unsupported by evidence, and calculated to prejudice the respondent by securing for vital statements of the witness a higher degree of credit than otherwise, and the evil not having been remedied as the law requires (*Story v. Railroad*, 70 N. H. 364, 376, 48 Atl. 288), but aggravated by persistence, it stands upon the record as reversible error, under the rulings of this court fully collected in *Story v. Railroad*, 70 N. H. 364, 372-376, 386, 387, 48 Atl. 288. The point that the exception was too general, if ever entitled to consideration in a capital case, where the exception involves a question of fair trial, has little weight in the present instance, the purpose and application of the exception being obvious and unmistakable from the connection in which it was made.

13. In view of the conclusions reached respecting the argument of the state's counsel in the particulars covered by the two preceding heads, we will not consider the argument in other particulars claimed by the defense to be exceptionable.

14. In the charge the court, after instruct-

ing the jury in regard to murder in the first degree, said: "There is no contention on the part of the state or the defendant that there is any other offense than that of murder in the first degree. You are therefore required to either acquit the defendant, or find him guilty of murder in the first degree." To this instruction the defendant's counsel assented, and during his closing argument he said: "This is an indictment for murder in the first degree. The state charges George H. Greenleaf with the premeditated murder of Mrs. Folsom. They charge it in the first degree, and in no other degree. There is no evidence introduced here by the state, or by any one else, that changes the issue in that respect." Some three months after the trial the defendant asked for an exception to the part of the charge above quoted. His request was not granted. His position now is that fundamental error was committed, because the question of the degree of the crime, if murder, was not left to the jury, but was determined by the court; and he calls attention to section 2, c. 278, of the Public Statutes, which provides, "If the jury shall find a person guilty of murder, they shall, by their verdict, find also whether it is of the first or second degree." If it is assumed, without deciding the point, that the respondent is entitled to the benefit of his exception taken long after the trial, it is not necessary to determine at this time the question raised thereby. Whether the charge of the court was erroneous, as now claimed by the respondent, and, if it was, whether he did not effectually waive his right to take advantage of it by assenting thereto at the trial, or whether it was competent for him to bind himself by such assent, are questions of so much difficulty that it is not deemed advisable to express an opinion upon them. As there must be a new trial for other reasons, it would not be useful to determine these questions, in anticipation that they will again be presented upon the next trial.

Exceptions sustained. Verdict set aside. All concurred.

McELROY v. CAPRON.

(Supreme Court of Rhode Island. Dec. 29, 1902.)

HUSBAND AND WIFE—TORT OF WIFE—PRES-
ENCE OF HUSBAND—INDIVIDUAL LIABILITY
OF WIFE—SUFFICIENCY OF PLEA.

1. Gen. Laws, c. 194, § 14, provides that the husband shall not be liable for antenuptial torts of his wife, nor for any contract of hers made after marriage, nor for torts of the wife after marriage "unless he participates therein or coerces her thereto." *Held*, in view of the intention of the statute to limit the common-law liability of the husband for acts of his wife, that a wife's plea to an action seeking to charge her with individual liability for a tort, that her husband was present and participated, was insufficient, as merely raising a prima facie presumption of coercion by him, which was an essential ingredient in her defense.

Trespass on the case for personal injury by Loretta McElroy against Luella W. Capron, individually, and as executrix of Herbert S. Capron, deceased. Heard on demurrer to plea. Demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Terrence M. O'Reilly, for plaintiff. William H. Sweetland, for defendant.

TILLINGHAST, J. The plea which the defendant, Luella W. Capron, interposes as a bar to this action, in so far as it seeks to hold her individually responsible for the negligence complained of, is that at the time of the alleged wrong and injury participated in by the testator, Herbert S. Capron, she was his lawful wife. To this plea the plaintiff demurs on the grounds (1) that the said defendant, Luella, does not, in her plea, allege that at the time of committing the said wrong and injury she was under the coercion of her said husband; (2) that said plea is not conclusive, but merely raises a presumption of law, which is only a prima facie presumption; and (3) that the matter set up in said plea can be shown under the plea of the general issue. The declaration alleges that, in the lifetime of said Herbert S. Capron, he and said Luella negligently caused a buggy in which they were driving to be driven against a bicycle upon which the plaintiff was riding, whereby she was injured.

The main question raised by the demurrer is whether a married woman can, in any event, be held liable for a tort committed by her in the presence of her husband. We think this question must be answered in the affirmative. At the common law the husband and wife are jointly liable for such of the wife's torts committed during coverture as fall within the following classes, namely: (1) Where the husband is absent and had no knowledge of the intended act, as in *Head v. Briscoe*, 5 Carr & Paine, 484; (2) where the husband is absent, but the tort is committed under his direction and at his instigation, as in *Handy v. Foley*, 121 Mass. 259; and (3) where the husband was present, but the wife acted of her own volition, as in *Cassin v. Delany*, 38 N. Y. 178. See *Kosminsky v. Goldberg*, 44 Ark. 401. The statement in 2 Kent, Com. 149, cited by counsel for defendants in support of his plea, viz., that if the wife commits a tort "in his company or by his order," he alone is liable, is too broad, and is not sustained by the current of authorities. *Handy v. Foley*, supra; *Kosminsky v. Goldberg*, supra. Where the tort is committed in the presence of the husband, and by his command or coercion, he alone is liable. To exempt her from liability, therefore, requires the concurrence of his presence and command, or coercion. *Cassin v. Delany*, supra.

The plea which is demurred to in the case at bar, taken in connection with the allega-

tions in the declaration, simply shows that the defendants were husband and wife, and that they were together at the time of the commission of the wrong complained of. These facts, however, which are admitted by the demurrer, make out only a prima facie case in favor of the defendant Luella, and hence are not conclusive as to the plaintiff's right of action against her. That is to say, under the facts shown in the pleadings, a prima facie presumption arises that the defendant wife acted under the control and coercion of her husband in committing or participating in the commission of the tort relied on by the plaintiff. Said presumption, however, being only a prima facie one, may be rebutted in evidence by showing that the wife was the instigator of the wrong, or the more active party in the commission thereof, or that the husband, although present, was incapable of coercing her. *Marshall v. Oakes*, 51 Me. 308; *State v. Shee*, 13 R. I. 535; *State v. Boyle*, Id. 537; *Schouler's Dom. Rel.* (4th Ed.) § 75; *Am. & Eng. Ency. of Law* (2d Ed.) 899, and cases in note 7. The plea, therefore, is insufficient as a bar to the action, in that it fails to allege that the wife was acting under the control, direction, or coercion of her husband. *Ency. Pl. & Pr.*, vol. 10, p. 273; *Wagener v. Bill*, 19 Barb. 321; *Burnett v. Nicholson*, 86 N. C. 90; *Clark v. Bayer*, 32 Ohio St., at page 311, 99 Am. Rep. 593.

The decisions of this court in *Simmons v. Brown and Wife*, 5 R. I. 299, 73 Am. Dec. 66, and in *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718, recognize and adopt the same general rule as that above stated as to the joint liability of husband and wife in such cases. In the latter case, *Durfee, C. J.*, in delivering the opinion of the court, said: "It is true that, where husband and wife join in committing a tort, the presumption is that she acts under marital coercion; but this presumption is prima facie only, and may be rebutted by proof that she acted of her own free will."

But the defendants' counsel contends that under Gen. Laws R. I. c. 194, § 14, the husband is solely liable for a tort in the commission of which both he and his wife participated. Said section provides that "the husband shall not be liable by reason of the marital relation for any contract made or for any tort committed by his wife prior to their marriage; nor shall he be liable for any contract made after marriage by his wife; nor for torts committed by his wife after marriage, unless he participates therein or coerces her thereto." The evident purpose of this statute is to restrict and lessen the common-law liability of a husband both for his wife's contracts and torts. It relieves him of all liability for her contracts, whether antenuptial or postnuptial. It also relieves him from all liability for her antenuptial torts, and leaves him liable only for those committed by her after the marriage, in which he participates, or which he coerces her to com-

mit. The statute, as we read it, simply leaves the husband subject to the same liability as to such torts as he was under at the common law. That is to say, where he simply participates in the tort, he is jointly liable with her; and, where he coerces her in the commission thereof, he is solely liable. To hold that he alone is liable simply because he is present and participates in the wrongful act would be to extend, instead of lessen, his common-law liability in a case like the one before us; and we do not think the statute was intended to have this effect. Moreover, if the intention of the general assembly had been to make the husband solely liable in cases where he participates with his wife in the commission of the wrong, we think they would have said so in plain terms. In this connection it is pertinent to remark that the evident intent of modern legislation in this state—and such seems to be the tendency of legislation in other states—is to place a married woman upon practically the same basis or plane with regard to legal rights and liabilities as if she were sole and unmarried. And hence, in the construction of statutes relating to such rights and liabilities, we think that, in so far as may be, consistently with the language used therein, they should be so construed as to carry out the general purpose aforesaid.

As the demurrer to the plea in question must be sustained on the first two grounds assigned by plaintiff's counsel, there is no occasion for us to consider the third ground, namely, that the matter set up in the plea can be shown under the plea of the general issue. But see, as bearing upon this question, *Goodell v. Bates*, 14 R. I. 65.

The plaintiff's demurrer to the special plea in bar is sustained, and the case remanded for further proceedings.

STONEMAN et al. v. LYONS.

(Supreme Court of Rhode Island. Dec. 17, 1902.)

TROVER—CONVERSION OF GOODS—CONSIGNMENT FOR SALE.

1. Though, in trover, the court finds as a fact that goods shipped by plaintiff to defendant were consigned merely to be sold to third persons, and not as a delivery consummating a sale to defendant himself, the latter is not liable as for a conversion of a portion sold to third persons merely because he has defended the action by contending that the goods were not consigned, but that there was an actual sale to him.

Exceptions from Sixth district court.

Trover by Stoneman & Grossman against John H. Lyons. Decision for plaintiffs granting insufficient relief, and they except. Exceptions overruled.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

T. M. O'Reilly, for plaintiffs. John L. Devlin, for defendant.

TILLINGHAST, J. This is trover for the conversion of certain merchandise which the plaintiffs claim was delivered to the defendant on consignment, and comes here upon exceptions to the rulings of the district court of the Sixth judicial district. The plaintiffs, who are wholesale dealers in groceries and provisions, claim that they consigned three lots of merchandise to the defendant, who was a retail grocer; that the first consignment was paid for by the defendant; and that the second and third consignments, valued at \$36.50, were delivered April 30 and May 15, 1902, and have not been paid for. On May 22, 1902, the defendant made a general assignment for the benefit of his creditors, whereupon the plaintiffs made demand for the goods found in defendant's store which they claimed belonged to them, of the value of \$14.48, and for the balance of the goods alleged to have been consigned, which the defendant had sold. The district court found, upon the evidence submitted, "that the plaintiffs had proved that the goods were consigned, that a demand therefor had been made, that the plaintiffs were entitled to decision for the value of the goods unsold at the time of the demand, and that the plaintiffs were not entitled to recover in this action the value of the goods sold." To this last ruling the plaintiffs took an exception, claiming that the conversion took place upon the assumption by the defendant of ownership under his claim (which he made at the trial) of buying the goods on credit and selling them for his own account. In other words, the exception is based upon the plaintiffs' contention that a decision in their favor should have been rendered for the entire value of said second and third consignments (\$36.50), on the ground that under the defendant's own testimony the conversion took place upon his assumption of ownership of said goods in himself, and the sale of the goods under such assumption; that, if any act was needed other than the mental assumption of ownership, the subsequent sale supplied such necessary act.

The main question of fact presented for decision in the district court was whether the goods alleged to have been converted by the defendant were consigned to him by the plaintiffs for the purposes of sale, or were sold to him outright. The testimony bearing upon this question was conflicting; that offered by the plaintiffs tending to prove that the goods were consigned to the defendant, while that offered by the latter tended to prove a sale in the ordinary course of business. The court found in favor of the plaintiffs upon this issue, and, a demand for the goods remaining in the defendant's hands at the time of making his assignment, and a refusal to deliver the same having been proven, gave decision for the plaintiffs for the value of the goods thus held by the defendant. This finding, being purely one of fact, cannot be reviewed by this court on exceptions. And

as it is clear that upon the finding made by the district court its decision was correct, the plaintiffs have no standing in this court.

The only exception taken was to the ruling that trover could not be maintained for that part of the goods in question which the defendant had sold. And that this ruling was correct, upon the finding of fact aforesaid, we fail to see how there can be any question. The goods having been consigned to the defendant for sale, as found by the court, his act in selling them not only constituted no conversion thereof, but was clearly within the scope of his authority as the plaintiffs' consignee and agent. And the mere fact that he testified at the trial that he bought the goods of the plaintiffs, instead of receiving them on consignment, and sold them as his own, did not render him guilty of the conversion of those sold. His sole defense to the action was that the goods were his, and not the plaintiffs'. And for us to hold that by putting in such a defense he necessarily proved himself guilty of the conversion of the goods sold, simply because the court found against him on the issue of title thus raised, would certainly be an anomalous decision. If a preconceived design on the part of the defendant to obtain the goods in question, whether by consignment or purchase, and not pay for them, had been shown, the plaintiffs would doubtless have had a good cause of action, as such conduct would clearly have been fraudulent. *Mulliken v. Millar*, 12 R. l. 296; *Swift v. Rounds*, 19 R. l. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. See, also, *Hassett & Hodge v. Cooper*, 20 R. l. 535, 40 Atl. 841. But nothing of this sort appears, or is even claimed on the part of the plaintiffs, and hence we see no ground upon which they can recover in this action for the goods sold by the defendant.

Exceptions overruled, and case remanded to said district court for judgment on its decision.

SPINK v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. Dec. 29, 1902.)

RAILROADS—FIRES—LIABILITY.

1. Act June 25, 1836, amending the charter of the N. Y., P. & B. R. Co., and providing in section 2 that the company should be liable to property owners for the burning of "houses, wood, hay, or any other substance whatever," caused by fire from its engines, is broad enough to cover all kinds of property so burned.

Action of debt by Daniel Spink against the New York, New Haven & Hartford Railroad Company, brought under Act June 25, 1836, amending the charter of the New York, Providence & Boston Railroad Company, of which latter road defendant was lessee. Demurrer to declaration overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

William B. Greenough and James C. Collins, Jr., for plaintiff. John W. Sweeney, for defendant.

PER CURIAM. The terms of the act making the defendant liable for damage caused by fire from its engines, embracing the burning of "houses, wood, hay, or any other substances whatever," are broad enough to cover all kinds of property so burned.

The demurrer to the declaration is overruled.

PEPIN v. SOCIETE ST. JEAN BAPTISTE.
(Supreme Court of Rhode Island. Dec. 19, 1902.)

BENEVOLENT SOCIETIES—EXPULSION OF MEMBERS—TRANSACTION OF BUSINESS—WORK OF CHARITY—SUNDAY LAW.

1. A member of a mutual benefit association cannot be expelled arbitrarily or without proper cause.

2. The member is entitled to notice and a specification of the charges, and an opportunity for defense.

3. A member of a mutual benefit association who defaults on a hearing of charges against him can be expelled on evidence tending to establish his guilt.

4. Where a member of a mutual benefit association has actual notice of the particular charge against him for which it is sought to expel him, such charge need not be formally stated.

5. The hearing of charges and expelling of a member by a benevolent association does not constitute the exercise of judicial power, but is part of the business of such society, and may be done on Sunday.

6. A benefit association whose object is not profit, but to relieve members and their families in case of sickness and death, is a charitable organization, and the transaction of its business is a work of necessity and charity, and can be done on Sunday.

Mandamus by Marjorique Pepin against the Societe St. Jean Baptiste. Demurrer to answer overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

Arthur M. Allen, for petitioner. Archambault & Gaulin, for respondent.

STINESS, C. J. The petitioner asks for a writ of mandamus to restore him to membership in the respondent society, a corporation, from which, he avers, he has been illegally and unjustly expelled. The respondent, in its answer to the alternative writ, sets up that a complaint was made against the petitioner, which was duly heard before a committee, he being present, and referred to the society; that on September 18, 1898, the committee reported to the society the charge that the petitioner had attempted to defraud the society by drawing, or trying to draw, benefits, under false representations; that, by the record of the society, the petitioner's demand for benefits was laid upon the table,

¶ 2. See *Beneficial Associations*, vol. 6, Cent. Dig. §§ 14, 15.

and the secretary was ordered to notify the petitioner to appear before the society to answer said charge, and that he would be stricken out of the list of membership should he fail to exculpate himself; that notice was sent to him by mail to appear on Sunday, October 2, 1898, specifying the charge; that on said day the petitioner failed to appear and to make any defense against said charge or accusation, as requested by said notice; that the accusation was then and there regularly brought before said society, and, said Pepin failing to appear and exculpate himself, and evidence being produced tending to establish the guilt of said Pepin, it was then and there decided by said society that said Pepin was guilty of said accusation, and he was then and there, by a vote regularly passed, expelled from membership. The by-laws provide that those who work against the interests of the society may be stricken off the roll of membership. The answer avers that the accusation was brought in good faith, and not for the purpose of injuring the petitioner or of avoiding the payment of benefits to him; that he was given full opportunity to appear and to offer evidence; and that he was expelled after it had been judicially determined by the society, upon evidence, that he was guilty of the offenses charged against him. The petitioner demurs to the answer.

It was held, in *Pepin v. Societe*, 23 R. I. 81, 49 Atl. 387, and in *Lavalle v. Societe*, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392, that membership in a beneficial association, where there is a contract to pay money by way of benefits or insurance, is a contract in the nature of a property right. As such, it is to be dealt with according to rules of law applicable to other cases of contract or of right. A member cannot be deprived of his membership arbitrarily or without proper cause. He is entitled to notice and opportunity for defense, which includes a specification of the charge against which he is to defend. *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *Reynolds v. Mayor*, 23 R. I. 370, 50 Atl. 645. All of these requirements to a legal expulsion are averred in the answer, and, on demurrer, must be taken to be true.

One ground of demurrer is that the answer does not state that the charge was true. We think it states all that could properly be said in this respect. It says that evidence was produced tending to establish the guilt of the petitioner, upon which the society made a judicial determination. As testimony only on one side was before the society, it would neither be natural nor proper that the society should say that the charge was absolutely true. For the purposes of this demurrer, the society had testimony which, in its opinion, proved the charge, after notice and opportunity to the petitioner to be heard thereon.

The averment of the petitioner that he had no notice raises a question of fact, not of law. Nothing appears to show that the

notice was insufficient as to time or substance. The charge, according to the by-laws, was one for which a member could be expelled, if for such a charge an authority in the by-laws was necessary. *Society v. Commonwealth*, 52 Pa. 125, 91 Am. Dec. 139.

It is further urged that the charge as set forth was not sufficiently specific, because it does not state to what particular matters or what occasions they refer, so as to enable the petitioner to defend against them. Doubtless this would have weight if it appeared that the member was unable, for want of specification, to meet the charge, and he was thereby deprived of a chance to present his defense. But when he has actual notice of the particular charge he has all that he can claim, even though it may not be formally stated. In *Reynolds v. Mayor*, the petitioner protested against immediate action on that ground, but his protest was refused. In this case it appears that the petitioner was present at the hearing before the committee, and that the matter then heard was referred to the society. He therefore knew the particular charge to be tried. We see no ground for demurrer in the substance of the answer.

Another ground for demurrer is that, as the hearing and expulsion took place on Sunday, it was illegal and void. It was a rule of the common law that Sunday is a nonjudicial day, and many cases have held that a judgment entered on Sunday was void. The petitioner argues that the trial in this case was an exercise of judicial power, and therefore void. The cases relied on by him relate to judgments of courts, where it has been held, in some upon common-law authority and in some upon statutory provisions, that judgments so entered were void. We recognize the correctness of such decisions upon common-law authority, and also upon grounds of public policy and recognition of Christian practice. The present case, however, does not come within such grounds of prohibition. While there was a trial, the respondent was not a court of law, but a benevolent association, and its action was a part of the business of such a society. Such bodies are recognized as charitable organizations because their object is not individual profit, but a provision to relieve its members and their families in cases of sickness and death. There was no rule at common law to forbid such societies to transact their business on Sunday. Possibly they are of too recent a date to have been embraced in such a rule. As said by *Savage, C. J.*, in *Story v. Elliot*, 8 Cow. 27, 18 Am. Dec. 423: "By the common law, then, it appears, all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute." That case involved an award made on Sunday, and the court held it void, as a judicial proceeding, because arbitrators are not only jurors to de-

termine facts, but judges to adjudicate as to the law; and their award, when fairly and legally made, is a judgment conclusive between the parties, from which there is no appeal. Accepting the rule thus stated, we do not think that the action here complained of was a judicial proceeding in the sense in which the term was used at common law, nor by the court in the opinion last cited. Evidently the courts of New York do not so regard it, for in *People ex rel. Corrigan v. Young Men's Society*, 65 Barb. 357, it was held that a notice to answer charges served on Sunday, and a hearing, resulting in expulsion from a benevolent society, on the next Sunday, were not illegal because the papers were served and were returnable on Sunday, because they were not illegal at common law nor forbidden by statute. The court added: "The relator chose to belong to a society which held all its regular meetings on that day, and if, at such a meeting, he was served with notice to attend the next meeting, it does not rest with him to make the objection." In *McCabe v. Father Matthew Society*, 24 Hun, 149, it was held that a resolution of suspension was not rendered invalid by the fact that it was adopted at a meeting held on Sunday, for the reason "it is pure charity to relieve sick members, and the passage of such a resolution on Sunday would be unobjectionable." In *Turnverein v. Carter*, 71 Mich. 608, 39 N. W. 851, under Comp. Laws, c. 55, § 1, like our law in excepting works of necessity and charity, it was held that a resolution authorizing a mortgage by the society, passed on Sunday, was void because it was not a religious or charitable association; implying that a charitable association might have done so. No cases are cited by the petitioner, and we know of none, which hold that a society of this sort may not transact its business on Sunday. That which comes nearest to such a statement is *Society v. Commonwealth*, 52 Pa. 125, 91 Am. Dec. 139. The court sustained the expulsion of a member of a relief association for the sick, at a meeting held on Sunday, on the ground that the question of illegality for that cause was not before the court as one of the grounds of demurrer. The court added, by way of quere: "It might be well to consider how far such trials on Sunday comport with the legislation of the state and the genius of our institutions." The statute was similar to ours in excepting works of necessity and charity. We think that the necessary work of charitable organizations is within the intent and words of our statute. The petitioner argues against such a construction, for the reason that he might not be able to compel the attendance of witnesses or the aid of counsel on Sunday. This consideration, however, is not raised by any facts set forth in the record. The attendance of witnesses before such a tribunal

cannot be compelled at any time; but a lawyer appearing to defend might be regarded as doing work of his ordinary calling. If either witnesses or counsel should be unwilling to attend on Sunday, or for any cause tending to deprive one of a fair trial he should ask for a reasonable postponement on that account, and it should be refused, there would be strong reason for holding such an expulsion to be illegal. But no such facts appear in this case.

We decide that the demurrer to the answer cannot be sustained upon the grounds stated.

McKEEN v. PROVIDENCE COUNTY SAV. BANK.

(Supreme Court of Rhode Island. Dec. 18, 1902.)

EMPLOYMENT BY AGENT—LIABILITY OF PRINCIPAL—SUFFICIENCY OF EVIDENCE—ESTOPPEL—BOOK ACCOUNT—THIRD PERSON—ADMISSIBILITY—ABSENT WITNESS—REFRESHING MEMORY.

1. In an action by a plumber, employed by a real estate agent for the latter's principal, it appeared that the plumber knew of the agency, and he testified that he intended to hold the principal. The plumber's book showed a charge against the agent, with subsequent alterations indicating an intention to charge the principal. *Held*, that the evidence was not sufficient to overthrow a verdict for the plumber, as, disregarding the alterations in the book account, it would still not be conclusive of an intention to charge the agent alone.

2. A principal received of its agent a voucher for work done by a plumber employed by the agent, receipted by the agent in the plumber's name. The sum so evidenced was credited to the agent, and the balance due from him proportionately reduced. No actual settlement by payment of this balance was had. *Held*, that the plumber was not estopped, by delay in presenting his claim to the principal, to hold the latter.

3. Books of a real estate agent, containing debits and credits relating to business transacted for a particular principal, and also other customers, are not admissible as books of the principal; it having had no power or right to make or direct entries therein.

4. Books of a real estate agent, showing payment of a plumber employed by him, are not admissible against the plumber in an action by him against the agent's principal; the entry being neither an admission by the agent against his interest, nor the record of a fact forming part of the *res gestæ*, made by a person not interested in the principal fact in issue,—payment of the plumber being the principal issue.

5. Where a witness of defendant was out of the state, and his evidence was before the court only by the admission of plaintiff that he would have sworn to a payment of the claim sued on, the books of such witness cannot be introduced as an admission that the witness, with his memory refreshed by their inspection, would have sworn to the payment, where no such demand was made by defendant on plaintiff.

Assumpsit by Thomas J. McKeen against the Providence County Savings Bank. On defendant's petition for new trial. Denied.

Argued before STINESS, C. J., and ROGERS and DOUGLAS, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. John A. Tillinghast, for defendant.

DOUGLAS, J. This action was brought to recover for certain plumbing work done by the plaintiff on several buildings owned by the defendant. There is no disagreement about the performance of the work or the price. The only question is whether the defendant is liable to pay for it. Both parties agree that the work was let to the plaintiff, under contract, through one J. D. Furlong, acting as agent for the defendant; that the plaintiff knew that Furlong was acting in this matter as agent; and that the defendant was his principal. The plaintiff claims that he charged the account to defendant as principal, and treated Furlong only as agent for defendant. The defendant claims—First, that credit was given by the plaintiff to Furlong alone; secondly, that the defendant settled its account with Furlong, and credited him with the payment of this bill, and the plaintiff, knowing the relations of the parties, has so conducted himself as to estop him from claiming payment of the defendant; and, lastly, that Furlong has paid the plaintiff this bill. The jury returned a verdict for the plaintiff for \$471.81, the amount claimed, and also found specially "that at the time the work in question was done the plaintiff did not give credit exclusively to Furlong." The defendant prays for a new trial on the grounds: (1) that the verdict is against the law and the evidence; (2) that certain evidence tending to show payment by Furlong was erroneously excluded by the court; (3) that the verdict is excessive. The latter ground is not insisted upon at this hearing.

1. The first question for consideration is one of fact, viz., whether the plaintiff gave credit to the defendant or to the defendant's agent exclusively. Upon a consideration of all the circumstances of the case, we cannot say certainly that the jury erred in deciding this question. It was properly left to them to decide. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Meeker v. Claghorn*, 44 N. Y. 349; *Hovey v. Pitcher*, 13 Mo. 191. It appears that Furlong was the agent of several property owners, and was in the habit of attending to work done upon their several estates, and in this capacity engaged the plaintiff to do the work in question. The plaintiff knew that the defendant was the owner of the premises, and supposed, as was the fact, that Furlong was its agent, duly authorized to procure the work to be done. He testifies that he intended to hold the defendant, and not Furlong, as his debtor. Against this statement is the evidence of Furlong that the plaintiff gave credit to him, and not to the defendant, and the fact that in the plaintiff's journal, which we consider to be shown by the book itself, he first charged the items of the work to

J. D. Furlong & Co., and afterwards added to the entry the abbreviation "Agts.," and interlined the words "Prov. County Savings Bank"; also, that he made persistent efforts to collect the bill of Furlong, and only presented it to the defendant when these efforts proved fruitless. All these circumstances combine to throw great doubt upon the plaintiff's claim; but we cannot say that they conclusively overthrow his testimony, corroborated by the presumption that he would naturally retain his valid claim against a perfectly responsible debtor, rather than abandon his right and take the agent as his debtor alone.

The changes in his book were evidently an afterthought, and very seriously impugn his veracity; but the book amounts to little more than a memorandum, and he may have considered it proper enough to correct the entries, which were carelessly made in the first instance. If he had thus explained his action, he would have been more worthy of credence than when he testifies that the additions were made when the entries were. Still, omitting the amendments entirely, we only have the fact that the book account stands charged against the agent, and not against the principal; and this is not conclusive of the fact in issue. It is said by Earl, J., in *Meeker v. Claghorn*, supra: "The evidence should be quite clear that the vendors gave exclusive credit to the agent of known principals, before we can hold the principals exempt from liability. In all cases where the principals seek exemption upon the ground that the credit was exclusively given to their agents, this should clearly appear, and they have the affirmative to show it; the natural presumption being in all cases that credit is given to the principal, rather than to the agent. It is sufficient to say, upon this branch of the case, that there is no conclusive evidence that the credit was given by the vendors exclusively to the agent, and that they intended to look to him solely for their pay. It is true that upon the ledger and daybook of the vendors the articles were charged to Shell, and, while this furnishes strong evidence that they were furnished upon his credit, it does not show it conclusively. The plaintiff gave some explanation tending to weaken the effect of this evidence, and its weight, under all the circumstances of the case, was for the referee." To the same effect see *Guest v. Burlington Opera House Company*, 74 Iowa, 457, 38 N. W. 158.

2. The next claim of the defendant is that the plaintiff ought not to recover in this action, because his delay in presenting his bill induced the defendant to credit the agent with the amount of it in the settlement of his account. As a matter of fact, the defendant received of its agent, as a voucher to his account, a bill for this work receipted by the agent in the name of the plaintiff. Without inspection of the voucher the sum

was credited to him, and the balance due from him so much reduced. It does not appear that any actual settlement, by the payment of this balance to the defendant, has ever taken place; and, if so, it is clear that, as the defendant is not bound by the statement of balances predicated upon the misrepresentation of the agent, it has only been drawn into a paper settlement, which can be revoked at its pleasure, and has suffered no real damage. But, if the settlement had been made by the payment of the balance found, we do not see how the mere delay of the plaintiff to require payment can bar his action now. What misled the defendant was the misrepresentation of its own agent, for which the plaintiff is not responsible. It is not true that the defendant thought it was not the debtor, but that it believed the statement of Furlong that the bill was paid.

The cases cited by defendant do not support the proposition it contends for. *Kymer v. Suwercropp*, 1 Camp. 109, holds that an undisclosed principal who has settled with his broker is liable to a vendor of goods bought by the broker, if the vendor makes demand on the principal in due season, or, in the case cited, before the stipulated day of payment. *Smethurst v. Mitchell*, 1. El. & El. 622, was likewise the case of an undisclosed principal whom the court held might be made liable if the plaintiff, within a reasonable time after discovering him, elected to proceed against him, but who would be discharged of all liability if the plaintiff lay by an unreasonable time and thereby induced him to alter for the worse his position toward the agent. Neither case concerns the condition of liability of a principal known to be such and to whom credit is originally given.

3. The last claim upon which the defendant insists arises as follows: Defendant expected to prove by Furlong, among other things, that he had paid this bill. At the time of the trial Furlong was absent out of the state. The plaintiff admitted that, if present, he would testify as expected by the defendant. In further support of this defense defendant offered the books of account of Furlong, which were admitted to be genuine and kept in the ordinary course of his business. Plaintiff objected to them as irrelevant, and, the objection being sustained, defendant duly excepted. He now argues that these books were admissible as the shop books of the defendant, kept by its clerk or agent, or as the books of a third party kept in the regular course of business, or to refresh the memory of Furlong. As the books are described, it is very evident that they were in no sense the books of the bank. Furlong was a real estate agent, and set down in his books debits and credits relating to that business, involving, no doubt, mention of his transactions with the defendant as well as with other customers. The defendant had no power or right to make or

direct entries therein. The case cited by defendant (*Dow v. Sawyer*, 29 Me. 119) seems, at first sight, directly in point, but on close analysis is seen to differ materially from the case at bar. The book there under consideration was a memorandum book kept by defendant's agent to record payments made by him on account of defendant for work done on defendant's mill. He seems to have been a superintendent and paymaster for the defendant. After the death of the agent the book was admitted in evidence. It is not quite clear, from the opinion of the court, whether the book was considered to be the defendant's book, kept by its agent, or the book of a third party, who was dead, and who had no apparent motive to pervert the facts recorded. As the book appeared to contain nothing but entries relating to defendant's business, it might well have been considered to be the defendant's book, and so admitted. If it were admitted as the book of a third party, we should differ from the learned court as to its admissibility.

The rule as to the admissibility of the books of third parties is not very clearly stated by the text-writers or the courts. Without attempting to reduce the conflicting decisions to uniformity, it may be said that two general grounds of admissibility of such documents are usually referred to. Either the entry is one made against his interest by a third person, who has deceased or who is beyond the reach of oral examination, or it is the contemporaneous record of a fact which forms part of the *res gestæ* in which the principal fact in issue occurred, made by a person not interested in the principal fact. "There are two classes of admissible entries," says Professor Greenleaf, "between which is a clear distinction in regard to the principle on which they are received in evidence. The one class consists of entries made against the interest of the party making them, and these derive their admissibility from this circumstance alone. It is therefore not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business and against his interest is received as secondary evidence in a controversy between third persons. The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties; the proof of one raising the presumption that another has taken place. Here the value of the entry, as evidence, lies in this: that it was contemporaneous with the principal fact done, forming a link in the chain of events and being part of the *res gestæ*. It is not merely the declaration of the party; but it is a verbal contemporaneous act, belonging, not necessarily, indeed, but ordinarily and naturally, to the principal thing. It is on this ground that this latter class of entries is admitted; and

therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead." 1 Greenl. Ev. (15th Ed.) § 120.

Neither ground exists for the admission of Furlong's books as those of a third party. Without insisting upon the fact that Furlong is in being and his deposition might have been taken, it is plain that an entry of the payment of money by him to the plaintiff is not an entry against his interest, and so the case does not come under the first branch of the rule; and it is equally clear that the payment of this bill to the plaintiff is the principal fact alleged in this defense, and not a contemporaneous fact leading up to the main issue. These distinctions are very clearly brought out in the case of *Sypher v. Savery*, 39 Iowa, 258, 262. In that case it became important to show the payment of a certain sum of money from Keene to Savery. It was alleged that this payment was made to White on Savery's account, and White's books were offered to prove the fact. The court says: "We think the account is not competent evidence to establish the indebtedness of defendant. Entries in books of account made by third persons are admissible in evidence, when it is shown that the party making them is dead and that the entries were against his interest. Neither fact appears in this case. It is not shown that White is dead, and it very clearly appears that the charges in the account were not against but in accord with his interest. The entries to the credit of Savery may be regarded as against the interest of White; but those to his debit were clearly in his favor, or they would tend to release him from liability if any force be given to them. The fact that White was charged with the duty of receiving money from the subscribers and paying it over to Savery does not make the case out of the rule. He became liable on receiving the money. Payment to Savery discharged him of such liability. The entries in the account which tend to show Savery's liability with equal force relieve White of liability. They are, therefore, not against his interest. But it is insisted that these entries are admissible on the ground that they are a part of the *res gestæ*, or contemporaneous with the principal fact done. It is true that an entry that is of the *res gestæ* and is contemporaneous with the principal fact done is admissible. But the rule is not applicable to the fact before us. The principal fact done was the payment to Savery of the money in controversy. This is the very transaction itself upon which defendant's liability is based. It cannot be said that this fact is of the *res gestæ* or contemporaneous with itself. If the entry related only to circumstances connected with the payment, to time or manner thereof, the rule might be applicable. But when it covers the whole transaction, and leaves nothing else to be proved in order

to make it complete, it is obvious that it is not admissible under the rule referred to."

4. It is contended, lastly, that Furlong's books would have been admissible as memoranda to refresh his memory as a witness. This is true, but has no application to the circumstances of the case. The books were not offered for that purpose, and could not be so long as Furlong was not a witness under examination. Books or papers used by a witness to refresh his memory do not become primary evidence, unless the opposing party makes them so by cross-examination concerning the entries contained in them. The evidence of Furlong was before the court only by admission of the plaintiff as to what he would have sworn to. His evidence could not be extended beyond the demand of the defendant and the admission of the plaintiff. The defendant asked the plaintiff to admit that Furlong, if present, would have sworn to the fact of payment. If he had wished the plaintiff to admit that Furlong, with his memory refreshed by inspection of his books, would have sworn to the fact of payment, he should have made that demand on the plaintiff. Then the plaintiff might have examined the books and made them evidence to impeach Furlong; but, unless this were done, the books would only be supposed to have been subjected to Furlong's examination as aids to his memory. In the circumstances as they were, defendant's counsel had the opportunity of using the books to frame his statement of what Furlong's testimony would be, exactly as Furlong might have used them before testifying, to make up the testimony he should give as a witness. We cannot say, therefore, that the court erred in rejecting the defendant's offer of these books.

The petition must be denied, and the case remitted to the common pleas division for judgment upon the verdict.

CRANDALL v. STAFFORD MFG. CO.

(Supreme Court of Rhode Island. Dec. 22, 1902.)

MASTER AND SERVANT—FELLOW SERVANT—NEGLIGENCE—INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. A person who, under the direction of the superintendent, erects the "hanger" in a mill, on which a pulley shaft is placed, is not, while doing such work, a fellow servant of an operative in the mill.

2. Evidence in an action by a servant for injury resulting from the falling of a pulley shaft in the mill, with which he was working, examined, and *held*, that the question of his contributory negligence was for the jury.

Action by David H. Crandall against the Stafford Manufacturing Company. Heard on petition of plaintiff for a new trial after a nonsuit. Petition granted.

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. §§ 332, 333, 336, 408.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. Walter B. Vincent, for defendant.

TILLINGHAST, J. 1. We think the trial court erred in granting the nonsuit in this case. The witness John S. Grant, who erected the "hanger" upon which the pulley shaft was placed, was not, in the doing of that work, a fellow servant with the plaintiff. The "hanger" was part of an appliance in the mill. It was put up under the oversight of the superintendent, and was intended to be used in facilitating the doing of certain work which the defendant corporation was carrying on. The duty of properly constructing and fastening said appliance, therefore, was clearly one which the law devolved upon the defendant as master, and it could not divest itself of this duty by devolving it upon another. As said by this court in *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204: "It is the duty of a master, who furnishes machinery for his servants to operate or work about, to see to it that it is reasonably safe. He cannot divest himself of this duty by devolving it on others, and, if he does devolve it on others, they will simply occupy his place, and he will remain as responsible for their negligence as if he were personally guilty of it himself." The same rule, in substance, is laid down in *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. 54; *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 517, 27 Atl. 328, 28 Atl. 661; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Whipple v. R. R. Co.*, 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; *Laporte v. Cook*, 21 R. I. 158, 42 Atl. 519; *McGar v. Natl. Worsted Mills*, 22 R. I. 350, 47 Atl. 1092; *McDonald v. Postal Telegraph Co.*, 22 R. I. 134, 46 Atl. 407; and *Cummings v. Natl. Worsted Mills*, 24 R. I. 390, 53 Atl. 280.

2. The case is not controlled by the dictum of this court in *Laporte v. Cook*, 21 R. I. 158, 42 Atl. 519. That was a case where the defendant city was engaged in digging a trench and laying water pipes therein. The trench was not sheathed, and the plaintiff, while digging bell holes at the bottom thereof, as he was directed to do by the foreman, was injured by the sudden caving in upon him of the bank of said trench. We held that, in view of the circumstances which appeared in evidence regarding the plaintiff's ignorance of the condition of the soil, the very brief time that he had worked in the trench before it caved in, his ignorance of the fact that it had repeatedly caved in before, etc., and in view of the further fact that nothing appeared to be dangerous in connection with the trench, the plaintiff's conduct in attempting to do the work as directed by the boss was not, as matter of law, a negligent act. We also suggested that if the city had fur-

nished the necessary sheathing for the trench, and the boss or foreman had neglected to use it and the plaintiff had been injured by reason of such neglect, the defendant's contention of nonliability on the part of the city would have been tenable, as such neglect would then have been that of a fellow servant. That this suggestion or dictum was in accordance with the well-settled rule of law under such a state of facts we see no reason to doubt. In *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112, which was specially relied on by us in support of the position thus taken, the court held that the street commissioner discharged his duty when he assigned to the work of digging the trench an experienced and competent foreman and furnished him with suitable and sufficient materials for any appliances necessary for the safe conduct of the work, and that the use and application of the materials formed a part of the duty of the workmen. The court further held that, if the commissioner's failure to place shoring against the side of the trench where the earth fell could be deemed negligence, it was the negligence of a fellow servant. It also held that said street commissioner was not required to perform any duty in the premises which legally belonged to the province of the master. But that the court did not intend by said decision to overrule or modify the well-settled rule of law regarding the duty and liability of a master in cases like the one before us is evident from the rule which it then adopted, namely: "The true test, it is believed, whether an employé occupies the position of a fellow servant to another employé, or is the representative of the master, is to be found, not from the grade or rank of the offending or of the injured servant, but is to be determined by the character of the act being performed by the offending servant, by which another employé is injured, or, in other words, whether the person whose status is in question, is charged with the performance of a duty which properly belongs to the master." The case of *Ziegler v. Day*, 123 Mass. 152, was similar to the one just referred to. There the plaintiff alleged a neglect on the part of the defendant to provide sufficient security against the caving in of a trench which he was digging for the defendant. But the court, in granting a nonsuit, said: "The work was committed to the supervision of a skillful and competent superintendent. It required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in case of the scaffold of the mason or the carpenter, the master is not liable, unless there is something to show that he assumed it as a duty independent of the servant's employment."

In cases like *Laporte v. Cook* and those just referred to, therefore, it is evident that a different rule applies, and must of necessity apply, from that which obtains in cases like the one now before us. That is to say: In the digging of a trench, the proper mode of doing the work and of applying the safeguards necessary for the protection of the workmen must, from the nature of the case, be left to be determined by the foreman or boss as the work of excavating progresses; and hence all that the master can reasonably be required to do is to furnish such appliances as may be found necessary to meet any contingency that may arise. And, as held in *Zeigler v. Day*, supra, the erection of such temporary structures is a work in which both the foreman and those under him are alike employed,—the former simply occupying a higher grade than the latter in the doing of the work,—and hence the fellow servant rule applies thereto. To the same effect are *McDermott v. Boston*, 133 Mass. 349; *Floyd v. Sugden*, 134 Mass. 563; *Clark v. Soule*, 137 Mass. 380; *Earich v. Moles*, 18 R. I. 513, 28 Atl. 661; and *Laporte v. Cook*, 22 R. I. 554, 48 Atl. 798. In the doing of the work in question in the case at bar, however, the servant, Grant, occupied the place of the master. In other words, he was the master in the doing thereof; and hence, if it was improperly or negligently done, and the plaintiff was injured by reason thereof, he, being free from contributory negligence, is entitled to recover. The character of the act done by Grant devolved it upon the master; and hence, under the rule laid down in *Hanna v. Granger*, supra, and followed in all the subsequent cases in this court in which the question has arisen, Grant was not a fellow servant with the plaintiff in the doing of said work.

3. Whether the plaintiff was guilty of contributory negligence in putting the belt upon a moving pulley was clearly a question for the jury under the evidence submitted, and it was, therefore, error for the court to decide that question. There was undisputed evidence that it was always customary to put on belts when the pulleys were moving, and also that the plaintiff was experienced and skillful in doing such work; and it is evident that no injury would have resulted to him from putting on the belt in question, or, rather, in assisting the witness Grant, at his request, in putting it on, as the evidence shows that he did, had not the "hanger" which supported the shaft given way, thereby causing the shaft to fall toward the plaintiff immediately after the belt was put on, whereby he became entangled in the belt and was injured. The plaintiff testified in part, relative to the manner in which he received the injury, as follows: "Q. When you got the belt, and got it on the pulley of the main shafting, and the power caught it, tell the jury what happened. A. The shaft-

ing of that countershaft dropped down for the want of being properly put up, and, of course, the belt was on the main shaft, and that drew that toward me instantly, and that twisted the other hanger off, and then the whole thing came at me. It was all done in an instant. Q. Tell us what happened. A. Whether I tried to jump out of the way, or whether the thing caught and knocked me down, I don't know. It was done too quick to explain how it was done. I know it took me over the shaft, belt and all. Q. How many times? A. I know I went over twice." In view of this testimony, it cannot be said, as matter of law, that the plaintiff was guilty of contributory negligence in assisting Grant in adjusting the belt. The well-settled rule in this state is that where the evidence is such that different minds, fairly considering it, might draw different conclusions therefrom, the question of contributory negligence is one for the jury to determine. *Boss v. Ry. Co.*, 15 R. I. 149, 1 Atl. 9; *Clarke v. Electric Lighting Co.*, 18 R. I. 466, 17 Atl. 59; *Elliott v. Ry. Co.*, 18 R. I. 711, 28 Atl. 328, 31 Atl. 694, 23 L. R. A. 208; *Swanson v. Ry. Co.*, 22 R. I. 122, 46 Atl. 402; *Blackwell v. O'Gorman Co.*, 22 R. I. 638, 49 Atl. 28.

Plaintiff's petition for new trial granted.

WELCH et al. v. GREENE.

(Supreme Court of Rhode Island. Dec. 6, 1902.)

REVIEW OF VERDICT—FICTITIOUS CHARACTER—PASSION OR PREJUDICE—NECESSITY—WITNESS—REFRESHING MEMORY—ORIGINAL MEMORANDA—REQUIREMENT—LANDLORD AND TENANT—LANDLORD'S BREACH OF COVENANTS—KNOWLEDGE OF TENANT'S CLAIM—ADMISSIBILITY OF EVIDENCE.

1. In a case where there is no certain measure of damages, the verdict cannot be disturbed, as excessive, unless the amount awarded is so excessive, in view of the evidence, as to show passion and prejudice.

2. A witness may refresh his memory from a memorandum made by him from original memoranda which had been made by him or under his direction at the time the event recorded occurred, and the fact that the memorandum used is not the original will not exclude his evidence.

3. In an action by a tenant for breach of a covenant in a lease to keep the ceiling of a room in such repair as to prevent injury to the tenant's goods, the landlord testified that he knew nothing of any claim by the tenant on that account. The plaintiff sought to show that the landlord was familiar with correspondence had by plaintiff with the landlord's agent, in which the claim was made and promise given to refer it to the landlord, and that a bill for storage, afterwards presented by the landlord's agent, was concocted as an offset thereto. Held, that it was not error to compel defendant, on cross-examination, to testify as to presenting the bill for storage; the connection with the plaintiff's claim being subsequently established as indicated.

Exceptions from common pleas division.

Action of covenant by Welch & Co. against Forrest Greene. From a judgment for plain-

tiffs, defendant excepts, and petitions for new trial. Exceptions overruled, and petition denied.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Doran & Flanagan, for plaintiffs. Comstock & Gardner, for defendant.

TILLINGHAST, J. This is an action of covenant, and is brought to recover damages which the plaintiffs claim to have suffered by reason of certain breaches by the defendant of the covenants contained in a lease, whereby he demised to the plaintiffs for a term of five years a part of the fourth floor of a building on Fountain street, in the city of Providence. The material parts of the lease in question are as follows: "The said lessor does hereby demise unto said lessees about twenty-four hundred square feet (2,400) of floor space, more or less, on the fourth floor in that certain building known as the 'Greene Building,' in said Providence, and contained within partitions now erected and partitions to be erected by said lessor, with power to the extent of one and a half horse power, more or less, as may be required to run the machines to be placed in said leased premises by said lessees, the use of the passenger elevator between the hours of 7 a. m. and 6:30 p. m., and also the use of the freight elevator in the adjoining building until the use of the same shall be cut off from said lessees, in which event the said lessor hereby agrees with said lessees that he will furnish a means for the transportation of freight with power from the street floor to said leased premises as convenient and as easy of access to said lessees as said freight elevator; and the said lessor further agrees that he will keep the ceiling of said leased premises in such condition that said lessees will not be damaged by reason of dust or other substance coming through or out of said ceiling; and said lessor further agrees to furnish steam heat sufficient to keep said leased premises in a comfortable living condition." The plaintiffs commenced to occupy the leased premises on February 1, 1890, and remained there for about one year. The principal business carried on by them was the manufacture of lace curtains; and for this purpose they bought muslins, laces, and other delicate goods, which, after being cut into proper shapes and sizes, were used in making the finished product.

The plaintiffs' claim is that the defendant failed to keep his covenants in several particulars, viz.: (1) In not furnishing sufficient power; (2) in not furnishing proper elevator service; (3) in not furnishing satisfactory means for transportation of freight; (4) in not keeping the ceiling in proper condition; and (5) in not furnishing sufficient heat to keep the premises in comfortable living condition. The plaintiffs' bill of particulars for damages thus sustained is as follows:

Loss from lack of agreed elevator service:	
Loss of time of men in receiving and shipping freight, average \$1 a day for 254 days, and other consequential losses	\$254 00
Extra charge, Weaver, in moving us out, over what would have been required with the agreed elevator service	14 08
Glass broken by chain hoist	6 00
Gage broken by chain hoist	19 75
Extra men employed in moving on account of lack of agreed elevator service	17 00
	<u>\$ 301 83</u>

Damages from failure to keep agreement to prevent substances from coming through ceiling:

Curtains spoiled, as per bill of July 31	\$ 12 90
Curtains and muslins spoiled, as per bill of November 6	54 43
Labor in cleaning goods not wholly destroyed, and other damages from this cause	100 00
Labor in making up curtains to replace those spoiled	15 00
Cost of platform put up to protect goods	54 25
Cost of replacing sprinklers under platform	19 50
	<u>256 17</u>

Damages from lack of power:

Wages plaintiffs were obliged to pay through help idle April 10 to April 15, 1899	\$ 24 00
Loss from being idle	74 00
Paid help while idle from lack of power between September 4 and 9	5 17
Paid to repair power motor	1 03
	<u>104 20</u>

Damages from lack of agreed heat:

April 8 to 21st. Loss of labor from cold	\$ 50 00
Loss of labor from cold during six weeks next preceding January 1, 1900, and other damages consequent thereon	150 00
	<u>200 00</u>

Damages in consequence of moving, rendered necessary by defendant's failure to keep terms of lease	315 00
	<u>\$1,177 20</u>

At the trial of the case in the common pleas division the jury returned a verdict for the plaintiffs for the sum of \$725 damages, and the case is now before us on the defendant's petition for a new trial on the grounds (1) that the verdict is against the evidence; (2) that the damages are excessive; and (3) that the court erred in refusing to admit certain testimony which was offered by the defendant, and also in admitting certain testimony offered by the plaintiffs.

The first ground of the petition is not relied on.

1. As to the second ground, defendant's counsel, in his brief, after carefully analyzing the testimony from his standpoint, strenuously argues that, from any fair construction thereof, the damages sustained by the plaintiffs could not have exceeded the sum of \$245; and hence he urges that the verdict rendered could only have been arrived at through prejudice and an entire disregard of the force and effect of the testimony. The plaintiffs' counsel, on the other hand, in his brief, after carefully analyzing the testimony from his standpoint, as strenuously argues that the amount of damages awarded is fully sustained by the evidence submitted. The case being one in which there is no certain measure of damages, the court cannot dis-

turb the verdict, unless the amount awarded is so large, in view of the evidence upon which it was based, as to show that the jury must have been influenced by prejudice or passion in rendering the same. Or, to state the rule differently, the excess must be so great as to satisfy the court that the jury were actuated by some improper motive or that they proceeded on some erroneous principle of assessment. Hilliard on New Trials (2d Ed.) p. 567, § 10, and cases cited in note. Still another way of stating the rule may be found in *Elliott v. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, where Matteson, C. J., in delivering the opinion of this court, held that a new trial, based upon the ground of excessive damages, should be denied, unless the verdict "is so clearly excessive as to lead us to believe that it was not a proper and honest exercise of the judgment of the jury." In *Sedgwick on Damages*, vol. 2, 7th Ed., p. 652, under the head of "Excessive Damages," the author says: "The court holds itself at liberty to set aside verdicts and grant new trials in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is very sparingly used, and never except in a clear case." This statement of the law is abundantly sustained by the numerous cases collected in note (a), pp. 655-659. See, also, *Am. & Eng. Ency. of Law*, vol. 8, 2d Ed., 629-30. The real question in this class of cases is, not whether the amount of the damages awarded by the jury is more or less than is, in the opinion of the court, proper, but whether it is shown that the jury have abused the discretion vested in them.

Upon a careful examination of the voluminous testimony submitted to the jury in the case at bar, while we are of the opinion that the damages are large, we are unable to say that they are so clearly and palpably excessive as to warrant the court in interfering therewith under any of the rules above stated. On the part of the plaintiffs, direct and positive testimony was offered in support of every item mentioned in the bill of particulars; and, after eliminating the charges for moving out, as the jury must have done under the direction of the trial court, together with certain other items, amounting in all to \$377.83, there still remained charges to the amount of \$799.37 in support of which testimony was offered. The jury cut down this amount to \$725, and rendered a verdict for this sum. And we fail to find that we could properly eliminate any of the items upon which the jury were allowed to pass, or that we should know where to draw the line in diminution of the verdict. It is one of those cases in which, in all human probability, no two juries or no two courts would ever arrive at the same conclusion on the question of damages; and hence it is one

where the decision of the tribunal whose special province it is to decide such questions should be final, unless clearly and palpably wrong. Furthermore, the case is one in which the evidence was very conflicting, and hence peculiarly within the province of the jury to decide. As a particular discussion of the testimony submitted would serve no useful purpose, and as the jury were in a much better position than we are to carefully weigh and consider the same, and, moreover, as there was evidence which, if believed by them, was sufficient to support their finding, we refrain from any further consideration of this branch of the case.

2. The first exception relied on in support of the third ground for a new trial is based upon the ruling of the trial court whereby John M. Welch, one of the plaintiffs, was permitted to refresh his recollection, as to the items of damages sustained by the failure of the defendant to perform the covenants in the lease, by referring to a memorandum which he had previously made. It appeared that this memorandum was made up by him from certain original memoranda made by him, or under his direct personal supervision, at the times when the injuries complained of were received. The witness did not then have said original memoranda. It is a well-settled rule of evidence that a witness may refresh his memory by referring to a writing or other record or document as a memorandum. In *Abbott's Trial Ev.* (2d Ed.) 395, the author gives the following as one of the cases in which this may be done: "If the memorandum was made by himself or by another person at his dictation, at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at the time fresh in his memory, or if made by any other person, and read by the witness within the same limits as to time, and if, when he read it, he knew it to be correct. If the witness testifies that he knew the writing to be correct at the time he made it or read it, the competency of testimony made by its aid is not impaired by the fact that he relies, not on his memory of the fact itself, but on his confidence in the accuracy of the memorandum." The same author further illustrates the rule as follows: "In cases requiring many details of date, quantity, etc., it is common practice to allow a witness to consult, but not to read from, memoranda made by him of facts within his own knowledge, to which he cannot speak in sufficient detail without such aid, although the memoranda were made in preparation for trial." Mr. Greenleaf states the general rule as follows (1 *Greenl. on Ev.* [15th Ed.] § 436): "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the

writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence."

The case of *Erie Preserving Company v. Miller*, 52 Conn. 444, 52 Am. Rep. 607, is strongly in point. There the witness, for the purpose of refreshing his recollection as to the number of crates received and the times when received, referred to certain memoranda in his hands, which he testified were true copies of the waybills in the office, all of which he had examined, and that he had no knowledge upon the subject other than that obtained by inspection of the waybills. The defendant objected to the evidence because the original waybills were not produced and identified by the witness; but the court overruled the objection and admitted the evidence. On appeal to the Supreme Court of Errors the ruling was sustained. In its opinion the court said: "It is a well-settled rule that a witness may refer to memoranda, made by himself or by others, for the purpose of refreshing his memory; but it must be for the sole purpose of refreshing his memory, not for the purpose of gaining entirely original information from them. Whether the witness in the present case brought himself within that rule it is not necessary for us to decide; for the objection taken was solely to his use as memoranda of copies of the waybills, and not the originals. This was a matter of no importance. A witness may refresh his memory as to dates, before leaving home, by turning to entries on his account book, and may make copies of such entries to use upon the witness stand. The entries or memoranda are not evidence in themselves. They do not go before the jury. Their office is solely to refresh the witness' recollection, and they are his private property for that purpose. If the waybills had been offered in evidence, the objection that copies, and not originals, were introduced, would have been pertinent; but that objection had no pertinency to the case as it stood." Cases to the same general effect are numerous. See *Chapin v. Lapham*, 20 Pick. 467; *Coffin v. Vincent*, 12 Cush. 98; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *State v. Collins*, 15 S. C. 373, 40 Am. Rep. 697; *Folsom v. Log Driving Co.*, 41 Wis. 602; *State v. Lull*, 37 Me. 246.

It is to be observed in the case at bar that the memorandum was not offered in evidence and was not read to the jury, but was only used to aid the witness in recollecting as to the items of damages claimed by him and

the amounts thereof, as they had been noted at or near the times of their occurrence; and under the law as above stated we fail to see that the court erred in permitting the witness to thus refresh his recollection. The practice in this state, so far as we are aware, has always been to permit witnesses to refresh their memory in similar ways. *State v. Colwell*, 3 R. I. 132. The exception in question is therefore overruled.

The second and only remaining exception relied on by defendant is to the ruling of the trial court requiring the defendant to testify, in cross-examination, as to the sending to the plaintiffs of a bill for storage by him of certain boxes, etc., during the tenancy aforesaid. The defendant in his testimony had denied all knowledge of injury to the plaintiffs from dirt, etc., falling from the ceiling, excepting four dollars damages to boxes therefrom, which amount he had paid in the spring; and he had also denied having seen a letter containing a statement of damages claimed to have been sustained by the plaintiffs, which letter and statement the plaintiffs had sent to defendant's agents who had charge of said building and collected the rents thereof. Said letter is as follows:

"Providence, R. I., July 31, 1899. Messrs. G. L. & H. J. Gross, Providence, R. I.—Gentlemen: Inclosed please find a bill for what we consider due us on account of inconveniences we have experienced under our lease with Mr. Greene. In the first place, we have had an inestimable amount of inconvenience because of the freight elevator being shut down since the power was shut off from the other building. Our lease reads that we shall have freight elevator as easy of access as the one we started with. All we have had, except promises, is the passenger elevator, which is inadequate, as we have had to carry goods down and pack them, and also goods received have had to be taken out of case and carried up as elevator would carry them. The first week power was shut off a motor was put in our place and started; but it was not of sufficient power to run our machines, consequently it was a case of run and shut down to fix that motor until another one was put in. We have been annoyed by dust, water, etc., percolating through the floor, and Mr. Greene has paid one bill for damages on this score; but that has nothing to do with this one. We have showed him where water and oil comes through on boxes and curtains. One item on gas came from our heater to run gas heater he had in here when heat was turned off. We took average between month previous and month after. The passenger elevator has been shut down for a considerable length of time and was afterwards run on the intermittent plan. We have had to walk up on innumerable occasions, and customers have gone away rather than climb the stairs. Respectfully yours, Welch & Company. [Dictated.]"

The bill sent with the letter was as follows:

April 10th-15th, labor while motor was being repaired and shrinkage on work.....	\$ 98 00
Difference on gas bill to April 21st, bill \$2.75, month previous 88c, month after \$1.75, average \$1.31—\$2.75 less \$1.31.....	1 44
57 boxes spoiled by water.....	\$ 3 99
Muslin and lawn spoiled by oil and dirt	5 40
Curtains spoiled by oil and dirt.....	12 00
	21 39
Extra cost of cases, cartage, etc., on account of shipping inconveniences, estimate.....	25 00
June 12, glass in door.....	3 50
Damages on account of two elevators.....	100 00
July—Extra time on getting goods in and out and pay for man getting up lumber.....	2 00
Goods and curtains soiled.....	7 00
Labor on goods soiled.....	2 00
	\$261 33

The reply of the defendant's agents to this letter was as follows:

"Providence, August 7, 1899. Messrs. Welch & Company, No. 26 Fountain street, City—Gentlemen: Your favor of July 31st came duly to hand, and contents noted. The matter will be brought to the attention of Mr. Greene, and he will give it prompt attention. Yours, respectfully, G. L. & H. J. Gross, by James H. Hurley."

On September 19, 1899, the following letter was sent to the plaintiffs, namely:

"Providence, September 19th, 1899. Messrs. Welch & Company, Greene Building, Providence, R. I.—Gentlemen: We take much pleasure in inclosing bill given to us for collection as agents of the Greene Building, in which you are a tenant. We will call on you at an early date in regard to this matter. Yours, respectfully, G. L. & H. J. Gross, by James H. Hurley. [Dictated.] Inclosure."

The bill which accompanied this letter was as follows:

Providence, R. I., September 1st, 1899.	
Messrs. Welch & Company, to Forrest Greene, Dr.	
To storage in basement to date.....	\$140 00
" " first floor.....	60 00
" " third ".....	15 00
" " fourth ".....	80 00
	\$245 00

Although the defendant denied all knowledge of the correspondence aforesaid, he admitted that he sent said bill for storage to the plaintiffs. The object of plaintiffs' counsel in inquiring about this bill was to lay the foundation for contradicting him later on by showing that he had seen and did know all about the letter of July 31st, and the claim for damages contained therein; that he had conferred with his agents regarding the same, and had then made up his bill to offset the claim made to his agents by the plaintiffs. The evidence was also offered for the purpose of discrediting or impeaching the defendant's testimony; and so long as the testimony objected to was followed up by the plaintiffs' counsel by calling Mr. James H. Hurley, who squarely contradicted the defendant in several important particulars, we think the ruling of the court here complained of was correct. Hurley testified that he had charge of the real estate department in the office of Gross; that the letter

of July 31st, with bill inclosed, was received by them, and that on receiving it they referred it to Mr. Greene; that Mr. Greene was in their office frequently, and that, as soon as he called, the letter was handed to him; and that in reply thereto he stated that he would have a bill in set-off for storage of boxes and cases, or something of that sort, that the concern stored in the hall or in rooms which they did not hire. The witness further testified that he had more than one conversation with the defendant about this matter; that the bill of the plaintiffs was talked over quite a little, and that answer to the plaintiffs was not made until after the defendant had been called up on the telephone in regard to it; and that it was understood that they were to submit the bill for storage to offset the plaintiffs' claim, and that in pursuance thereof such a bill was sent to the plaintiffs. As we find no error in permitting the plaintiffs to offer the testimony in question, the exception must be overruled.

Exceptions overruled, petition for new trial denied, and case remanded for judgment on the verdict.

McDERMOTT v. ST. WILHELMINA BENEV. AID SOC.

(Supreme Court of Rhode Island. Dec. 18, 1902.)

BENEFIT ASSOCIATION—ELECTION OF OFFICER—MAJORITY OF VOTES CAST—NECESSITY—ESTOPPEL TO DENY ELECTION—MEMBERS NOT PRESENT—PHYSICIAN—ACTION FOR SERVICES—EVIDENCE—ADMISSIBILITY—ASSUMPSIT—EXECUTED CONTRACT—COMMON COUNTS—INSTRUCTIONS.

1. The constitution of a voluntary charitable association provided that a physician should be chosen at the regular election of the society, and that the election of officers should take place at the regular meetings in January and July. It also provided that, when there were more than two candidates for office, at every successive balloting the person receiving the least number of votes should be dropped, and the voting should continue in this manner until one candidate received a majority over all. It had been the custom to elect officers in June and December. At the last regular meeting in December a person was declared elected physician, though he received a plurality, and not a majority, of the ballots. No dissent was expressed to the announcement of his election. *Held*, that the failure to receive a majority did not invalidate his election, especially in view of the society's customary departure from its rules as to the time of elections.

2. The record of a voluntary charitable association showed that a certain person was elected its physician at a regular meeting of the society. It showed that at a special meeting held later the society recognized such election by directing the secretary to notify the incumbent of his discharge. Still later another person was chosen as physician "for the balance of the present term." *Held*, that the society was estopped to deny the regularity of the election of the first incumbent.

3. The fact that an officer was declared elected at a meeting of a voluntary association, though he received a plurality, instead of a majority, of the votes, as required by the constitution, will not prevent his election binding absent members; it appearing that the society

had regarded itself as somewhat at liberty to depart from its rules governing elections.

4. In an action by a physician against a voluntary association to recover compensation as its medical officer, plaintiff introduced a newspaper notice that he had resumed practice after an illness. At the time of plaintiff's election as medical officer, it was known that he had been ill, and doubts were entertained by some members as to whether he would be able to resume his duties. The newspaper notice was referred to by plaintiff when accepting his election, and was before the society later when its action was rescinded. *Held*, that the notice was admissible to show that plaintiff was physically competent to discharge his official duties when elected.

5. Even if irrelevant, the notice was of such small account that it could not have prejudiced the society's rights, and afforded no ground for a new trial.

6. When a contract has been fully executed, and nothing remains to be done but the payment of the price agreed on, plaintiff may declare on the common counts in indebitatus assumpsit.

7. In an action by a physician against a voluntary association to recover compensation as its medical officer, the main issue was whether plaintiff had been properly elected, and had accepted before the election was rescinded. It appeared that he had previously served the society at a certain rate per capita of membership. *Held*, that an instruction that when one enters the service of another for a definite period, and continues in the employment afterwards without any new contract, the presumption is that the employment is continued on the terms of the original contract, was not so foreign to the issues as to be error.

8. In an action by a physician for compensation as medical officer of a voluntary association, the court instructed that, if plaintiff was entitled to recover at all, he should have all that he claimed, and a verdict for that amount was returned. *Held*, that a further instruction that a request from the association to render services for it implied an agreement to pay him what his services were worth was harmless error.

Assumpsit by Bernard F. McDermott against the St. Wilhelmina Benevolent Aid Society. On petition of defendant for a new trial. Denied.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

William M. P. Bowen, for plaintiff. Franklin P. Owen, for defendant.

TILLINGHAST, J. This is assumpsit to recover the sum of \$90, which the plaintiff claims to be due and owing to him from the defendants for professional services, under a contract entered into between him and the defendants on the 28th day of December, 1900. The action is brought against the individual members of said society, associated together under the name aforesaid. At the trial of the case in the district court of the Sixth judicial district, a decision was rendered in favor of the plaintiff for the amount claimed, whereupon the case was taken to the common pleas division for a jury trial upon the defendants' claim therefor, and upon trial in that court the plaintiff recovered a verdict

for the full amount of said claim, with interest. The case is now before us upon the defendants' petition for a new trial on the grounds (1) that the verdict was against the evidence, and (2) that certain rulings of the common pleas division made during the trial were erroneous.

1. The plaintiff is a physician, and the defendant society is a voluntary association organized for the purposes of charity. The plaintiff was first employed by the defendant society in July, 1899, and rendered services during the period for which he was then employed, except that he was ill and absent for a while during the autumn and early winter of 1900, prior to the period now sued for, and his place was taken by a substitute, Dr. Gray. The rate originally agreed upon in 1899 was the same as that now sued for, namely, ten cents a month for each member of the society in financial standing; and no different contract was entered into between the parties at the time when the plaintiff was last elected.

Article 9 of the constitution of the defendant society, in force during the period in question, provides as follows:

"Section 1. There shall be a physician attached to this society, whom the members can consult at any time.

"Sec. 2. The physician shall be chosen by the society at the regular elections of the society, and shall serve for six months.

"Sec. 3. The physician shall receive such sum per month, per annum, per member, as may be agreed between him and the society, from time to time, to be paid at the expiration of each quarter.

"Sec. 4. The financial secretary shall furnish the physician with a list of all members in good standing and entitled to benefits, at the beginning of each year; also notify him of all who are in arrears and all that have been reinstated.

"Sec. 5. Every member applying for medical advice must present her card of membership if the doctor requests her so to do."

Article 3, § 4, of the constitution provides that "the election of officers shall take place at the regular meetings in January and July," and article 1 of the by-laws of the society provides that its meetings shall be held on the second and fourth Fridays of each month, at 8 o'clock. It had been the custom, however, for some time before the election in question, to elect officers in June and December.

At the last regular meeting in December, 1900 (held on December 28th), the plaintiff was declared elected the physician of the society, and the president directed the corresponding secretary to notify him of his election. Although the plaintiff did not receive a majority of all the ballots, he was declared elected the physician of the society; and this was acquiesced in by all the members thereof who were present at this regular meeting. The records of the meet-

¶ 6. See *Assumpsit*, Action of, vol. 5, Cent. Dig. § 17.

ing state that the plaintiff was duly elected, "provided he answered the corresponding secretary's letter." On December 30, 1900, the secretary sent a notice to the plaintiff, by mail, of his election, directing it to Ashton, R. I., from which place it was forwarded to the plaintiff at Providence, where he had returned, and was received by him on January 1, 1901. On January 3, 1901, the plaintiff duly mailed his acceptance of the offer of contract, made by the society, to the corresponding secretary thereof. This was done before he received the notice of the withdrawal of the offer of contract by the society, hereinafter referred to. The plaintiff's substitute, Dr. Gray, in October, 1900, received the list of the society's members, and the plaintiff himself was notified of some members in arrears and of some members in good standing during the period in question. He testifies that he performed whatever services were required of him during the period for which he was elected, and that these services included quite an amount of regular professional work. At a special meeting of said society, held on January 2, 1901, the object of which meeting was to elect a doctor for the society, Dr. Boucher was elected to that position, and the corresponding secretary was directed to notify the plaintiff that his services were no longer required. At a subsequent meeting of the society, held on January 11, 1901, it was "moved and seconded that all business transacted at our special meeting stand legal; moved and seconded that Dr. Boucher shall be doctor for the balance of the present term." In pursuance of the action taken by the society at said special meeting, the corresponding secretary notified the plaintiff, by mail, that his services were no longer required. The letter containing this notice was posted at Providence on January 3, 1901, at 4 p. m., and was received by the plaintiff on the evening of the following day.

The first point relied on by defendants' counsel is that the plaintiff is not entitled to compensation for services to individual members of the society; that he must stand or fall upon his right to claim that the contract was entered into with him on the 28th of December, 1900. Assuming that by this statement counsel means that, in order to entitle the plaintiff to recover, he must prove that he was legally elected to the office or position of physician to said society, and that he accepted said office or position before receiving notice of the withdrawal of the offer made to him in manner aforesaid, we concur in the position taken. Moreover, we do not understand that the plaintiff is suing for compensation for services rendered to individual members, but that he is suing simply on the contract which he claims to have made with the society. His bill shows this. It is as follows: "Providence, R. I., July 1, 1901. St. Wilhelmina Benevolent Aid Society, of Providence, R. I., and Branch

No. 625 of the O. L. B. U. of America. To Bernard F. McDermott, M. D., Dr. To professional services from January 1, 1901, to July 30, 1901, both inclusive, for 150 members of the society, at ten (10) cents a month each, covering a period of six months, in accordance with contract with the society, \$90.00." This testimony as to services to individual members was offered simply for the purposes, as we understand it, of showing that the plaintiff regarded himself as the legally appointed physician, and also that he had in good faith discharged the duties imposed upon him as such physician during the period for which he was employed.

The only question to be considered, then, in connection with defendants' first point, is whether the plaintiff and the defendant society, representing the defendants individually, entered into binding contract relations in the premises. The defendants claim that, being a mere voluntary association, they are not bound by any contract entered into with the plaintiff, unless that contract was entered into in strict accordance with the constitution and by-laws of the association, and that in any event those members of the society who were not present when the election relied on by the plaintiff took place cannot be held liable, unless the action of the society was had in strict accordance with the constitution and by-laws. As hereinbefore stated, the plaintiff did not receive a majority of all the votes cast at the meeting of the society held on December 28, 1900. The testimony of the defendants' witness, Julia O'Donnell, the president of the society, who presided at said meeting, regarding the number of votes cast for and whom, etc., was that the plaintiff, Dr. McDermott, received 23 votes, and that Dr. Boucher received 16 or 17 votes; also, that the plaintiff did not receive a majority of all the votes cast, but that he did receive more than any other candidate, and that no other ballot was taken after the one in which he received the number aforesaid. She also testified that she then declared Dr. McDermott elected, and directed the secretary to notify him of his election. No objection was made to these proceedings. Section 6 of article 3 of the constitution provides that: "When there are more than two candidates for any office, at every unsuccessful balloting the person receiving the lowest number of votes shall be dropped. The voting shall continue in this manner until one candidate has received a majority over all." We do not think that the irregularity referred to in connection with the election of the plaintiff as the physician of the society can properly be held to render the action void. It was merely a technical violation of the rule referred to, and it was doubtless competent for the society, if it saw fit, as it evidently did, to dispense with the formality of taking a second vote. Moreover, by allowing the president to declare the plaintiff elected to

said position without dissent on the part of any one present, his election was practically made unanimous. Again, the record of the society shows that the plaintiff was elected at a regular meeting thereof. It also shows that at the special meeting held on January 2, 1901, the society recognized the fact that the plaintiff was occupying the position to which he had thus been chosen by directing the secretary to notify him of his discharge therefrom; and at a subsequent meeting of the society, held on January 11, 1901, the plaintiff's election to said position was still further recognized by adopting and ratifying the doings of said special meeting, and by choosing Dr. Boucher as the society physician "for the balance of the present term."

In view of all these facts, we think the defendants are clearly estopped from setting up said technical irregularity as a defense to the plaintiff's right of recovery. It is matter of common knowledge that both corporations and voluntary associations often disregard, to some extent, the strict rules of procedure prescribed in their charters or by-laws in transacting their internal affairs; but, so far as we are aware, the courts have not held that such technical variation from prescribed forms relieved them from liability to outside parties doing business with them in good faith upon the strength of what appeared by their own records to have been regularly and properly done. Thus, in *Fire Insurance Co. v. Schettler*, 38 Ill. 166, it was held that, notwithstanding the charter of an insurance company required their contracts of insurance to be executed in a particular mode, yet, if they adopted a different mode and received the benefit of the contract, they would be bound by it. In the case of *Industrial Trust Company v. Green*, 17 R. I. 586, 23 Atl. 914, 17 L. R. A. 202, Stiness, J., in delivering the opinion of the court, said: "Many things may be done improperly by an association; but if its members acquiesce in them, and go on as though they were right, they will be bound by them." See, also, 1 Bacon, *Benefit Societies* (New Ed.) § 40; 2 Mor. Corp. § 752; *Henry v. Jackson*, 37 Vt. 431. In this connection it is pertinent to remark that it appears that it had been the custom of the defendant society to elect its officers in June and December of each year, instead of electing them in January and July, as required by section 4 of article 3 of the constitution; and also its custom had been to choose its physician at the same time, although by section 2 of article 9 he is required to be chosen at the time of the regular election. This shows that the association regarded itself at liberty to informally modify its rules to some extent; and therefore it clearly has no ground for complaint when a stranger to its particular methods of transacting business insists that such modifications shall not affect his rights.

2. Of course, we need cite no authorities in support of the plaintiff's claim that the

contract with the defendant society was consummated upon his depositing his acceptance thereof in the mail, as aforesaid; the jury having found, as they must have done, under the instruction of the court, that the acceptance was made within a reasonable time after notice of plaintiff's election.

3. As to the contention of defendants' counsel that in any event those members of the society who were not present when the plaintiff's election took place cannot be held liable in this action, we are of the opinion that it is untenable. The presumption is that each person, upon becoming a member of an association of this sort, knows and consents to be governed by the rules thereof; and hence whatever action is properly taken thereunder by the association is as binding upon those members who were absent at the time it was taken as upon those who were present. See *Supreme Lodge, etc., v. Knight*, 117 Ind. 496, 20 N. E. 479, 3 L. R. A. 409. This individual liability arises, not on the ground that the members of such an association are partners, for they are not (*Textile Workers' Union v. Barrett*, 19 R. I. 663, 36 Atl. 5), but on the ground that the society is their agent in the premises; and hence they are bound by its acts if done within the scope of its authority. In *Mechem on Agency*, § 69, the author says: "The power of appointing agents may rest with a single individual or with a number of individuals. It rests with a single individual in those cases in which he is the only person authorized to make the appointment, and also in those cases in which he, in common with others or as the representative of others, has the power to make it. It rests with a number of individuals in those cases where the conjoint action of all is necessary in dealing with the subject-matter." The same author also says (see section 72) in referring to associations, clubs, societies, etc., "that it is now quite generally settled that such organizations are not partnerships, and that the members are not liable as partners, but that their liability is to be determined upon the rules of principal and agent. The principle which applies here is the familiar one that no person can be charged upon a contract alleged to have been made upon his responsibility, unless it can be shown that to the making of that contract upon his responsibility he has given his express or implied assent. This assent may be expressed in a variety of ways and at one of several times. It may have been given in advance by consenting to be bound by all contracts of a certain kind that may be made in the future; it may be given contemporaneously with the making of the contract; and it may also be inferred from a subsequent ratification. Thus, where it is a part of the scheme or purpose of the organization, as provided by its articles of association, charter, constitution, or by-laws, that certain contracts or obligations in behalf and

upon the credit of the organization may be entered into either upon the vote of a majority or at the discretion of the committee or officer, or upon any other lawful contingency or event, every person who becomes a member by so doing impliedly consents in advance to be bound by any contract or obligation of the kind contemplated, entered into under the circumstances prescribed." See, also, *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; *White v. Brownell*, 2 Daly, 325. As what we have thus said covers all of the exceptions taken by defendants' counsel touching the plaintiff's election and his general right of recovery, as well as the particular one above discussed, there is no occasion for considering those exceptions separately.

The defendants' next exception is based upon a ruling of the trial court whereby the plaintiff was allowed to introduce in evidence a newspaper notice that he had resumed his practice after a period of illness. At the time of the plaintiff's election to said position it was known to the society that he had been ill, and it is evident that some doubt was entertained by some of the members as to whether he would be able to resume his practice by the 1st of January, 1901. It was stated by one of the members at said meeting that he would be on duty the first of the new year, as he in fact was. This newspaper notice was referred to by the plaintiff in his formal acceptance of the election in question, and was also before the society on the evening of January 2, 1901, when the order of withdrawal aforesaid was made. The evident purpose of its introduction was to show that the plaintiff was physically competent to discharge the duties of said office at the time when he was elected; and, although its probative force in this direction was evidently very slight, yet, in view of the circumstances, we cannot say that it was wholly irrelevant. At any rate, it was of such small account that, even if erroneously admitted, it was not of such a character as to have possibly prejudiced the defendants' rights, and hence is no ground for a new trial. *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998; *York v. Stiles*, 21 R. I. 225, 42 Atl. 876; *Schnable v. Public Market*, 24 R. I. 480, 53 Atl. 634; *Ames v. Potter*, 7 R. I. 269. The exception to the refusal of the trial court to instruct the jury that the plaintiff was not entitled to recover, because he had not declared specially on the contract of employment, is clearly untenable.

4. When a contract has been fully executed, and nothing remains to be done but the payment of the price agreed on, the plaintiff may declare specially on the contract, or he may rely on the common counts in *indebitatus assumpsit*. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Ency. Pl. & Prac.* vol. 2, p. 1009, and cases in note 1.

Among the plaintiff's requests to charge the jury, which were granted subject to de-

fendants' exceptions, were the following: "(2) When one enters into the service of another for a definite period, and continues in the employment after the expiration of that period without any new contract, the presumption is that the employment is continued on the terms of the original contract. (3) An express request from the defendants to the plaintiff to render services for them implies an agreement on the defendants' part to pay the plaintiff what his services are reasonably worth." Defendants' counsel states in his brief that he insists upon these exceptions, because, while the requests may be true as propositions of law, they had no bearing upon the points in issue in the case, and hence to charge them was to confuse the jury, and cause them to believe that other matters were in issue than those that really were, and thereby divert their minds from the real points in issue, which were: Was Dr. McDermott duly elected physician? and did he accept within a reasonable time?

5. We think the first of said requests was pertinent, because the case shows that no compensation was expressly fixed upon by the society at the time of plaintiff's election; and, as it appears that he had previously served the defendants in the same capacity at a given rate per capita, the presumption was, in the absence of any statement or agreement to the contrary, that his compensation would be the same as that previously paid. *Booth v. Rubber Co.*, 19 R. I. 696, 36 Atl. 714.

6. As to the second of said requests, we fail to see that it was strictly pertinent, because the court had already instructed the jury, and very properly so, that, if they found that the plaintiff was entitled to recover, their verdict should be for the sum of \$90, with interest; and this was all he claimed. Moreover, the court had already refused to instruct the jury, in accordance with the defendants' fifth request, "that Dr. McDermott, if he recovers at all, can only recover what his services are reasonably worth." But conceding, as we do, that said third request was not pertinent, yet we fail to see that it could have prejudiced the defendants or the jury in the least. Indeed, it is very evident from the verdict rendered that the jury were neither confused nor misled by the instruction, as they followed the instruction previously given by the court as to the amount, as they clearly should have done under the evidence in the case; that is to say, the evidence shows that, if the plaintiff was entitled to recover at all, he was entitled to recover that amount and no more.

Some other exceptions were taken by the defendants' counsel during the trial; but upon careful examination thereof we fail to find that they are material to the question in issue, and hence they need not be particularly considered. The evidence is sufficient to sustain the verdict.

Exceptions overruled, petition for new trial denied, and case remanded for judgment on the verdict.

SINGER et al. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Court of Appeals of Maryland. Jan. 15, 1903.)

COSTS—COUNSEL FEES.

1. Under Acts 1898, c. 123, § 315, declaring that if the defendant shall dispute the whole or any part of the plaintiff's demand in certain actions, and upon trial of the case the plaintiff shall recover a judgment for any portion of the demand so disputed, the plaintiff shall be allowed, in addition to the costs of the suit, reasonable counsel fees, counsel fees so allowed are no part of the costs of the suit, so that where a judgment for plaintiffs, in which counsel fee had been allowed them, was reversed on appeal, with direction that defendants pay the costs, they could not be compelled to pay counsel fees.

Appeal from superior court of Baltimore city; Danl. Giraud Wright, Judge.

Action by Frank O. Singer and another against the Fidelity & Deposit Company of Maryland. From an order granting a motion to quash a writ of *fi. fa.*, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

S. S. Field and H. C. Gaither, for appellants. Alfred S. Niles and Rich. Bernard & Sons, for appellee.

SCHMUCKER, J. The controversy of which this appeal is an incident has been before us on three previous occasions. It originated in a replevin issued out of the superior court of Baltimore city by the Standard Horseshoe Company against Bernard J. O'Brien and Frank O. Singer, Jr., to whom he had made a deed of trust for the benefit of his creditors. The first trial of the replevin suit resulted in a judgment for the defendants, which was reversed, on appeal, by this court, and the case remanded for a new trial, in *The Standard Horseshoe Co. v. O'Brien et al.*, 88 Md. 335, 41 Atl. 898. The second trial also resulted in a judgment for the defendants, which was affirmed by this court, in 91 Md. 751, 46 Atl. 346. O'Brien and Singer then brought suit, to the use of Singer as trustee, in the same court, against the present appellee, the Fidelity & Deposit Company, as surety on the replevin bond, and recovered a judgment, which was reversed, without awarding a new trial, in 94 Md. 124, 50 Atl. 518. In reversing this judgment, we directed the costs in the superior court to be paid by the Fidelity & Deposit Company. When the suit on the replevin bond was instituted in the superior court against that company, it disputed, under oath, the entire claim of the plaintiffs. When it lost the case, the court, after the entry of the judgment, passed an order al-

lowing the plaintiffs a counsel fee of \$100, in exercise of the power conferred on it by section 315 of chapter 123 of the Acts of 1898, which reads as follows: "If the defendant shall dispute the whole or any part of the plaintiff's demand, in any action brought under the provisions of the three foregoing sections, and upon trial of the case the plaintiff shall recover a judgment for any portion of the demand so disputed, then the plaintiff shall be allowed, in addition to the costs of the suit, reasonable counsel fees to be fixed by the court, said fees to be not less than twenty-five dollars, nor more than one hundred dollars." After the reversal by us of the judgment on the replevin bond, the Fidelity & Deposit Company paid all of the costs in the superior court of that suit, but declined to pay the \$100 counsel fee allowed by that court to the plaintiffs. The plaintiffs, who are the present appellants, thereupon directed the clerk to issue a *fi. fa.* for the counsel fee. The clerk issued a *fi. fa.* for the entire costs, including the counsel fee; indorsing on the writ a credit for the costs already paid by the appellee, leaving a balance due under the writ of \$100. The defendant filed in the superior court a motion to quash this writ, which motion the court granted; asserting in its order that the counsel fee was not part of the costs, but was an incident to the judgment, and became nullified by the reversal of the latter upon the appeal. From that order the present appeal was taken.

The appellants contend that the counsel fee in question must be treated and considered as part of the costs of the case in the superior court, which we, by our decision in 94 Md. 132, 50 Atl. 518, required the Fidelity & Deposit Company to pay. In making disposition of the costs of the case when it was then before us, we did not have in mind this counsel fee of \$100 allowed to the plaintiffs in the court below, as the fact of its allowance had not at that time been brought to our attention. It is therefore not payable by the present appellee, by virtue of the disposition of the costs there made by us, unless it falls properly within the description of costs of the suit. It is well settled in this state that the costs of a suit do not, apart from statutory direction, include the counsel fees of the successful party. *Wallis v. Dilley*, 7 Md. 249; *Corner v. Mackintosh*, 48 Md. 390; *Wood v. State*, 66 Md. 68, 5 Atl. 476. When we turn to the statute authorizing the allowance of the counsel fee now under consideration, it is quite plain from the language there used that the fee was intended to be imposed upon the defendant apart from and in addition to the ordinary costs of suit, which, under our system of practice, follow the judgment in cases like the present one as a matter of course. By reference to section 315, and the three preceding sections therein referred to, it appears that the fee is allowable as against

only those defendants who in the courts of Baltimore city dispute under oath the claim of a plaintiff who in an action on a contract has filed with his declaration the contract sued on, together with a statement, under affidavit, of the true amount in which the defendant is indebted to him thereon. If in such cases it turns out that the defendant has not in fact a good defense to the action, the law visits upon him the payment, "in addition to the costs of the suit," of such counsel fee, not exceeding \$100, as the court may, upon application, allow to the successful plaintiff. The obvious purpose of the statute is to discourage the interposition of feigned or insufficient defenses by imposing as a penalty upon the unsuccessful defendants, having set them up in the class of cases referred to, the payment of the counsel fee, in the discretion of the trial judge, in addition to the liability for those costs which follow the judgment as a matter of course. The fee is a special allowance made upon particular grounds, and is not part of the costs of suit, in the ordinary sense. As its allowance to the plaintiff is conditioned upon his having gained the suit, a consistent application of the principle upon which it is allowed requires us to hold that, when the judgment by which his success is supposed to have been established is reversed upon an appeal, the allowance of the fee should fall with it. In our opinion, the learned judge below was right in granting the motion to quash the *fi. fa.*, and we will affirm his order passed for that purpose.

Order appealed from affirmed, with costs.

SAVIN et al. v. WEBB et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

WILLS—CONSTRUCTION—LEGACIES—VESTED INTERESTS—DEATH OF LEGATEE BEFORE PAYMENT—RECOVERY.

1. Where infant legatees under a will bequeathing certain legacies in trust for them payable on their arriving at age, took vested interests in such legacies, and were entitled to interest thereon from testator's death, on the decease of one of such legatees before arriving of age his administrators were entitled at once to recover the legacy and interest accrued, and distribute the same as a part of the legatee's estate.

2. Where a will bequeathed certain legacies to grandchildren to be paid at such time as the executors find convenient, but not before the legatees arrived at 21 years of age, the direction to the executors to pay when convenient referred to the exigencies of the settlement of the estate only, and did not confer on such executors power arbitrarily or capriciously to delay payment.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

Action by Bella Woolsey Savin and others, as administrators of the estate of Wilbur M. Webb, deceased, against William Rollins Webb and others, to recover a legacy. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Frank Gosnell and James W. McElroy, for appellants. Rhodes & Rhodes, for appellees.

SCHMUCKER, J. This is an appeal from an order passed on a petition filed in a case which was before us upon a previous appeal in *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499. By reference to that case it will appear that the late William Prescott Webb, of Baltimore city, by his last will, gave a legacy of \$5,000 to each infant child of his deceased son, George Prescott Webb, to be paid to the child at such time as the executors named in the will find convenient, but not before he arrived at 21 years of age. A controversy having arisen among the parties interested in the estate of the testator as to whether these legacies were vested or contingent, and also as to the date from which they bore interest, a bill was filed by the grandchildren against the executors in the circuit court of Baltimore city for a construction of the will and for an administration of the legacies as a trust fund under the supervision of the court until the time arrived for their payment to the legatees. In that proceeding an order of court was passed, after an answer had been filed and testimony taken with the assent of the executors, in which they were treated and designated as trustees of the legacies, and were required to give bond for the discharge of their trust, and to pay a monthly sum to the guardian of the infant legatees until the further order of the court. That order was complied with, but the case came here upon an appeal from a subsequent order ratifying an auditor's account, and we found it necessary, in deciding the issue then presented to us, to construe the will, and pass upon the nature of the legacies. We there held that the legacies to the grandchildren were vested, and not contingent, and, it appearing from the evidence that the testator had assumed to stand in loco parentis to the legatees, we also held that the legacies bore interest from the date of his death. We further held that the case should be retained by the circuit court for the further administration of the legacies as being in the nature of a trust fund. Since the case was last before us, Wilbur Morrison Webb, one of the legatees, died before reaching the age of 21 years, and letters of administration on his personal estate issued out of the orphans' court of Baltimore city to the present appellants. After they had duly qualified as administrators, they filed their petition in the pending case in the circuit court, setting out the facts which we have mentioned, and asserting their title to the legacy of \$5,000, held for the benefit of their intestate by the appellees as executors and trustees under the

will of William Prescott Webb, and praying for an order of court directing its payment to them. The appellees answered the petition, admitting that they were directed by the will of William Prescott Webb to pay the legacy of \$5,000 to the petitioner's intestate, Wilbur M. Webb, but insisting that they could not be compelled to pay it "before the time when the said Wilbur Morrison Webb would have reached the age of twenty-one years." The circuit court, upon a hearing of the matter, refused to direct the payment of the legacy, and passed an order dismissing the petition. From that order the present appeal was taken.

We think the learned judge below erred in his action on this petition. The appellees do not, in their answer, deny that they have the \$5,000 in their hands, or assert that the fund held by them for the payment of the legacies to the grandchildren is so invested, or in such condition, that it would be inconvenient or disadvantageous to raise the \$5,000 with which to make the payment, nor do they suggest any other reason for declining to make it than the inability, in their opinion, of the appellants, to compel it to be made before the time when the legatee, if living, would have reached his majority. It is not necessary, in this connection, to repeat in detail the provisions of the will by which the legacies to the grandchildren were given. When that instrument was before us in the case in 92 Md., 48 Atl., and 84 Am. St. Rep. we distinctly decided, as we have already said, that those legacies were vested, and bore interest from the death of the testator, and that the provisions of the will in reference to the time of their payment were not of the substance of the gift, but related merely to its enjoyment. The authorities agree that, where a vested legacy, not charged upon land, is given to a child, to be paid at his majority, and interest is payable thereon in the meantime, if the legatee die under age his representative will be entitled to the immediate payment of the legacy; but, if no interest be payable on the legacy, the representative must wait until the legatee would have come of age if he had lived. *Roper on Legacies*, vol. 1, *871; *Williams on Exrs.*, vol. 2, *1254; *Crickett v. Dolby*, 3 Ves. Jr. 13; *Trustees of Jacobs v. Bull*, 1 Watts, 372, 26 Am. Dec. 72; *Felton v. Sawyer*, 41 N. H. 213; *McReynolds v. Graham* (Tenn.) 43 S. W. 138; *Bowman's Appeal*, 34 Pa. 19; *Am. & Eng. Encycl. of Law* (2d Ed.) vol. 18, pp. 792, 793. In most of these cases interest was made payable on the legacy during the minority of the legatee by the terms of the will, but in *Bowman's Appeal*, supra, the legacies were given, as in the present case, to the grandchildren of the testator, to be paid on their respective coming of age, and no disposition of the interest in the meantime was made. The court there held that as the testator, under the circumstances of that

case, stood in loco parentis to the legatees, they were entitled to interest from his death, and then applied the rule to which we have referred to the case of one of the legatees who died under age, and ordered the immediate payment of the legacy to the personal representative of the legatee. The Maryland cases relied on by the appellees are not in conflict with the rule. In *Keerl v. Fulton*, 1 Md. Ch. 535, the decision that the representative of the deceased minor legatee must wait for the legacy until the child would, if living, have attained its majority, was put upon the express ground that interest was not payable upon the legacy during the minority of the legatee; and the case of *Crickett v. Dolby*, supra, was cited by the court as an authority for its decision. The cases of *Hinkley v. House of Refuge*, 40 Md. 469, 17 Am. Rep. 617, and *Wehrhane v. Safe Deposit Co.*, 89 Md. 179, 42 Atl. 930, presented questions of the acceleration of remainders in one instance by the death of the life tenant and in the other by the renunciation of the widow. The court in each of those cases admitted that under ordinary circumstances the acceleration of the legacy there under consideration would have occurred, but held that by reason of the special terms of the wills creating these legacies such a result would contravene the intention of the testator, and therefore held that no acceleration took place.

The direction to the appellees, as executors, to pay the legacies at such time as they might find it convenient, appearing in the will in the present case, referred to the exigencies of the settlement of the estate, and did not confer upon them any arbitrary or capricious power to delay payment. It appears from the proceedings that they turned the money over to themselves as trustees some time ago, and they do not suggest that it would prejudice the estate in any manner to make an immediate payment of the legacy now in question, but rest entirely upon the want of title in the appellants to receive it at this time. We think the appellants are entitled to receive the legacy now. The order appealed from will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order appealed from reversed, with costs, and case remanded for further proceedings in accordance with this opinion.

HUNTER v. HERSPERGER et al.

(Court of Appeals of Maryland. Jan. 16, 1903.)
DESCENT AND DISTRIBUTION — STATUTES —
RIGHTS OF HUSBAND — CHOSES IN
ACTION — INTEREST.

1. Code, art. 93, § 32, as amended by Acts 1892, c. 571, provides that, where a married woman dies intestate, leaving children or descendants, the "surplus" of her estate shall be distributed to the husband for his life, and after his death to the children and descendants per stirpes, and that the orphans' court shall direct

the mode in which the estate shall be invested for the best interests of the remaindermen. *Held* that, where a married woman died intestate leaving children, and owning a judgment, which at her death was uncollectible, but which, several years after, her administrator collected, the husband was not entitled to interest accruing thereon between the date of his wife's death and the collection of the judgment, but was only entitled to the income of the fund remaining after paying debts and expenses of administration.

Appeal from orphans' court, Montgomery county; Samuel D. Waters and Geo. W. Meem, Judges.

Final accounting by Samuel Hersperger, as administrator of Hannah Hunter, deceased. From an order directing the administrator to invest the surplus of the estate, which included interest accruing on a judgment subsequent to decedent's death, Thomas Hunter appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Wm. H. Surratt, for appellant. Edward C. Peter, for appellee.

BOYD, J. This is an appeal from an order of the orphans' court of Montgomery county directing the administrator of Hannah Hunter to invest the amount remaining in his hands, after payment of the debts and costs, and to pay the income to the appellant during his life, and after his death to the children of Hannah Hunter, who was the wife of the appellant, and died intestate, leaving four children surviving her. We have had some doubt about the propriety of passing on the question which has been argued before us, as it is not presented by the record in a way which we can approve of, as the facts necessary to be considered are in an agreement of counsel filed in the orphans' court a month after the order appealed from was passed. But as it states that, "The following is the agreed statement of facts upon which the order of the orphans' court for Montgomery county dated July 22, 1902, * * * was passed," and, as the question has been argued without objection as to the method of presenting it, we will determine it, but do not want it to be considered as a precedent binding on us in the future. When a case is heard on an agreed statement of facts, it should be reduced to writing, and filed in the lower court before the case is there disposed of, or the facts should be certified to this court by the lower court in such way as will enable us to know with certainty what that court understood was before it, and what it passed on.

From the statement of facts we find that Hannah Hunter died on the 26th day of May, 1897, and Samuel A. Hersperger was appointed administrator of her estate on the 7th of the following August. At the time of her death she was the owner of a judgment for \$1,173, rendered March 17, 1879, in the circuit court for Montgomery county, which

"had been kept alive by appropriate proceedings, and was still in full force and effect, but which judgment was at the time of her death worthless." On the 12th of May, 1902, the administrator collected it, amounting at that time to \$3,375.25, including \$7.45 costs, "said judgment having been collected at the earliest possible date." The statement of facts does not show why it could not be collected sooner, but it was said at the argument that the judgment debtor inherited some property, which enabled the administrator to recover it. The administrator settled an account on July 12, 1898, and on the 22d of July, 1902, he settled another, in which he distributed the proceeds of this judgment; the debts of the decedent and the commissions, costs, etc., amounting to \$1,622.07, leaving in his hands \$1,753.18 for distribution. The record does not disclose how so much was realized on the judgment, but the brief of the appellant states that on March 17, 1891, the amount of the judgment was \$2,017.56, and interest was apparently collected on that sum from that date to May 12, 1902, when it was paid; but, as the amount that was due on the judgment is not before us for review, that is not material. The question intended to be presented is whether the appellant is entitled to interest on this judgment from the date of the death of Mrs. Hunter. He contends that under the statute he was a tenant for life of his wife's personal estate, and, as the judgment was bearing interest until paid, that he was entitled to all such interest as accrued after her death; the principal and interest to that time being more than sufficient to pay her debts and the cost of the administration.

The statute in force at the time of her death was section 32 of article 93 of the Code, as amended by chapter 571 of the Acts of 1892. That provided that, if the intestate be a married woman, and leaves no child or descendants, all her personal property, including choses in action, shall devolve upon her husband absolutely, and it shall not be necessary for him to administer upon her estate in order to pass title to him, unless she shall be liable for debts owing by her; and, after making provision as to how the husband is to get title to the property in such case, it proceeds: "But if the intestate be a married woman, and leave a child or children or descendants, her personal estate including all choses in action shall devolve upon her administrator or administrators, and the surplus of her estate shall be distributed by the orphans' court to the husband for his life and no longer, and after his death then to her children and descendants per stirpes; and it shall be the duty of the orphans' court granting the said administration to direct the mode in which the said estate shall be invested [statute reads "interested"] so as best to serve the rights of children or others interested after the ex-

piration of the life estate; and the whole of the said personal estate shall be subject to the orders of the orphans' court, and shall not be disposed of by the administrator except by virtue of an order or a decree duly passed by said court." The appellant, in support of his contention, cited *Evans v. Iglehart*, 6 Gill & J. 171; *Merryman v. Long*, 49 Md. 545; *Abell v. Abell*, 75 Md. 44, 23 Atl. 71, 25 Atl. 389; *Wethered v. Safe Deposit & Trust Company*, 79 Md. 153, 28 Atl. 812; and *Burt v. Gill*, 89 Md. 145, 42 Atl. 908, 43 Atl. 177,—but in each of those cases the decedent left a will, and, while questions as to when interest should begin to run on various kinds of legacies and when incomes should be paid to life tenants were considered, the familiar principle that such questions must be governed by the intention of the testator, when that can be ascertained from the will, was fully recognized and applied. In this case the only right that the appellant has to any part of his wife's personal estate is given him by the statute, and hence we must look to it to ascertain what that is; and when we do we find that it says in plain terms that "the surplus of her estate shall be distributed by the orphans' court to the husband for his life, and no longer, and after his death then to her children and descendants per stirpes." The only portion of her estate he is thus entitled to is the surplus during his lifetime. That is to be distributed by the orphans' court to him for life, and after his death the same thing—that is to say, the surplus—is to be distributed to the children and descendants. If the legislature had intended that he should receive interest earned before that distribution was made, it would doubtless have said so; but the statute not only limits the right of the husband to the surplus,—which means that part of the estate which is left after the debts, costs, etc., are paid,—but it makes it the duty of the orphans' court "to direct the mode in which the said estate shall be invested, so as best to serve the rights of children or others interested after the expiration of the life estate"; thus showing that the legislature was endeavoring to carefully guard the rights of the children, and there is nothing in the statute to justify an inference that it was intended that the surplus should be depleted by deducting interest from the wife's death, or any other period, from it. After the debts and expenses connected with the administration are ascertained, the surplus should be distributed—or, more properly speaking invested—promptly, so as to give the husband the benefit of the income therefrom; but there must necessarily be some delay in the settlement of estates. In this case the final distribution was not made until over five years after the death of the intestate, but, as we have seen, the judgment was considered worthless, and was "collected at the earliest possible date." No one, therefore, is to be blamed for the

delay, and, although the right to collect the judgment was vested in the administrator from the time of his qualification, it was impossible to do so before he did. He received the money on the 12th day of May, 1902, and stated an account in June, which was finally acted on by the court on the 22d of July, after giving parties in interest an opportunity to be heard. We are of the opinion that the order of the court below was in accordance with the terms of the statute, and must, therefore, be affirmed, but we will direct the costs of the appeal to be paid out of the fund.

Order affirmed, costs to be paid out of the fund.

NEWBOLD v. HAYWARD et al.

(Court of Appeals of Maryland. Jan. 14, 1903.)

TRIAL—EVIDENCE—DIRECTING VERDICT.

1. In passing on an instruction withdrawing plaintiff's case from the jury, the court must assume the truth of all the evidence tending to sustain plaintiff's claim, and all inferences of fact fairly deducible from it, even though such evidence may be contradicted in every particular by opposing evidence.

2. Where the evidence as to whether there has been a waiver of a demand is directly conflicting, there is an issue of fact, which should be submitted to the jury.

Appeal from superior court of Baltimore city; John J. Dobler, Judge.

Action by David M. Newbold against Thomas J. Hayward and others. From a judgment for defendants, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John Prentiss Poe and Thomas Ireland Elliott, for appellant. John E. Semmes, for appellees.

BRISCOE, J. The pleadings in this case are voluminous, but, as the questions presented by the appeal arise upon the rulings of the court on the prayers, we deem it unimportant to set them out in full, but shall refer to them in so far as it may be necessary for the purposes of this decision.

The suit was brought by the appellant against the appellees to recover for the breach of an alleged contract whereby the latter were to deliver to the former certain shares of the capital stock of the City & Suburban Railway Company of Washington, under an alleged contract of guaranty given by them to the Baltimore Trust & Guarantee Company. The basis of the action is the alleged guaranty, as contained in the following letters:

"Baltimore, August 25, 1898. Mr. N. P. Bond—My Dear Sir: As I understand it, Hayward, Parr, Scott, and yourself guaranty to the Davidson Co. that the amount of the bonds underwritten by them will complete the City & Suburban enterprise in

Washington in conformity with the contract with them; and, should it fail to do so, then you four gentlemen are to make it good. To the extent of $\frac{1}{2}$, which would be my proportion, I am willing to accept the same risk they do. Of course, if there are others in this guaranty, it lessens my responsibility and pay in like proportion of whatever we get for this guaranty; it being distinctly understood that, for assuming such risk, adequate compensation be allowed us. Please communicate this to the gentlemen interested. Respectfully, D. M. Newbold."

"Baltimore, September 24, 1898. D. M. Newbold, Es'r., Baltimore—Dear Mr. Newbold: Referring to your letter of August 25, 1898, addressed to Mr. Bond, I beg to say that it is understood that you assume the same liability as any one of the guarantors, and that you shall share equally with them any compensation which may be allowed them for entering into the contract of guaranty. Yours truly, T. J. Hayward, for Guarantors."

Briefly stated, the facts out of which the controversy arose are as follows: On or about the 11th day of October, 1897, a corporation was formed in the city of Baltimore called the Baltimore Security & Trust Company; the appellant and appellees being the principal stockholders. The object and purpose of its incorporation was to purchase an option on the Columbia & Maryland Railway. Shortly after the incorporation it purchased this railway, which at the time included a majority of the capital stock of the City & Suburban Railway of Washington. Subsequently the stock of the security company was increased, and the Baltimore Trust & Guarantee Company, a corporation of the city of Baltimore, purchased the bonds of the City & Suburban Railway under an agreement and guaranty on the part of certain directors of the security company that the proceeds of the bonds would be sufficient to convert certain street horse car railways of the City & Suburban road into electric roads. The enterprise proved very successful, and shortly afterwards a stock dividend of \$4.50 in stock of the City & Suburban Railway for each dollar paid into the security company was distributed among the holders of the stock of the security company, after the payment for certain services rendered to the company.

The appellant contends (1) that he was equally liable as guarantor to the Baltimore Trust & Guarantee Company, and that, under the contract, he was entitled to share in the compensation and profits; (2) that the guarantors entered into a contract with him to share the responsibility of the guaranty, and, in consideration thereof, promised to pay him; and (3) that the defendants have been paid by the security company for their services, but have refused to pay him. The appellees, on the other hand, contend, as stated in their brief, that they never received any

compensation for the guaranty, and that a resolution was introduced by the plaintiff, and voted for by him, at the directors' and stockholders' meeting, under the terms of which the guarantors were required to release the security company from all liability, which the majority of the guarantors were unwilling to do, and that the guarantors were not entitled to compensation; and they deny the liability claimed by the appellant.

At the trial below, the plaintiff offered 5 prayers, all of which were refused. The defendants offered 12 prayers. All of these were rejected, except the first and second. It will be thus seen that the questions for our consideration arise upon the rulings of the court on the rejection of the plaintiff's prayers, and the granting of the defendants' first and second prayers, and to a special instruction given by the court. The defendants' prayers, as granted, and the special instruction of the court, practically withdrew the case from the jury. These prayers were in the nature of a demurrer to the evidence, and were a concession of the material facts, but a denial of their legal sufficiency.

We have carefully examined the record before us, and think that the plaintiff was entitled, under the facts in the case, to have the evidence submitted for the consideration of the jury, and the court committed an error in withdrawing the case. In *Jones v. Jones*, 45 Md. 154, it is said that before a prayer can be granted, withdrawing a case from the jury, the court must assume the truth of all the evidence before the jury tending to sustain the claim or defense, as the case may be, and all inferences of fact fairly deducible from it, as on demurrer to the evidence; and this though such evidence be contradicted in every particular by the opposing evidence in the cause. The defendants' first and second prayers were therefore erroneous, and should have been rejected. *Roberts & Co. v. Bonaparte*, 73 Md. 207, 20 Atl. 918, 10 L. R. A. 689.

The special instruction given the jury by the court raised the questions of waiver and demand. It is as follows: "The plaintiff, having offered at the directors' meeting held October 5, 1898, the resolution which led to the passage of the resolution of the subsequent stockholders' meeting, read in evidence, thereby waived his right to insist upon his claim to the 400 shares of stock in the City & Suburban Company, as his proportion of the compensation for the guaranty entered into by the defendants; the condition contained in said last-mentioned resolution never having been complied with on the part of the defendants. And by this failure to make any demand during the period of the responsibility of the defendants under said guaranty, either upon the security company or upon the defendants, for any other measure of compensation for his undertaking with them, he must be held to have acquiesced in the position of the de-

defendants with respect to their compensation for such guaranty; and, since the evidence fails to show that the defendants have received any compensation for said guaranty, the plaintiff cannot recover in this action." As to the question of waiver presented by the prayer, we need only say there was a question of fact to be submitted to the jury, and the court erred in assuming the fact. *McGrath v. Gegner*, 77 Md. 339, 26 Atl. 502, 39 Am. St. Rep. 415; *Herzog v. Sawyer*, 61 Md. 354; *Bollman v. Burt*, Id. 422-423. There was evidence tending to show that a demand had been made upon the defendants under the contract of guaranty, and also evidence tending to show that the defendants had received compensation for the guaranty. These were material facts, and should have been left to the jury. The plaintiff was clearly entitled to have the jury pass on facts of which contradictory evidence had been given. There was error in granting this instruction.

This brings us to the consideration of the plaintiff's prayers, which, with those offered on the part of the defendants, but not considered by the court, cover 11 pages of the record. We do not deem it necessary to consider them *seriatim*, but think they were all properly rejected, under the circumstances of the case. Conceding that they submitted the correct theory of the plaintiff's case, they at the same time excluded from a consideration of the jury the material facts relied upon by the defendants in support of their defense to the action. These prayers were misleading, as tending to emphasize certain portions of the evidence to the exclusion of other evidence in the case, and specially excluded and ignored the question of waiver and other defenses made by the defendants to the suit.

For the reasons we have given, the judgment must be reversed, and a new trial awarded. Judgment reversed and new trial awarded, with costs.

JONES v. ROSE et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

GROUND RENT—APPORTIONMENT BY LEASE-HOLDERS—ESTOPPEL—MERGING OF FEE—EXTINGUISHMENT.

1. Where the owners in common of an estate subject to a ground rent partitioned the land among themselves, leaving, however, certain lots undivided, the rental of which was specially appropriated by the partition deed to the ground rent of the whole estate, such appropriation, as between the parties and those claiming through them, exonerated the residue of the property from the ground rent.

2. Where certain of the parties to the partition deed subsequently purchased the fee or reversion to the whole estate, the estoppel arising from the partition deed also bound them, as owners of the reversion, from asserting that any of the property except that specially appropriated thereto was subject to the ground rent, especially when they, as owners of the rever-

sion, recited such apportionment in a deed designed to extinguish the ground rent.

3. The purchasers of the reversion attempted to extinguish the ground rent by an agreement with B., who had become the owner of the undivided interest not owned by the purchasers of the reversion in the lots apportioned to meet the ground rent, and who was also the owner of all the partitioned portion of the estate not owned by them, except certain lots which he and another held as trustees. The agreement failed to include as trustees either B. or his co-trustee. *Held*, nevertheless, that the agreement extinguished the ground rent on the lots held in trust, since by the partition deed the purchasers of the reversion were estopped to assert the ground rent against any of the property except that apportioned thereto, and since the whole interest in such apportioned property was included in the agreement.

Appeal from circuit court of Baltimore city; Pere L. Wickes, Judge.

Bill by Thomas H. Rose and others against T. Milton Jones. From a decree in favor of complainants, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Parker & Staum, for appellant. Gans & Haman, Vernon Cook, and Stuart S. Janney, for appellees.

McSHERRY, C. J. This case was commenced by a bill in equity, which was filed to enforce specifically the performance of a contract for the sale of a lot of ground lying in Baltimore city. The contract is admitted. The purchaser refused to accept the title and to pay for the property solely because it is alleged that the vendors are not the owners of the fee, and it is insisted that they are not the owners of the fee by reason of there being an outstanding ground rent charged upon the lot. The case was tried upon an agreed statement of facts. Circuit court No. 2 decreed that the purchaser should forthwith bring into court the purchase money stipulated to be paid, and that the plaintiffs should then convey the property to him. From that decree this appeal was taken.

Have the vendors a fee-simple title? If there is no outstanding ground rent on the premises, they confessedly have such a title. So the only question is, is there an outstanding ground rent on the property? That question must be solved by an examination of the various conveyances set out in the record, and this is neither a very interesting nor a very exciting task. Prior to the year 1834 the leasehold estate in a parcel of land lying in Baltimore city became vested in George and Peter Hoffman as tenants in common. The property was subject to two-ground rents,—the one created in 1775, for £3 sterling; and the other in 1794, for £16 current Maryland money,—the two together aggregating about \$56. George Hoffman died in 1834, leaving a last will and testament; and Peter Hoffman died in 1837, also leaving a last will and testament. In 1846 the devisees of George and Peter partitioned

this parcel of land by a deed which made division of it between them with the exception of lots 19, 20, and 21, and those the parties still continued to hold in common. The three lots just mentioned had been subleased by George and Peter Hoffman to George Addison at a rental of \$75 per annum. In the deed of partition of 1846 the rent of \$75 reserved in lots 19, 20, and 21 was appropriated to the payment of the \$56 rent chargeable upon the whole parcel; and it was distinctly provided in the deed that "said rent of seventy-five (75) dollars is to be collected and applied to the payment of the original rent of fifty-six (56) dollars on the whole lot, and the balance divided among the parties hereto agreeably to their interests." By the will of Peter Hoffman it was provided that his son, Samuel O. Hoffman, and his son-in-law, Lennox Birkhead, should choose out of the testator's portion of the entire parcel two lots of ground for each of his grandchildren living at the time of his death, each lot to be not more than 20 feet front by from 75 to 100 feet deep; and the lots so chosen were directed to be held in trust by Samuel O. Hoffman and Lennox Birkhead until the grandchildren became of age, and upon the happening of that event the lots were to be conveyed to them. Pursuant to the direction contained in Peter Hoffman's will, the devisees of the testator, on April 8, 1846, conveyed to Samuel O. Hoffman and Lennox Birkhead, trustees, ten lots of ground out of that half of the whole parcel which had been partitioned off to them three days before; and those ten lots were to be held for the grandchildren according to the terms of the will. Eight of those ten lots thus conveyed constitute lot No. 4 on the plat accompanying the partition deed; the other two are in lot No. 6. Lot No. 4 is the one concerning the title to which this controversy relates. Four days later—that is, on April 7, 1846—the devisees of Peter Hoffman conveyed to Lennox Birkhead all the remaining portion of the lots assigned to them by the deed of partition, together with "all the undivided right, title, and claim of the said parties of the first part in and to those three several lots * * * marked Nos. 19, 20, and 21, which were heretofore leased to George Addison by George Hoffman and Peter Hoffman, reserving a rent of seventy-five dollars per annum on the same and which were left undivided for the purpose of providing a fund to pay the original ground rent of fifty-six dollars, reserved on the whole property." Now, at the time last mentioned, namely, April 7, 1846, Lennox Birkhead was possessed in his individual right of all the lots assigned to the devisees of Peter Hoffman by the deed of partition, except lot No. 4 (the one in question here), and except part of lot 6; and he held lots 19, 20 and 21 as tenant in common with the devisees of George Hoffman; and as co-trustee with Samuel O.

Hoffman he possessed lot No. 4 and part of lot No. 6. In February, 1848, George B. Hoffman, son of the George Hoffman who died in 1834, purchased the fee to the entire parcel; that is, to all the lots divided in the deed of partition. On March 16th of the same year George B. Hoffman executed a deed of the same fee or reversion in all of the parcel to the devisees of George Hoffman, deceased, reciting in the deed that he had purchased the fee as their agent, they having paid the purchase money. On March 20, 1857, the parties to the last-named deed—they being the devisees of George Hoffman, the elder—executed a conveyance to Lennox Birkhead, wherein they granted, bargained, sold, released, and conveyed to the grantee, his heirs, executors, administrators, and assigns, "all their and each of their interest in and right and title to the said yearly rent of fifty-six dollars, and to the property of which the said yearly rent was reserved, * * * so that neither the parties grantor * * * nor the said Lennox Birkhead can claim payment of the said yearly rent of fifty-six dollars, or any part thereof, and so that the parties grantor * * * shall hold the property which passed to them in severalty under the said deed of partition in fee simple clear of the yearly rent of fifty-six dollars; and also that the said Dr. Lennox Birkhead shall hold the property conveyed to him by Samuel O. Hoffman and others in fee simple, and clear of said yearly rent of fifty-six dollars, or any part thereof." No rent seems to have been demanded from or paid by the owners of the lots which make up lot No. 4 for very many years. Samuel O. Hoffman and Lennox Birkhead, the two trustees who held the title to lot No. 4, having died without conveying to the grandchildren of Peter Hoffman the parcels making up that lot, and to which the latter were entitled upon arriving at age, proceedings were instituted in 1872, and a decree was passed appointing a trustee to make sale of the lots comprising lot No. 4. The lots were sold, and were conveyed in fee simple, and under mesne conveyances from the purchasers the appellees claim title.

From this outline of the chain of title it is apparent that the subrent of \$75 issuing out of lots 19, 20, and 21 was set apart by the owners of the leasehold estate to pay the original ground rent of \$56, and this appropriation was conclusive upon the parties to that deed, for the law is clearly settled upon authority that a party is estopped from denying a fact recited in his deed. *Lloyd v. Burgess*, 4 Gill, 192. No one claiming under or through those parties will be allowed to question those recitals, or permitted to impeach that apportionment. Consequently, as far as the leaseholders and all persons claiming under them were or are concerned, an effective apportionment was made of the original rent of \$56 upon lots

19, 20, and 21, and therefore the residue of the property was exonerated therefrom. Of course, however, no act of the leaseholders could of itself bind the reversioner; but, when the lessee became the reversioner, the estoppel arising from the recitals contained in the grant which he made as lessee and which bound him in the latter capacity, likewise bound him as the owner of the reversion; analogically, as a title acquired by a grantor, after he has conveyed by warranty, land to which he had no title, inures to the grantee by estoppel. *Funk v. Newcomer et al.*, 10 Md. 316. The deed of partition wherein the apportionment of the original rent was made was executed on April 1, 1846. In less than a year afterwards George B. Hoffman, one of the parties to that very deed, acquired the ground rent for and in behalf of, and subsequently conveyed it to, all of the devisees of George Hoffman, deceased, who were the identical parties to the deed by which the apportionment was made. Now, as the leaseholders who made the apportionment, which, by reason of the recitals in their deed they are forever estopped to deny, subsequently acquired the fee, they cannot be permitted to repudiate those same recitals, or be allowed to assert a claim directly at variance therewith. And especially is this so in view of the fact that in 1857, they, as owners of the reversion, deliberately undertook to extinguish the ground rent; and in the deed designed to accomplish that result they recited the apportionment of the rent, and thus thereby assented to that apportionment.

But this is not all. The series of conveyances alluded to, and particularly the deed of March 20, 1857, clearly indicate an intention on the part of the owners of the fee to wholly extinguish the original ground rent. When it is remembered that at the time the deed of 1857 was executed Lennox Birkhead owned lots 19, 20, and 21 as tenant in common with the owners of the fee, and that those three lots were, under the deed of partition, to bear the entire original rent, and that he owned individually all the lots assigned under the deed of partition to the devisees of Peter Hoffman except lot No. 4 and part of lot No. 6, which he and Samuel O. Hoffman held as trustees for the grandchildren of Peter Hoffman, the full significance and effect of the recitals contained in, and the conveyance made by, the deed of 1857, are manifest. It cannot be disputed that this deed did completely extinguish the ground rent upon all the property, unless the failure to name in the deed Samuel O. Hoffman and Lennox Birkhead, trustees, prevented the deed from applying to lot No. 4 and part of lot No. 6, then held by them in the capacity just mentioned. But no such effect can be given to that omission or failure. All the property, except lots 19, 20, and 21, had already been exonerated from the burden of the ground

rent by virtue of the estoppel above adverted to, and therefore it became necessary only to release the owner of those three lots if the rent was intended to be wholly extinguished. When the owner of those lots was released by the deed of 1857, the original rent was completely destroyed, and lot No. 4 was then, if not before, held in fee. As the title to lot No. 4 is a good and marketable one in fee simple, the decree of circuit court No. 2 granting the relief prayed in the bill must be affirmed, and it is accordingly so ordered.

Decree affirmed, with costs.

BALTIMORE COUNTY COM'RS v. WILSON.

(Court of Appeals of Maryland. Jan. 22, 1903.)

ROADS—DEFECTS—PERSONAL INJURIES—DAMAGES—COUNTY COMMISSIONERS—LIABILITY.

1. The liability of county commissioners for damages resulting from the defective condition of roads in their counties does not arise from the common law, but solely by implication from the provisions of Code Pub. Gen. Laws, art. 25, §§ 1, 2, giving county commissioners charge of and authority over roads within their respective counties.

2. Code Pub. Gen. Laws, art. 25, §§ 1, 2, provide that the county commissioners of each county shall have power to appoint road supervisors, shall have charge of the property owned by the county and of roads and bridges, and shall make such regulations for repairing and perfecting the same as they may deem necessary, etc. Acts 1900, c. 685, §§ 183-190, create a board of road commissioners, and provide generally that they shall perform certain duties relative to roads and bridges in the county; and declares specifically in section 195 that these road commissioners shall take charge of all roads and bridges in their respective districts, and shall see that no obstructions or injury is permitted on any road or bridge under their supervision, etc. Held that, as the act of 1900 deprives the county commissioners of almost all of their authority relative to the construction, care, and repair of roads, it takes away the basis of their liability for injuries resulting from the defective condition of the roads.

Briscoe and Jones, JJ., dissenting.

Appeal from circuit court, Harford county; James D. Waters, Judge.

Action by Hattie E. Wilson against the county commissioners of Baltimore county. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Frank I. Duncan and Geo. L. Van Bibber, for appellants. John I. Yellott and S. A. Williams, for appellee.

SCHMUCKER, J. This appeal presents the question of the liability of the county commissioners of Baltimore county, in the present state of the law, for personal in-

¹ See Highways, vol. 25, Cent. Dig. §§ 315, 504, 507.

juries caused to travelers by obstructions improperly permitted to remain upon the county roads. There is evidence in the record tending to show the following facts: Mrs. Hattie E. Wilson, the appellee, when traveling at night, with due care, on one of the county roads of Baltimore county, was injured through being thrown from her carriage, which was overturned by running upon a rick of stone about three feet high, placed upon the side of the road, and extending into its bed. The stone had been put there by Frank Hurline, a neighboring farmer, with the permission or assent of Christopher Hall, one of the county road commissioners, but without the knowledge of the appellant. The appellee sued the appellant in tort for damages for her injury, and recovered a judgment in her favor, from which the present appeal was taken.

The record contains two exceptions, one of which is to a ruling of the lower court upon the admissibility of certain evidence, and the other is to its action on the prayers. The first exception was not insisted upon by the appellant, and the real issue arises under the second one. At the trial below, the appellee, as plaintiff, offered two prayers, both of which were granted, and defendant offered seven prayers, all of which were rejected. The proposition of the plaintiff's first prayer is that it was the duty of the county commissioners to keep the road so free from obstructions that persons using reasonable care could travel on it in safety; and that, if the rick of stone in question had, with the consent of the road commissioner, Hall, been put and permitted to remain for several weeks in such position on the road as to make it unsafe for one using ordinary care to travel the road at night, and the plaintiff, while so traveling upon the road, was injured by her carriage coming in contact with the stones, she was entitled to recover. Her second prayer is upon the measure of damages in the event of a verdict in her favor, and is in the usual form, and free from objection. The defendant's first prayer asks the court to take the case from the jury for want of legally sufficient evidence of negligence on the part of the defendant to entitle the plaintiff to recover.

It is conceded that, if all of the provisions of the public general law regulating the powers and duties of county commissioners throughout the state remain in force in Baltimore county, the commissioners of that county are liable for personal injuries to travelers on the public roads resulting from a failure to keep those roads in proper repair. The question is whether the local road law now in force in that county, enacted by the act of 1900 (chapter 685) is so inconsistent with the public general law in respect to the powers and duties of the county commissioners that the local law has superseded the general one, and taken away from these commissioners that charge and control over county

roads and the means and agencies with which to enforce the control which have always been held to constitute the foundation of their liability. In order to reach a solution of the question thus presented for our consideration, it becomes necessary to compare the provisions of the general and local laws pertinent to the issue, that we may ascertain whether there is a material conflict between them. Sections 1 and 2 of article 25 of the Code of Public General Laws contain the following provisions:

"Section 1. The county commissioners of each county in this state are declared to be a corporation and shall have full power to appoint * * * road supervisors * * * and all other officers, agents and servants required for county purposes not otherwise provided for by law or by the constitution, and they shall have charge of and control over the property owned by the county and over county roads and bridges, and whenever in their opinion the public interests require or will be thereby advanced they may commit the whole matter of grading and constructing public roads, and the repairs thereof, and the construction and repairs of public bridges, to the charge of competent and scientifically educated civil engineers, who shall direct and manage all such public works under the immediate control of said county commissioners, and who shall hold office for such time, with such salary, under such bond and subject to such regulations as may be directed by the said county commissioners from time to time. * * *

"Sec. 2. That they shall also in their respective counties have control over all public roads, streets and alleys, except in incorporated towns, and make such rules and regulations for repairing, cleaning, mending and perfecting the same, and providing for the costs of the same, as they may deem necessary. * * *

It has been repeatedly held by this court that these sections of the general law not only conferred the power, but also imposed the duty, upon the county commissioners to keep the public roads in a safe condition; and that, as the law provided them with proper agents for the discharge of these duties, and the power to levy the requisite taxes for the repair of the roads, it made them liable for injuries resulting from the nonrepair of such roads or the existence of dangerous obstructions upon them. Duckett's Case, 20 Md. 468, 83 Am. Dec. 557; Gibson's Case, 36 Md. 229; Baker's Case, 44 Md. 9; Eyler's Case, 49 Md. 269, 33 Am. Rep. 249; Duvall's Case, 54 Md. 354. It was admitted in these cases that there was no such liability at common law or by the express terms of the statute, but it was held to have arisen by necessary implication from the powers and duties of the commissioners under the several provisions of the general law. The local road law in force in Baltimore county when the appellee was injured

was enacted, as we have already said, by chapter 685 of the Acts of 1900. Its salient features are as follows: Section 188 directs the county commissioners to appoint a board of road commissioners for each district from the voters resident therein who have in the previous year paid taxes on property assessed at least \$500, and requires the appointees to give bond for the faithful discharge of their duties. Sections 188 and 190 require the road commissioners to promptly organize as a board, and, with the advice of the road engineer, adopt a system for the repairs and improvement of the roads in their respective districts. Section 191 requires the road commissioners to keep books, showing in detail the costs of the labor and material used in the repair or improvement of each road in their respective districts. These books are to be open to the inspection of the road engineer, to whom the road commissioners are required to make annual reports of the condition of the roads and the nature and extent of the work done on them during the year. Section 192 requires the road commissioners of each district to make monthly itemized statements of the labor and material used by them to the road engineer, who must approve all bills for labor and materials if correct, and deliver them to the county commissioners, who, after the bills have been properly audited, are required to direct their payment to an amount not exceeding the special road tax collected from the district for that year. Section 194 authorizes the county commissioners, upon charges made, and after notice and a hearing, to remove any road commissioner for neglect or refusal to perform his official duty, and also to fill vacancies caused by resignation or removal of road commissioners. Section 195 provides, among other things, that the road commissioners "shall take charge of all roads and bridges in their respective districts and shall see that no obstructions, hindrances or injury is permitted upon any road or bridge under their supervision, and if any road or bridge under their supervision shall form the boundary between districts the county commissioners shall assign to each district its portion of said road or bridge." Section 196 provides that "the governor shall appoint a Baltimore county roads engineer, who shall hold office until removed by the governor or his successor for such good cause as he shall deem sufficient." Section 197 prescribes the duties of the road engineer. These are mainly advisory in their nature, and to be rendered to the road commissioners to aid them in the management and repair of the roads; but he is required to pass upon the propriety of the expenditures of the road commissioners, and to make an annual report to the county commissioners and to the Maryland Geological Survey of the condition of the roads, and the nature and cost of the improvements made on them during the year. Section 199 directs the county commissioners

to levy annually on the assessable property in the county not less than 15 nor more than 25 cents on the \$100 for the use of the roads and bridges, of which only 5 per cent shall be applied to the general use of the county roads and bridges, and the balance shall be set apart as a special road and bridge fund for the use only of that district from which it has been collected.

It is apparent from this synopsis of the act of 1900 that it not only introduces into the management of the public roads of Baltimore county many details of administration not found in the general law, but it deprives the county commissioners of almost the entire charge and control of the roads, and imposes that duty upon a new set of officials, for whose appointment it makes provision. It creates a board of road commissioners for each district, and requires them to "take charge of all roads and bridges in their respective districts," and keep them free from hindrances and obstructions, to adopt a system for repairing and improving them, and to cause the repairs and improvements to be made, and to purchase the materials requisite for that purpose. The road commissioners receive a fixed salary, and are not made subject to the control of the county commissioners in connection with the repair or improvement of the roads or the purchase of materials. On the contrary, the act directs them to report the condition of the roads and the improvements made thereon to the road engineer, an independent official, appointed by the governor; and to make monthly statements of their expenditures for labor and material to the same official, to be by him approved, if correct, and handed to the county commissioners, who are then required to order their payment, after they have been properly audited. The road engineer, and not the county commissioners, is made the adviser of the road commissioners in the exercise of the charge conferred upon them by the act over all the county roads and bridges. The road commissioners are, it is true, appointed by the county commissioners from a certain class of taxpayers, and they may be removed for neglect of duty by the county commissioners after charges made and a hearing thereon; but they do not act under the direction or supervision of the county commissioners in keeping the roads in safe condition, as the charge and management of the roads is conferred by the local law upon the road commissioners themselves. Not only are the persons directly charged with the care of the roads thus made practically independent of the county commissioners, but the power of the latter to levy taxes for the use of the roads is now so limited and restricted as, in effect, to deprive them of their former discretion as to the application of the funds raised by those taxes. As by this local law, which prevails over the general law whenever the two conflict, the county commissioners of Baltimore county have been shorn of

the very powers and duties which constituted the only ground of their liability for damages for injuries caused by the condition of the public roads, it follows as a matter of course that their liability for such damages no longer exists. If it be objected that the conclusion which we have reached as to the effect of this local road law deprives the users of roads in Baltimore county of that redress for injuries resulting from defects therein which is afforded to those using roads in other portions of the state, we are compelled to reply that the remedy for that situation must be sought at the hands of the legislature, and not of the courts.

The learned judge below should have rejected the plaintiff's prayers, and granted the defendant's first prayer; and for his error in not doing so the judgment must be reversed. As it is apparent that there is no liability on the part of the appellants for the injuries sustained by the appellee, no new trial of the case will be awarded, and for that reason we find it unnecessary to review the remaining prayers of the defendant below.

Judgment reversed, with costs, without a new trial.

BRISCOE and JONES, JJ., dissenting.

OPPENHEIMER et al. v. LEVI.

(Court of Appeals of Maryland. Jan. 16, 1903.)

QUIETING TITLE—JURISDICTION—POSSESSION BY PLAINTIFF—LANDLORD AND TENANT—TAX TITLE.

1. Where the lessee in a lease for 99 years, which provided that the lessee should pay certain rent and all taxes on the property, made a fictitious and fraudulent assignment of the lease to another, and then neglected to pay the taxes, and purchased the property at a tax sale, and thereafter took a reassignment of the lease, and, claiming to be owner of the property, refused to pay rent, suit may be maintained by the lessor to set aside such tax title and to quiet his title to the reversion, though he does not allege that he is in possession.

Appeal from circuit court, Baltimore county, in equity; David Fowler, Judge.

Action by Amanda Oppenheimer and husband against Jacob Levi to set aside a tax deed and quiet title. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

John Watson, Jr., for appellants. Grason & Bacon, for appellee.

PEARCE, J. Samuel Ellinger and wife, in 1869, leased the lot of land now in controversy, situated in Baltimore county, to Lena Sachs, for 99 years, reserving to the said Ellinger and his heirs a yearly rent of \$50, payable one half February 1st and the other half August 1st; and the lessee covenanted for herself, her personal representatives and

assigns, to pay this rent and the taxes upon the lot. The leasehold estate therein, by deed of assignment made December 31, 1884, became vested in the appellee Jacob Levi, and his wife, Babet Levi, who, on February 16, 1887, assigned the same to Wm. H. Dryden. In 1890, the taxes for a previous year being in arrear, the fee in the premises was sold by the collector of Baltimore county to Jacob Levi, the appellee, to whom it was conveyed by said collector on January 23, 1891. This deed, however, was not placed upon record until June 13, 1896. Samuel Ellinger died July 6, 1891, and shortly thereafter his heirs conveyed to the appellant, Amanda Oppenheimer, the reversion in, and the ground rent issuing out of, said lot. On May 8, 1896, Levi united with Dryden in conveying to Henry Toner and wife a lot of ground designated as the lot described in the Ellinger lease, but which, through error, was made to embrace a lot but 50 feet square, instead of 50 feet by 150 feet, and this was conveyed "subject to the annual rent reserved in the original lease from Samuel Ellinger and wife to Lena Sachs. On December 21, 1900, Toner, whose wife in the meantime had died, conveyed the lot to Jacob Levi, the appellee, subject to the payment of said annual rent. Levi paid the annual rent from the time he acquired the leasehold estate, December 31, 1884, down to the time of the conveyance by himself and Dryden to Toner, May 8, 1896, and Toner paid the same from May 8, 1896, to December 21, 1900, when he assigned to Levi, who has refused to pay the subsequently accruing rent, claiming the fee by virtue of said tax sale and the subsequent assignment to him. Thereupon Amanda Oppenheimer and her husband, on January 15, 1901, filed a bill alleging all the facts above recited, and averring that the tax sale mentioned and the various subsequent conveyances constituted a cloud upon her title to the reversion and rent, for the removal of which she was entitled to relief in equity. The bill also alleges that at the time of this tax sale this lot was assessed to Jacob Levi, and had been so assessed for several years, and that the tax sale was void for several reasons, not necessary to enumerate here. The bill further charges that, notwithstanding the assignment from Levi to Dryden in February, 1887, Levi remained, and continued to be, the real owner of the leasehold, and that he paid the ground rent continuously from 1884 to 1896 to Samuel Ellinger and those claiming under him; that the lot was assessed up to the time of the tax sale to Levi, and that notice that the taxes were overdue, and that sale would be made if they were not paid, was served upon him, who was the real owner of the leasehold, and as such bound to pay said taxes; and then specifically charges "that by his fraudulent acts and concealments he encouraged, promoted, and procured the said sale with the intention of acquiring the fee-simple interest in said lot for the trivial

sum of \$46, for which the same was sold; * * * and that the payment by him of the purchase money at such tax sale was but the payment of the taxes and expenses, which he was under obligation to pay." The prayer of the bill is: (1) That the tax sale may be declared void; (2) that the deed from the collector may be declared void, and be vacated and annulled; (3) that a decree may be passed declaring the appellant to be seised in fee of the reversion in said lot, and to be entitled to collect the rent reserved in the original lease from Ellinger. The appellee demurred to the bill, and assigned the following grounds: (1) That the bill stated no sufficient case to entitle the plaintiff to relief; (2) that the court had no jurisdiction to hear and determine the matter; (3) that the plaintiff's remedy, if any, was in a court of law; (4) that there was a full, complete, and adequate remedy at law; (5) that the plaintiff had neither the legal title to nor the possession of the property.

At the hearing the court sustained the demurrer, and dismissed the bill, holding in the opinion filed that, as there was no allegation of possession by the plaintiff at the time the bill was filed, the case was governed by the case of *Textor v. Shipley*, 77 Md. 474, 26 Atl. 1019, 28 Atl. 1060, and those which preceded it, in all of which it is held that there must be such averment of possession, followed by proof, to warrant a decree for plaintiff. There can be no doubt that such is the general rule of equity, and that as such it is firmly established in this state by numerous decisions. In *Helden v. Hellen*, 80 Md. 621, 31 Atl. 506, 45 Am. St. Rep. 371, where a bill filed to remove a cloud upon the title failed to allege possession by the plaintiff, the bill was dismissed on demurrer; the court saying: "If the possession is in another, the remedy is by an action of ejectment. * * * Whatever may be the decisions elsewhere, no case in this state has gone so far as to maintain a bill in equity under the facts and circumstances of this case." And the rule was reaffirmed in *Keys v. Forrest*, 90 Md. 132, 45 Atl. 22, the latest case upon the subject in this court. But, while this is the general rule, there are some recognized exceptions to its application. In *Crook v. Brown*, 11 Md. 172, applying the general rule to the facts of that case, Judge Tuck said: "We know of no head of equity jurisdiction under which this [amendment to the bill] can be maintained. It would be substantially to give to a chancery suit the effect of an action in ejectment. * * * There are some circumstances under which courts of equity will remove a party in possession, and put in another, but these are cases of peculiar character." So, in *Livingston v. Hall*, 73 Md. 395, 21 Atl. 49, Judge Alvey said: "To maintain a suit of this character, it is, as a general rule, necessary that the plaintiff should be in the possession of the property." And in *Steuart v. Meyer*, 54 Md. 467,—a case arising under a tax sale of

property subject to ground rent,—relief was granted notwithstanding the plaintiffs were not in possession; Judge Alvey saying: "They are interested only in the annual ground rents and in the estate of the reversion. They are not entitled to the possession, and could not, therefore, sue in ejectment for the recovery of the property. Under the circumstances of this case, without resort to a proceeding like the present, the parties would be without adequate remedy for relief against the effect of the prima facie title in the purchaser." In *Textor v. Shipley*, 77 Md., 26 Atl., 28 Atl., supra, it was argued that the decision in *Steuart v. Meyer* was in conflict with all the other cases in this court on that subject, and overruled the previous cases, but the opinion filed by Judge Robinson on the reargument in *Textor v. Shipley*, in which Judge Alvey concurred, explained what were the circumstances alluded to by him in *Steuart v. Meyer*, and showed that in that case, when the bill was filed, the property in controversy was in the possession of receivers appointed by the court, and that the plaintiff could not resort to the ordinary remedy by ejectment against Meyer as a dispossessor, for the reason that he was not in possession of the property, and that in maintaining the jurisdiction of equity under the peculiar circumstances of that case it was not meant to question the general rule laid down in the earlier cases; "that those only who have a clear legal and equitable title to land, connected with the possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on title." There are decisions elsewhere from courts of repute that actual possession by a tenant is equivalent to actual possession by the landlord for the purpose of such a bill, but these are not consistent with the decision in *Steuart v. Meyer*, as explained in *Textor v. Shipley*, and need not be referred to. There are, however, well-established legal principles applicable to the facts of this case, which, in our opinion, take it out of the general rule, and bring it within the exceptions in which equity has jurisdiction. These principles cannot be better stated than in the language of Judge Cooley, extracted from his *Law on Taxation*: "Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers, on grounds which are apparent when their relation to the property and to the taxes is shown. The title to be given on a tax sale is a title based on the default of the person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty. But one person may owe the duty to the public, and another may owe it to the owner of the land, by reason of contract, or other relations. Such a case may exist where the land is occupied by a tenant, who, by his lease, has obligated himself to pay the taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law

were to permit this tenant to neglect his duty, and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale. * * * There is a general principle applicable to such cases, which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as a payment only. He shall acquire no right, as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." A long list of cases illustrating the application of the principle thus stated under a great variety of circumstances is given in a footnote to the text, and a valuable note on the same subject will be found upon page 939 of 53 L. R. A., appended to the case of *Smith v. Newman* (Kan.; 62 Pac. 1011), in which it is said that the cases are all agreed that a tenant cannot acquire a valid title, as against the landlord, by virtue of a tax sale during the tenancy for taxes which the tenant had agreed to pay. Among these may be cited the following: "At most the tenant could only become seised under the tax deed in trust for his landlord if living; if dead, then for his heirs or their assigns." *Burgett v. Talliaferro*, 118 Ill. 516, 9 N. E. 334. "Payment of taxes by a tenant at a tax sale will be considered as a redemption of the land for his landlord, and he will remain his tenant as before." *Williamson v. Russell*, 18 W. Va. 625. "In such case the tenant can acquire no valid title as against such owner, but would hold any title thus acquired in trust for such owner." *Bertram v. Cook*, 32 Mich. 519. "A tax purchase, made while such relation exists, is made in wrong; and the law, in circumvention of dishonesty, will conclusively presume that it was made in performance of duty, and not in repudiation of it." *Conn. Mut. Life Ins. Co. v. Bulte*, 45 Mich. 120, 7 N. W. 707. "A title so acquired would remain void in the hands of a bona fide purchaser without notice." *Blake v. Howe*, 1 Aikens, 306, 15 Am. Dec. 681. "Where a lessee covenanted to pay all taxes and assessments on the demised premises during the term, he was bound to pay a special assessment for planking and curbing the sidewalk in front of the premises; and where he disputed this liability, and permitted the lot to be sold to pay this assessment, and after the expiration of the term became the assignee of the purchaser, and took the tax deed, the lessor was held entitled to a judgment that the lessee quitclaim the premises to him, and that he be restrained from conveying or incumbering them." *Shepardson v. Elmore*, 19 Wis. 424. Some of these cases were actions of ejectment; others, and notably the last cited, were bills to remove cloud upon title. To the same effect are the cases of *Stout v. Merrill*, 35 Iowa, 47; *Haskell v. Putnam*, 42 Me. 244; *Willard v. Ames*, 130

Ind. 351, 30 N. E. 210; *Relly v. Lancaster*, 39 Cal. 354; *Coxe v. Gibson*, 27 Pa. 160, 67 Am. Dec. 454; *Rothwell v. Dewees*, 2 Black, 613, 17 L. Ed. 309; *Lamborn v. Dickinson County Commissioners*, 97 U. S. 181, 24 L. Ed. 926.

It is true that in an action of ejectment this plaintiff would be entitled to recover upon proof of the facts she alleges in her bill, but it does not follow that equity has not jurisdiction to grant the relief prayed, and we think an examination of the authorities will show that it is our duty to sustain this bill, and not to send the plaintiff to a court of law. In *Hamilton v. Cummings*, 1 Johns. Ch. 523, a bill was filed praying the delivery up and cancellation of certain bonds executed by the plaintiff's testator, which it was charged were given to indemnify defendant as bail in certain suits, but which were to be surrendered and canceled if defendant was not damaged or put to costs. The bill alleged that the suits were all settled, and that defendant had been put to no costs or damage. In considering the objection made to the jurisdiction of equity in that case, Chancellor Kent said: "I am inclined to think that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause. * * * But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications, where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, in order to be sustained, must be expedient, because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of any suspicion of any design to promote expense and litigation." In *Van Horne v. Fonda*, 5 Johns. Ch. 406, two devisees were in possession of lands under an imperfect title devised to them by their common ancestor, and it was held that one of these could not buy up an adverse title to disseise or expel his co-tenant, but that such purchase would inure to their common benefit, subject to an equal contribution to the expense; and the same high authority said: "It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be immoral, and repugnant to a sense of refined and accurate

justice." Accordingly, the chancellor sustained a bill for an account filed by the devisee sought to be ousted under the adverse title bought by his co-devisee. That case was relied on as conclusive by Chancellor Cooper in *Harrison v. Winston*, 2 Tenn. Ch. 544, in which it was held that a beneficiary under a trust assignment for the benefit of creditors, who is a party to the suit for the execution of the trust, consenting thereto, and accepting its benefits, cannot acquire a title to any of the property under a tax sale free from the trust; and that one who joins with him in the purchase with knowledge of his fiduciary relations will stand in no better position; and that the complainant was entitled to a decree perpetually enjoining an action of ejectment brought by the purchaser of the tax title, and declaring that the tax title inured to the benefit of the trust.

Applying the principles thus declared to the case before us, we cannot say, as was said in *Crook v. Brown*, supra, "we know of no head of equity jurisdiction under which this can be maintained." We perceive at once that upon the allegations of the bill there was fraud in the acquisition by defendant of the tax title, and that, as a result of this fraud, the title is held by the defendant in trust for the plaintiff, and we know that fraud and trusts are independent heads of equity jurisdiction. In *King v. Carpenter*, 37 Mich. 386, it was held that, "where a party has an equitable cause of action against another, coming within any recognized rule of equity jurisdiction, such right can be enforced in equity, whether the complainant is in possession or not." In *Sheppard v. Nixon*, 43 N. J. Eq. 633, 13 Atl. 617, the court said: "The exception to the rule [that the plaintiff must be in possession] is where the case presents some special ground for equitable interposition, such as fraud, accident, or mistake, requiring the setting aside or reformation of deeds or instruments of conveyance. If these elements be wanting, a bill to establish complainant's title is an ejectment suit, pure and simple." To the same effect is *Essex County Bank v. Harrison* (N. J. Ch.) 40 Atl. 211. And in *Security Savings & Trust Co. v. Mackenzie* (Or.) 52 Pac. 1046, it was held that the question of possession of real estate, as required by a statute of the state, in a suit for an interest therein, was immaterial, when the relief sought is such that an equity court has jurisdiction independent of the statute. This view of the law is sustained in 17th Enc. of Pleading & Practice, 309, where it is said: "Where there is any other distinct head of equity jurisdiction sufficient to support the action, possession by the plaintiff is not required, but equity will retain the cause, and grant relief by quieting the title or removing clouds." In the present case fraud in the acquisition of the title is distinctly charged: such fraud as would raise a trust in favor of the plaintiff. The defendant has demurred, and the effect of his demurrer is

to admit all matters of fact well pleaded, and we think the fraud is well pleaded. Again, in 17th Enc. of Pleading & Practice, 311, it is said that "it would seem that ejectment is an inadequate remedy in all cases where, although the plaintiff might recover possession, a void instrument or muniment of title would be left outstanding, and uncanceled," and it was so held in *Redmond v. Packenham*, 66 Ill. 434. Here, if the plaintiff were to recover in ejectment, the tax title would remain outstanding, and would, after such recovery, still constitute an apparent cloud upon the title whenever the property might be upon the market. Consequently, we think the demurrer should have been overruled and the bill retained.

Nothing that we have said, however, is to be understood as overruling or impairing the authority of any of the previous cases in this court, none of which presented the question now before us. In *Keys v. Forrest*, supra, the case was not presented on demurrer, but was heard upon bill, answer, and testimony. The bill alleged, and the answer denied, fraud in the acquisition of the tax title; and it will be seen on reference to the record that the lower court considered the allegation of fraud, and found it was not sustained, and this court concurred in that finding. Had the possession by the plaintiff been essential in that case, it would have been idle to determine the question of fraud. There is therefore no conflict or inconsistency between this case and any of the earlier cases in this court. For the reasons given, the decree of the circuit court will be reversed.

Decree reversed, with costs to the appellant above and below, and cause remanded for further proceedings.

SNOOK v. MUNDAY.

(Court of Appeals of Maryland. Jan. 23, 1903.)

PRINCIPAL AND SURETY—ESTOPPEL—RIGHT OF SUBROGATION—TENDER—PLEADING—AMENDMENT—APPEAL.

1. Under Code, art. 16, § 16, providing that a party to a bill in equity shall have the right, on payment of such costs as the court may direct, to amend so as to bring the merits fairly to trial, the application to amend is addressed to the discretion of the court, and there is no appeal from an order permitting an amendment.

2. Where a wife, as surety for her husband, joined him in a mortgage which stated that "the debt is a joint and several one," in an action praying leave to pay the debt and be subrogated to the rights of the mortgagee she may show that she was simply surety, though she could not do so to defeat the mortgage.

3. Where, in a suit by a surety to a debt secured by mortgage for leave to pay the debt and for subrogation to the rights of the mortgagee, the plaintiff alleges that she endeavored, but failed, to ascertain the exact amount due, and then paid into court a sum in excess of

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 582, 706.

the debt, interest, and costs, the tender was sufficient.

Appeal from circuit court, Washington county, in equity; Edward Stake, Judge.

Action by Elizabeth Munday against Catherine Snook. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEAROE, SCHMUCKER, and JONES, JJ.

Thompson A. Brown and Chas. A. Little, for appellant. Alexander Armstrong and Samuel B. Loose, for appellee.

PAGE, J. John Munday, deceased, in his lifetime, together with the appellee, executed a mortgage upon certain lands to secure the payment of \$1,600, evidenced by two promissory notes in favor of Edward Mealey. The appellee, who, under the last will of John Munday, is the life tenant of the mortgaged property, filed a bill in the circuit court for Washington county praying for the writ of injunction to restrain the appellant, as assignee of the debt and mortgage, from making a sale, and for a decree requiring the appellant to receive from her, as the surety of John Munday, the money due and owing, so that she may stand in the place of the mortgagee, and be subrogated to all of his legal and equitable rights. This bill was also demurred to by the appellant, the demurrer was overruled, and a decree passed allowing the relief prayed for, whereupon the appellant took this appeal.

One of the contentions in support of the demurrer made by the appellant is that the amended bill is not an amendment of the old one, but in fact a new bill, which the court should not have permitted to be filed. But an application to amend is addressed to the discretion of the court before whom it is made, and is not the subject of an appeal to this court. In *Calvert v. Carter*, 18 Md. 108, where the court was considering the effect of the act of 1854, c. 230, now article 16, § 16, of the Code, it was said: "The best construction we have been able to give it is that it was intended to enlarge the time within which the amendments may be made in proceedings in equity. Formerly the 'proper time' to apply for leave to amend was before the cause was at issue. The act authorizes amendments to be made at any time before final decree. They are still to be made 'on application to the court,' 'so as to bring the merits of the case fairly to trial.' The court to which the application is made must of necessity judge of the propriety of the proposed amendment. * * * We think the act of 1854 must be construed in the same way. It does not, in terms, confer any right of appeal, and we think none exists." The relief prayed for in the bill is based upon the claim of the appellee that she is "simply" the surety of her husband. An additional contention of the appellant is

that the complainant cannot now set this up, because of the fact that by the terms of the mortgage it is established that "the debt is a joint and several one." But this is not a proceeding between the payors and the holders of the note, nor is there any attempt to deny the liability of the appellee as a joint maker. The allegation of her suretyship, only, is not made to alter or vary her liability to the payee, but solely for the purpose of proving her relation to her co-maker. If, in fact, whatever may be the form of the transaction, as between herself and her co-maker she is a surety only, it would be contrary to the principles of equity for the creditor to permit, or by his conduct to cause, her co-maker, the principal debtor in fact, to be exempt from payment, or from liability to his surety to make good what the latter has paid on his account. This is an equity binding upon the conscience of the creditor, though not within the actual words of the contract. All the rights of co-sureties *inter sese* rest upon this principle. "Subrogation," says Sheldon (page 3), "as a matter of right, independently of agreement, takes place for the benefit of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been made by another." See, also, as to the basis of the right of contribution between sureties, *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Stirling v. Forrester* (O. S.) 3 Bligh, 590. When, therefore, the true relations of co-makers of a note, *inter sese*, are in issue, or, in plainer terms, where the question at issue is not the contract between the makers and the payees, but the measure of obligation between the makers, parol evidence establishing the true relations between themselves does not vary the terms of the contract as evidenced by the note, and may therefore be offered in evidence. *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Clapp v. Rice*, 13 Gray, 403, 64 Am. Dec. 639; *Sweet v. McAllister*, 4 Allen, 355; *Nurre v. Chittenden*, 56 Ind. 462; *Melms v. Werdehoff*, 14 Wis. 18; *Carpenter v. King*, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; *Barry v. Ransom*, 12 N. Y. 462; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689; *Weston v. Chamberlin*, 7 Cush. (Mass.) 404; *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 152. This court also has applied the same doctrine in *Chapman v. Davis*, 4 Gill, 179,—an action of assumpsit brought by Davis, as executor, to recover money paid by his decedent on account of a promissory note signed, as co-makers, by Chapman and Davis. The contention on the part of the latter was that while his decedent was apparently a joint obligor, he was in fact a surety only for Chapman, and therefore, having paid part of the obligation, he was entitled to recover it from the estate of Chapman, the principal. To establish this relation toward each other, he offered evidence that, at the time the note was signed, both were members of the vestry

of Port Tobacco Church. On objection, the lower court rejected this evidence, but on appeal this court reversed the ruling: saying, as it did so, that "the fact proposed to be proved by the defendant was material to the issue, as the jury might have found from the position of Davis, as a member of the vestry, in connection with other testimony, that he intended to sign the note in question, not as the surety of Chapman, but as a principal obligor." It seems to be clear that, if she is at liberty to prove by parol testimony that her true position as between herself and her co-maker was that of surety only, it was proper (indeed, in this case it was imperative upon her) to allege it in the bill. The demurrer admits the averment to be true, and therefore, being a surety, she is entitled to pay off the debt of her principal, and be subrogated to all the rights of the creditor. *Freaner v. Yingling*, 37 Md. 497.

With respect to the tender of the money due, we think the allegations of the bill are sufficient. It appears therefrom that the appellee sought, but failed, to ascertain the exact amount due. She then paid into court a sum more than sufficient to pay the debt, with all proper interest and costs. *Chicora Co. v. Dunan*, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; *Maughlin v. Perry & Warren*, 35 Md. 358.

The order will be affirmed, with costs, and the cause remanded, that the defendant may answer. Order affirmed, with costs, and remanded.

REICHARD et al. v. IZER et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

WILL CONTEST—OPPOSITION TO CAVEAT—ESTOPPEL—EXPLANATION—SUFFICIENCY.

1. Certain of testator's heirs filed a petition protesting against a caveat filed against the will by a brother and sister of petitioners, and alleged that they had peculiar means of knowledge of the circumstances attending the making of the will, and that all the allegations made against the validity of the will were untrue, to their personal knowledge. The petition prayed that the administration be continued by the executors, and that the petitioners be made parties caveatees. The caveat was dismissed, and thereafter petitioners sought to contest the will on the same grounds alleged in the original caveat. In explanation of this action, they alleged that when they signed the original petition they were ignorant of the true facts surrounding the execution of the will, and signed the petition at the instance of the executors, and that, having taken their position with the caveatees, they were not in a position to ascertain facts which since came to their knowledge. It was alleged that one of the executors had stated that he knew the will could be set aside on the ground of fraud, but that it was better that the caveat should be dismissed, as a long litigation would have resulted; but it was not alleged when this statement was made, or to whom. It was also alleged that, after the signing of the first petition, one of the executors was required to produce vouchers for certain sums claimed by him, and that when he filed them

the petitioners "were aroused to the importance of an investigation," and filed exceptions to the account. The account, as filed, contained some charges which should not have been allowed; but they amounted to but a few dollars, relating to the personal expenses of the executor, and had no bearing on the validity of the will. It was further alleged that the petitioners had learned, from letters written by one of the executors, of the exercise of undue influence by him, but the only letter relied on in support of this claim was one which was in possession of the caveators at the time the first petition was filed. *Held* not a sufficient explanation to justify the court in allowing petitioners to appear and contest the will in contradiction of their first petition.

Appeal from orphans' court, Washington county; Elias Cost, A. D. Sager, and Wm. L. Hammond, Judges.

Petitions by Nancy E. Izer and others against V. Milton Reichard and another, as executors of the will of Margaret Shipley, deceased. From an order allowing petitioners to appear as contestants of the will, the executors appeal. *Reversed*.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

J. Clarence Lane, Henry H. Keedy, Jr., and M. L. Keedy, for appellants. Thompson A. Brown, John E. Wagaman, and Chas. D. Wagaman, for appellees.

BOYD, J. The question before us in this case is whether or not the appellees have made such allegations in their amended petition and caveat as were necessary to avoid the effect of the papers signed by them, and referred to in *Reichard et al. v. Izer et al.*, 95 Md. 451 (s. c. 52 Atl. 592). As is shown in that case, Wynkoop Shipley and Emma F. Davis, a brother and sister of Mrs. Izer, had filed a caveat to the will of their mother, Margaret Shipley, which included the same grounds, in substance, as are now relied on by the appellees. While that was pending in the orphans' court of Washington county, Mr. and Mrs. Izer, and others interested in the will, filed, on February 12, 1901, a petition in that court, which was there called, and will be herein referred to as, "Exhibit B," in which they alleged "that all the allegations made against the validity of the said last will and testament, and codicil thereto, are untrue and unfounded in fact, and that the allegations therein made of undue influence, fraud, and misrepresentation, and alleged to have been exercised by V. Milton Reichard and Edwin J. Farber, executors named in said will, are false and without any foundation in fact; and your petitioners, on the contrary, further show and allege, from their knowledge of the circumstances and surroundings of their deceased mother, and from their intimate knowledge and acquaintance with the said Reichard and Farber, that all of said allegations in said caveat, so far as they reflect upon the character and conduct of the said Reichard and Farber, are unjust, untrue, and unfounded in fact." They then protest—

ed against the caveat; asked to be made parties caveatees, and that the administration of the estate might be continued in the hands of the executors without further interference. They had previously entered into an agreement not to contest the validity of the will and codicil, and on September 27, 1901, all of the children of Mrs. Shipley, and the husbands of the married daughters, signed a paper stating that they had examined the first account of the executors, acknowledged it to be correct, and asked the court to affirm and ratify it. Under those circumstances, we held in the former appeal that the Izers should not be permitted to file a caveat to the will, unless they satisfactorily established that what they thus alleged in Exhibit B was the result of having been imposed on by the executors or some one interested in sustaining the will, and that what they now rely on was ascertained subsequently by them. We further held that it was necessary for them to make such explanation in their petition, and that, with leave of the orphans' court, it could be amended. They did amend it, and we are now to determine whether or not they have made such allegations as give them a standing in court, notwithstanding the papers signed by them prior to filing their caveat.

As we are of opinion that Exhibit B is the most important paper to be considered, we will examine the amended petition, to see whether it is sufficient in respect to that. In it they allege that when they signed Exhibit B they were ignorant of the true facts surrounding the execution of the will and codicil; signed it at the instance of Messrs. Farber and Reichard, who advised them that the allegations in the Davis caveat were untrue; that they then believed that said charges, so far as they reflected upon the character of either of the executors, were untrue, and in good faith and conscience signed that paper. They say "that, thus having taken their position with the caveatees in said Davis caveat, they were not in a position and did not have the means of ascertaining any of the facts which have since come to their knowledge." That admission itself causes us to pause to inquire upon what theory one sister can justify herself in going before a court and solemnly asserting that what another sister and brother had said is untrue and unfounded in fact, and then afterwards, in the same court, with reference to the same subject-matter, alleging that it was true, and attempting to explain her reason for such act by what we have quoted above. It was certainly more natural to go to the sister and brother, to ascertain what facts they relied on, than to accept the statements of those against whom such charges had been made; and, in the absence of some valid reason for not adopting that course, it must be assumed that she could have ascertained all the facts within the knowledge of Mrs. Davis if she

had used ordinary diligence to do so. But she not only did not do that, if we accept her statement in the amended petition, but, by the course she pursued, deliberately placed herself in a position in which she could not ascertain the facts within the knowledge of those caveaters. And she was not satisfied with that, but she not only alleged that what they said was false, but based that allegation on "their knowledge of the circumstances and surroundings of their deceased mother, and from intimate knowledge and acquaintance with the said Reichard and Farber." It is thus apparent that the petitioners have not justified any ignorance of facts that were in the possession of those caveaters.

But what are the substantial allegations by which the appellees seek to show newly discovered facts, after they signed Exhibit B? In the first place, they allege that, after the Davis caveat was dismissed, "V. Milton Reichard, one of the executors of said alleged will, stated that he knew that the will could be set aside on the ground of fraud, but that it was better that the caveat was dismissed, as long litigation would have resulted, and that he, as one of the executors, would protect the interest of Mrs. Shipley's children." Dr. Reichard positively denies in his answer that he ever made such a statement, and it is asking a good deal to expect a court to believe that he did; but, if it be conceded that that is a question of fact to be passed on, the petition does not even allege before whom he made the statement, and, for aught that appears, it may have been mere idle rumor; and, without some more specific allegations about it, it certainly is not sufficient to justify the petitioners in now asserting to be true what they have said was false, and thus subjecting this estate to the expenses of a trial. Then it is said that after Exhibit C was signed the orphans' court required Farber to produce vouchers for certain sums claimed by him; that when he filed them the "petitioners were aroused as to the importance of an investigation, and they immediately filed an exception to said account"; and "that the said Reichard then stated that he knew the account was not as it should be, and was glad that the petitioners had excepted to it." But although it must be admitted that some of the items included in what is called "Exhibit Vouchers" in the record are, to say the least, of a remarkable character, and such as should not be allowed, they amount to but a few dollars, and could not in any possible way reflect upon such issues as are sought to be raised by this petition, as they have no relevancy whatever to any of them. The items are for personal expenses of Mr. Farber, beginning nearly a year after the will was probated, and some of them of a character that ought not to be charged to the estate. Of course, the orphans' court should see that no expenses are allowed the executors, or either

of them, which are not authorized by law, but there is nothing in these that could in the most remote way properly reflect upon the execution of the will. It might be added that Dr. Reichard denies having made the statement attributed to him about the account, but, if he did, it only showed that he was desirous of seeing the estate properly administered.

The petition goes on to say "that your petitioners then learned, from letters written by Edwin J. Farber, prior to and about the time of the execution of the said alleged will, to Jacob A. Bricker, who had for some years been the confidential adviser of said decedent, and from other papers and persons, that the said Margaret Shipley had been induced to execute the said alleged will and codicil by the means hereinbefore alleged, to wit, by misrepresentation, circumvention, fraud, and undue influence," and alleges that Farber, having ascertained that Margaret Shipley had made a will, soon began to plan and contrive to have her execute another will, and, by divers methods and plans, succeeded on January 20, 1900, in having her make one in which he was named as attorney for the executors; that he subsequently represented that that will was not properly and legally executed, and sought the influence of Jacob A. Bricker to have another will made, which resulted in the one now in controversy being executed. After making various allegations as to what Farber represented, the petition states, "which representations will appear by reference to a copy of a letter from said Farber to said Bricker, filed herewith, marked 'Exhibit Letter,' as well as by other testimony which these petitioners will produce at the proper time." They allege "that they had no knowledge of the existence of the letters herein referred to during the pendency of the Davis caveat, nor could they have seen them if they had such knowledge, as said letters were in the possession of the attorneys for the caveators." What we have already said about their ignorance of facts within the knowledge of the caveators in the Davis caveat applies equally to this statement, but, as special reliance is based on this letter, we will see what there is in it. In passing, it may be remarked that, although the petition speaks of letters from Farber to Bricker, this is the only one filed. It is dated April 17, 1900, and states that the writer has just returned from Chicago, where most of the estate of Mrs. Shipley came from through her father, John McCaffery, who died there, leaving a large estate. The material suggestions made in it may be stated as follows: (a) That he was informed by the judge of the probate court in Chicago that a foreign executor will not be appointed by that court, but must be a resident, and he suggests that Mrs. Shipley's will be redrawn, naming Mr. Bricker, Samuel Adams, of Chicago, and himself, as joint executors; that, if Bricker and himself could

not, Adams could, serve, and Adams had written him a letter that in that event he would give him (Bricker) his share of the fees, and they could do the same for Adams in Maryland. He adds that "I hope you will have my suggestions most kindly made to Mrs. Shipley, and let me know if she will accede to this suggestion, which I assure you is a good one"; (b) that Adams suggested that no one who is interested in the will, or named in it as executor, trustee, or legatee, should be a witness to it, as that is against the law of Illinois; that "Dr. Reichard had better not be appointed one of the trustees, because we will want him as one of the witnesses to the will, especially as he will be able to testify, as one of Mrs. Shipley's physicians, as to her sanity"; (c) that Adams tells him that it will be very beneficial to Mrs. Shipley's interest not to compel the executors to give bond, as the expense, which may amount to a thousand dollars, would be borne by the estate. The will executed on April 25, 1900, did name Messrs. Bricker, Farber, and Adams as executors; but on July 6th she revoked that clause, and appointed Mr. Farber and Dr. Reichard executors, and, in case administration was necessary in Illinois, she appointed Samuel Adams for that state. She did name Dr. Reichard trustee for her son Wynkoop, and expressly required her executors to give bond. So it is evident she was not altogether under the influence of Bricker or Farber, and, if she had been under the influence of Bricker, it apparently ceased, as by her codicil she not only left him out, but directed her executors to contest any bill he might bring against her estate. There are some expressions in the letter which could be used with effect to the detriment of the writer before a jury, but, when taken as a whole, it certainly would not sustain a verdict in favor of the appellees on any of the issues sought to be made by the petition. It is not alleged in the petition that the statements made in the letter as reasons for a change of the will were not true, but it alleges that Mr. Bricker "for a long number of years had been the trusted confidential business agent and personal friend of the said Margaret Shipley, and the executor named in both her former wills." The letter was written to him, and he was requested to make the suggestions of the changes to Mrs. Shipley. If the object of the letter was in any way to take advantage of or impose on Mrs. Shipley, it is rather remarkable that it was sent to her trusted and confidential friend, who was the executor named in the wills already made. It does undoubtedly manifest a desire on the part of Mr. Farber to become one of the executors, but, instead of urging it in person, he wrote to Mr. Bricker, who was personally interested in the matter himself. So far as the letter showed, Farber did not propose to take the will he was to draw to Mrs. Shipley, but instructed Bricker how it should be execut-

ed; and it cannot be presumed that the codicil, which expressly confirmed the will in all other respects, was in any way influenced by that letter, as Bricker was by it omitted as an executor. But if we give to the letter all of the meaning claimed for it by the appellees, it was, as we have seen, in the possession of the attorneys for the caveators of the Davis caveat; and, if the Izers had sought such information as was incumbent on them before signing a paper such as Exhibit B, they could have ascertained the facts that were then relied on, and would doubtless have been permitted to see the letter, if they were in good faith seeking to ascertain the facts. But they apparently made no effort to find out what information their brother and sister relied on. Apparently, they did not even seek information from the attesting witnesses before filing their caveat, although in the original petition they attacked the execution of the will. They allege that Margaret Shipley was an uneducated person, unable to read intelligently, and scarcely able to write anything except her own name, and that she did not know or understand the contents of the will or codicil. If what they said in Exhibit B as to their knowledge of the circumstances and surroundings of their mother was true, they certainly knew her capacity to understand the will and codicil as well when they signed that paper as they do now. Although they presumably knew the contents of the will of January 20, 1900, as they say they will furnish a copy of it, they do not state them or file a copy, but content themselves with general allegations; and they admit that it and the one of April 25, 1900, are "substantially similar as to the devises and bequests to the children of Margaret Shipley," but "are substantially unlike as affecting the said Edwin J. Farber." So, without prolonging this opinion further, it will be seen from what we have intimated that, in our opinion, the appellees have not sufficiently explained their conduct with reference to Exhibit B to authorize the orphans' court to entertain this caveat. We do not deem it necessary to say more than we said in the former opinion about Exhibit A and Exhibit C. Parties who not only take a decided position on one side of a controversy in a court, but solemnly allege that statements made by the other side are false and unfounded in fact, and, in order to give more effect to their own statements, assert their opportunity to know whereof they speak, must not only show that they have since acquired further information, which had been withheld from them by the parties complained of, or through their instrumentality, but they must show that they had used at least reasonable diligence to acquaint themselves with the real facts before they voluntarily placed themselves in the attitude of branding as false and unfounded what they afterwards rely on for relief in reference to the same

subject-matter; and, if they do not, they cannot complain if they are denied further relief. If parties to proceedings in court are to be permitted to thus shift their positions as some whim or caprice may lead them to do, the end of litigation would be as uncertain as such unstable litigants can make them; and, although it is to be regretted if the doctrine we have announced does at any time prohibit investigation in a meritorious case, it is one which is well established by the authorities, and of great importance to the proper administration of the law,—especially in matters affecting wills.

The orphans' court should have dismissed the petition, and, for error in not doing so, the order of September 24, 1902, will be reversed. Order reversed and petition dismissed; the appellees to pay the costs.

BACK RIVER NECK TURNPIKE CO. OF BALTIMORE COUNTY v. HOM- BERG et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

TURNPIKE COMPANIES—CONDITION OF ROAD—
CHARTER PROVISIONS—MODE OF ENFORCE-
MENT—NOTICE—APPEAL—SPECIAL STATU-
TORY JURISDICTION.

1. Code Pub. Gen. Laws, art. 23, § 233, provides for the incorporation of turnpike companies, whose roads shall comply with certain specifications. Laws 1891, c. 607, amending Code Pub. Gen. Laws, art. 23, § 242, provides that, where a turnpike company fails to keep its roads in the condition required by the law under which it was incorporated, or of the width required by its charter, on due proceedings an order of court may issue forbidding it to charge tolls on such road. *Held*, that proceedings under the act of 1894 against a corporation organized under section 233, and whose charter provisions required a road in accordance with the specifications of such section, did not constitute in any way a taking of private property, but only a mode of enforcing charter obligations.

2. Laws 1894, c. 607, amending Code Pub. Gen. Laws, art. 23, § 242, provides that, where a turnpike company fails to keep its roads in the condition required by the law under which it was incorporated, or of the width required by its charter, the judge of certain specified courts may, on an ex parte showing by petitioners, order an inspection by a jury and a return of an inquisition in writing by them, which, if it sustain the petitioners, the judge may confirm, and order a cessation of toll charges. It is further provided that the company may appear at the inquisition, and before the confirmation may require a trial by jury in court or move to quash for matters of law. *Held*, that the statute contemplates notice to the corporation.

3. A service upon the company of a copy of the order of the court directing the proceedings was sufficient notice.

4. Laws 1894, c. 607, amending Code Pub. Gen. Laws, art. 23, § 242, gives "the circuit court for the county, and the superior court of Baltimore city, in which the part" of a turnpike road not in good repair may lie, jurisdiction of special proceedings looking to an enforced cessation of toll charges thereon. *Held*, that such jurisdiction is a special jurisdiction conferred by statute, and, the act being constitutional, and no appeal allowed by the act, none will lie from the judgment of such court to the court of appeals.

Appeal from circuit court, Baltimore county; N. Charles Burke, Judge.

Action by Daniel Homberg and others against the Back River Neck Turnpike Company of Baltimore County. From a judgment in favor of petitioners, defendant appeals. Appeal dismissed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, and SCHMUCKER, JJ.

Charles F. Stein, for appellant. John L. Yellott, for appellees.

BRISCOE, J. The appellant is a body corporate, duly incorporated under the Public General Laws of the state under the corporate name of the Back River Neck Turnpike Company of Baltimore County for the purpose of making and constructing a turnpike road in the Twelfth election district of Baltimore county, not to exceed in length 12 miles. On the 10th day of April, 1902, the appellees, residents of Baltimore county, filed a petition in the circuit court for Baltimore county, under section 242 of article 23 of the Code of Public General Laws, as amended by chapter 607 of the Acts of 1894, alleging, among other things, that the turnpike company had failed to keep and maintain its road stoned or otherwise made of hard material to a depth of 12 inches, or to a width of 15 feet, as required by its charter, but had negligently permitted the road to become full of holes and to become practically unfit for use and travel by the public, contrary to law. It was further alleged by the petition that travel on said turnpike, by reason of its condition, was rendered uncomfortable and dangerous, and that such conditions had been permitted to remain for a period of time exceeding 15 days before filing of the complaint, and the prayer of the petition was for relief under the laws of the state. The record shows that an inquisition was had, and on the 28th day of April, 1902, was returned to the circuit court of Baltimore county, as provided by the statute; and from an order of the court overruling a motion to quash, and confirming the inquisition of the jury, and directing that tolls shall not be charged until the turnpike road shall be put in good order and repair, and properly widened, this appeal has been taken.

The sole question in the case relates to the validity and constitutionality of the act of 1894 (chapter 607) amending section 242 of article 23 of the Code. The appellant contends that this act is unconstitutional and void, because it does not provide for any notice of the proceeding to the turnpike company, and it provides for taking private property without due process of law in contravention of the state and federal constitutions. This act was recently before the court in

the Turnpike Company v. Startzman, 86 Md. 365, 38 Atl. 777, a case involving proceedings under the act; and, while the points here made were not directly presented in that case, we said the proceedings adopted and pursued in that case could not be objected to on constitutional grounds. Now, it is quite difficult to see how and in what manner the proceedings authorized by the act of 1894 (chapter 607) can involve the question of taking private property without due process of law, as urged by the appellant in this case. The appellant company was incorporated under article 23 of the Code (section 233), which provides for the formation of corporations for making turnpike roads, and according to the express terms of its charter it was required to have at least 15 feet in width of the bed of its turnpike road covered with broken stone or gravel or other hard or durable materials to the depth of at least 12 inches, unless the natural bed be hard. The act of 1894 provides that it shall be the duty of the company which has been incorporated to keep and maintain its road in good order and repair, and of the proper width, as required by its charter; and its failure so to do disentitles it to charge tolls for the use of its road by the public. The act does not provide for the taking of private property in any way, but simply adopts a method or mode for compelling the corporation to comply with its charter obligations and the law under which it derives its powers. Appropriate regulation of the use of property is not taking property within the meaning of the constitutional prohibition. Railroad Co. v. Richmond, 96 U. S. 527, 24 L. Ed. 734; Baltimore Belt R. Co. v. Baltzell, 75 Md. 98, 23 Atl. 74.

Upon the question of notice we need only say that it appears from the record that notice in this case was given the company by service of a copy of the order of court upon the president of the company. The company appeared at the hearing before the sheriff and the jury of inquisition, and subsequently the hearing before the circuit court. The statute does not provide in terms for notice to the company, but it contemplates a notice by providing for a hearing before the inquisition and by the court, and this, we think, is amply sufficient under the statute. The notice in such cases is usually provided in the order of court directing the proceedings. The statute in this case having been declared valid and constitutional, the appeal will have to be dismissed. The act allows no appeal to this court, and, the court below being in the exercise of a special jurisdiction conferred by statute, its judgment was final and conclusive. Jackson v. Bennett, 80 Md. 77, 30 Atl. 612; Smith v. Goldsborough, 80 Md. 63, 30 Atl. 574.

Appeal dismissed, with costs.

CLARKE v. O'BRIEN**CHAPPELL v. SAME.**

(Court of Appeals of Maryland. Jan. 22, 1903.)

AUDITOR'S ACCOUNT—NOTICE OF FILING—SUFFICIENCY.

1. An auditor's statement of the account of a trustee was filed on the 4th of February, and on the same day an order nisi was passed thereon, giving 10 days within which to show cause against its ratification, and on the 13th an exception was filed to the effect that there was not sufficient notice of the filing of the auditor's account. *Held*, that the exception was untenable, the exceptant having been in court in time to be heard, according to the exigencies of the order.

Appeals from circuit court No. 2 of Baltimore city; Pere L. Wickes, Judge.

Suit by H. Lee Clarke and others against Thomas C. Chappell individually and as trustee, in which William J. O'Brien, Jr., by decree of court was substituted in place of said Chappell as trustee. From an order ratifying an auditor's account, Fannie Chappell Clarke and Thomas C. Chappell, as trustee, prosecute separate appeals. The former affirmed, and the latter dismissed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Wm. A. Little, for appellant Fannie Chappell Clarke. William J. O'Brien, Jr., Gans & Haman, and Vernon Cook, for appellee.

JONES, J. There are two appeals in this record, standing on the docket of the October term, 1902, of this court as Nos. 89 and 90. The appeals are from an order of the court below finally ratifying an auditor's account in a cause pending in the circuit court No. 2 of Baltimore city. This is the third time that proceedings in that cause have been brought to this court for review. The first of the cases brought here is reported under the title of "Chappell v. Clark," in 92 Md., at page 98, 48 Atl. 36. It there appears how the cause originated, and what proceedings had been had therein up to the time of the appeal to this court. Upon that appeal this court reversed the order of the court below, which was brought up for review for certain irregularities appearing in the proceedings, which are pointed out in the opinion filed. It was indicated how these irregularities could be cured, and the court said the orders were reversed on purely technical grounds, and that the court was not passing upon, and its action did not affect, "the merits of the controversy." The cause was remanded for further proceedings, and, these being had in the court below, seven appeals from orders passed in the course of these proceedings were taken by the parties who have brought the present appeals,—four of them by the appellant in No. 90, Thomas C. Chappell, trustee, and the remaining three by the appellant in No. 89, Fannie Chappell Clarke. These appeals were brought up in

one record, and were disposed of by this court in the case reported in 94 Md. 178, 50 Atl. 527, in which it will appear that one was dismissed and in all the others the orders of the court below were affirmed. The principal question raised and urged in this court in the last-mentioned appeals was as to the jurisdiction of the court below, and its power to pass the original decree under authority of which the proceedings had been had; and also as to its power to pass orders which were the subject of appeal, apart from its jurisdiction to pass the foundation decree. The decision of this court affirmed the jurisdiction of the court below in every instance. Upon the remand of the cause to the court below, further proceedings were had therein, and from orders passed in the course of these further proceedings the present appeals were taken.

From an examination of the record we find that in No. 90 precisely the same questions are presented in the present record as were presented and passed upon by this court in the former appeals, decided as reported in 94 Md., 50 Atl., *supra*, and that in No. 89 the questions are practically the same as those thus passed upon. The proceedings, as they have appeared in this court upon the several appeals, show that the appellant in No. 90 was removed as trustee by the court below from the execution of a trust devolved upon him by will, and that the appellee has been substituted as trustee in his stead. In the execution of the trust the appellee filed a report of his proceedings, and asked to have an account stated by the auditor in relation thereto. Upon the filing of the account of the auditor the appellants here respectively filed exceptions thereto, but the court finally ratified the account. In the first exception of the appellant in No. 89 to the account there is alleged want of sufficient notice of the filing thereof. The account was filed on the 4th of February, 1902. On the same day an order nisi was passed thereon giving 10 days within which to show cause against its ratification. On the 12th of February the exceptions of both the appellants here were filed. They were thus in court in time to be heard by the court according to the exigency of its order, and had full opportunity to be so heard. This exception needs no further comment. All of the other exceptions of both appellants are designed to present questions already fully determined and settled by the former cases in this court already referred to, and none of them introduce new matter, except the seventh and ninth exceptions of Fannie Chappell Clarke, appellant in No. 89. Of these last-mentioned exceptions the seventh, beyond repeating an exception to the jurisdiction of the court, alleges matters totally irrelevant to any question involved in the ratification of the auditor's account. And the ninth alleges matters totally unsupported by anything appearing in the record as to the facts upon which

it is grounded. The order of the court below will be affirmed in No. 89 of these appeals, with costs. And, it appearing that the appellant has been removed as trustee, and having, therefore, no right to further interfere in that capacity with the trust being administered in the court below, the appeal in No. 90 will be dismissed upon the motion filed by the appellee.

In No. 89, order affirmed, with costs, and in No. 90 appeal dismissed, with costs.

GARDNER v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. Jan. 15, 1903.)

EMINENT DOMAIN—AWARD—DEPOSIT IN COURT—JURISDICTION—EQUITY—BILL—PARTIES—APPEAL—EVIDENCE.

1. Under Acts 1892, c. 165, now New Charter of Baltimore, § 827, providing that when property shall have been condemned for the city, and in consequence of conflicting claims, refusal to accept, or any other cause, the money cannot be safely paid to any person, the mayor and city council may file a bill in equity, and the court may decree that the money be paid into court, the court has jurisdiction of a bill showing that defendant claimed that a tract owned by him and condemned extended into a street, and included a portion of such street which the city claimed, and that he refused to accept the sum awarded for so much of such tract as was not in the street.

2. A bill in equity filed with the single object of condemning lands for a street is not multifarious because all persons interested in any of the lands to be condemned are made parties.

3. Where property claimed adversely by different persons is condemned by a city for a street, the title to the property passes to the city; and an action to determine which of such claimants is entitled to the award therefore is not an action to determine title to land, and may be prosecuted in equity.

4. A decree overruling a demurrer to a bill by the mayor and city council of Baltimore for leave to deposit money in court in condemnation proceedings is not reviewable on an appeal from a decree entered after answer and hearing, under Code, art. 5, § 26, providing that, on an appeal from a final decree, all previous orders shall be open to revision, but can be reviewed only on a direct appeal from such decree, under section 24, allowing an appeal from any final decree.

5. Evidence in an action to determine conflicting claims to money awarded for condemnation of a tract of land for a street examined, and held to justify a finding that a certain portion of the tract had previously been dedicated as a street, and that defendant had no right thereto.

Appeal from the circuit court of Baltimore city; Pere L. Wickes, Judge.

Bill by the mayor and city council of Baltimore against John C. R. Gardner and others for leave to pay into court money awarded for property condemned for the use of the city. From a decree granting the petition, the defendant Gardner appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

James Hewes, for appellant. Wm. Pinkney Whyte, Olin Bryan, and Jas. W. McElroy, for appellee.

PEARCE, J. This is an appeal by John C. R. Gardner from a decree of the circuit court No. 2 of Baltimore city, passed May 21, 1902, in the case of the mayor and city council of Baltimore against John C. R. Gardner and others. The bill was filed under the act of 1892, c. 165, now section 827 of the new charter of Baltimore city, which is as follows: "Whenever any property shall have been condemned in any form of proceeding for the use of the mayor and city council of Baltimore, and in consequence of infancy, insanity, absence from the city of any persons entitled to receive any money awarded in such proceeding, conflicting claims, refusal to accept, or any other cause, such money cannot be reasonably or safely paid to any person or persons, it shall be lawful for the mayor and city council of Baltimore to file a bill or petition in any court of equity in the city or county where the property is condemned, or any portion thereof lies, and whenever such court shall be satisfied for any of the persons aforesaid that such money ought to be paid into such court, it shall pass such decree as it shall deem proper, and the payment of any money into court under such a decree or order shall be considered in all respects equivalent to a tender thereof to any person or persons entitled to such money, and who may be made a proper party to such proceeding." The original bill filed set forth that under Ordinance No. 44, approved April 4, 1892, land was condemned to open Ensor street from Eager street to the south side of Chase street, and that damages and benefits were awarded thereunder to the various owners or alleged owners of the land condemned, and that, among these, damages were awarded to John C. R. Gardner and Sarah R. Gardner, his wife, as joint tenants, or to such persons as may be legally entitled thereto, for the fee-simple interest in lot designated on the plat accompanying this opinion by the letter "J," in the sum of \$2,801.33, less benefits assessed on lot 44 on plat B, returned by the commissioners, in the sum of \$223 (the net damages in their case being \$2,578.33 for the fee-simple interest in the lots aforesaid), but that in fact the said Gardner and wife were not entitled to any allowance for that part of lot J which comprised the bed of Little Ensor street, as shown on the plat accompanying this opinion, because the same was, before said condemnation, a dedicated highway, and that said Gardner and wife had, by petition in the Baltimore city court, asked for a writ of mandamus to compel the then

12 See Eminent Domain, vol. 12, Cent. Dig. § 478.

city official known as the "Examiner of Titles" to issue a certificate for the net amount of said damages, which the said Baltimore city court refused to order. The bill further alleged that said portion of lot J previously dedicated as aforesaid was valued by the commissioners for opening streets at \$1,193.33, and that the true and just amount due said Gardner and wife under said condemnation was \$1,385, arrived at as follows:

Total award	\$2,801 33
Deduct benefits	\$ 233 00
Deduct value of bed of Little Ensor street dedicated.....	1,193 33
Net	\$1,385 00

—And then tendered said Gardner and wife said sum of \$1,385, which they refused. And the bill further alleged that they could not reasonably or safely pay said award to said Gardner and wife. The prayer of the bill was that the net sum alleged to be due Gardner and wife and the other parties to the bill, all of which have since been adjusted, be paid into court to the credit of the cause, and that the defendants answer the bill and adjust their respective demands.

A few days later an amended bill was filed, under leave of court, asking that the whole amount awarded to Gardner and wife, less benefits, viz., \$2,578.33, be allowed to be deposited in court. Gardner and wife demurred to the original and amended bill: (1) Because they alleged the bill did not state a case within the operation of section 827 of the new charter; (2) because the bill was multifarious, in making the other landowners mentioned parties to the cause; and (3) because the bill did not state any case entitling the plaintiff to relief in equity. This demurrer was, after argument, overruled by Judge Wickes on December 8, 1900, and correctly, as we think, for reasons which will hereafter appear.

Gardner and wife then answered the original and amended bill, admitting the condemnation proceedings set forth in the bill, but denying that there had ever been any dedication of that part of lot J comprising the bed of Little Ensor street, or that the commissioners for opening streets had ever valued that part of said lot so dedicated at \$1,193, or at any other sum, and averring that at the time of said condemnation they had a fee-simple title to the whole of lot J, and filed as an exhibit a deed to them from Olivia Wolfe, dated February 23, 1889, embracing the whole of lot J within its lines. The answer also alleged that plaintiff was estopped from disputing the title to lot J, and to the whole of the award, by article 48 of the City Code of 1893, and that the decree prayed would operate as a taking of their property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. The bill and answer were considered without testimony, and on December 8, 1900, the court

(Judge Wickes being of opinion that the sums of money mentioned in the original and amended bill should, under section 827 of the new charter, be paid into court as prayed) passed a decree that said sums be paid into court, subject to its order, "in full settlement and satisfaction of all claims and demands of all parties against the said mayor and city council growing out of the condemnation of said lots. * * * But it appearing that there is a contention between the mayor and city council and the said Gardner and wife as to the actual ownership of a portion of the fee-simple estate in lot J, * * * It is adjudged, ordered, and decreed that the said net amount of \$2,578.33 awarded for the fee-simple interest in lot J shall await and abide the final adjudication of the said contention over lot J." This decree further appointed James W. McElroy trustee, to grant and convey to the mayor and city council all the lots condemned as aforesaid, and such conveyance was accordingly made. No appeal has ever been taken from this decree, which was passed December 8, 1900, and is consequently, by lapse of time, final and conclusive as to every matter therein determined, provided the decree was within the jurisdiction of the court. *Barrick v. Horner*, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 233.

We do not doubt that the court had full jurisdiction to pass this decree. The allegations in a bill determine the question of jurisdiction, and the true test in all cases is whether a demurrer will lie to the bill. *Tomlinson v. McKaig*, 5 Gill, 276. The allegations of this bill state a case clearly within the scope of section 827 of the new charter, and there can be no doubt of the power of the legislature to make that enactment. The bill is not multifarious, since its object is the single one of making the condemnation under the ordinance for opening Ensor street effective, and all of the parties to the cause are interested in that condemnation. The third ground stated in the demurrer we understood from defendant's argument to mean that the cause is one involving title to land, which, it is well settled, cannot be tried and determined in equity. But we think it is plain there is no question of title to land in this case.

Under Ordinance No. 44, approved April 4, 1892, the mayor and city council condemned and opened Ensor street from Eager street to the south side of Chase street, as shown on the plat in this case, and awarded to Gardner and wife, as already stated, net damages of \$2,578.33, upon the supposition that they owned the whole of lot J. When this award was made, the city had no right of appeal. *Baltimore City Code 1893*, art. 50, § 60. But no money could be paid on account of any condemnation without a certificate from the examiner of titles that the person or persons claiming the payment of any money therefrom are the owners of the

property for which such money was awarded, and, when these proceedings were submitted to the examiner of titles, he refused to give such certificate to the Gardners, because, as he stated in his testimony, he discovered that they did not own that part of lot J which constituted the bed of Little Ensor street. Thereupon the street commissioners valued and assessed that part of lot J (which, it will hereafter appear, had been previously condemned for the use of the city) at \$1,193, and tendered the Gardners the residue of the award made to them, viz., \$1,385, which they refused to receive, and some time in 1898 filed a petition for a mandamus compelling Mr. Story, the examiner of titles, to certify that they were the owners of the whole of lot J, and were entitled to the whole of the award therefor, and also compelling Mr. Fenhagen, the city comptroller, to pay that amount, but this was refused by Judge Phelps; and thus the matter stood until this proceeding was instituted.

Condemnation proceedings are proceedings in rem, and bind all persons interested in the rem, even though not technically parties to the proceeding. All questions of title to the rem are transferred to the money awarded, after a valid and final condemnation. Here the city could not, under then existing law, appeal, and the Gardners did not within the time allowed them for that purpose. This case is therefore one of valid condemnation, and the question is no longer one of title to land, but of title to money substituted for land. As stated by this court in *Norris v. Mayor and City Council of Baltimore*, 44 Md. 604, where the question was whether an assessment for damages carried interest from its date, the condemnation proceeding might be abandoned at any time before actual payment of the amount assessed, "and until that time no title to the property condemned vests in the corporation. * * * But when this sum is paid or tendered, the title vests." We are of opinion, therefore, the court had jurisdiction, and that the demurrer was properly overruled. It was to just such a situation that section 827 of the new charter applied, and the decree of December 8th, passed on the overruling of the demurrer, is in full conformity with the provisions of that section. Nor is that decree open to revision on this appeal. In *Hopper v. Smyser*, 90 Md. 378, 45 Atl. 206, we held that a decree which exonerated certain lots of land from sale under a certain mortgage until the exhaustion of other mortgaged properties was in the nature of a final decree, and not open for revision under section 26 of article 5 of the Code, but only upon appeal directly therefrom under section 24 of article 5.

Coming next to the consideration of the decree of May 21, 1902, passed by Judge Wickes, awarding to Gardner and wife \$1,385 (being the sum tendered them by the mayor and city council), and awarding the residue of the whole award (\$1,193) to the

mayor and city council, a brief review of the testimony will suffice to show the correctness of that decree. Under an ordinance approved October 8, 1857, the city commissioner was authorized and directed to condemn and open Ensor street from Chase street to Harford avenue, as shown on the plat by the letters A, B, C, D, E, F. The evidence shows that this was done at the earnest solicitation of Marcus Wolfe, who was then the owner of lot J, and also of the adjoining lot, marked "184" on the plat. His son Alonzo Wolfe and his daughter Olivia Wolfe both testified to this fact. Olivia says her father paved that part of lot J which constituted the bed of Little Ensor street, and gave it to the city, in order to improve his property; and Alonzo says a deed was prepared for this bed of the street to the mayor and city council, and he is sure his father executed it. They both say the street, after being paved, was always used as a street by the public, and that the city authorities put up a sign at the corner of Harford avenue and that street, bearing on it the words "Ensor Street." Marcus Wolfe died in 1875, and by his will, made July 29, 1875, devised to his daughter Olivia "my homestead, No. 184, on the northwest side of Harford avenue," without otherwise describing it. Wm. P. Price and wife, by deed of July 27, 1849, conveyed to Marcus Wolfe a lot on the northwest side of Harford avenue, the metes and bounds of which embraced lot 184, and also lot J, as shown on the plat, and nothing more. In 1857, as already stated, lot J was condemned, and was conveyed or given by Marcus Wolfe to the city, and from that time, up to the condemnation of 1892, and the institution of these proceedings, has constituted part of the bed of Little Ensor street; and neither Marcus Wolfe, in his lifetime, nor Olivia Wolfe, since his death, ever claimed any ownership or interest therein. On February 23, 1899, Olivia Wolfe sold and conveyed to John C. R. Gardner and Sarah A. Gardner, his wife, a lot on the northwest side of Harford avenue, by metes and bounds, designating it as the same devised by Marcus Wolfe "to my daughter Olivia, * * * No. 184, my homestead"; but this conveyance followed the metes and bounds contained in the deed from Price and wife to Marcus Wolfe, and thus embraced that part of lot J which had been condemned in 1857, and had since constituted a part of the bed of Little Ensor street. Olivia Wolfe testified that the house on lot 184 fronted on Little Ensor street, and that, after the condemnation and opening of that street, the homestead did not include any part of the bed of that street. Gardner testified that, when he purchased the dwelling and lot from Olivia Wolfe, she gave him the Price deed "to go by," and that he had the property surveyed, and would not have purchased it "without getting the old deed," and that Olivia Wolfe told him if the street was ever

opened he would be paid for the street. Olivia Wolfe testified in rebuttal that the street was never mentioned by her to Gardner, and that she knew the homestead devised to her by her father did not include any part of lot J, and that when she executed the deed to the Gardners she did not know it included any part of lot J, and that she would not have attempted to sell what she knew she did not own, and, further, that she never knew until this controversy arose that he claimed to have purchased any portion of the bed of the street. Gardner testified on cross-examination that his father-in-law advised him to have Price's lines put in his deed, but it nowhere appears that Gardner informed her this had been done when the deed was presented for execution by her, and the fact that his father-in-law's advice led to the insertion of the Price lines is strong presumptive evidence that Gardner would otherwise not have inserted these lines, and that he understood lot No. 184 did not, in fact, embrace any part of lot J.

We find no error in the decree disposing of the fund before the court. Decree affirmed, with costs in this court to the appellee, but each party is to pay its respective costs below, as provided by the decree of the circuit court No. 2 of Baltimore city.

BLACK v. FIRST NAT. BANK OF WESTMINSTER.

(Court of Appeals of Maryland. Jan. 22, 1903.)

NOTES — CONSIDERATION — CONTEMPORANEOUS PAROL AGREEMENT — VIOLATION BY PAYEE — SUBSEQUENT HOLDERS — KNOWLEDGE OF INFIRMITIES — CORPORATIONS — OFFICERS — NEGOTIATION OF INSTRUMENTS — AUTHORITY — ACTION ON NOTE — EVIDENCE — ADMISSIBILITY — CROSS-EXAMINATION — SCOPE.

1. Code, art. 13, § 75, relative to negotiable instruments, provides that in order to constitute notice of an infirmity in an instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had knowledge of the defect. *Held* that, in an action on a note by an indorsee thereon, a plea interposed by the maker that the notes were procured by the fraud of the payee, and delivered to the plaintiff in breach of faith, was insufficient, for failing to charge that plaintiff took the notes with knowledge of the fraud or breach of faith.

2. Recovery by an indorsee of a note, as against the maker, could not be defeated by showing an agreement between the original parties that the same was not to be negotiated, whether the agreement was written or oral.

3. One to whom notes are delivered by the payee as collateral is presumed to be a holder for value.

4. Under the express provisions of Code, art. 13, § 77, relative to negotiable instruments, a holder under a holder in due course has all the latter's rights.

5. Under the express provisions of Code, art. 13, § 48, the maker of an accommodation note is liable to a bona fide holder, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party.

6. Breach of an agreement which forms the consideration of a note is no defense against an indorsee who took the note for value before maturity, though he had knowledge of the contract, unless he was also informed of the breach.

7. Notes indorsed by the secretary and treasurer of a corporation were properly received in evidence as indorsed by the corporation, where it was shown that the corporation was accustomed to receive notes, checks, and drafts which were habitually indorsed by the secretary and treasurer under the same circumstances and in the manner that the notes in question were indorsed.

8. Where a demurrer to a plea has been properly sustained, the exclusion of facts alleged therein, when offered in evidence, is not prejudicial to defendant.

9. Notice to a director of a banking corporation privately, or acquired by him generally through channels open to all persons, and which he does not communicate to his associates in the management of the corporation, is not binding on the same.

10. Where, in an action on notes, it appeared that they had been pledged by the payee, and indorsed to plaintiff by the pledgee, and defendant, on direct examination of plaintiff's cashier, had inquired into the circumstances under which plaintiff took the notes sued on, it was proper, on cross-examination, to permit plaintiff to show witness the note for which the notes sued on were pledged as security, and to admit the same in evidence.

11. On an issue whether a certain note had been discounted by a bank, it was error to admit a letter which accompanied the note when it was sent to the bank, and which tended to show that it had been discounted; the effect of such letter being to admit the unsworn statement of a third party.

12. Such error was harmless; the party claiming that the note was not discounted not having objected to the subsequent admission of another letter in answer to the former, which tended to show that the note had been discounted.

13. In an action on notes which had been pledged to secure certain other notes, and indorsed by the pledgee to plaintiff, it was proper to admit in rebuttal evidence as to what had been paid on the principal note.

14. The issue being whether the note sued on by plaintiff bank had been sold to plaintiff, by another bank, or merely discounted, the passbooks of the maker with the first bank were properly admitted in evidence.

15. It was error to allow an employé of the first bank, who had not made any entries in the passbook, to state that he understood that the entries therein showed a discount; the inference to be drawn from the entries being for the jury.

16. The error was harmless, the entries themselves tending to show the discount.

17. In an action by a banking corporation on a note, against the maker, it is no defense that the bank has no authority to purchase the note.

Appeal from circuit court, Carroll county; I. Thomas Jones, Judge.

Action by the First National Bank of Westminster against Levi Black. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

¶ 9. See Banks and Banking, vol. 6, Cent. Dig. §§ 285, 286.

Charles E. Fink, Roberts & Crouse, and Guy W. Steele, for appellant. John Milton Relfsmdler and W. Burns Trundle, for appellee.

PEARCE, J. This suit was brought by the First National Bank of Westminster to recover from Levi Black the amount due upon two negotiable promissory notes, for \$100 each, made by him, and payable to the order of the United Milk Producers' Association (now an insolvent corporation) in 6 and 12 months, respectively, from date. The declaration, which contains the common counts, and a special count upon each of said notes, alleges that they were indorsed to the plaintiff by the payee before its insolvency. The defendant pleaded "Never indebted as alleged," and "Never promised as alleged," and subsequently filed 10 additional pleas. The third denied that the plaintiff was a corporation as alleged, and this, on motion, was stricken out by the court, because the defendant, having failed in his previous pleading to deny plaintiff's incorporation, had thereby admitted it. There was no exception to this ruling, and none could have been sustained. The fourth and fifth pleas denied that the notes were indorsed as alleged. The sixth and seventh pleas denied that J. B. Councilman, the secretary and treasurer of the United Milk Producers' Association (which will hereafter, for brevity, be called the "Association"), and by whom the alleged indorsement was made, was the agent of the association to indorse said notes to the plaintiff, or that he had power and authority so to do. The eighth plea alleged that the notes were procured and negotiated by the fraud of said association. The ninth plea alleged that the notes were given to the association, and were deposited by it with the Old Town Bank of Baltimore, and by that bank were delivered to the plaintiff in breach of faith. The tenth plea alleged an agreement between the defendant and said association that these notes were to be deposited by it with the Old Town Bank of Baltimore as collateral security for advances to be made by it to said association, and that the Old Town Bank was to hold, and not to negotiate, the same, and that the plaintiff, well knowing these facts, received said notes from said bank. The eleventh plea alleged that said notes were executed and delivered for the accommodation of said association, under the agreement set forth in the tenth plea, and that the plaintiff took said notes, well knowing all these facts. The twelfth plea alleged that the defendant had subscribed to 400 shares of the capital stock of said association, upon condition that said association would take his milk and pay him for it, and, out of the amount thus due him at the end of each month, would deduct 5 per cent. of his said subscription, to be credited thereon, and that subsequently said association requested him to give to it three notes, cov-

ering the amount then unpaid on said subscription, to be deposited with the Old Town Bank under the agreement stated in the tenth plea, and that he gave said notes, two of which are the same here sued on; that for four months this agreement was carried out, and then said association, without any fault on defendant's part, refused to receive his milk and pay him for it, or to credit anything upon his said subscription; and that the plaintiff took said notes well knowing all the terms and conditions of said agreement. The plaintiff joined issue on the 1st and 2d pleas, traversed the 4th, 5th, 6th, and 7th, and demurred to the 8th, 9th, 10th, 11th, and 12th pleas. This demurrer was sustained, whereupon issue was joined on all the pleas, and the case went to the jury, resulting in a verdict for the plaintiff for the amount due on the two notes. During the trial nine exceptions were taken to rulings on the evidence, and one to the ruling on the prayers.

The first question is presented by the ruling on the demurrer. As to the eighth and ninth pleas, there is no averment in either that the plaintiff took the notes with knowledge of the fraud charged in one, or of the breach of faith charged in the other, and there was therefore no error in the ruling as to these pleas. *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478, Code, art. 18, § 75. The tenth plea does not aver that the agreement set out therein was in writing. In *McSherry v. Brooks*, 46 Md. 118, prayers were rejected which sought to defeat recovery by an indorsee upon promissory notes because of an alleged parol promise by the payee to keep the notes in his possession and not pass them away; the court saying, "This would seem to be contrary to all principle and authority," and that it was not competent "to destroy their legal import and operation by the introduction of parol evidence that the notes were not to be negotiated, notwithstanding the negotiable terms employed on their face." But it is not necessary, as was contended by the appellee, to allege in the declaration that the promise is in writing. If it appear in proof at the trial to be in writing, it is sufficient for its admission. *Ecker v. Bohn*, 45 Md. 285; *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133. But if in writing, that could not avail in this case, since this plea expressly alleges the execution and delivery of the notes by the defendant to the association, and section 43 of article 13 of the Code provides that every negotiable instrument is deemed, prima facie, to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party for value; and section 45 provides that, where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time. But apart from these considerations, the plea states a case

which does not disentitle the plaintiff to recover, since it alleges that the notes were delivered by the association to the Old Town Bank "as collateral security for advances to be made by it to the association"; and in *Maitland v. The Citizens' Bank*, 40 Md. 562, 17 Am. Rep. 620, it is said that "every person is within the rule, and entitled to the protection of a bona fide holder for value, who has received the note in payment of a precedent debt, or has taken it as collateral security for a precedent debt, or for future as well as past advances." The Old Town Bank, therefore, as well as the plaintiff, is presumed to be a holder for value; and in *Cover v. Myers*, 75 Md. 419, 23 Atl. 850, 32 Am. St. Rep. 394, the court said: "Where a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it. But if any subsequent holder takes the instrument, in good faith and for value, before maturity, he is entitled to recover on it, and so any person taking title under him may recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is that it be proved that he, or some preceding holder or indorsee, under whom he claims, acquired title to the paper before maturity, bona fide, and for value." And this view of the law has since been formulated in section 77 of article 13. We find no error, therefore, in the ruling as to this plea. The only difference between the tenth and eleventh pleas is that the latter alleges these notes were given to the association for its accommodation, and that this fact was known to the plaintiff. But this does not alter the case, nor destroy the negotiability, in fact, of paper which was made negotiable in form for the accommodation of the party receiving it, for, as was said in *Maitland v. Citizens' Bank*, supra: "The result of all the well-considered cases upon the subject is that it is no defense that the note sued on was known to be an accommodation note between the maker and the payee, provided the plaintiff took the note for value, bona fide, before it was due. The reason is, as stated by Mr. Justice Story, that the very object of any accommodation note is to enable the party accommodated, by sale or negotiation, to obtain a free credit and circulation of the note; and this object would be wholly frustrated unless the purchaser, or other holder for value, could hold such a note by as firm and valid a title as if it were founded in a real business transaction." And section 48 of article 13 of the Code declares that: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a party is liable on the instrument to a holder for

value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party." It is obvious from the above language of the Code, and from that of *Maitland's Case*, that an accommodation note, taken for value and before maturity, is taken bona fide; and what we have said respecting the tenth plea is equally applicable to the eleventh plea. The twelfth plea is based upon the alleged executory agreement between the defendant and the association, which is sufficiently stated in the earlier part of this opinion. The plea avers knowledge by the plaintiff of the terms of this agreement when the notes were taken, but contains no averment of breach and notice of breach before the plaintiff took the notes, and parted with its money on their faith and credit. Upon principle, it would seem that this must constitute a fatal defect in the plea, and the authorities sustain this view. The rule is stated thus in *U. S. Nat. Bank v. Floss* (Or.) 62 Pac. 751, 84 Am. St. Rep. 752: "The breach of an executory agreement which forms the consideration of a negotiable note is not a defense, in whole or in part, against an indorsee who took the note for value, before maturity, even if he had notice of the contract, unless he was also informed of the breach before its purchase." In *Davis v. McCready*, 17 N. Y. 233, 72 Am. Dec. 461, the reasons upon which this rule rests are well stated in an opinion by Judge Denio. In that case the consideration for the acceptance of a bill of exchange was the sale of a brig, accompanied by an executory agreement of the vendor to make such repairs as would render her seaworthy. The defense was that this agreement had not been performed, but the court said: "The plaintiffs were not bound to follow up the transactions between the original parties to the bill. To hold otherwise would attach an inconvenient and repugnant condition to such an acceptance. By accepting, simply and unconditionally, a negotiable bill, the defendants are to be held as intending to give it all the qualities of commercial paper, one of which is that it shall circulate freely for the purposes of business, and be available in the hands of any holder for value. To decide that one who proposed to purchase it, and who had a knowledge of the transaction upon which it was given, must await the consummation of that transaction, would essentially impair its character and legal effect." So in *Arthurs v. Hart*, 17 How. 6, 15 L. Ed. 30, the supreme court of the United States said: "It is true, the plaintiffs knew at the time they took the paper that it was given as part of the price of a sugar mill, and that the mill had been defectively constructed; but they also knew that the defendant, upon the promise of the builders to make the necessary repairs, had agreed to accept the bill unconditionally, and had accepted it accordingly. They knew, therefore, that he looked to this undertaking

for indemnity, and not to any conditional liability upon the acceptance; and the transaction which is brought home to the plaintiff lays no foundation, in law or equity, to impeach the paper in their hands." We are of opinion, therefore, that the demurrer was correctly overruled, as to all the pleas to which it was addressed.

The demurrer having been overruled, the plaintiff put in evidence the certificate of the incorporation of the association, and of the amendment thereto, showing that it was a trading corporation, with large and varied powers, incorporated December 5, 1899, with a capital stock of only \$1,000, but that by amendment certified February 27, 1900, the capital stock was increased to \$250,000. The plaintiff also proved payment of the proper bonus tax upon the original and amended certificates of incorporation, and then proved by Miles W. Ross that he was a clerk in the employment of the association, at its principal office, in Baltimore city, from February 7, 1900, to September 4, 1900, when it went into the hands of receivers; that during the period of his employment the association received notes, checks, and drafts, all of which were indorsed by J. B. Councilman, treasurer; that he knew Mr. Councilman's signature; and that the name of the association was always indorsed with a rubber stamp. The two notes sued on were then shown him, indorsed, "The United Milk Producers' Association of Baltimore City, Jas. B. Councilman, Secy. and Treas.," by a rubber stamp, and "J. B. Councilman, Treas.," and he testified that he recognized this signature as Mr. Councilman's, and that the name of the association was indorsed in the usual way, with a rubber stamp. These two notes were then offered in evidence by plaintiff, and were admitted over defendant's objection, and to this ruling the first exception was taken. The defendant contends that a corporation can only make such contracts as are authorized by its board of directors, and that such contract is then made through an agent, whose authority can only be shown by a vote of the board. But this is too general and broad a statement of the law on the subject. It is true that, in the absence of express authority conferred by charter or by-law, there is no power inherent in the office of secretary or treasurer that would enable him to make or indorse promissory notes in the name of the corporation; but, on the other hand, to hold that, for every transaction of this character, it is necessary to show a vote of the board, no matter what may be the custom of the corporation in this regard, would be to take an untenable position. Thus, in vol. 1 (2d Ed.) Amer. & Eng. Enc. of Law, p. 1032, it is said: "The power of an agent to draw and indorse negotiable instruments must, as a general rule, be expressly conferred, yet in some cases it is necessarily implied from the duties to be

performed. * * * Where the execution or indorsement of negotiable paper is necessary or customary in the transaction of the business, authority in the agent may be implied." "Parol evidence is admissible to show the authority of an indorser's agent to indorse." *Miller v. Moore*, 1 Cranch, C. C. 471, Fed. Cas. No. 9,584. "A corporation may confer authority by parol upon an officer to issue or indorse negotiable paper." *Odd Fellows v. Sturgis Bank*, 42 Mich. 461, 4 N. W. 158. "The implication of power arises where the act falls under the customs and usages of business within the officer's sphere of duty." 1 Daniel on Neg. Inst. sec. 396; *Farmers' & Mechanics' Bank of Kent Co. v. Butchers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678. Special reliance is placed by defendant on the case of *The City Electric Street R. W. Co. v. First Nat. Exchange Bank (Ark.)* 34 S. W. 89, 31 L. R. A. 536, 54 Am. St. Rep. 282, where it is said: "Unless the authority is expressly conferred by the charter, or given by the board of directors, it may be stated as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. * * * Where the authority of the president and secretary is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as matter of law." And in *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169, Justice Miller said: "The person dealing with the agent, knowing that he acts only by a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was issued or indorsed." Accepting fully both those authorities, we think they in no way affect the present case. In *Credit Co. Limited, v. The Howe Machine Co.*, 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123, the strong court of that state held that drafts accepted by the treasurer of a corporation are presumed to be properly accepted by the corporation, there being no circumstances to indicate fraud or illegality; and, in an action by the holder against the corporation as acceptor, the burden of proof is upon the defendant corporation to show that the plaintiff had knowledge that the acceptances were for accommodation, and that he was not a bona fide holder for value. In the course of the opinion in that case, Judge Carpenter said: "A preliminary question of some importance is, on whom was the burden of proof? In the pleadings the defendant assumes that burden, and properly so, upon principle. The drafts apparently may be for a legitimate purpose. As there is some presumption that all parties act properly and within the scope of their powers, the plaintiff

establishes a prima facie case when it presents the drafts, duly drawn and accepted; there being no circumstances indicating fraud or illegality. And so are the authorities. Edwards on Bills, 686, 689; Daniel on Neg. Inst. 626, 662; 1 Parsons on Notes & Bills, 255. * * * The course of dealing by the defendant shows clearly the treasurer had power to accept drafts, but it is claimed that, under the circumstances, he had no power to accept these particular drafts. Obviously the authority or want of authority in the treasurer to accept these drafts depended, not upon the nature of the act, but upon the attending facts and circumstances. That he had power to accept drafts under some circumstances is not denied. Hence, if they were drawn on account of the defendant's business, or to draw out of the treasury money which belonged to the drawer of the draft, the power of the treasurer to accept them must be conceded." And to the same effect is *Nat. Bank of Battle Creek v. Mallan*, 37 Minn. 404, 34 N. W. 901, and *Beach on Corp. sec. 189*. There is much in the reasoning of the Connecticut case above cited which strongly commends itself to us, but it is not necessary for us to determine here upon whom the burden of proof lies in such respect, since here the plaintiff assumed that burden, and offered evidence showing the course of dealing by the defendant, and that it was accustomed to receive notes, checks, and drafts which were habitually indorsed by the secretary and treasurer under the same circumstances and in the same manner that these notes were indorsed. Both upon principle and authority, we think these notes were properly admitted in evidence.

The plaintiff then, by Miles W. Ross, proved that the signatures to a note for \$5,000 then shown him were the signatures of W. B. Crother, president, and J. B. Councilman, treasurer, known to him, and that the note was indorsed by J. B. Councilman, treasurer. He was also shown certain passbooks, which he identified as the passbooks of the association with the Old Town Bank, and the plaintiff then closed its case. The defendant then offered to prove by himself the alleged agreement set forth in the twelfth plea, and to follow it up with proof that Granville Haines, who was the president of the plaintiff at the time these notes were taken, had notice of the terms and conditions of said agreement. The plaintiff objected, and the second exception was taken to the rejection of this offer. If the demurrer to the twelfth plea was correctly sustained, it would follow that the exclusion of the facts therein alleged, when offered in evidence, could work no injury to the defendant. Moreover, this offer of proof was made as a whole, and it could be of no avail to prove the alleged agreement, without proof, also, of such knowledge by Mr. Haines as would bind the plaintiff; and it is seen that

the offer of proof does not propose to show that the facts were communicated to Mr. Haines officially, to be brought by him to the knowledge of the board; and it is settled in this state, however the law may be elsewhere, that the sound and safe rule on this subject is that notice given to a director of an incorporated institution privately, or which he acquires from rumor, or through channels open alike to all, and which he does not communicate to his associates at the board, will not bind the institution. *U. S. Ins. Co. v. Shriner*, 3 Md. Ch. 388; *Genl. Ins. Co. v. U. S. Ins. Co.*, 10 Md. 523, 69 Am. Dec. 174; *Gemmell v. Davis*, 75 Md. 553, 23 Atl. 1032, 32 Am. St. Rep. 412. It follows that there was no error in excluding this offer of evidence.

The defendant then proved by Geo. R. Gehr that he had been the plaintiff's cashier since 1895, and that his bank took the two notes sued on, on June 7, 1900, and that he had agreed on June 6th, over the telephone, to take them; that he received them from Mr. Wilcox, cashier of the Old Town Bank, and that they had sent two drafts to the Old Town Bank, payable to it; and that he had paid the Old Town Bank the proceeds of the note. On cross-examination he was then shown a note for \$5,000 made June 6, 1900, by the association, payable to the order of James B. Councilman, treasurer, at the Old Town Bank, 90 days after date, and indorsed, "J. B. Councilman, Treas.;" and this note was offered in evidence, and was admitted over the objection of the defendant, and to this ruling the third exception was taken. The ground of this objection is that defendant did not introduce this note, or interrogate the witness respecting it, and therefore it was not a proper subject of cross-examination. Under ordinary circumstances, it is true that in this country the cross-examination can only relate to facts and circumstances connected with the matters stated in the direct examination of the witness, and that, if a party wishes to examine a witness as to other matters, he must do so by making the witness his own, though the rule in England is that, where a witness is called to a particular fact, he may be cross-examined upon all matters material to the issue. But the rule indicated has its qualifications, and much must be left to the discretion of the presiding judge in the determination of this question. 3 Jones on Evidence, sec. 821. "One of the objects of the cross-examination is to elicit the whole truth of transactions only partly explained, and the rule limiting the inquiry to the general facts stated in the direct examination must not be construed as to defeat the real object of the cross-examination." *Idem*. Here the defendant inquired into the circumstances under which the plaintiff took the two notes sued on, and any circumstances connected with and explaining the taking of those notes would seem

to come within the qualification of the rule above stated. The author just quoted, citing numerous cases, says: "Unless a trial court should so far overstep the bounds as to admit that in cross-examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross-examination is upon facts competent to be proved under the issues in the case." Here the matter thus inquired into was the foundation of the whole transaction, and the notes inquired of by defendant were collateral thereto. Under these circumstances, the discretion of the trial judge must be upheld.

The fourth and sixth exceptions were taken to a continuation of the cross-examination begun and referred to in the third exception, and which related to the circumstances under which the \$5,000 note of the association was taken, and how the proceeds of said note were paid to the Old Town Bank, and it follows from what we have said that there was no error in these rulings.

The fifth exception was taken to the admission in evidence of a letter of June 6th from Wilcox, cashier of the Old Town Bank, to Gehr, cashier of the plaintiff, referring to the \$5,000 note of the association above mentioned. We think it was error to admit this letter, because its effect was to admit the unsworn statement of a third party to prove that the note was to be discounted, and that Wilcox had charged plaintiff with proceeds of that note, less 91 days' discount; one of the questions at issue being whether the note was discounted or sold. But we do not think its admission constitutes reversible error, because, after that exception, in continuing the cross-examination of Gehr, which we have said was properly allowed, the plaintiff proved, without objection by the defendant, through a letter of June 7th from Gehr to Wilcox, that his letter of the 6th inst. was received, and that he had credited "\$4,924.17, pro. of note discd."; that being the exact amount which Wilcox, in his letter, said should be the proceeds of the note which he sent "to be discounted."

The seventh exception was taken to the allowance of a question asking what had been paid on the collateral notes, and this question was addressed in rebuttal to the cashier of the plaintiff. If sufficient had been paid on these notes to discharge the \$5,000 note, it is obvious there could be no recovery on the two notes here sued on. There was therefore no error in allowing the question. Indeed, under our previous ruling, this question might have been asked as part of the cross-examination. The plaintiff then proved by James R. Schultz that he had been in the employment of the Old Town Bank for three years, and continued so during the year 1900; and plaintiff then offered in evidence the passbooks of the association with the Old Town Bank, which had been

identified by Mr. Ross, and which showed, among other debits and credits, the following:

	Dr.	Cr.
June 7th, 1900.....	\$5,000 00	
" " Dis., \$75 83.....		\$4,924 17

To this offer the defendant objected, but the objection was overruled, and the passbooks were admitted; and this constitutes the eighth exception. The books being admitted, Schultz identified them, and testified that the entries of that date, including the one above set forth, were in the handwriting of Mr. Price, one of the tellers of the Old Town Bank. He was then asked to "state what were the discounts under June 7th," to which the defendant objected, but the objection was overruled; and this constitutes the ninth exception. These passbooks had been previously identified by Mr. Ross, and only the entries of June 7, 1900, the date when it had been already shown this \$5,000 note was received by the plaintiff from the Old Town Bank, were offered in evidence; and we can perceive no reason why they should not have been admitted, in order that the jury might determine therefrom, so far as these entries threw any light upon the transaction, what the parties understood and intended it to be. Not having made these entries himself, however, and not professing to have any actual personal knowledge of what these items represented, we think it was error to allow him to state what he understood them to represent. He could only draw deductions from the entries themselves, or, as he says in his answer, "argue that the particular \$5,000 item, with discount of \$75.83, referred to the note of June 6th for that amount, because that was the correct discount for 91 days." But it was the province of the jury to draw this inference from all the facts in evidence, including these entries. Again, however, we think the error was a harmless one, because these entries, unexplained by Schultz, or in any manner, necessarily tended to show the identity of the \$5,000 note in evidence with that therein referred to as subject to discount of \$75.83; and it is not reasonable to ask an appellate court to find that any inference of the jury was drawn from the inference of Schultz, rather than from their own unaided common sense, as applied to the meaning apparent from the face of the entries.

At last, then, we come to the ruling on the prayers brought up by the tenth exception. The plaintiff offered two prayers, which were granted, and the defendant offered five, which were rejected. The substance of both the plaintiff's prayers is that if the two notes sued on were executed by the defendant and delivered to the association, and before their maturity said notes were indorsed in blank by said association, and delivered, with other notes similarly indorsed, to the Old Town Bank, and if the \$5,000 note of said association of June 6, 1900, was indorsed in blank

by the secretary and treasurer, and was delivered to the Old Town Bank, and was discounted by the plaintiff, for the Old Town Bank, upon the faith and credit of the two notes sued on, together with the other notes similarly indorsed, and delivered with said two notes, as collateral security for said \$5,000 note, and the proceeds of said \$5,000 note were paid by plaintiff to said Old Town Bank, and there was still due and unpaid on said \$5,000 note a sum greater than the amount due upon said two notes, then the plaintiff is entitled to recover. The second prayer of the plaintiff also instructs the jury that there was no evidence legally sufficient to show bad faith on the part of the plaintiff in receiving said notes. We think the theory and form of these prayers correct, and that they were properly granted, and that the defendant's special exception thereto on the ground that there was no evidence to show that the \$5,000 note, or the notes sued on, were discounted, was properly overruled. The abstract principle embodied in the defendant's first prayer is correct, if it were so framed as to require merely the same preponderance of evidence required of every plaintiff in all essential matters of proof on his part. But we think it was correctly rejected, for the reason assigned in the plaintiff's special exception thereto, viz., that it was calculated to lead the jury to suppose that full power and authority to indorse the notes sued on could only be expressly conferred, and that the evidence of implied authority arising from the custom proved, and from ratification by acceptance of the proceeds of the \$5,000 note, which the prayer ignored, was insufficient to prove such authority. The defendant's second, third, fourth, and fifth prayers are all based upon the theory that there was evidence proper to be submitted to the jury to show that the \$5,000 note and the two notes sued on were sold to, and were not discounted by, the plaintiff; that such purchase was not within the corporate powers of the plaintiff; and that such defense was open to defendant, and precluded recovery by the plaintiff. But we do not find that there is any legally sufficient evidence that the transaction was a sale, and the plaintiff specially excepted to all these prayers on that ground. In *Lazear v. Union Bank*, 52 Md. 78, 38 Am. Rep. 355, there was such evidence. The court says on page 124, 52 Md., "The evidence shows that Winchester & Son, note and bill brokers, were employed by Lazear Bros. to sell the note of June 22, 1872, to any purchasers willing to buy, and that it was sold to the appellee, over the counter of its banking house, at nine per cent. discount, for Lazear Bros., the drawers, who received the proceeds of sale." Here the evidence of the plaintiff's cashier, Gehr, who was put upon the stand by the defendant, is that the \$5,000 note was discounted (the note sued on being shown to be among the collateral given therefor), and

that the amount of the discount was the legal rate for 91 days,—the time that the note ran. "To 'discount paper,' as understood in the business of banking, is only a mode of loaning money, with the right of taking the interest allowed by law in advance." Vol. 2 (2d Ed.) Amer. & Eng. Enc. of Law, p. 469. This term has been defined by this court, in almost the same exact language, in *Weck' r v. First Nat. Bank*, 42 Md. 592, 20 Am. Rep. 95, where Judge Miller says: "The ordinary meaning of the term 'to discount' is to take interest in advance, and, in banking, is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable." Only the legal rate of interest would be due on the principal when payable, and thus Judge Miller's definition of the term is shown to be the same as that given above. If the legal rate were exceeded, a presumption might arise that the parties intended or the law implied a sale, rather than a discount, because a sale (between ordinary parties, at least) would be legal at any rate of deduction agreed on; but, where a bank discounts paper at a rate exceeding that allowed by law, the transaction would be within the usury law. Being of opinion that there is in this case no legally sufficient evidence to show a purchase of these notes, or of the \$5,000 note, we have no occasion to consider the conflict between the decision in *Lazear's Case* and those decisions of the United States supreme court, upon section 5136 of the National banking act [U. S. Comp. St. 1901, p. 3456], in *Nat. Bank v. Matthews*, 98 U. S. 626, 25 L. Ed. 188, and *Nat. Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 561, cited with apparent approval in *Heironimus v. Sweeney*, 83 Md. 160, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333, in an opinion concurred in by the full bench, as well as the later case of *Nat. Gloversville Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742. In the still more recent case of *Danforth v. The Nat. State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622, it was held that cases could not be distinguished, where the title to the paper is transferred by an indorsement imposing the ordinary liability upon the indorser, from those where it is transferred by indorsement without recourse, or by mere delivery. In *United German Bank v. Katz*, 57 Md. 141, this court reviewed the case of *Lazear v. Nat. Union Bank*, supra, and distinguished it from the case before them; holding that the doctrine of ultra vires is not applicable to executed contracts, which the court said, "by the plainest rule of good faith, should be permitted to stand." In that case it was held that the United German Bank had no authority to discount promissory notes, but the court said: "It does not follow, as a consequence of this view, that, because the appellant exceeded its legitimate powers in procuring this note by discounting the

same, recovery cannot be had. If he received the plaintiff's money, or was the knowing instrument of some one else doing so, he ought not to escape liability to pay on that ground. * * * Whether he received the money personally, or not, is immaterial, if by his procurement some one else did get the money upon the faith of what he did. It was all one transaction." So in the case before us the First National Bank of Westminster is supposed to have parted with its money upon the faith not only of the principal note of \$5,000, but also of the other notes put up as collateral. "The two, as elements of the consideration, are inseparable. The courts will not inquire whether the holder parted with value because of the original or collateral paper. They consider such value given for both." *Bank of State of N. Y. v. Vanderhorst*, 32 N. Y. 553; *Norton on Bills and Notes* (3d Ed.) 314, 315. Being thus an executed contract, even if the transaction were a sale, and not a discount, recovery could be had under the *Katz Case*, *supra*, which was held not to be in conflict with *Lazear's Case*.

Finding no reversible error in any of the rulings of the lower court, the judgment will be affirmed. Judgment affirmed, with costs above and below.

SMITH v. HOOPER et al.

(Court of Appeals of Maryland. June 19, 1902.)

APPEAL—AGREED STATEMENT OF FACTS—AFFIRMANCE—REMAND.

1. Code, art. 5, § 36, declares that if it shall appear to the court of appeals that the substantial merits of a cause will not be determined by the reversing or affirming of any decree or order, or that the purpose of justice will be advanced by permitting further proceedings, the court may remand the case for further proceedings. *Held* that, after the court of appeals has entered a final order of affirmance, it is without power to remand a case upon an *ex parte* application, alleging that because of facts not appearing in the record, and contradictory to an agreed statement of facts upon which the case was decided, substantial justice has not been done.

On motion that the cause be remanded for an amendment of the pleadings and further proceedings. Motion overruled.

For former opinion, see 51 Atl. 844.

McSHERRY, C. J. This cause was argued and decided during the last January term. The questions involved in the controversy were presented by a bill in equity, and by an answer thereto. The facts were not disputed. On the contrary, they were distinctly agreed to. Accepting as true the averments of the bill which were admitted by the answer,—and all the material ones were admitted,—we proceeded to decide, and did decide, the legal questions raised, discussed, and submitted. After the judgment of this court had been handed down, a mo-

tion was filed asking this court to remand the cause for amendment of the pleadings and for further proceedings. That motion will now be considered.

In the petition accompanying the motion, it is stated that the facts which should have been presented, but were not, are wholly and radically different from those set forth in the bill and answer, and relied on in the decision heretofore made; and it is asserted that if the appellant be given an opportunity to submit the actual facts, in place of those erroneously assumed in the pleadings to be true, the result would be precisely the reverse of the one heretofore announced. We are therefore asked to remand the case to the court below, notwithstanding we have affirmed the decree appealed against, so that the pleadings may be amended in such a way as to present an entirely different and exactly opposite state of facts. In a word, the request is that, instead of affirming the decree, the accuracy of which, on the facts disclosed as they now stand by the admission of the parties, is not at all disputed, we remand the record with instructions to allow the parties to so amend the pleadings as to make a totally different case from the one they originally presented. The ground upon which this request is placed is that the case was a "noncontentious one,"—that is a case which did not involve a hostile contest as respects the facts, because the facts were conceded. It is insisted that inasmuch as facts were conceded which ought not to have been conceded, because, in reality, they did not exist, the appellant should not be bound by the concession after the decision has been adverse to her, but that she should be allowed to withdraw that concession now, and should be permitted to assert and rely on precisely opposite facts. Have we the power to do this? Section 36, art. 5, of the Code, declares: "If it shall appear or be shown to the court of appeals that the substantial merits of a cause will not be determined by the reversing or affirming of any decree or order that may have been passed by a court of equity, or that the purposes of justice will be advanced by permitting further proceedings in the cause, either through amendment of any of the pleadings or the introduction of further evidence, making additional parties, or otherwise, then the court of appeals, instead of passing a final decree or order, shall order the cause to be remanded to the court from whose decision the appeal was taken, and thereupon such further proceeding shall there be had by amendment of the pleadings; or further testimony to be taken, or otherwise, as shall be necessary for determining the cause upon its merits, as if no appeal had been taken in the cause," etc. It must be borne in mind that this court has no original jurisdiction. Its functions are purely appellate. If the statutes do not give jurisdiction to hear a case except upon the record as

transmitted, then it is obvious that this court has no power to inspect documents or to consider evidence with a view to determining whether facts stated in the record to be facts are facts, or simply fiction. To decide whether conceded facts are facts is to determine, not what is the law applicable to the conceded facts, as was done by the court below and by this court, but to investigate a distinctly new question, not raised by the record, and not suggested in the court below. We declined to do this very thing in *Stanley v. Safe Deposit Co.*, 87 Md. 458, 459, 40 Atl. 53; *Rogers, Brown & Co. v. Citizens' Bank*, 93 Md. 618, 49 Atl. 843. We have been furnished no reference to any adjudged case which holds that this court, after deciding a case on a record sufficiently full and explicit to justify the rendition of a final decree, can go into an investigation, outside of the record, to ascertain whether the facts contained in the record, and upon which the decision was based, were in reality true. In the very nature of things, such a power could not exist, because it would involve an independent investigation, and would require this court to decide, as a court of first instance, and upon evidence adduced before it, an issue of fact not embraced in the record of the case. The exercise of such a power might, and most probably would, in some proceedings necessitate the summoning and examination of witnesses to determine whether the conceded facts were facts; and this court has no jurisdiction to do any such thing. *Lenderking v. Rosenthal*, 63 Md. 38. After the case just cited had been finally decided, a motion was filed asking for a modification of the decree of reversal, and certain allegations of fact were made in support of the motion. Those facts, if they existed, were not disclosed by the record. The appellant answered the application, and denied the averments of fact. In overruling the motion, and in declining to remand the cause, under section 28, now section 36, art. 5, of the Code, this court said: "It is manifest, therefore, upon the allegations thus made by the respective parties, that questions for the exercise of original jurisdiction are presented, which this court, as an appellate tribunal, cannot hear and decide. Such questions must be presented to and be passed upon by the court below, having cognizance of the proceedings. In the manner in which they are presented here, we can express no opinion in regard to them, not being embraced in the appeal which we have decided." If this court is without authority to make such an investigation so as to enable it to determine whether a case, after having been decided, shall be remanded, with a view to being amended in a way to present precisely opposite facts, it is equally without authority to remand the record for a similar amendment merely upon the *ex parte* application of the unsuccessful litigant. This court cannot pass an order sending the rec-

ord back, so that the pleadings may be amended, simply upon the allegation that the conceded facts are wrong, when it has no power to ascertain by the aid of evidence whether the allegation of error is correct. To hold the contrary would be tantamount to deciding that, though we were without jurisdiction to investigate the truth of conceded facts, we yet have jurisdiction to act upon a simple allegation that the conceded facts were not true. Where would such a doctrine lead? It will not do to say that the doctrine is confined to cases where the facts are admitted by the pleadings, because there is no difference between such an admission and one made in an agreed statement of facts, or in a case stated. If the doctrine is a sound one at all, it is applicable to every case in which a decision has been rendered upon a state of facts honestly believed to exist, but subsequently doubted, disputed, or discovered not to exist. Litigation would be greatly protracted by the adoption of such a doctrine. Each decision of the same case might develop some new feature that would furnish the ground for an additional amendment, and the contest would be drawn out by successive applications for remanding with a view to other amendments.

Returning to the language of the statute, it is apparent that the Code contemplates an entirely different situation from the one now being dealt with. Whenever it shall appear or be shown to the court of appeals: First, that the substantial merits of a cause will not be determined by affirming or reversing a decree; or, secondly, that the purposes of justice will be advanced by permitting further proceedings,—then and in either of these events the court of appeals, "instead of passing a final decree or order," shall remand the cause, etc. Such a remanding, if made, must be made before final decree, and because a final decree cannot be passed on the record as it stands without doing injustice. In addition to this, such a remanding is allowed only when it appears or is shown to the court by the record in the case either that the substantial merits of the case will not be determined by an affirmance or a reversal, or that the purposes of justice will be advanced by permitting further proceedings. In *Genl. Ins. Co. v. U. S. Ins. Co.*, 10 Md. 528, 69 Am. Dec. 174, it was said: "But the record must indicate that the ends of justice will be promoted by such further proceedings, in order to authorize this court to remand a cause." Neither of the above-named alternatives will warrant the striking out of a final decree in order to let in a remanding, so that an entirely new and different case may be made by amendment. And so this court has flatly held. *Benscoter v. Green*, 60 Md. 333. Indeed, a plaintiff is not at liberty to abandon the entire case made by his bill, and to make a new and different case by way of amendment. *Bannon v. Comegys*, 69 Md. 422, 16 Atl. 129.

The thirty-sixth section of article 5 of the Code was taken from the Acts of 1832, c. 302, § 6, and has been adverted to—sometimes applied, and sometimes not—in 64 cases, beginning with *Kent's Adm'r's v. Taneyhill*, 6 Gill & J. 1, and ending with *Rogers, Brown & Co. v. Citizens' Bank*, 93 Md. 618, 619, 49 Atl. 843; and in not one of those 64 cases, covering a period of 70 years during which the act of 1832 has been in force, was an application made like the one now being considered. The nearest approach to the pending motion will be found in *Paine v. France*, 28 Md. 46, and that application was refused.

We do not perceive how the circumstances now relied on, even if proved, would change the conclusion heretofore reached, unless the authority of the case of *In re Armitage*, [1893] 3 Ch. 337, be repudiated. But we refrain from discussing a situation which is not before us, though we may add that a resolution adopted by the directors of the R. Tynes Smith Company subsequently to the decision of this cause, and considerably more than a year after the company went out of existence, can have no influence on any of the questions considered and decided heretofore, or on any of those raised by the motion now under review.

It is unfortunate if the appellant misconceived the facts in the first instance, but the appellees deny that there was any such misconception. They assert that the facts alleged in the bill and admitted by the answer are true. Thus a distinct issue is presented by the motion and the answer thereto, and it is an issue which this court has no jurisdiction to decide.

For the reasons assigned, the motion must be overruled. Motion overruled.

ZELOSOSKEI v. MASON.

(Prerogative Court of New Jersey. Jan. 27, 1903.)

WILLS—UNDUE INFLUENCE.

1. A testatrix, having three daughters, left the bulk of her estate to two of them, bequeathing to the other only \$1. The daughter thus discriminated against filed a caveat against probate, and contended that the will was the product of the undue influence of one of her sisters, who resided with the mother. It appeared that testatrix had imbibed a strong prejudice against the caveator, by reason of an inference drawn by her in respect to caveator's conduct, which inference was probably unjustified, but was not unnatural under the circumstances known to testatrix. *Held*, that a case of undue influence by false statements or suggestions on the part of the daughter who lived with testatrix was not made out by mere proof that she acquiesced in her mother's view, without proof that she knew, or at least had reason to believe, that her mother's prejudice was unwarranted by the facts.

(Syllabus by the Court.)

Appeal from orphans' court, Essex county.

Application of Elizabeth Mason for the probate of the will of Bridget Trainor. From an order allowing the probate, Bridget Zelososkei, a caveator, appeals. Affirmed.

William J. Kearns, for appellant. Guild, Lum & Tambllyn, for respondent.

MAGIE, Ordinary. This is an appeal from a decree of the orphans' court of Essex county admitting to probate a written instrument as the last will and testament of Bridget Trainor, deceased. The appellant is a daughter of Bridget Trainor, and the will discriminates against her, and gives her only a nominal share of the estate of testatrix. At the time of the execution of the will there were three children of Bridget Trainor living, all of whom were daughters. The caveator was one; another was Mrs. Keyes, living in Buffalo; another was the respondent Elizabeth Mason, a widow, who had lived with her mother from a time about three months before the execution of the will, and who continued to live with her until her death, which occurred nearly three years afterward. The bulk of testatrix's estate was by the will given to Mrs. Mason and Mrs. Keyes. The bequest to the caveator was \$1. The evidence before the orphans' court, appearing in the transcript, clearly shows that the instrument in question was executed with all the formalities necessary to make it a valid testamentary disposition of property. The evidence also discloses that at the time of the execution of the will the testatrix, although aged and somewhat infirm, possessed testamentary capacity; and there was no question in the court below, and there has been no question here, but that she was capable of making a will, or that she had executed properly the will in question. The contention below, and here, has been that the will was not the act of decedent, but was induced by the undue influence of Elizabeth Mason, the daughter who lived with her mother, the decedent. The fact that Elizabeth Mason was, and had been for some little time, an inmate of her mother's house, living with her in the close intimacy that such conditions produce, no doubt discloses that she had the opportunity to exert some influence upon her mother. But the burden of establishing by proof the existence of that influence which is called "undue" is primarily upon the person who asserts its existence. Proof that opportunity existed to exert influence will not suffice. Nor will such proof, standing alone, raise such a presumption as to shift the burden, and require explanation or denial from the accused person. When proof of the opportunity to exert influence is supplemented by proof of the existence of relations of a confidential character, justifying the inference that the testator relied upon the advice and assistance of the other person in business matters, or by proof that such person exerted an actual control of the testator, as by excluding from communication with him

others who would naturally be subjects of testamentary bounty, or by like conduct, the burden of proof is shifted, and explanation or denial is required. The probate judge, who heard and saw the witnesses, has found that there was no proof in this case imposing any burden of explanation or denial upon Mrs. Mason, and in that conclusion I entirely concur. I am unable to find any evidence justifying a contrary conclusion. If I had reached a different conclusion, I should be obliged, also, to conclude that Mrs. Mason had sustained such burden. She testified unequivocally that she never made any suggestions or exerted any influence upon her mother in respect to the execution of a will, or its provisions. There is no evidence that her mother relied upon her advice, or was accustomed to yield to her influence. On the contrary, in the sole instance in which it was sought to show the exertion of influence over her mother by Mrs. Mason, it clearly appears that the attempt was ineffective. Caveator and a witness called by her testify to having overheard Mrs. Mason suggest to her mother that caveator should be evicted from apartments which she occupied in her mother's house as a tenant. Mrs. Mason denied having made any such suggestion, but, if the charge is credited, it appears by the same evidence that her mother declined to act as suggested, and permitted caveator to remain as tenant of the apartments. The contention that Mrs. Mason exerted undue influence upon her mother is mainly put upon the grounds that her conduct was fraudulent, in that she permitted and encouraged an untruthful inference to operate upon her mother's mind, to the disadvantage of the caveator. The circumstances upon which this claim is made are these: Shortly before the will was executed, another daughter of decedent had died very suddenly from apoplexy. For certain reasons, the authorities of the church to which the parties belonged refused to permit the body of the deceased daughter to be buried in the cemetery of that church, and the family were compelled to bury it in another cemetery, which they deemed not consecrated. The evidence discloses that this occurrence occasioned very great sorrow to the testatrix, and also that she attributed the fact that the ecclesiastical authorities had excluded the body of her dead daughter from what she conceived to be proper burial to some act or omission to act on the part of the caveator. The evidence tends to show that the exclusion from burial in the Catholic cemetery was not brought about by any act of the caveator, but wholly because of the application of the rules of the church to the case in hand. But it also appears that the rules of the church in that respect were sometimes relaxed or dispensed with, or at least the parties believed so. Caveator admits that, in behalf of the family, she put herself in communication with the church authorities, and sought to obtain permission

for the burial of her sister in their cemetery. As her negotiation failed, it was not wholly unnatural in the deeply grieved mother to attribute the failure to caveator, as not having made all possible efforts in that regard. The caveator admits that although she knew of her mother's grief at the fact of the exclusion, and that her mother held her responsible for it, she never laid before her mother the real facts, or sought to disabuse her mind, or show her that her notions with respect to caveator's conduct were not justified. Whether or not the feeling of the testatrix against the caveator operated in producing the will in question and reducing the bequest to caveator to a nominal sum, is open to serious doubt. There is very persuasive evidence that testatrix had executed a previous will, made before the death and burial of the daughter, and therefore before there was any reason for the mother having a prejudice against caveator on account of any act or omission connected therewith, in which there was a like provision with respect to caveator. Assuming, however, that there may be justifiable inference from the evidence that testatrix deceived herself with respect to the conduct of the caveator, and that such self-deception produced the nominal bequest to caveator, that fact will not render invalid the testamentary disposition made by testatrix. She had a right to act upon her own inferences, and to give or withhold her bounty according as matters appeared to her, even though an apparent injustice is thereby done.

But the claim is that Mrs. Mason encouraged her mother in her delusion respecting the conduct of the caveator, and that thereby she exerted over her mother an influence that was undue. Undoubtedly a knowingly false representation of facts to one who proposes to make a testamentary disposition of property, intended to influence and actually influencing his testamentary act, made by one who seeks and obtains an advantage therefrom, may be admitted to be an exertion of an influence that is undue; the will of the deceased being deemed to be dominated, not by excessive persuasion or threats or force, but by fraud. *Stewart v. Jordan*, 50 N. J. Eq. 733, 28 Atl. 706. The proofs respecting any communication between Mrs. Mason and her mother on the subject of the mother's anger at the caveator is extremely contradictory. But there is evidence which, if credited, seems to indicate that Mrs. Mason appeared to acquiesce in her mother's view of the responsibility of the caveator for the occurrence which the mother deemed so grievous. But a case of undue influence is not thus made out. There is no evidence whatever that Mrs. Mason knew the real facts, or had any reason to believe that the real facts would have exonerated her sister, the caveator, from the charge her mother persisted in making. There is therefore no room for inference that Mrs. Mason

presented to her mother, by her acquiescence in her mother's view, a statement which was known to her to be false in fact. This result renders it unnecessary to consider the question whether, if there was evidence that Mrs. Mason was aware that her mother's animosity was founded upon error, and that the real fact was that caveator had not been delinquent, as her mother deemed, she exerted an influence that was undue, by the mere fact that she did not disclose it to her mother. If her mother had questioned her with respect to the facts, and especially if she had connected such questioning with her preparations to make a will, perhaps duty would have required her to disclose the real facts; and her suppression of them might be considered fraudulent, and, if it influenced the mother, the influence might be considered undue. But there is no evidence whatever that the testatrix sought from Mrs. Mason any statement respecting the facts, or any advice or aid respecting the testamentary disposition of her property.

The attack upon this will as being the product of undue influence has no support, in my judgment, in the evidence. The decree admitting the will to probate was therefore proper to be made, and must be affirmed.

VERMEULE v. VERMEULE.

(Supreme Court of New Jersey. Nov. 11, 1901.)

REMOVAL OF CAUSES—FILING OF PETITION—ENTRY OF ORDER—TIME—JURISDICTION OF STATE COURT.

1. Under the United States removal act authorizing removal of a cause to the federal courts having jurisdiction of the same on an application made at any time before the time for pleading has expired, and providing that when the petition and bond are filed it shall be the duty of the state court to accept the same and proceed no further in the cause, where the petition and bond were filed by defendant seeking removal, before the time within which he was entitled to plead in the action had expired, it was immaterial that the order of removal was not within such time.

2. State courts have jurisdiction to examine the petition and record on an application for removal of a cause to the federal courts, for the purpose of determining whether the statutory requirements have been complied with, subject to the final determination of the question of jurisdiction by the federal courts.

Action by Cornelius C. Vermeule against John D. Vermeule. On petition for an order to remove the cause to the United States Circuit Court for the District of New Jersey. Granted.

Argued June term, 1901, before GUMMERE and HENDRICKSON, JJ.

McCarter, Williams & McCarter, for plaintiff. Washington B. Williams, for defendant.

PER CURIAM. This application is resisted by the plaintiff on the ground that it is not made in time. The federal statute en-

acts that the party applying for such removal "may make and file a petition in such suit in such state court" at any time before the time for pleading expires. And, further, that, "when the petition and bond are so filed, it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit." The defendant's time to plead did not expire until May 18, 1901. On the 10th of the same month the petition and bond were duly filed in the office of the clerk of this court, and on the same day copies thereof, with notice of this motion, were duly served upon counsel of the plaintiff. It is contended that the order of removal cannot now be allowed, because the time to plead had passed before this application was actually made. We are unable to concur in this view. We think that the filing of the petition and bond in the office of the clerk was a compliance with the terms of the statute.

The state courts have generally, and as we think properly, claimed the right to examine the petition and record, and determine whether the statutory requirements have been complied with, subject, however, to the final determination of the federal court upon the question of jurisdiction. This supervisory right of the state court was exercised in *National Docks Railway Co. v. Pennsylvania Railroad Co.*, 52 N. J. Eq. 58, 28 Atl. 71, but that case is not an authority against the practice that has been pursued in the matter now before us. While the application for an order is the better practice, it is not essential to the transfer of the jurisdiction.

The order for removal may be entered.

BELLES v. KELLNER.

(Court of Errors and Appeals of New Jersey. Nov. Term, 1901.)

Dissenting opinion. For majority opinion, see 51 Atl. 700, 57 L. R. A. 627.

MAGIE, Ch. In my judgment the trial court committed no reversible error in declining to charge the request in question, because it immediately proceeded to give instructions on the subject which were, in my judgment, unexceptional.

STATE v. BONOFIGLIO.

(Court of Errors and Appeals of New Jersey. Nov. Term, 1901.)

Dissenting opinion. For majority opinion, see 52 Atl. 712.

DIXON, J. My dissent from the judgment rendered in this case is not caused by any dissent from the doctrines stated in the opinion delivered by the Chief Justice. I concur in the principles there expressed.

STATE (WYCKOFF, Prosecutor) v. LUSE.

(Supreme Court of New Jersey. Nov. 11, 1901.)

PARTNERSHIP AS TO THIRD PERSONS—EVIDENCE—APPEAL—OBJECTIONS IN INTERMEDIATE COURT—NECESSITY—REVIEW.

1. Evidence that defendant W. purchased certain timber, and that his brother was permitted by him to take general charge of the cutting and removal thereof, and that the latter and M. were jointly interested in the timber to be cut, and the net profits were to be paid to W. to be credited on debts owing to him by his brother and M., and that the men cutting the timber were boarded by plaintiff at the personal request of M., who represented himself as a partner with W. and his brother in the business, was sufficient proof that the three were partners to justify a joint judgment against them for the value of the board furnished to their employes.

2. Where an action was tried before a justice of the peace at which the costs taxed were excessive, but no objection was made thereto on a trial de novo on an appeal to the court for the trial of small causes, such question cannot be reviewed on a further appeal to the Supreme Court.

Certiorari to court of common pleas, Warren county.

Certiorari by the state, on the prosecution of Martin Wyckoff, against Fanny Luse to review a judgment. Affirmed.

Argued June term, 1901, before GUMMERE and HENDRICKSON, JJ.

Martin Wyckoff, pro se. John H. Dahlke, for defendant.

PER CURIAM. This writ brings here for review a judgment of the Warren pleas, entered after a trial de novo, on an appeal from the court for the trial of small causes. The judgment was given for a balance of the bill of the plaintiff below for the board of men, while engaged in cutting off a piece of timber near her house, against the prosecutor, his brother (Cornelius Wyckoff), and Robert Melrose, who were defendants below. The present prosecutor was the only one who appealed.

One reason urged for a reversal is that a motion to nonsuit for insufficiency of the state of demand was overruled. We think there is no merit in this objection.

Another ground urged was that there was no evidence to show that the three defendants were jointly interested in the cutting of the timber, or that they permitted themselves to be so held out to the public. The evidence did tend to show that the timber was purchased by Cornelius Wyckoff; that his brother, the prosecutor, was permitted by him to take general charge of the cutting and removal of the timber; that the latter and Melrose were jointly interested in the timber to be cut; and that the net profits were to be turned over to Cornelius Wyckoff, to be credited upon debts owing to him by the prosecutor and said Melrose. We think there was evidence from which a partnership

interest in the cutting of this timber might be inferred, and hence a joint liability for the expenses incurred therein by the partners or either of them. The men were boarded at the personal request of Melrose, who represented himself to plaintiff as a partner with the other defendants in the business then in hand. There being at least some evidence to support the judgment, this court cannot interfere. It is not the province of this court, in reviewing the judgments of the court of common pleas in appeal cases, to retry the cause upon the merits. *Deubel v. Vanderbilt*, 64 N. J. Law, 159, 44 Atl. 842.

The judgment of the pleas having reduced the amount recovered in the court below, there should have been no judgment for costs in that court. The costs before the justice appear to be excessive, but, since no effort was made to correct the taxed bill in the court below, we cannot grant the relief here.

The judgment below is affirmed, except as to the costs of the appeal.

MURPHY v. WATSON.

(Supreme Court of New Jersey. Nov. 11, 1901.)

PLEADING—AMENDMENT AT TRIAL—VERBAL ORDER—FILING OF AMENDED PLEAS AFTER JUDGMENT.

1. Where, on the trial of an action, the court orally ordered certain amended pleas to be filed which were necessary to raise the issues in controversy, the fact that the pleas were not filed, under a rule entered nunc pro tunc, until after judgment was entered on the verdict, did not invalidate the judgment, the verbal order entered at the trial being sufficient to sustain the same.

Error from circuit court, Essex county.

Replevin between one Murphy and one Watson. From a judgment in favor of the latter, the former brings error. Affirmed.

Argued June term, 1901, before DEPUE, C. J., and DIXON, GARRISON, and COLLINS, JJ.

Jerome D. Gedney, for plaintiff in error. Blake & Howe, for defendant in error.

PER CURIAM. The only question raised was with respect to the power of the court to order an amendment to the pleadings after the case was tried. The cause was tried December 3, 1900. Judgment was entered upon the verdict the same day. On March 6, 1901, pleas were filed that were necessary to raise the real subject-matter in controversy between the parties. The contention is that the filing of these pleas will not support the judgment, there being no triable issue at the time of the trial, and the power of the judge to order an amendment after the trial is contested. It appears from the stipulation, in writing, that the order referred to as allowed on March 2d was verbally made by the court at the trial of the cause. That was a sufficient order. The

subsequent entry of the rule was a matter of form, and, although entered after the trial, was entered *nunc pro tunc*.

Judgment should be affirmed.

PENNSYLVANIA MIN. CO. v. THOMAS.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

SPECIFIC PERFORMANCE—MODIFICATION OF CONTRACT—ESTOPPEL—PRESUMPTIONS—ASSIGNEE OF CONTRACT.

1. A bill for specific performance of a contract for the sale of land was based on the original agreement and a subsequent agreement on the back thereof, modifying the original in two points favorable to defendant. *Held*, that defendant was estopped to aver that the agreement was indefinite as to parties because neither the plaintiff nor any other vendee was named in the indorsement, or because the plaintiff had not signed the indorsement, where it was signed by his counsel.

2. It will not be presumed that the purchaser of land stipulating for the abstract of title clear of incumbrances is to pay for the land before he examines the abstract.

3. When an assignee of the vendee under an agreement for the sale of land tenders the purchase money and demands the deed, and the vendor does not object that the assignee has given no notice of his rights as assignee in the agreement, he cannot thereafter object.

Appeal from court of common pleas, Washington county.

Bill by the Pennsylvania Mining Company against L. Thomas for specific performance. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John C. Bane and R. W. Irwin, for appellant. J. W. Donnan, A. Donnan, John G. MacConnell, and A. M. Neeper, for appellee.

MITCHELL, J. The material facts admitted by the demurrer and found by the learned judge were as follows: Appellant, being the owner of land, sold an option to purchase a vein of coal therein to one J. M. Thomas by written agreement describing the land and the terms of the sale fully and explicitly. On November 30, 1899—the day before the expiration of the option—J. M. Thomas notified appellant of his acceptance and election to purchase. On December 27th J. M. Thomas assigned his right to plaintiff, and on the next day appellant signed an agreement, indorsed on the original contract of option, changing the latter in two points favorable to him, viz., that the purchase money was to be payable presently in full, instead of in three annual payments, and appellant was to receive \$20 as part of the cost of the abstract of title, which the original contract bound him to furnish. Appellant on his part agreed to execute a deed within 10 days after delivery of the abstract to the plaintiff's counsel. The bill charged that this contract was made with the plaintiff, which in April, 1901, noti-

fied appellant to furnish the abstract of title. This appellant failed to do, and in July, 1901, plaintiff tendered the purchase money, the \$20 on account of the abstract, and a deed for execution. Appellant refused to carry out the agreement, and this bill was filed in September, 1901. The court decreed performance.

The chief defense set up by the appellant is that the bill is founded on the second contract, made December 28, 1899, and that this will not support a decree for specific performance, because neither the plaintiff nor any other vendee is named in it, and it is therefore indefinite as to parties, and plaintiff did not sign it, and therefore it is not mutually binding. This argument is well answered by the opinion of the court below that it "entirely ignores the fact that the agreement signed by defendant on December 28, 1899, was written on the back of the original agreement [quoting the latter]. * * * It also ignores the fact that an assignment of the rights of J. M. Thomas under this original agreement was made to the Pennsylvania Mining Company, plaintiff, after he had elected to purchase under his option; the election to purchase and assignment being in writing [quoting them]." The averments of the plaintiff's bill clearly show that its claim for specific performance is based upon the original agreement dated May 26, 1899, as modified by the agreement of date December 28, 1899; and, taking these two agreements together, there can be no doubt as to the parties to the contract, or as to its mutuality. J. M. Thomas, his heirs and assigns, are named as the parties who shall "have the exclusive right to purchase said coal," and the plaintiff company is, under the averments of the bill, which are confessed and found to be true, a party to the contract under the descriptive word "assigns." "The agreement entered into by A. M. Neeper, Esq., the general counsel of the plaintiff company, and the defendant, on December 28, 1899, was not an agreement which vested in the company an equitable title to the coal in question that had vested already under the terms of the original agreement and the acceptance and assignment of Thomas, but it was an agreement modifying to some extent the manner in which the original agreement, which was executory, should be executed. Mr. Neeper, as general counsel of the plaintiff, had the original contract in his possession, and it was in the line of his duty to supervise the execution of this executory contract. At all events, if it was not, it would in no way affect the plaintiff's rights to a decree of specific performance under the original agreement, its acceptance and assignment, which are all admitted, and found to be binding upon the defendants."

The other objections are manifestly only afterthoughts to excuse a plain breach of contract. It is said that no tender of the \$20 for half the expense was made when the

abstract of title was demanded, and that while, by the original agreement, appellant was to furnish the abstract at his own expense, it was not made a condition precedent to the payment of the purchase money. But it was so in the nature of things. It would require a very clear contract to that effect to justify a construction that a purchaser who stipulates for an abstract of title, clear of incumbrances, is to pay the purchase money before he examines the abstract.

It is further said that plaintiff was dilatory in the assertion of its rights and should be barred for laches. The court found that the plaintiff had at all times been ready, anxious, and willing to perform its part of the contract, and we see nothing to indicate that it was more than indulgent to the appellant in modifying the original contract in a manner favorable to him, and in failure to resort to the court until after repeated efforts to get an amicable settlement.

Lastly, it is said that plaintiff did not give defendant notice of its right or title, as assignee of J. M. Thomas, at the time it made demand for the abstract or tender of the purchase money and the deed for execution. It would be sufficient answer that no objection or question on that account was made at the time by the defendant. But in fact no such notice was required, as he had full knowledge of the fact as long ago as December, 1899, when he accepted the favorable modification of the original agreement by the counsel of the plaintiff company.

Decree affirmed, with costs.

HOOVER et al. v. SMITH et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)
WILLS—CONSTRUCTION—VESTED REMAINDER.

1. Under a will made when two of testator's daughters had died, leaving children, giving all his property to his wife during her life, or as long as she remained his widow, with direction that on the happening of either event the property shall be sold and divided equally among his lawful heirs, the interest in remainder vests on testator's death, so that a child of one of such deceased daughters, dying after him, but before his widow, has an interest which passes to her representatives.

Appeal from circuit court, Frederick county, in equity; John C. Motter, Judge.

Bill by John J. G. Hoover and others against Carrie Smith and others. From the decree, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Emory L. Coblentz, Chas. C. Waters, and John S. Newman, for appellants. S. A. Lewis, for appellees.

BOYD, J. This is an appeal from a decree of the circuit court for Frederick county construing the will of Gideon Hoover.

The portion of the will involved in this controversy is as follows:

"Item 1st. I devise and bequeath to my beloved wife Elizabeth all my property, real, personal and mixed, to have and to hold the same during her natural life, or as long as she shall continue to be my widow.

"After either of the above events the property to be sold and divided equally among my lawful heirs.

"The children of deceased heirs shall inherit the full portion as their parents would have done if living."

The testator died September 6, 1874, the day after his will was executed, leaving surviving him a widow, two sons, a daughter, two grandchildren, who were the children of a deceased daughter, Eliza Stottlemeyer, and a granddaughter, who was the child of another deceased daughter, Olive Wolf. Elizabeth Wolf, the daughter of Olive, died December 7, 1890, and Elizabeth Hoover, the widow of Gideon, died in October, 1901, without having remarried. Annie M. Maugans, one of the daughters of the testator, and her husband, made a deed for their interests in the "Gideon Hoover farm," which the bill prays may be construed; but it was stated at the argument that that was no longer necessary, and the only question for us to determine is whether Elizabeth Wolf had such interest in the estate of her grandfather as to pass at her death to her representatives. She never married, and Jacob Wolf, her father, claims the interest in the estate which it is admitted she would have been entitled to if she had lived until the period of the distribution of her grandfather's estate.

The law favors the early vesting of estates, and "courts will, in the absence of plain expressions, or an intent plainly inferable from the terms of the will, adopt the earliest time for the vesting, where there is more than one period mentioned." *Straus v. Rost*, 67 Md. 476, 10 Atl. 75. It is a well-recognized rule of construction that in doubtful cases the interest shall be deemed to be vested in the first instance, rather than contingent, unless the instrument under consideration does not admit of such construction. When a testator has employed terms in his will which in their ordinary signification are in accord with such familiar and fixed rules of law, it should require very clear expressions elsewhere in the will to justify the court in giving such terms some other and unusual meaning. When, therefore, a testator directs that after his wife's death or marriage his property is to be sold and divided equally among his "lawful heirs," and makes no other disposition of the remainder after his wife's death or marriage, when and in whom does such remainder vest? At common law an heir is "he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements or hereditaments immediately upon the death of his

ancestor." In 15 Ency. of Law (2d Ed.) 322, it is said: "A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent." And again it is there said: "It is well settled that a gift to the heirs of one will be construed as referring to those who are such at the time of the ancestor's death." If, then, we adopt the ordinary meaning of the term used by the testator ("lawful heirs"), we find that he presumably intended that those who would be entitled to his real estate at the time of his death should get the benefit of the proceeds of the sale. It cannot be successfully contended that merely because he gave his wife an estate for life, or as long as she continued to be his widow, the vesting of the estate given the heirs should be postponed until the widow's interest ceased. If he had said, "After either of the above events the property to be sold and divided equally among those who are entitled to it by the rules of descent at the time of my death," there could be no question about it. And when he used a term which has that meaning, in the absence of some intention expressed to the contrary, must it not be given to it? It is true that this will speaks of real and personal property, and the record does not show how much there was of either, but the word "heirs" has been held to include "next of kin," when used in such connection as it could be seen such was the intention; and as this testator left three children and three grandchildren, who were children of his deceased daughters, if he had died intestate the same persons who would have inherited his real estate would have been entitled to distribution of his personal property. Those who were his heirs were also his next of kin, and we are now considering the class of persons who were to receive his property. His children and grandchildren were not named in the will, but, instead of naming them, he described them by the term we have mentioned. So reading the will thus far, we find that the testator left his property to his wife for life, or as long as she remained unmarried, and, after her death, or marriage, to a class of persons whom he designated by the term which the law says means those upon whom the law casts his real estate immediately upon his death; and, as he made no other provision for his personal property, it may be assumed that he meant to include that. Under the rules of construction we have already referred to, the presumption, therefore, is that he intended that the interest in his property should vest in them at the time of his death, unless there be something else in the will to show the contrary. We have quoted above all that it says on the subject,

and hence, unless the last clause changes the meaning of the others, there would seem to be no ground to question the vesting of the estate at the death of the testator. That says, "The children of deceased heirs shall inherit the full portion as their parents would have done if living." When the will was made, two of the testator's daughters were dead; one having left two children, and the other one child. It is manifest that he had those grandchildren in mind, and primarily that provision was made for them. It is true that no one can, strictly speaking, be said to be an heir of his ancestor while he is living, but it is evident that the testator spoke of those as such who would have been "heirs" if living. If the theory of the appellants be correct, the child of one of the testator's children who died after the testator and before the widow could not have taken, as he would not have been a child of a "deceased heir." There would be nothing for the child of the deceased child of the testator to inherit unless the estate had vested in the latter. We think there is nothing in this clause of the will from which it can be fairly inferred that the testator intended to postpone the vesting of the estate until the widow's interest in the property ceased by death or marriage, but he only intended by the provisions in his will to postpone the time of their enjoyment of the interests they were to receive.

It is always difficult, in construing wills, to find cases exactly in point; but that of *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, is in several respects as applicable to this one as we are apt to find. There the testator left certain real and personal property to his wife for life, and his will contained this clause: "It is my will that after the death of my wife, Mary Ann Handy, all the property devised to her for life * * * shall be sold, if necessary for equal partition, or if the same can be accomplished without a sale, shall be divided amongst my children, share and share alike, the child or children of any deceased child to take the portion to which the parent if living would have been entitled." This court held that a share of the property vested in each of the children of the testator who survived him, and if any such child died before the life tenant, leaving children, that his share was divested in favor of such children, but that the share of a child dying without children was not divested, but went to his personal representatives. Or, as was said in the opinion delivered after a motion for reargument, "a share of the property vested in each of the children who were living at the time of his death, and if any child died before the period of distribution, leaving children, they were substituted in his place; his share, however, was not divested if he left no children, but it went to his representatives." In reference to the share of Julia J. Handy, whose father died before the will was made, it was held that it

was clearly the testator's intention that she should take a child's part; and that opinion concluded by saying, "If the deceased parent survived the testator, the child took by substitution in his place; but, if he died in the lifetime of the testator, the child's title was by direct and original gift." So applying the rules thus announced to this case (and the clauses in the two wills as to what a child of a deceased child shall take are very similar), we are of the opinion that the child of Mrs. Wolf took by direct and original gift the interest her mother would have been entitled to if she had survived the testator, and Elizabeth Wolf's interest went to her representative.

The appellants have cited *Straus v. Rost*, 67 Md. 463, 10 Atl. 74, *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702, *Small v. Small*, 90 Md. 550, 45 Atl. 190, and other cases, but they can readily be distinguished from the one we have before us. It is sufficient to say that in those cases the court reached the conclusion from the wills under consideration that the testators had, with reasonable certainty, indicated the time at which they intended the estates in controversy to vest, and the court was governed by such intention. In *Small v. Small*, supra, it was said "the distinction is clearly drawn between that class of cases where the estate or interest vests at the death of the testator, because of an absence of any expressed intention that it vest later, and those where the testator by his will fixes a more distant period for the vesting," and a number of cases are cited to illustrate the respective classes.

As no question has been raised as to whether there ought to be administration on the estate of Elizabeth Wolf, and as the bill made Jacob Wolf, her father, a party, we need not determine that question, and will affirm the decree, which decreed that Elizabeth Wolf took a one-fifth vested interest in the estate of Gideon Hoover, which survived her death, and that her representative is entitled to share in the distribution of said estate to that extent.

Decree affirmed; the costs to be paid out of the estate of Gideon Hoover.

GREEN v. STATE.

(Court of Appeals of Maryland. Jan. 21, 1903.)
MURDER—CONFESSION—EVIDENCE.

1. One's confession to commission of a murder, being voluntary and not induced by threats or promise of advantage, is admissible.
2. One may testify to a confession he heard made, though he cannot give the exact language, but only the substance thereof.

Appeal from circuit court, Talbot county; James A. Pearce, Edwin H. Brown, and Wm. R. Martin, Judges.

Lewis D. Green was convicted of murder, and appeals. Affirmed.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1146.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

Seth & Willson, for appellant. Isidor Rayner, Atty. Gen., for the State.

JONES, J. The appellant was indicted in the circuit court for Talbot county on a charge of murder, and upon trial was convicted of murder in the first degree. He received the sentence of the court on the 7th day of June, 1902, and brings this appeal from that judgment. The questions upon this appeal are presented by exceptions to evidence admitted by the trial court against objection made on his behalf.

The victim of the homicide was a woman, and the killing was done by shooting with a pistol. After using the pistol with fatal effect upon his victim, he turned the weapon upon himself, presumably with suicidal intent. He was found to have shot himself through the right ear (the bullet passing through the bone, and on down through the throat, as described by a physician who saw him), and also in the chest, over the heart (this bullet passing under the muscles and lodging under the big muscles of the arm). Immediately after the shooting, he was found to be suffering greatly from shock, and was unconscious. It was soon discovered, however, that the wounds which he thus inflicted upon himself, after their immediate effects had subsided, were not dangerous. Within two days after the shooting the appellant made certain confessions or statements to an attending physician in the presence of a justice of the peace, who took the same down, as to his having done the killing for which he was afterwards indicted and convicted, and as to his motive therefor. These confessions or statements were admitted as evidence against the appellant upon his trial by the court below, which overruled objections thereto made by his counsel, and are the subject of the exceptions brought up by the record.

The questions presented upon the exceptions are matters of grave import to the appellant, but, as respects the disposition the court must make of them, are free from difficulty. The rules of law that must determine these questions would seem to be too well settled by our own decisions to make necessary any reference to other authorities. The confessions of the accused, especially in capital cases, as this was, are always to be received with caution. The law imposes the condition upon the admitting of them in evidence that they be not induced by threats, or by promise of advantage to be derived from making them, and the burden of showing affirmatively that they were not so induced to be made in any given case is upon the prosecutor. *Nicholson v. State*, 38 Md. 140. The confession which was objected to by the prisoner's

counsel, and admitted by the court, as deposed to by Wm. E. Hollyday, a justice of the peace, who took the same down, appears in the record as follows: "Feb. 6, 1902. I examined him. I asked him why he shot Carrie Price. He said: 'I shot her because she wouldn't do as I wanted her to do, and cursed me and called me a damn liar. Then I asked her to get me my things, and I would leave, and Carrie Price said I knew where my things were, and I could get them myself; that she was not going to get them. Then she left the house. I went after her, and asked her to go home, and she said she was not going home; she would go uptown and get an officer, and have some peace. Then I went to the house and got my pistol.' I asked him what did he do then. He answered: 'Carrie Price had \$12 of my money, and Lewis asked Carrie for my [his] money. Q. Did she give it to you? A. Yes, sir. Q. What did you do then? A. I fired on her two or three times—I don't know which—and once after she fell. Q. What house was Carrie at? A. Gussie Wheatley's. Q. How came you to take the pistol with you? A. I went and got it on purpose to shoot her with. Q. What did you shoot Carrie for? A. Well, I was going with her, and she would go with other men. That was the cause I shot her. Q. Was she your wife? A. No, sir; but I thought she shouldn't go with other men.' The subscriber wrote this while Lewis Green was stating it." Before offering this confession in evidence, the state questioned the witness Hollyday as follows, after proving that he was a justice of the peace, and that he went to where the prisoner was: "Q. Did he make any statement to you about the shooting? A. Yes, sir. Q. Just tell the court whether it was freely and voluntarily made on his part. A. It was. Q. Were any threats made against him, or any inducements held out to him to make a statement? A. None at all. Q. Who requested him to make a statement? A. No one at all." Then upon cross-examination this witness was asked: "Q. Did you take his statement at his request? A. I asked him if he was willing to give a statement, and he said 'Yes,' and I asked him to give the cause of the shooting. He said he had a cause. That is the only cause he gave me. Q. Did you tell him he better tell? A. No, sir. Q. You didn't ask him to tell? A. No, sir; I told him he was not required to incriminate himself." Upon further examination by the state he said: "He did freely and voluntarily make it [the statement] himself. I was merely asking him, and he made it"—and further said that he did not offer the prisoner anything, nor promise him anything, nor tell him it would be better for him if he would confess. In all this he was confirmed in a negative way by Dr. Eckels, the attending physician, who testified to being present, and that he did not bear anything in the way of threat or

inducement, and that he did not himself "tell him that he [the accused] ought to confess, or advise him to confess." It was to the admission of this confession that the first exception was taken on behalf of the accused (the appellant). There was no error in the ruling of the court upon this exception. The foundation laid by the state in its preliminary inquiries was quite sufficient to justify the admission of the confession. The confession admitted, and which action was approved by this court, in the case of *Ross v. State*, 67 Md. 286, 10 Atl. 218, was made under circumstances much more likely to subject the accused to pressure than any appearing here.

The second exception of the appellant was taken to the admission of the evidence of the witness Dawson, who testified that he was a constable; that he was present when the appellant made to the witness Hollyday the statement which has been set out in connection with the testimony of that witness; that the statement by the appellant was made voluntarily; that there were no threats made, nor "inducements or promises held out to him to make a statement"; and that he "was with Mr. Hollyday the whole time"; they "went together"—and was then asked, after being questioned on the part of the appellant as to the appellant's condition, and as to whether the appellant knew that the witness was a constable and that the witness Hollyday was a justice of the peace, and answering these two last inquiries affirmatively, to tell as near as he could what the appellant said in making his statement to the witness Hollyday. The ground upon which the objection to this testimony was put was "because of the physical and mental condition, as shown by Dr. Eckels," of the appellant at the time of the confession. Assuming this to be a legal ground of objection, if the basis of fact assumed existed. Dr. Eckels' testimony as to the mental and physical condition of the appellant was to the effect that though he found him suffering greatly from shock when he first was called to him on the day of the shooting, which was the 4th of February, 1902, and that he was then unconscious, later in the day he saw the appellant again, when his condition was improved, and he had recovered somewhat from the shock, and was "partially" conscious; that the next morning he had recovered from the shock, and was conscious; and that on the 6th, the day the confession or statement was made by him, his "condition" of "mind was all right"; that his general condition was very much improved; that he "talked very intelligently, as an intelligent man would talk in normal mind"; and that he answered all questions promptly and intelligently. With this testimony before the jury, there was no reason for withholding the statement from them on account of the physical and mental condition of the appellant at the time it was made. He

was shown to be fully capable of making an intelligent statement.

The objection having been overruled and the evidence admitted, the witness testified: "Squire Hollyday asked him in regard to it. He said he shot her. He asked him what for. In the first place, he said he had a reason, or something that way. He went on and said that he couldn't live with her, and no one else should; he wouldn't let any one else. That was about the amount of it." Upon further questioning he said, in substance, that he had given all he could recollect of what was said. Asked to state the exact language of the appellant, he answered: "That is about the substance of it. I couldn't go over it word for word, for the life of me." At this point the counsel for the appellant moved the court "to strike out the testimony of this witness on the ground that he didn't state anything but the impressions as he gained them from the language, and did not give the language." The court overruled this motion, and this action of the court is the ground of the third and last exception of the appellant. In this the court was clearly right. It was not necessary that the witness should be able to repeat the exact language used, in order to testify. He did not give mere impressions, but gave the substance of what was said, as far as he could recollect it, and this was sufficient. *Worthington v. State*, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506. A comparison of what this witness said with the statement taken down by the witness Hollyday will show that there is no divergence from that statement by the witness, in substantial effect, as far as the recollection of the witness allowed him to go.

Finding no error in any of the rulings of the court brought up by the exceptions, the judgment will be affirmed. Judgment affirmed, with costs.

MAYOR, ETC., OF CITY OF BALTIMORE v. SCHAUB BROS.

(Court of Appeals of Maryland. Feb. 11, 1903.)

CONTRACT—CONSTRUCTION—SALE TO CITY—
PAYMENTS—RIGHT TO TERMINATE.

1. Plaintiffs' contract to furnish a city coal for a certain period provided for monthly payments, to be made on the basis of analysis of the coal; that at the end of the month, from the shipments during the month, the city chemist would make an analysis, and plaintiffs' bill would be adjusted in accordance therewith; that, if the analysis showed that the shipments were not within the specifications, then when the next shipment was received an analysis would be made, and if the coal was not within the specifications the shipment would be rejected; and that the water engineer was to interpret the conditions of the contract and the accompanying specifications, and in case of dispute his decision was to be final. *Held*, that monthly payments were of the essence of the contract, and, not being made, authorized plaintiffs to terminate the contract; and this though the city chemist had not made an analy-

sis, whatever the reason therefor, and though he used due diligence.

2. The question whether the city was in default because of such nonpayment was not a dispute as to the meaning of a provision or clause of the contract, so as to be for the determination of the water engineer.

Jones, J., dissenting.

Appeal from Baltimore city court; J. Upshur Dennis, Judge.

Action by Schaub Bros., use of Benjamin H. Read, against the mayor and city council of Baltimore. Judgment for plaintiffs. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Wm. Pinkney Whyte and Olin Bryan, for appellant. Frederick C. Cook, for appellees.

PEARCE, J. On June 18, 1901, the plaintiffs, dealers in coal, entered into a written agreement with the defendant to supply certain departments of the city government, including the school board, with coal up to April 15, 1902, to be delivered at such times, and in such manner, as provided in specifications forming part of the agreement. This contract has been complied with by both parties, except as to the coal required for the school board. The approximate quantity required for the school board, as stated in the blue print attached to the specifications, was 6,290 tons, of which two-thirds was to be delivered during July and August, and one-third as needed; but the school board reserved the right to order less than the estimated quantity, if less was needed. The plaintiffs made the first delivery July 16, 1901, and continued to make deliveries up to August 29, 1901, aggregating 2,101 tons, when they refused to make further deliveries, alleging that the defendant had broken the contract by failing to make payment as provided, and had thereby discharged the plaintiffs from further liability under the contract, and this suit was brought October 28, 1901, to recover for the coal delivered, amounting to \$11,062.35. The defendant admitted the correctness of the statement of coal delivered, and that it was indebted to the plaintiffs in the sum of \$5,326.42, but filed a plea of set-off, alleging that the plaintiffs had broken the contract by refusing to make further deliveries, and that they were indebted to defendant in the sum of \$5,735.93 "for actual damage caused by the failure of the plaintiffs to fulfill and carry out said contract, as shown by the statement attached to this plea, and prayed to be taken as a part thereof." Issues were properly joined on the pleadings, and the case went to trial before Judge Dennis, sitting as a jury. The amount admitted to be due was paid before the actual trial, and a verdict was rendered for the plaintiffs for \$6,175.46, being the full amount claimed after deducting the payment made. The only exception taken was to the rulings upon the

prayers, and the only question thus presented is whether the defendant is entitled to the set-off claimed.

The provisions of the contract material to the consideration of the case are as follows: **Payments:** "Payments will be made once a month by each department for all the coal delivered to that department by the contractor or during the previous month, and will be made on the basis of what the coal shows on analysis." Provision is made for taking samples of coal for analysis from each shipment made to any department during the month. "At the end of the month all the samples thus accumulated will be thoroughly mixed, and a quart preserving jar will be filled with the mixture, labeled, and sent to the city chemist. The city chemist will, at the end of each month, thoroughly mix the contents of all these jars, and from that mixture take three quart jars for analysis, and will send to each department the result of his analysis of any one of these three jars, and the department will then adjust the contractor's bill, adding or deducting a given percentage of gain or loss upon given percentages of ash shown in the coal." **Rejections:** "If the analysis shows that the shipments of coal made by any contractor during the month do not come within the specifications, * * * then when the next shipment made by the contractor of the same class of coal is received an analysis will be made of a sample of this coal at once, and if that analysis shows that the coal does not come within the specifications, that shipment will be rejected, and must be removed at once, at the contractor's expense." Water engineer to interpret contract: "The contractors agree that the water engineer is to interpret the terms and conditions of this agreement, and the specifications accompanying; and, in event of any dispute as to the meaning of any of the provisions and clauses of same, the decision of the water engineer is to be final."

The testimony in the case may be summarized thus: Lewis W. Schaub, one of the plaintiffs, testified that after the first month's delivery he took a statement to Mr. Owens, supervisor of school buildings, who had the matter in charge, and who went over the bill with him and corrected it; that he told Mr. Owens he would like to have the money, as the contract was taken at a low figure, and they needed the money, and that Mr. Owens told him they should have it as soon as possible; that they continued delivering through August, and that during that month he went to Mr. Owens more than once, and told him they must have the money, as their shippers had made an agreement with them according to their own specifications with the defendant, and if they did not pay the shippers accordingly they would not ship any more coal; that they went again to urge payment, and were told the analysis had not been sent in, and that he replied, "You have

to look out for that yourself; we have only to deliver the coal;" that they went again in September, and were told there was nothing for them, and that he then went to see the shippers, who replied, "We can't put up with that, we must have money," whereupon, on September 3d, they sent to the school board the letter of that date set out in the evidence, stating that both Mr. Owens and Mr. McGill had told them they were unable to pay them, because no analysis had been received from the city chemist, and that they would not be paid until such analysis was received, also stating that they had called on Prof. Lehman, the city chemist, in reference to the matter, and that he told them that with an extra force he could not furnish the analysis required by the school board by Christmas; that it was apparent the defendant was unable to keep its part of the agreement, and, having failed to do so, they must refuse to ship it any more coal. This witness further testified that he told Mr. Quick, the water engineer, that they had trouble about the payment, and needed money, and that he said they would do the best they could, but could not say he asked Mr. Quick whether they had to wait for payment until an analysis was made; also that his brother, Francis J. Schaub, was with him when he talked with Mr. Quick, and that his brother did most of the talking at that time. Francis J. Schaub, testifying for the plaintiffs, said he was a member of the bar, and attorney for the plaintiffs, and confirmed Lewis W. Schaub in detail. He said the plaintiffs understood that defendant had the month of August to make the analysis for July, and they so told Mr. Owens, when they presented the July bill, but asked him to hurry Prof. Lehman up, and he said he would; also that he went to see Prof. Lehman, who said he would do the best he could, but that the way the school board wanted the analyses he could not get them through by Christmas, even with six assistants; also that he had seen Mr. Quick, and asked him if he could not hurry it up, and he said he had nothing to do with it; that after the letter of September 3d there was a meeting at the mayor's office, when Mr. Quick and Mr. Owens were present, and Mayor Hayes, and an effort was made to arrange for delivering the residue of the coal under the contract, and he agreed to this for the plaintiffs if defendant would take the coal by the manifest weight, and Mayor Hayes thought this was reasonable, but Mr. Owens thought this would not be just to the other dealers, and no agreement was reached. He also said that Mr. Owens phoned him after this interview to ship the coal, and he went to see Gov. Whyte about it, and Gov. Whyte said, "Get an order in writing before delivering any more coal; if you ship that coal on Mr. Owens' say so, it will get you in trouble;" that Mr. Owens, at his request, on the 7th of September, phoned him the analysis, but said nothing

about payment, and that if he had they would have been glad to accept it. Prof. Lehman, who also testified for the plaintiffs, confirmed the testimony of the two Schaub. He says that he furnished no analysis to the school board until September 6th; that he was called some time in September to the mayor's office, by the mayor himself, to explain why there was delay in the coal analyses, and subsequently, on the same day, received instructions how to furnish the analyses to the school board, and they were then furnished to Mr. Owens on September 6th, but before that he was not informed that analyses in detail were not required, and understood that a separate analysis was required from every school; that before receiving the instructions in September he did tell the plaintiffs he could not furnish the analyses, with the force at his command, before Christmas, but after receiving Mr. Owens' instructions on the day of the meeting at the mayor's office he could easily furnish them in the required time of one month; that he was not furnished with a copy of this contract until after September 6th, and only received a lot of samples, without any directions as to how they were to be treated, and that he wrote Mr. Schaub August 2, 1901, no analysis would be made until all the coal from one district was furnished, and then it would be for all the business of that district. He said, on cross-examination, that he was never directed to analyze the July coal without waiting for the August coal, though the plaintiffs told him they were depending upon the analysis for their payment, and were anxious to have the analysis made before August 31st, as they feared trouble with their shippers if they did not receive payment from the school board. Robert L. Windsor, a clerk for Lynah & Read, from whom plaintiffs purchased their coal, testified for plaintiffs that the specifications furnished by the defendant with the contract in this case were shown to Lynah & Read, and were the basis of their contract with plaintiffs as to payments; that is, all coal was to be settled for in the month succeeding that in which it was shipped. This closed plaintiffs' case, and Benjamin B. Owens was the first witness for defendant. His testimony did not materially contradict any of the plaintiffs' testimony. He admitted that about August 1st the plaintiffs brought in the bill for July deliveries, which was adjusted, and he told them that as soon as he got the analysis the bill would be paid; that they continued delivering through August, and frequently urged payment for July, and his reply always was that as soon as the analysis was received payment would be made; that after August 29th they stopped deliveries without telling why, and that they had not yet told why, though he admitted receipt from the school board of plaintiffs' letter of September 3d. He also said that the plaintiffs had only delivered about 2,000 out of

6,000 tons, though the contract required the delivery of two-thirds during July and August; but he admitted the correctness of plaintiffs' statement that, as no coal was ordered until July 16th, they were given until September 16th to furnish the two-thirds, as an offset to the two weeks in July. He also admitted that he gave no instructions to Prof. Lehman as to the method of analysis prior to the meeting in the mayor's office, and added that he had never since given any such instructions, and that Prof. Lehman was mistaken in his testimony on this point. He also proved the purchase of coal from other parties for the school board after plaintiffs ceased delivering, and that the increased cost was the amount claimed by way of set-off. Alfred M. Quick, for defendant, then testified that he was the water engineer; that the plaintiffs did complain to him of inconvenience to them by the delay in the analysis, but that they did not apply to him for any interpretation of the contract. Upon this testimony the prayers were offered, which will be set out by the reporter in the statement of the case.

The contention of the plaintiffs is that the monthly payments provided for were meant and understood by the parties to be of the essence of the contract, and, the defendant having failed to fulfill this stipulation, that the plaintiffs had a right to put an end to the contract. The contention of the defendant is that the analysis of the city chemist is an absolute condition precedent to payment, and that the failure of the chemist to make the analysis within the time limited for payment enlarged the time for payment; and also that the question whether the city was in default by reason of nonpayment by September 1st for the July deliveries was a question to be submitted to and determined by the city engineer, and consequently that the plaintiffs had no right to put an end to the contract, and defendant was entitled to set off damages arising from its breach.

We are of opinion that the contention of the plaintiffs is correct, and that neither position of the defendant can be maintained. We cannot distinguish this case from that of *McGrath v. Gegner*, 77 Md. 331, 28 Atl. 502, 39 Am. St. Rep. 415, which we regard as conclusive of this controversy. There the plaintiff agreed to buy of the defendant all the oyster shells made during the season, and to pay on the first day of each week for the shells delivered during the previous week. After the delivery of a large quantity the defendant notified the plaintiff that the contract was at an end, on account of his failure to make the weekly payments, and refused to deliver any more shells. Judge Robinson, speaking for the full bench, said: "We cannot suppose for a moment that the defendant meant to give an indefinite credit to the plaintiff, nor even a credit until all the shells were delivered or taken away. On the contrary, looking to the terms of the con-

tract, it seems to us it was the intention of the parties that the weekly payments by the plaintiff should constitute an essential part of the contract. In other words, it was of the essence of the contract." In *Withers v. Reynolds*, 2 Barn. & Adol. 882, where the defendant agreed to supply the plaintiff with straw to be delivered on plaintiff's premises, at the rate of three loads in a fortnight, during a specified time, and the plaintiff agreed to pay 30 shillings for each load so delivered, it was held that according to the true construction of the contract each load was to be paid for on delivery, and that on the plaintiff's refusal to pay for the straw as delivered the defendant was not bound to deliver any more. And in *Curtis v. Gibney*, 59 Md. 131, treating the contract as an agreement on the part of the defendant to consign 10,000 bushels of barley to the plaintiffs, the shipments to be made at different times, and payment to be made on receipt of each shipment, Bartol, C. J., said: "It is equally clear that, upon his failure to remit to the appellant the proceeds in his hands arising from the sale of the barley according to the terms of the contract with the appellant, the latter was not bound to make further consignments to him."

In the case before us a careful examination of the contract we think will leave no question as to the intention of the parties, and their conduct will confirm the construction placed upon the contract. It is not reasonable to suppose that the plaintiffs would enter into a contract, the fulfillment of which on their part would require the use of so large an amount of money, without some corresponding obligation on the part of the defendant to reimburse them during the progress of the fulfillment. In order to provide for payments to be made by them, it was essential that they should know when they could demand payments to be made to them, and accordingly the proof shows that they bound themselves to pay their shippers, *Lynah & Read*, in the same manner that the city was bound to them. It is thus made clear that they attached importance and value to this stipulation for time of payment, as observed in *Bowes v. Shand*, 2 App. Cas. 455.

Again, we think it is plain that the parties contemplated an early monthly analysis, in order to prevent the hardship upon the plaintiffs of full delivery for a succeeding month, with the possibility of its rejection and consequent removal at their expense; for it is expressly provided that, if the analysis for any month shows that the coal does not conform to the specifications, when the next shipment is received an analysis will be made at once, and if that analysis shows the coal does not conform to the specifications that shipment will be rejected, and must be removed at the contractor's expense. For these and other reasons of like character we do not think the analysis can be regarded as an absolute condition precedent to payment,

and we find nothing in the cases of *Gill & McMahon v. Vogeler*, 52 Md. 663, and *Lynn v. B. & O. R. R.*, 60 Md. 411, 45 Am. Rep. 741, in conflict with our conclusion, the distinction between both those cases and the present being obvious when examined. Nor do we think that the question whether the city was in default by reason of nonpayment for the July deliveries by September 1st constituted any "dispute," within the meaning of the contract, as to the "meaning of any of the provisions or clauses of the same." Questions as to the size, kind, or quantity of the coal delivered, as to the points of delivery, the correctness of weights or analysis, or other kindred questions, would seem to be within the scope of this provision, but not the ultimate legal right of the parties to the enforcement or the termination of the contract. It follows from what we have said that the plaintiffs' first prayer, which embraces and clearly states all the facts necessary to warrant a verdict in their favor upon the principle announced and adopted in *McGrath v. Gegner*, was correctly granted, and that the defendant's first and fourth prayers, which required the liability of defendant to be submitted to the water engineer, were properly rejected. Defendant's second prayer was properly rejected because it declared analysis of the coal to be a condition precedent to payment, and also because it made plaintiffs' right to recover depend upon the finding that the analysis was delayed for the purpose of delaying payment, whereas the failure to make analysis within the prescribed time was sufficient, without regard to the reason of the failure. In like manner, defendant's third prayer was properly rejected because the contract in prescribing a specific period for making analysis excludes any question of due diligence. The fifth prayer of defendant was defective in submitting to the court sitting as a jury the question whether the defendant's failure to perform its contract, if found as a fact, was sufficient in law to justify the plaintiffs in rescinding the contract on their part. Finding no error in the rulings of the learned judge, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

JONES, J. I respectfully dissent from the views of the majority of the court upon a vital point in this case, and will briefly state my reasons therefor. The facts and the evidence in the case are sufficiently stated in the majority opinion to make it unnecessary to do more here than to refer to such part of the evidence as will make intelligible the grounds of my dissent. The pleadings in the case put in issue the right of the appellant to recoup from the claim of the appellees, in suit, damages sustained by the appellant by reason of the refusal of the appellees to carry out the contract which the appellees offered in evidence as the basis

of suit. The only ruling of the court below which the record brings up for review is that upon the prayers submitted by the respective parties. The prayer which was offered by the appellees and granted by the court asserted the proposition that if the court (which was sitting as a jury) should find that this contract was entered into between the parties to the suit, and the other facts therein set out, and should then further find that "the city chemist did not make the analyses of the coal furnished to the school board during the month of July, 1901, until September 6, 1901, its verdict must be for the plaintiffs (appellees) for the amount of coal bills for the months of July and August, yet remaining due and unpaid to the plaintiffs by the defendant, together with interest in the discretion of the court on the amount so found to be due and unpaid from October 1, 1901." The nature of the evidence offered by the appellees under the pleadings, and this instruction based thereon, in effect, make this case a suit upon the contract by the appellees in which they are not confined to a recovery of such damages as they might be able to show they had sustained from a breach of the contract without fault on their part, but are enabled to treat the contract as not existing, as respects the appellant and its rights thereunder, and to secure to themselves all the fruits thereof, as far as it had been performed, without requiring them to show that they had performed, or were ready, able, and willing to perform, the contract in its several requirements on their part. This ignores important evidence in the case affecting the rights and obligations of the parties to the contract. The gravamen of the instruction granted at the instance of the appellees, and the ground upon which they based their rescission of the contract, consisted in the failure of the appellant to pay "for the coal by them furnished" to the appellant for account of the school board "during the month of July, 1901, at any time in the month of August, 1901, and up to and until September 3, 1901." The contract provided that payments should be "made once a month by each department for all coal delivered to that department by the contract during the previous month," and should "be made on the basis of what the coal" showed "on analysis." The provision for an analysis of the coal was an important one to the city, not so much in fixing the exact price of coal delivered, but in protecting the city against having supplied to it coal of inferior quality. The city, of course, could only act through its agents, and no agent would have been justified in making payment for coal delivered until furnished with the analysis stipulated for in the contract. The appellees, of course, knew this, or must be held to have known it. It was the duty of the city, however, to have the analysis in every case furnished within reasonable time.

and so that payments could be made for coal in accordance with the stipulation in the contract in that regard. Now, as to the analysis of the coal here in question, the testimony shows that the city chemist, in answer to a letter addressed to him by the appellees, wrote them on the 2d of August, 1901, "it will be some time before the coal delivered to the schools will be ready. There will only be one analysis for each district from each shipper, and the samples which I now have will be kept until all the coal to the schools is delivered, when I shall mix the samples and furnish the school board with the analysis. I will consider it a favor if you will kindly let me know when all the coal which you are delivering to the several schools under your contract has been delivered."

The chemist, as a witness, testified that he had had a misconception as to how the analysis for this coal was to be made, but that during August he learned from the proper city officials how it was to be made; that he had "a number" of visits from the appellees or one of them during August to inquire about the analysis, and there was no complaint "about any delay" on his part "in furnishing the analysis"; that he understood, and thought it was understood "by all hands concerned," that "only one analysis should be made for the summer of 1901" (referring, of course, to the analysis of the coal for the school board); that he had an analysis ready by September 6, 1901; and that it took three or four days to make it, as he had a good many analyses from the other departments, and they had to take their turn. A brother of the appellees, an attorney, who represented them in their dealings with the city, as shown by his own and other evidence, testified as follows: "The July payment under the contract which we had with the mayor and city council under date June, 1901, we did not consider due until the 1st of September following." There is other testimony that might be adverted to in this connection; but what has been noticed is sufficient, with the further fact that after the letter of the 2d of August, 1901, the appellees went on delivering coal under the contract, to show that they waived such right as they may have had to rescind the contract because of the analysis not being furnished in August. They treated the contract as still in force, holding the appellant bound by all the terms thereof, and apparently intending on their part to continue its performance, without any notice of an intention to rescind or any act indicating such intention until September 3, 1901. The present suit was brought, and the recovery here sought was based, on the assumption of the contract being a subsisting one up to that date. The appellant was entitled to have these facts submitted to the trying tribunal, and to the legal effect to flow from them if they should be found. *Bollman v. Burt*, 61 Md. 415; *McGrath v. Gegner*, 77

Md. 331, 26 Atl. 502, 39 Am. Rep. 415; Waggaman v. Nutt, 88 Md. 265-276, 41 Atl. 154. On the 3d of September, 1901, upon the theory of a waiver by the appellees of an analysis of coal during August, there were two reasons why the appellees were not entitled to rescind the contract. To entitle them to call upon the appellant for performance on its part on the penalty of a rescission of the contract, in case of a neglect of strict performance, it was incumbent on them to show that they had fully complied with the agreement on their part (Waggaman v. Nutt, 88 Md. 265, 267, 276, 41 Atl. 154), unless there be some reason appearing which in law is a legal excuse for not performing. The contract here in question contained a stipulation, by reference to an accompanying table, that the appellees should deliver to the appellant for use of the school board something over 6,600 tons of coal, and that two-thirds of this amount should be delivered during the months of July and August. The appellant was not only entitled, by this stipulation, to have this quantity of coal delivered, but also to have coal that would come up to the analysis prescribed and provided for in the contract. It did not gratify the contract to have a part of the coal delivered and coming within the analysis. The contract could only be gratified by having all the coal delivered and all coming up to the analysis. When on the 3d of September, 1901, the appellees attempted to rescind the contract instead of having delivered two-thirds of the coal as required, they had by their own showing delivered less than one-third. How could they complain of the absence of an analysis upon which payment for the coal was to be based when they had failed to deliver the coal of which the contract contemplated the analysis was to be made? There is no excuse attempted to be shown for nonperformance of the contract on their part by the appellees other than that having reference to the absence of an analysis of the July delivery of coal, which has already been considered. But, even if there had been performance by the appellees of the stipulation of the contract as to the quantity of coal to be delivered, there would still have been no sufficient legal justification for a rescinding of the contract on the 3d of September, 1901. No definite fixed day was prescribed in the contract on or before which the analysis should be made ready. The obligation imposed in this regard, therefore, upon the appellant was to have it ready in a reasonable time, subject, of course, to the provision in the contract as to making payments for coal. What is a reasonable time is a question of law for the court. 2 Parsons on Cont. 661; Ragan v. Gaither, 11 Gill & J. 472; Burroughs v. Langley, 10 Md. 248; Mispelhorn v. Farm. Fire Ins. Co., 53 Md. 473. The proof in the case shows that an analysis of the coal in question was ready within one week from the end of August, and the appel-

lees were so notified. From what appears in evidence, this was not an unreasonable delay of the analysis of the quantity of coal that was to be made the subject of analysis. The instructions granted by the trial court at the instance of the appellees, in ignoring the facts and considerations pertaining to a waiver of analysis of coal delivered in July, and to the right of the appellees to rescind the contract on the 3d of September, 1901, shut out the defense of the appellant raised by its third plea, and which there was evidence tending to support. In this, in my judgment, there was error. I agree with the majority opinion as to the rulings made upon the prayers proposed by the appellant.

TAYLOR v. FORREST.

(Court of Appeals of Maryland. Feb. 11, 1903.)

TAX SALE—REPORT BY COLLECTOR—DEED.

1. Under Code Pub. Loc. Laws Baltimore City, art. 4, § 832, providing that, where lands are sold for taxes, the collector shall report the sale, with the proceedings, to the circuit court, which shall examine them, and if they appear regular, and the provisions of law in respect thereto have been complied with, shall order the sale ratified and confirmed, the report must be made by the collector who makes the sale; otherwise the sale is void.

2. Code Pub. Loc. Laws Baltimore City, art. 4, § 834, providing that the collector shall, when required, if the property sold for taxes is not redeemed at the expiration of a year and a day from the day of sale, execute a deed to the purchaser, requires the deed to be made by the collector who made the sale.

Appeal from Baltimore city court; J. Upshur Dennis, Judge.

Action by Mary C. Taylor against Hattie V. Forrest. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John V. L. Findlay and Thomas Mackenzie, for appellant. Charles A. Briscoe, for appellee.

BRISCOE, J. The plaintiff brought an action of ejectment against the defendant in the superior court of Baltimore city to recover the reversion in a certain lot of ground, situate at the southeast corner of Trinity and Exeter streets, in the city of Baltimore. The case was tried before the court, without the intervention of a jury, upon an agreed statement of facts, which are fully set out in the record. The judgment being in favor of the defendant, the plaintiff has appealed.

The title of the defendant rests upon a tax sale of the property in question, dated the 17th day of December, 1895, and made by Lewis N. Hopkins, collector of taxes for Baltimore city, for the years 1893 and 1894. The property was purchased by Wm. E. Crowell, the predecessor in title of the defendant. The plaintiff's title is derived as

devisee of one Margaret J. Keys, who died on the 28th of December, 1900, and by her will, duly admitted to probate, devised the lot of ground, and the ground rent issuing thereout, to her sister, the appellant. The plaintiff's title appears to be good and sufficient, if the defendant derived no title to the property under the tax sale. The questions of law are presented for our consideration on the rulings of the court on the prayers, and the controversy relates to the regularity and validity of the proceedings under the tax sale.

The sale of the property, through which the defendant claims title, was made on the 17th of December, 1895, by Lewis N. Hopkins, collector, for the nonpayment of state and city taxes amounting to \$68.50, due and in arrear, for the years 1893 and 1894, by one Mary A. Forrest. The property was assessed at \$1,900 in the name of Mary A. Forrest, who at the date of the sale held only a life estate; but it was sold by the collector, in fee simple, to the purchaser, for the sum of \$135. The sale was on the 29th of December, 1896, reported to the circuit court of Baltimore city by John F. Parlett, the then collector, and the successor of Mr. Hopkins, and was subsequently, on the 14th day of April, 1897, ratified and confirmed by the court. Now, the effect of an order of ratification by the court is simply to establish a *prima facie* case. The regularity of the proceedings under the sale, and the title of the purchaser derived from the sale, can be attacked, if the collector has failed to comply with the law. The collector's power to sell property for taxes is conferred by statute, and the law is well settled that, in order to render a sale valid, there must be a substantial compliance with the essential requirements of the law from which this power is derived. The statute provides (section 52 of article 81 of the Code of Public General Laws, and section 832 of article 4 of the Code of Public Local Laws of Baltimore City) that in all cases where lands held in fee simple, etc., have been sold or shall be sold for payment of taxes in arrears, according to the provisions of existing laws, it shall be the duty of the collector of taxes to report the sale, together with all the proceedings had in relation thereto, to the circuit court of the county where said lands are situate, or, when lands are situate in Baltimore city, to the circuit court of the city. It is further provided that the court to which such report shall be made shall examine the proceedings, and if the same appear to be regular, and the provisions of law in relation thereto have been complied with, and if, after the notice required by the statute has been given, and no cause to the contrary has been shown, the sale shall, by order of court, be ratified and confirmed, and on the payment of the purchase money, the purchaser shall have a good title to the property sold. Baltimore City Code 1892, art 50. It is ob-

vious, then, from an examination of the statute applicable to this case, that the report of sale, and the proceedings had in relation thereto, by the collector who made the sale, are essential requirements of the statute; and being conditions subsequent to the sale, prescribed by the statute, no title will pass to the purchaser where the collector fails to perform this duty. The manifest object and policy of the law in requiring a report of the sale and the collector's proceedings is to enable the owner to ascertain the fact of sale, and to protect his interest by contesting the validity of the sale, or by a redemption of the property within the period allowed by law. The proceedings, says Mr. Blackwell, in his work on Tax Titles, vol. 1, sec. 644, is against the owner's will, in hostility to his rights, and for the purpose of subverting his title. There are no parties to the proceeding but the state, officer, and purchaser. The officer is not his agent, and has no power to bind him, except so far as he pursues the imperative provisions of the law.

In the present case, it will be seen, while Mr. Hopkins, the collector, made the sale to pay state and city taxes due and in arrear for the years 1893 and 1894, and payable by him as such collector, the report to the circuit court of Baltimore city was subsequently made, signed, and sworn to by John F. Parlett, his successor in office, and this report was not made until over a year after the sale. Was the report, then, as thus made, in this case, a compliance with the statute? If not, it is quite clear, the sale is void and a nullity, because the report of sale is an essential condition precedent, required by the statute to be performed, and a substantial prerequisite to the validity of the purchaser's title. The statute, it seems to us, can have but one meaning, and that is that the report of the tax sale, and all the proceedings in relation thereto, must be made by the collector who made the sale. The report should be made by the collector with all convenient speed after the sale, in order that the owner of the land, and others in interest, may have information of the facts, so as to decide upon the right of redemption or contest the validity of the proceedings. The law does not authorize the successor in office of a collector of taxes to report the sale made by a predecessor in office; and in the absence of such statutory authority and of law from which such a power is derived, it is difficult to see how it can be exercised by him. Collectors of taxes, under our revenue laws, are statutory officers; and their powers being derived from statute, the title of purchasers at tax sales is made dependent upon a compliance with the law. In the case of *Duvall v. Perkins*, 77 Md. 589, 26 Atl. 1085, it is said that, without some express authority conferred by the legislature, a sheriff is powerless to complete an execution commenced by his predecessor, and the successor of a collector has no great-

er authority in this respect than the successor or a sheriff.

But it is urged upon the part of counsel for the appellee, in his supplemental brief, that it has been an established custom and usage in the city of Baltimore for more than 25 years for the successor of a collector of taxes to report sales of real estate made by his predecessor in office. We fail to find any warrant in law, or any authority under the statutes applicable to Baltimore city, even should it be conceded that such a custom has prevailed in the city, that could sustain such a practice. The statutes referred to by the appellee cannot, in our opinion, be so construed.

The second objection relates to the deed executed to the purchaser. Mr. Parlett, clearly, had no authority to execute the deed in question. The statute (article 4, § 834, Public Local Laws of Baltimore City) provides that the collector shall, when required, if the property so sold shall not be redeemed at the expiration of a year and a day from the day of sale, and on payment of the full purchase money, execute a deed for the same to the purchaser. This clearly means that the collector who made the sale must execute the deed, and, without legal authority, the property cannot be conveyed by the successor in office. There was no order of court in this case authorizing the execution of the deed by the successor of the then collector. Code, art. 81, § 58; *Miller v. Williams*, 15 Grat. 218; article 50, § 51, p. 1045, Baltimore City Code 1892.

Our conclusion, then, is, for the reasons stated, that the tax sale in question was void, and the purchaser acquired no title to the property so sold.

The plaintiff's first prayer, which ruled that, under the pleadings and evidence, the plaintiff had shown such a title and right of possession to the property described in the declaration as entitled her to recover, should have been granted. The defendant's prayer, which was the converse of the plaintiff's prayer, should have been rejected.

For the errors in rejecting the plaintiff's prayer and in granting the defendant's prayer, the judgment will be reversed, and a new trial awarded.

Judgment reversed and new trial awarded, with costs.

EWELL v. MCGREGOR et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

WILLS—PECUNIARY LEGACIES—PAYMENT—CHARGE ON REAL ESTATE.

1. Act 1894, c. 438, providing that the real estate of a testator, not specifically devised, shall be charged with the payment of pecuniary legacies when the personalty is insufficient, unless a contrary intention clearly appears, is, by its explicit terms, not applicable to wills made before it went into effect.

2. Previous to the adoption of Act 1894, c. 438, making real estate chargeable with pecuniary legacies unless otherwise directed, the

real estate of a testator was not chargeable with the payment of pecuniary legacies, unless a clear intention to the contrary appeared in the will, either by express words or by a fair and reasonable implication.

3. In a will made prior to the enactment of Act 1894, c. 438, testator gave his property to his wife during widowhood, with remainder to his children, to be distributed equally among them, with the exception that the executor was directed to pay before distribution two pecuniary legacies; one of them to a grandson, out of the property due one of his daughters under the will. The executor was not empowered to sell the real estate, nor were any directions given that it should be sold, and upon the death of the widow it was divided by partition. *Held*, that the real estate set off as the daughter's share in the partition proceedings was not chargeable with the legacy to the grandson, which had not been paid by the executor.

Appeal from circuit court, Prince George's county, in equity; George C. Merrick, Judge.

Bill by Jesse Ewell against Mary E. McGregor and another. From an order sustaining a demurrer to the bill and dismissing it, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Wells & Wells and Robt. A. Hutchison, for appellant. C. H. Stanley, J. K. Roberts, and Alan Bowle, for appellees.

McSHERRY, C. J. The bill of complaint in this case was filed to enforce the payment of a legacy bequeathed by a certain Nathaniel M. McGregor to his grandson Jesse Ewell. McGregor made his will in January, 1869, and died in the following year. By his will he gave all of his property of every kind and description to his wife during widowhood, with remainder at her death to his children, "to be divided into six equal parts or proportions, and distributed among six children," who were named, "share and share alike, with the following exceptions; that is to say: I desire that my executor hereinafter named, before making the distribution hereinafter directed, shall pay unto my daughter Susan E. McGregor, in addition to her said property, the sum of six hundred dollars, to be deducted out of the property due my daughter Mary Eliza, and also four hundred dollars out of the property so due my daughter Mary Eliza, unto my grandson Jesse Ewell." Roderick M. McGregor was appointed executor, but was given no power to sell the real estate, and there is no direction that the realty should be sold by any one. In 1894 the widow of the testator died. Proceedings were subsequently instituted for a partition of the real estate of which the testator had been seised at the time of his death. Commissioners were appointed to make the partition, and their report, wherein they awarded a parcel of land designated "Lot Number Five" to Mary Eliza McGregor, one of the daughters, was finally ratified by the circuit court for Prince George's county. The legacy of \$400 to Jesse Ewell has never been

paid, and it is alleged that there is no personal estate of the testator with which to pay it. The bill of complaint charges that in these circumstances the legacy is a charge and lien upon lot No. 5, so awarded to Mary Eliza as her interest in her father's estate; and the relief prayed against the executor and Mary Eliza McGregor is a sale of lot No. 5 under a decree, so that out of the proceeds the legacy and accrued interest thereon may be paid. To this bill Mary Eliza McGregor demurred. The court below sustained the demurrer, and dismissed the bill. From that order the pending appeal was taken.

The single question is this: Is the legacy of \$400 a charge or lien upon the share of the testator's estate devised to his daughter Mary Eliza, as that share has been partitioned and awarded to her? If the legacy was not made by the will a charge or lien upon the real estate of the testator, then no part of that real estate can be sold for its payment, and consequently the portion acquired by the daughter would not be chargeable with it. So the whole controversy resolves itself into the inquiry, is the legacy a charge upon the real estate devised? The will was made and became operative before Act 1894, c. 438, was adopted. That act provides that the real estate of a testator, not specifically devised, shall be charged with the payment of pecuniary legacies when the personal estate is insufficient to satisfy them, unless a contrary intention shall clearly appear. By the explicit terms of the statute the enactment is not applicable to wills made before it went into effect. It must, therefore, be laid out of view in considering the question now before us. How stood the law when the will spoke? In the absence of a clear intention to charge a pecuniary legacy on real estate, manifested either by express words or by a fair and reasonable implication, all such legacies were payable only out of the personal estate which remained after the extinguishment of all debts. According to the terms of the will, the testator had both real and personal estate at the time of his death, and it is averred in the amended bill of complaint that the personal estate was inadequate to discharge the debts due by the testator and to pay the legacy. Unless, then, there is to be found in the will a clear intention to fasten this legacy on the land devised to the daughter Mary Eliza, and unless that intention be revealed in one or the other of the two ways named, the appellant, Ewell, is without remedy. There is no direction in the will to convert the real estate into money, and consequently the share given to the daughter cannot be considered personalty. The executor was not empowered to sell the land at all, and partition proceedings were resorted to for the purpose of dividing it. The executor, and not the daughter, was directed to pay the legacy. And he was directed to pay it "before making the distribution" between the six children, as prescribed

by the will. Inasmuch as the legacy was to be paid by the executor, and to be paid by him before he "divided" or "distributed" the estate into six equal shares, it is obvious that the duty to pay was imposed upon him, and not upon the daughter; and, whilst her share was to be diminished by the amount of the two pecuniary legacies, it was to the executor, and to no one else, that the legatees could look for payment. In the case of *White, Exr., v. Kauffman et al.*, 66 Md. 93, 5 Atl. 865, this court had before it the question as to whether certain legacies were a charge on land devised. The terms of the will were not the same as those in the will now before us, but a portion of the judgment of the court is quite applicable here. On the page above referred to it is said: "When we look at the clauses of the will giving these legacies, we see that the executor is directed to pay them out of the estate. No portion of the real estate is devised to him, and consequently the only portion of the estate over which he has any control is the personalty. It would not be reasonable to construe the will as requiring him to pay out of the realty when the same will has placed it beyond his reach. It seems to us, therefore, clear that, if payment is to be made by the executor, it must be made out of the personalty. If we now turn our attention to the clause devising the real estate, we find that it is given to the devisee unconditionally. There is no direction or request or intimation that she shall pay the legacies." Had the daughter Mary Eliza been charged with the duty to pay the legacy, an implication would have arisen that the intention of the testator was to fasten the legacy as a lien on the land devised to her. *Ogle v. Tayloe*, 49 Md. 158. But there is no such duty imposed upon her, and in the condition in which the law stood when the will spoke the legacy was payable by the executor only out of that part of the personalty to which Mary Eliza was entitled, and, that failing, the legacy was lost. This is the conclusion which the lower court reached, and, as we concur therein, the order appealed from will be affirmed.

Order affirmed, with costs.

JOHNSTON et al. v. LIPPERT et al.

(Court of Appeals of Maryland. Feb. 11, 1903.)
RECEIVERS—INJUNCTION—BILL OF COMPLAINT
—ALLEGATIONS—SUFFICIENCY.

1. A daughter of a decedent, who shortly before her death had distributed her property among her three children by deeds, filed a bill against the others which alleged that they, by undue influence, when decedent was lacking in testamentary capacity, had obtained the deeds; that the value of the property deeded to each of defendants exceeded that given complainant; and that one of defendants, who was administrator, had refused to account to the orphans' court for the property conveyed to defendants, or to take steps to have the same set aside. A receiver was appointed, and an injunction granted, restraining defendants from disposing

of any of the property. *Held* that such action was erroneous, there being no allegation of facts showing lack of testamentary capacity, or undue influence, or the value of the property conveyed to each child, other than the bare allegations of the pleader, and defendants, as heirs, being entitled to two-thirds of the entire estate, and it not appearing that the property was being wasted or improperly dealt with.

Appeal from circuit court No. 2 of Baltimore city; Pere L. Wickes, Judge.

Suit by Agnes J. Lippert and another against William J. Johnston, individually and as administrator of the estate of Rachel A. Johnston, deceased, and another. From a judgment appointing a receiver of certain property deeded by deceased to defendants, and restraining them from disposing of such property, they appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SOHLMUCKER, and JONES, JJ.

Frederick C. Cook and D. H. Emory, for appellants. Charles M. Trueheart and Armstrong Thomas, for appellees.

JONES, J. Rachel A. Johnston, late of Baltimore city, died intestate in that city about the 19th of June, 1902, leaving surviving her a son, William J. Johnston, and two daughters, Mary Ellen Kellen and Agnes J. Lippert. The last-named daughter and her husband, John G. Lippert, are the plaintiffs in this cause, and the son and the other daughter of the deceased are the defendants. On the 26th of August, 1902, these plaintiffs filed in circuit court No. 2 of Baltimore city their bill of complaint, in which they allege the death of Rachel A. Johnston on the 19th of June, 1902; that she was possessed of a considerable personal estate, consisting of leasehold properties and chattels in the city of Baltimore; that the plaintiff Agnes J. Lippert, Mary Ellen Kellen, and William J. Johnston are the children of the deceased, and the only persons entitled to participate in the distribution of her estate; that on the 18th day of June, 1902, "when the mental condition of the said Rachel A. Johnston was such as to render her incapable of executing a valid deed or contract, and when she was unable to recognize persons in her room, and well known to her, the said William J. Johnston . . . presented to her for execution four deeds, one . . . purporting to convey to the said William J. Johnston the leasehold interest in five lots of ground of the value of about \$5,000, another purporting to convey to the said Mary Ellen Kellen the leasehold interest in four lots of ground of the value of about two thousand nine hundred and fifty dollars, and the third purporting to convey to . . . Agnes J. Lippert [plaintiff] the leasehold interest in three lots of ground of the value of about two thousand dollars, and a bill of sale purporting to convey to the said Mary Ellen Kellen certain household furniture and a stock of goods of

the value of about twelve hundred dollars, and, by undue influence practiced upon the said Rachel A. Johnston, obtained her mark to said conveyances; that the said Rachel A. Johnston, when of sound mind, was able to write her name, and would have signed and sealed said papers, if in sound mind; and it had been her wish to do so; that the effect of said conveyances, if permitted to stand, would be to make an inequitable and unjust division of the personal estate of the said Rachel A. Johnston among her said children, to the injury and prejudice of" the plaintiff Agnes J. Lippert, "and contrary to the expressed wishes and intention of the said Rachel A. Johnston"; "that the said William J. Johnston, without the authority of the orphans' court of Baltimore city, assumed and exercised the right to collect the rents from and manage all the property of the said Rachel A. Johnston," and refused information to the plaintiff Agnes J. Lippert "as to the extent or disposition of the estate of the said Rachel A. Johnston until the 9th day of August, 1902, when, upon notice of contest, the said William J. Johnston applied for letters of administration upon the estate of said Rachel A. Johnston, and qualified as such administrator by filing a bond in the penalty of seven hundred dollars; that upon application for letters of administration the said William J. Johnston informed the judges of the orphans' court that the personal estate of the said Rachel A. Johnston consisted of but a small amount of cash, amounting to three hundred and nine dollars and thirty-six cents; that said administrator has refused to account to the orphans' court for the property purporting to have been conveyed by deeds and bill of sale, and has refused to take necessary legal proceedings to have said conveyances set aside and annulled, that the property might be brought into the orphans' court for distribution; that William J. Johnston and Mary Ellen Kellen have entered into possession of the properties purporting to have been conveyed to them, respectively, and that Mary Ellen Kellen has taken possession of the stock of goods purporting to have been conveyed to her by the bill of sale, and is selling and disposing of the same, and commingling the same with goods purchased by her." The bill then prays that the deeds and bill of sale referred to therein be set aside and declared void and of no effect; that an injunction may be granted, restraining the defendants from disposing of any of the property covered by the deeds or bill of sale to them; that a receiver be appointed to take charge of all the said property, and to collect the rents and profits therefrom, and manage the same, pending the litigation; that the court assume the administration of the estate of the deceased intestate; and that the defendants be required to account. There were filed with the bill, as exhibits, certified copies of the deeds and bill of sale referred to therein. On the day the bill was

filed the court below granted a preliminary injunction, and on the 16th day of September, 1902, without any intermediate proceedings, and without notice to defendants, passed an order appointing a receiver, as prayed in the bill. From these orders the present appeal was taken by the defendants, after having filed their answer.

The allegations of the bill have been fully set out, because the appeal challenges the sufficiency of these allegations to sustain the orders appealed from, and we are not permitted, in the present attitude of the case, to look beyond the bill and exhibits to determine this question. *McCann v. Taylor*, 10 Md. 418; *Blondheim v. Moore*, 11 Md. 363; *Lamm & Hughes v. Burrell*, 69 Md. 272, 14 Atl. 682. It will not be necessary to multiply authorities to ascertain the principles or rules of law that are to guide an inquiry of this character. In the case of *Blondheim et al. v. Moore*, supra, it was said in reference to the power of the court to appoint a receiver "(1) that the power of appointment is a delicate one, and to be exercised with great circumspection; (2) that it must appear the claimant has a title to the property, and the court must be satisfied, by affidavit, that a receiver is necessary to preserve the property; (3) that there is no case in which the court appoints a receiver merely because the measure can do no harm; (4) that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and (5) that, unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." And in the more recent case of *Lamm & Hughes v. Burrell*, 69 Md. 272, 14 Atl. 682, it was said "that, to warrant the court in issuing an injunction, a full and candid disclosure of all the facts must be made. There must be no concealment, and the *res gestæ* must be represented as they actually are. * * * The court must be informed by the bill itself and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may be seen whether there is a just and proper ground for the application of so summary a remedy. Strong *prima facie* evidence of the facts on which the plaintiff's equity rests must be presented to the court." These propositions may be regarded as settled in the decisions of this state. The application of the principles thus enunciated in any given case is addressed to the sound discretion of the court. The bill here charges that the deeds which are sought to be annulled, if allowed to stand, will make an "inequitable and unjust division" of the property which is the subject of this controversy among the children of Rachel A. Johnston. The deeds that are attacked make division of the property left by the said deceased among all three of the children. Each gets a portion. In-

equality of division, therefore, must arise from a difference in amount and value of the several portions; and the real subject of contention is, not the whole property, but that amount of it which represents this difference of amount and value that makes the inequality. The defendants are shown to be in possession of the property conveyed to them by the deeds, and until the deeds are set aside they are invested with the legal title to it. They have an undoubted right to two-thirds of the whole property, subject to rights of creditors, as next of kin to their mother; assuming the deeds to be invalid. It will thus be seen, from the allegations of the bill as to values, that the amount of property really involved in the contention here bears but a small proportion to the whole property which is affected by the orders here under review, and to the larger part of which—two-thirds of the whole—the defendants have an undoubted right. This being the situation with respect to the property involved in the controversy, and the rights of the parties therein, what appears as a basis for summary process? In the first place, the valuation given to the properties embraced in the several deeds referred to in the bill appears as resting on the bare assertion of the pleader. There is nothing to show that the values assigned to the respective properties are anything more than mere arbitrary statements of value. No *prima facie* evidence is adduced, and no fact is stated in that connection, going to give color to the values assigned. In respect to one of the defendants, Mary Ellen Kellen, there is no charge that she has been guilty of, or was in any way connected with, any improper act in acquiring title to or possession of the property in controversy. It is alleged that the defendant William J. Johnston had refused to account to the orphans' court for the property embraced in the deeds. This he was not required to do, if the deeds were, as he claimed them to be, valid. It is further alleged that the defendants had entered into possession of the properties purporting to have been conveyed to them, respectively, by the deeds that are assailed, and that the defendant Mary Ellen Kellen had taken possession of the stock of goods purporting to have been conveyed to her by the bill of sale, and was selling and disposing of the same, and commingling them with goods since purchased by her. This the defendants had a perfect right to do if the deeds and bill of sale were valid conveyances. How does the bill attempt to show color or support for the claim that the deeds were not good legal conveyances? Only by the general averments that the grantor therein was, at the time the deeds purported to have been executed, in a mental condition to render her incapable of executing a valid deed or contract, and that, being in that condition, the deeds were obtained by undue influence practiced upon her. The

vagueness of this charge is apparent from the inconsistency involved in it. Undue influence presupposes mental capacity to do the particular act which its exercise brings about. *Stirling v. Stirling*, 64 Md. 138, 151, 21 Atl. 273. In cases involving questions of the existence vel non of capacity to execute a valid deed or contract, or of undue influence, it is the well-recognized province of the court to define what facts will constitute or be sufficient to show the one or the other, as the case may be; and these facts must be found, and, when found, mental incapacity, to the extent sufficient to avoid the act in question in the particular case, or undue influence, is a result deduced from them. So, in a case of this nature, where, as we have seen, there must be made "a full and candid disclosure of all the facts," and "the *res gestæ* must be represented as they actually are," it is not sufficient, as affording a satisfactory basis for summary action, for the pleader to characterize for himself the mental condition that may exist in the particular case as one that renders the subject of it incapable of executing a valid deed or contract, or the influence that may be present to affect the act performed as undue influence, without the allegation or disclosure of facts necessary to enable the court to see whether the conclusions of the pleader have a reasonable and probable basis. In the bill which brings up this controversy no fact is alleged going to show the mental condition of the grantor in the deeds in question at the time of their execution by her, other than that "she was unable to recognize persons in her room, and well known to her," which may have been due to other causes than the absence of a capacity to execute a valid deed or contract. In respect to undue influence, it is merely alleged that, while the grantor was in the mental condition alleged by the pleader, the defendant William J. Johnston "presented to her for execution four deeds, * * * and, by undue influence practiced upon" her, "obtained her mark to said conveyances." No act or conduct on the part of this defendant that amounted to or which shows undue influence, as the law defines it, is made to appear. Again, it is not shown that the property in question here is in danger of being wasted or lost, or of being put beyond the reach of the process of the court upon a final adjudication between parties, "if the intermediate possession should not be taken by the court." No act or even threat on the part of the defendants, suggestive of any such danger, is alleged or charged. It is merely alleged that they are in possession of the property, exercising the ordinary rights pertaining to ownership. The bill prays, in addition to asking that the deeds to the property be set aside, that the defendants be required to account; and it is not alleged that they are insolvent, or would not be able to respond to such final decree as might

be passed against them in the cause. On the contrary, it appears that they would be able to so respond. In short, no such fraud or condition of imminent danger or stringent necessity is made to appear as to warrant the appointment of a receiver before the defendants were "heard in response to the application."

Some other aspects of the case were referred to in the argument, which it is not necessary to discuss.

It follows that the orders appealed from must be reversed. Orders reversed, with costs to the appellants.

GILL v. DONOVAN.

(Court of Appeals of Maryland. Feb. 11, 1903.)

SERVANT—WAGES—LIMITATIONS—ACKNOWLEDGMENT OF DEBT—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS.

1. In an action against an estate for services, brought 10 years after their rendition, plaintiff's stepmother testified as to the services, and that decedent had, three months before her death, told witness that, though she had not paid plaintiff yet, she would pay her, and that decedent was referring to the debt in controversy. There was other testimony of an acknowledgment of the debt on the part of the deceased. *Held*, that it was a question for the jury whether there was a new promise, so as to interrupt the running of limitations.

2. Where a debtor acknowledges a debt as due, and states that she is going to pay it, the obligation to pay is not impaired by her expressed intention to discharge the obligation by a bounty to the creditor under her will.

3. Where, in an action against an estate for services, a witness testified that decedent had told plaintiff she would pay her at her death, and that she had it in her will, such testimony is sufficient to support a modification of an instruction, on the defense of limitations, that plaintiff's claim was not barred if the jury found that decedent promised that the debt should be paid at her death.

4. The refusal of a requested instruction is not error, when it is substantially included in another instruction granted.

5. In an action against an estate for services rendered by a young girl, evidence is admissible to show whether any one else did the sort of services plaintiff was employed to do, and whether she was sent to school during any part of the time she was with decedent.

6. Where, in an action against an estate for services rendered by a young girl, defendant's proof proceeded on the theory that plaintiff was with the decedent as a member of the family, and not as a domestic, and testimony had been offered that she was a niece of decedent, there was no error in admitting evidence that the relationship was of the half blood.

7. Where, in an action against an estate for services, limitations have been pleaded, evidence that decedent had admitted, within time before the suit was brought, that she had not paid plaintiff anything for her services, was material.

8. Where, in an action against an estate for services rendered, plaintiff's bill of particulars did not define just what the services were, or the time during which they were performed, but the proof showed a verbal contract, and that it had been executed, except as to the payment of the compensation due, evidence in regard to the value of the services was admissible.

Appeal from Baltimore city court; John J. Dobler, Judge.

Action by Margaret Donovan, by Edward L. Donovan, her husband, against Roger T. Gill, administrator of the estate of Catharine L. Staylor, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

William S. Bryan, Jr., and R. E. Lee Gill, for appellant. Robert W. Beach and Chas. Morris Howard, for appellee.

JONES, J. The appellant is the administrator of Catharine L. Staylor, and as such was sued in the Baltimore city court by the appellee for money claimed to be due the appellee for services rendered the appellant's intestate in her lifetime. The declaration contained only the common counts, and the appellant demanded a bill of particulars in response, to which the appellee filed the following statement of her claim: "Complying with defendant's demand for a bill of particulars, the plaintiff begs to state as follows: That on or about the 5th day of September, 1886, the plaintiff was employed by Catharine L. Staylor, deceased, as a domestic, at \$2.50 per week; that the plaintiff remained in the employ of the said Catharine Staylor, deceased, until about the 10th day of October, 1890, making a total of two hundred and ten weeks, which, at \$2.50 per week, makes due her, in all, the sum of \$525, no part of which claim was ever paid to her." The appellant then pleaded the general issue pleas and the statute of limitations, as, also, want of assets. The appellee took issue on the other pleas, and, to the plea of limitations, replied new promise, upon which issue was joined. The questions in the case are made mainly upon the effect of the bill of particulars and upon the plea of limitations. The record shows there was a motion in arrest of judgment, but this was abandoned in this court. The matters for review here are presented by eight exceptions to the rulings of the trial court upon objections to evidence made by the appellant and overruled by the court, and an exception by the appellant to the action of the court in granting an instruction asked for by the appellee, and the overruling of special exceptions thereto, and the rejection of certain instructions asked for by the appellant. The instructions proposed by the appellant were eleven in number, of which the court rejected the 1st, 2d, 3d, 5th, 6th, 7th, 9th, 10th, and modified the 11th, and granted the same as modified, and granted the 4th, 8th, and 9th as offered.

There was an agreement that in case of a verdict for plaintiff "the judgment thereon should be to bind assets only in the hands of the administrator." This, evidently, is the reason that neither in the evidence offered,

nor in the instructions in the case, is there any reference to the matter of the appellant's fourth plea. We therefore are not concerned with any question in that connection, and may dispose of other questions without reference to this plea. The claim which is the basis of the plaintiff's suit is, as has been seen, for money due her for services rendered the appellant's intestate, Mrs. Catharine Staylor, between September, 1886, and October, 1890. This suit was brought April 16, 1900—about 10 years after the rendering of the services. The plea of the statute of limitations, therefore, upon the appellant's theory of the case, will be a complete bar to the recovery by the plaintiff in this suit, unless the replication of a new promise be supported by the proof.

After all the evidence was in at the trial below, the appellant offered a prayer (being the first of his prayers) to the effect that there was "no legally sufficient evidence to remove the bar of the plea of the statute of limitations." This prayer the trial court rejected. Whether there was error in this may be regarded as a question in limine, for, if this prayer asserts a correct proposition as respects the evidence in the cause, all other propositions would become moot questions. There was no error in this ruling. Among other witnesses in the cause, a Mrs. Carr testified that she was the stepmother of the plaintiff; that the plaintiff (appellee here) was living with her at the time "she went to Mrs. Staylor's"; that after her (appellee's) father died "she went to work with a little girl friend of hers, and was making \$2.50 a week. She continued at that work until she went to Mrs. Staylor's." The witness then further testified that "Mrs. Staylor said she would like to have Maggie with her, and she would give her the same wages that she had at the store where she worked then, so Maggie went to her. Mrs. Staylor told me this. And then, later on, I called to see her there, and quite three months before she died, and she told me she intended to do well by Maggie [appellee], though she had not paid her yet, but she would pay her, and she intended to give her more than wages; and she said she would give everything to Johnnie and Maggie. This was not quite, but nearly, three months before Mrs. Staylor died." From other proof it appeared Mrs. Staylor died in October, 1890. Here was testimony tending to prove the appellee's claim as set out in her bill of particulars; and assuming the debt claimed by the appellee to be due to her by Mrs. Staylor to have been proved by this, or by this and other proof, the testimony also tended to show that Mrs. Staylor, in the conversations detailed by the witness, was referring to this debt. If so, when she said she had not paid the appellee "yet," and that she "would" pay her, and more than "wages," this was a sufficient acknowledgment to take the case out of the operation of the statute of limita-

tiona. Shipley and Wampler, *Extra*, v. Shilling, 66 Md. 558, 8 Atl. 355; Stewart v. Garrett & Maus, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333; Beeler v. Clark, 90 Md. 221, 44 Atl. 1038, 78 Am. St. Rep. 439. It did not impair the obligation, which the law imposes, to pay a debt so acknowledged, that she indicated an intention to discharge the obligation by bounty to the appellee under her will. The acknowledgment of a subsisting debt, unaccompanied with any sufficient excuse for not paying it, will remove the bar of the statute. This was laid down in the case of Oliver v. Gray, 1 Har. & G. 204, and is fortified by other decisions. There is other testimony going to show a recognition by Mrs. Staylor that the appellee had rendered for her services of value, and that the appellee had not been paid for the same. It was proper, therefore, that the question of new promise raised by the plaintiff's replication to the plea of limitations should be submitted to the jury; and, before leaving this aspect of the case, we may inquire whether it was properly submitted.

The appellant offered two prayers—the tenth and eleventh—defining the character of the acknowledgment or promise that ought to be found by the jury to remove the bar of the statute. The eleventh prayer asked that the jury be instructed that, “under the pleadings in this case, they must find, by a fair preponderance of evidence, that within three years before her death Mrs. Catharine Staylor, the defendant's intestate, either expressly promised to pay the claim of the plaintiff, sued on in this action, or within three years made a distinct acknowledgment of it as an existing obligation, which distinct acknowledgment showed a present, subsisting, moral obligation to pay the same.” The court modified this prayer by adding to it the following: “unless they further find that Mrs. Catharine Staylor expressly promised the plaintiff that the plaintiff would be paid for her services at Mrs. Staylor's death.” It is contended there was no evidence to support this modification. But we find that John Staylor, a witness, after giving testimony tending to establish the claim made by the appellee according to her statement of claim, testified that after the appellee entered upon service for Mrs. Staylor, and had remained there for a time, she, in the language of the witness, “got fussing about money, and said she wanted money, and her aunt told her she could not give it to her now, but said she would give it to her at her death. She said she had it in her will.” He also testified that after this “fuss” about money the appellee left the home of Mrs. Staylor, and returned again to Mrs. Staylor's service upon the latter's request. This testimony afforded a basis for the hypothesis of the court's modification of this eleventh prayer. In the case of Gill v. Staylor, 93 Md. 453, 49 Atl. 650, in which the administrator of Mrs. Staylor was sued, as

he is in the case at bar, for the value of services rendered to his intestate in her lifetime, the trial court, upon a very similar condition of proof, attached to one of the prayers offered by the appellant a modification to the same effect as, and in almost identical terms with, the one we have under consideration; and the same was approved by this court. We see no reason why the part of the instruction in that case which was embodied in the court's modification is not equally appropriate here. We find no error in this action of the court.

The tenth prayer of the appellant, which was rejected by the trial court, was, in substance and effect, the same as his eleventh prayer as offered. By the court's action on the eleventh prayer, the appellant got the benefit of the proposition of law embodied in these two prayers, as far as he was, upon the evidence, entitled to the same. There was no error, therefore, in the court's action as to this tenth prayer.

Before advertent to other prayers embraced in the appellant's ninth exception, the exceptions to evidence will be disposed of. In the first exception, the question objected to was, did Mrs. Staylor herself do work about the house while appellee was with her? The fourth was to the question, were there other servants about the house? And the eighth was whether anything was done to educate the appellee—was she sent to school? There was no error in overruling these objections. The ground of the appellee's suit was that she was in the house and family of Mrs. Staylor by reason of being employed as a domestic; and inquiries whether there was any one else about the household to do, or who did, the sort of service indicated in such employment, and whether the appellee was sent to school, or remained uninterruptedly at the place of service, elicited evidence which, together with the evidence in the case as to the character and amount of service rendered by her while with Mrs. Staylor, tended to show what her position in the household of Mrs. Staylor really was. The second, third, and seventh exceptions were to questions intended to elicit evidence that Mrs. Staylor's relationship to the appellee was of the half blood. This evidence would seem to have no probative force as to any issue in the cause at the time it was offered, or as the case then stood; but it had been testified that the appellee was a niece of Mrs. Staylor, and it could at least do no harm to have it explained exactly what the relationship was. Especially was this so in view of the theory upon which the appellant's proof proceeded, which was that the appellee was not with Mrs. Staylor as a domestic, but as a relative and member of her family. In connection with such proof, it was not inappropriate to have the exact relationship of the parties in question explained, for what it might be worth, though it might reflect but

little upon the issues in the cause, under the circumstances of this case. There is therefore no cause for reversal, at least, in the action of the court in the matter of these exceptions. The fifth exception was to the evidence given by a Mrs. Lafferty, in which she testified to conversations had with Mrs. Staylor in reference to the appellee, one of which conversations occurred about three weeks before Mrs. Staylor died. She testified to statements made by Mrs. Staylor to the effect that she (Mrs. Staylor) had not given the appellee anything for her services. The appellee had offered evidence tending to show that she had rendered services for Mrs. Staylor, and that these services were to be paid for. The admissions testified to by this last-named witness went to the appellee's whole case—all of them to the merits, and some of them to the appellee's replication to the plea of the statute. It was a part of the appellee's case to show that she had received no payment for her services, and that this had been admitted by Mrs. Staylor within time before suit brought to sustain her replication of new promise. The evidence in question was therefore directly in support of the issues on trial. The sixth exception is to an offer by the appellee of evidence to show what was the reasonable value of such services as it had been testified, in the course of the trial, that the appellee rendered during her stay with Mrs. Staylor. The objection to this offer of evidence is based upon the same reason and theory as are the third and fifth prayers of the appellant, which were rejected by the court. The ground of the objection is that the appellee's bill of particulars shows that the services, for the value of which the appellee sues, were rendered under a special agreement, according to which the appellee must recover, or not recover at all, and that consequently no evidence is admissible to show what is the reasonable value of the services in question, because this would be to allow a recovery by the appellee upon a quantum meruit. Now, it is to be observed that, assuming that the bill of particulars does set out a special contract, this contract has been fully executed, as to the rendering of the services, and nothing remains to be done under it, except the payment of the compensation due for the services so rendered. The contract was not specific in its terms, fixing a period within which it was to be performed, and defining just what the services were that were to be rendered under it. The time during which the services were to be rendered was left indefinite, and the employment was a general one, as a domestic. Under such a contract there can be no way of ascertaining the extent, character, and value of services actually rendered, except by proof such as was proposed to be introduced here, and made the subject of the exception now under consideration. It was incumbent upon the

appellee to show the character of services actually rendered, and it was just as necessary that the value of them should be shown. There could have been no recovery for larger compensation than the appellee had claimed in the bill of particulars, but within that claim she would have been entitled to recover for services actually rendered by her and accepted by Mrs. Staylor, according to their extent and value, provided they were not "other and different services" from those claimed for in the bill of particulars, and had been rendered with the intention on her part to charge for them, and the expectation on Mrs. Staylor's part to pay for them. All question as to the admissibility of the evidence under consideration, or as to the action of the trial court upon the prayers that have been referred to in this connection, is concluded by the case of *Fairfax-Forrest Mining & Manufg. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024. In that case the court was dealing with a bill of particulars of like character and effect as the particulars in the case at bar, and, in reference to the identical question which is here raised in the sixth exception to evidence as to the admissibility of evidence to prove the value of services actually rendered, this court said, through Judge Robinson, "Evidence as to the nature and character of the services, and what would be a fair and reasonable compensation therefor, was admissible in evidence." Judge Robinson also said that, for the services rendered, the plaintiff in that case "was, beyond question, entitled to recover, irrespective altogether of the contract itself." Again, in dealing with a prayer in that case which had been rejected, and which asserted the proposition that, to entitle the plaintiff to recover, he had to prove the contract set out in the bill of particulars, the court further said, after criticising the prayer in other particulars, "we are not to be understood as meaning that the right of the plaintiff to recover in an action of assumpsit depended upon his being able to prove the agreement under which his services were rendered. On the contrary, if services were actually rendered by him and accepted by the defendant, he was entitled to recover compensation for such services, independent altogether of the special agreement." Then, after speaking of the office and effect of the bill of particulars, and saying that the plaintiff could not "recover for other and different services, nor could he offer evidence of any other claim or demand," the court further said: "But the bill of particulars did not prevent the plaintiff from recovering under the common counts if the special contract was executed, or, in other words, if the services under it had been fully rendered, and nothing remained to be done but the payment of the money by the defendant." This would seem to make clear the correctness of the ruling of the court below upon the sixth ex-

ception to evidence, and upon the third and fifth prayers of the appellant. The case of *School Commrs. v. Adams*, 43 Md. 349, much relied upon by the appellant here, is not in point. In that case this court said there was error in the ruling of the court below, because the plaintiff there had been allowed to recover for "other and different services" from those that fell within the description given in the bill of particulars. From what has been said, no special comment need be made upon the second, sixth, and seventh prayers of the appellant. They were properly rejected. It remains only to make reference to the one instruction granted by the court below at the instance of the appellee, of which it need only be said that it was based upon the evidence in the cause, and its special form received the approval of this court in the case of *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650.

It follows from the foregoing views that the judgment of the court below must be affirmed. Judgment affirmed, with costs, to the appellee.

CANNON v. BRUSH ELECTRIC CO. OF BALTIMORE et al.

(Court of Appeals of Maryland. Jan. 22, 1903.)

CORPORATIONS—CONSOLIDATION—ILLEGAL INCORPORATION PROCEEDINGS—RELATION OF STOCKHOLDERS INTER SESE—ACTS OF DIRECTORS—FRAUD—EVIDENCE.

1. Where a consolidated corporation was formed from two other supposed corporations, which in fact never had any legal existence, the rights of stockholders of such consolidated corporation inter sese should be governed by the supposed charters of the corporations, and laws of the state relating thereto, and not by the rules governing partners; nor should the managing directors be treated as agents of the stockholders.

2. The B. Electric Company purchased a majority of the stock of the U. Electric Company to prevent competition, and some time thereafter, on the B. Company's plant being destroyed by fire, its directors, who also managed the U. Company, directed that the latter should not take any more business until further orders from such directors. The B. Company thereafter used the machinery of the U. Company to furnish power to its customers, and its directors fixed a price of \$1,500 per month for the use of such power. Plaintiff, a dissenting stockholder of the U. Company, objected to this allowance, but only requested that it be increased \$50 per month, which was denied. *Held*, that such facts did not show that such price was unfair or unreasonable.

3. Where a competing electric light company purchased a majority of the stock of the U. Company, and, on the burning of the former's plant, notified the U. Company not to take any more lights until notified to do so, but the U. Company's bookkeeper testified that the company had no capacity for more lights, said order did not show that the competing company was managing the U. Company for the benefit of the former's stockholders at the expense of the latter.

4. Where the B. Electric Company owned a controlling interest in the U. Electric Company, with which it was in competition, and the plant of the B. Company was destroyed by fire, the fact that the directors of the U. Company, who

were also directors of the B. Company, used the U. Company's fund in redeeming the ground rent on the U. Company's works, instead of increasing the U. Company's capacity by purchasing more machinery, "so that it could reap the benefit of the B. Company's misfortune," did not show that the B. Company was fraudulently using the U. Company for its benefit, at the expense of the U. Company's stockholders.

5. Where a valuable contract for furnishing electric power, lost by the U. Electric Company without any fault or act of the B. Company, which owned a controlling interest in the U. Company, was thereafter obtained by the B. Company, the fact that the B. Company entered into an agreement with the U. Company to supply the power required by the contract at 66 per cent. of the price received by the B. Company, in the absence of any showing that the U. Company incurred any loss in supplying such power, did not indicate a fraudulent design of the B. Company to injure the U. Company.

6. Where the B. Electric Company owned a controlling interest in the U. Electric Company, with which it was in competition, the fact that the latter had extended its lines on certain streets of the city in which it was located did not prevent the B. Company, in the exercise of fair competition, from rightfully constructing its lines on the same street to serve its customers thereon.

Appeal from circuit court No. 2 of Baltimore city; J. Upshur Dennis, Judge.

Suit by Thomas J. Cannon against the Brush Electric Company of Baltimore and others for the appointment of a receiver of the United States Electric Power & Light Company of Baltimore City, and to recover damages from the Brush Electric Company of Baltimore for alleged injuries and unfair competition. From a judgment on an auditor's report in favor of defendant Brush Electric Company, plaintiff appeals. Affirmed.

The following is the report of the auditor, referred to in the opinion:

"The bill of complainant alleges, among other things, that the complainant and defendants are copartners, as the attempted incorporation of the consolidated company, the United States Electric Power & Light Company, is void. The court, by decree of November 26, 1897, has decided that the said United States Electric Power & Light Company was not duly incorporated, and did not acquire and possess the powers and rights of a legally incorporated company under the laws of Maryland. The auditor does not understand, however, that the court has as yet considered and determined whether or not the parties interested in the said company are, as inter sese, copartners, or what is their legal status as regards each other. The facts are: On October 8, 1881, the United States Electric Light Company attempted to incorporate under the general law, and on September 5, 1885, the United States Electric Lighting Company made a similar attempt; and on October 21st, 1885, the present company, the United States Electric Power & Light Company, was attempted to be formed by a consolidation of the two former companies. By the terms of the pretended articles of consolidation the present

company was to have a capital stock of five thousand shares, of one hundred dollars each, and its board of directors was to consist of nine of its shareholders. Under these attempted incorporations the United States Electric Power & Light Company erected works and proceeded to furnish light and electric power in Baltimore City. On March 7, 1882, the Brush Electric Company made a similar attempt to incorporate under the general law, and in 1890 applied to the Legislature to validate its attempted incorporation, which the Legislature did March 31, 1890. Laws 1890, c. 233. In 1886 the Brush Company purchased from certain stockholders 2,784 shares of the United States Electric Power & Light Company, and thus obtained a controlling interest in the United States Company.

"Under this state of facts, the question arises, what was the relation thus created between the Brush Company and those interested in the United States Electric Power & Light Company? As to third parties who had dealings with or became creditors of the United States Company, there can be no doubt that the relation would be that of quasi copartners. 1 Lindley on Part. p. 25. But as between themselves the conditions seem to lack many of the elements which go to create the relation of copartners. Thompson on Corporations, vol. 1, sec. 14, states as follows the difference between a corporation and a partnership: '(1) Its members may, in general, without restraint, by transferring their shares, introduce other persons in their stead,' etc. '(2) The members of a partnership are agents of the partnership firm, whereas in a corporation they only act through the agency of a board of directors,' etc. '(3) The partners are liable in their private estates, for debts,' etc. And furthermore, as between the parties themselves, the mere fact of sharing in the profits will not create a partnership between the parties themselves, as to the property, contrary to their intention. Berthold v. Goldsmith, 24 How. 537, 16 L. Ed. 762. And again, between the parties themselves the test has always been their actual intent. Culley v. Edwards, 44 Ark. 424, 51 Am. Rep. 614; Waring et al. v. Nat. Marine Bank, 74 Md. 278, 22 Atl. 140. That there was no intention or understanding of the Brush Company, or those representing it, when it bought into the United States Company, to become partners with their other co-shareholders in the latter company, is clear from the evidence; nor is there a particle of evidence to show that anyone connected with either company supposed or intended at the time of said purchase of stock by the Brush Company that a copartnership was thereby formed as between themselves. But all parties, up to the filing of the present bill, treated the United States Company as a duly incorporated company, the shares of which were sold, dealt in, and transferred without

the consent or prohibition of the other shareholders. The affairs of the concern were governed by a board of directors elected by the shareholders according to the number of shares held. In view of the fact that the incorporation of the United States Company has been found to have been void, and that there was no intention of the parties to become copartners as between themselves, it appears to the auditor that the shareholders in this unincorporated company should be treated as members of a voluntary association, who have by their acts agreed to conduct its affairs, as between themselves, as a corporation, the interests in which are represented by shares of stock, and the management of which has by them been confided to the board of nine directors, and that the written terms upon which they have agreed to conduct the association are to be found in the pretended charter and the by-laws of the association. If the auditor is right in this view of the case, then, as between the controlling shareholder, the Brush Company, a duly incorporated company, and the shareholders of the United States Company, who, as above stated, had conducted the United States Company as a corporation, it would appear that the principles of law which govern the dealings of one corporation with that of another corporation are the proper principles to apply to this case.

"The bill of complaint, after alleging, as above stated, that the parties are to be considered, *inter sese*, as partners, goes on to charge that the Brush Company, in buying a controlling number of shares in the United States Company, did so 'with the intent and for the purpose of securing to itself the control of said United States Company, and of its property and business and of withdrawing it from competition with said Brush Company,' etc., and that the Brush Company elected a board of directors, a majority of whom were representatives of said Brush Company, and that said Brush Company has for several years past conducted the business of said United States Company for its own advantage, without regard to the benefit or advantage of the United States Company, and has excluded the members of the United States Company from participation in the management or control of said business, and from sharing in any benefit therefrom, and that the Brush Company is seeking to destroy the United States Company and take its business for said Brush Company; that it took from the United States Company the business of the Northern Central Railway Company, and that in consequence of this the United States Company is now running at a loss, and that it has taken other lighting contracts from said United States Company, and it has caused certain of the poles and lines of said United States Company to be taken down, and it has borrowed large sums of money from the United States Company; that, when the central station of the

Brush Company was destroyed by fire (October 13, 1893), it required the United States Company to furnish the Brush Company's customers with electric current, and paid the United States Company for it at rates wholly inadequate for the service, and forced the machinery of United States Company beyond its power capacity, and thereby greatly injured the same, and thus caused its service to be inferior and unsatisfactory, and created dissatisfaction among its customers, resulting in loss of business and revenue. The bill then prays for an accounting by the Brush Company of all business, income, services, and profits taken as aforesaid, and for a dissolution and winding up of the alleged copartnership, and the appointment of a receiver.

"Such being the allegations of the bill, this case would seem to be similar to that of Booth et al. v. Robinson et al., 55 Md. 419, with this exception: That the company (the Powhatan Steamboat Company) which it is alleged was wrecked by mismanagement of the directors of another company was a duly incorporated company, whereas in the present case the United States Company was an unincorporated company or association, but which, as between its members, was carried on and conducted on the same principles and under the same form of management as a corporation. In fact, the whole foundation of the allegations is that, under the form of management established by the shareholders of the United States Company, the Brush Company was enabled, through owning the greatest interest in the United States Company, to elect a majority of the managing agents of that company, which was designated as a board of directors, and that as such agents they mismanaged its affairs." In Booth v. Robinson, 55 Md. 437, the court (Judge Alvey), in referring to the case of The Charitable Corporation v. Sutton, 2 Atk. 400, says: 'In that case, Lord Hardwicke, in defining the degree of care and fidelity required of a director, and for what nature of default he may be liable, referred to the doctrine of the civil law upon the subject. By that law it is declared that those who are named by companies and corporations to have the directions of their affairs are obliged to the same care and diligence as factors or agents, and they are answerable not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them. 1 Donat, 2 b, tit 3, sec. 2, art. 1. And in the Case of Sutton the lord chancellor held that directors of a corporation are liable in equity to the corporation not only for gross frauds and breaches of trust whereby the assets of the corporation are wasted, but are also liable to the corporation if the assets of the corporation have been wasted by negligence on their part so gross as to amount to a breach of trust. This is the leading

case upon the subject, and in which the law is as strongly laid down as in any subsequent case.' And on page 438 the court, continuing, says: 'In the case of Overend v. Gurney, L. R. 4 Ch. 701, and the same case on appeal reported as Overend v. Gibb, L. R. 5 H. L. 480, where the question was most elaborately discussed in respect to the negligence of directors, it was held that facts which may show imprudence in the exercise of powers clearly conferred upon directors will not subject them to personal responsibility; but if the imprudence be so great and manifest as to amount to crassa negligentia, and consequently a breach of trust, personal responsibility will be incurred. Indeed, all cases agree that directors are not liable for the consequence of unwise or indiscreet management if their conduct is entirely due to mere default or mistakes of judgment. And the onus of proof of fraud, combination, or gross negligence, to render the directors personally liable, is upon the party making the charge, and the proof must be clear and manifest. Turquand v. Marshall, L. R. 4 Ch. 376; Overend v. Gibb, L. R. 5 H. L. 480; Hodges v. New England Screw Co., 1 R. I. 312 [53 Am. Dec. 624].' Although the court, as above stated, was discussing that phase of the case which charged the directors Robinson and Shoemaker with a personal liability, it also applied these principles in reviewing these facts to the liability of the defendant company, the steam packet company, represented by said Robinson and Shoemaker. And continuing, the court, on page 439, says: 'In this case the fact that Robinson and Shoemaker were stockholders and directors in the steam packet company, as well as in the Powhatan Company, and participated in the transactions between the two companies, with certain interests in other companies, supposed to be interested, would seem to constitute the main foundation for the principal charges of the bill. And if it be true, as charged by the plaintiffs, that the two defendants, Robinson and Shoemaker, acting for and in behalf of the steam packet company, did purchase the stock in the Powhatan Company, and procured themselves to be elected directors therein, for the purpose of getting control of the management of that corporation, and by that means to make it subservient to the interest of rival companies, or with the design of making insolvent and utterly breaking down the corporation altogether, and thus getting rid of competition, no more flagrant fraud could be perpetrated; and there can be no question but that for all loss to the company or its stockholders, resulting from the carrying out of such device or contrivance, the guilty parties should be held responsible to the fullest extent allowed by the law. Not only would there be incurred a personal responsibility by the directors or agents participating in the wrong, but, if such a scheme were de-

vised and executed at the instance or on behalf of another corporation, deriving its powers and franchises from the state, such conduct would be a fraud upon the state; and, in addition to incurring civil liability for the injury done, such conduct would subject the offending corporation to the penalty of misuser or abuser of its franchises. A corporation cannot be allowed to do indirectly and covertly what it is not authorized to do directly and openly. Such is the law, as applicable to the case, as stated in the bill. But if, upon the proof, there is a failure to establish the fraudulent design or purpose alleged to have characterized the various acts and transactions done and instigated by the two directors named, the whole foundation falls. For, we have seen, mere indiscretion, want of skill or foresight, or mistake of judgment, in the conduct of the affairs of the corporation, afford no ground of personal liability on the part of the directors. And upon the question of the fraudulent intent or design charged, though it be true that these two directors represented both corporations—in the one, being two of a board of eight directors; and in the other, two of a board of six directors—this fact alone, while it should subject their conduct to rigid scrutiny by the court, does not afford ground of presumption against the legality and the fairness of the dealings and transactions between the two companies. The two companies were certainly competent to contract the one with the other, and the two directors whose conduct is in question were interested in both companies, and, by their relation to and official positions in them, they owed duties and were bound to be faithful alike to both. Therefore, while acting within the scope of the powers delegated to them by the stockholders of the corporation, there is no presumption of illegality or unfairness in their dealings and transactions between the two companies. They were the chosen agents of both, and to be successful in any attempt to impeach the validity of their acts, with a view of making them personally responsible either to the corporation or to the stockholders, there must be distinct charges of misconduct, fully supported by proof. *Adams Mining Co. v. Senter*, 26 Mich. 73; *U. S. Rolling Stock Co. v. Atlantic & Great Western R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380. This case is altogether unlike that of a trustee, agent, or director bargaining, in a matter of personal advantage to himself individually, with the party reposing the confidence in him, and where it is incumbent upon him to show that a fair and reasonable use has been made of that confidence, as in the cases of *The Hoffman Steam Coal Co. v. Cumblid. Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumblid. Coal & Iron Co. v. Parish*, 42 Md. 598; *Jackson v. Ludelling*, 21 Wall. 616, 22 L. Ed. 492. The auditor has quoted thus fully from the above case because not only the principles

of law laid down appear applicable to the present case, but also because the conclusions the court came to on a very similar state of facts in that case are the same that the auditor feels compelled to arrive at in this case.

"In the account which the complainant has submitted to the auditor, as embodying his claim, the items are substantially as follows:

1. For business conducted from			
Oct. 1, 1893, to Dec. 1, 1894..	\$254,262 66		
Int. Dec. 1, 1894, to Nov. 1, 1901	104,247 65		
			\$358,510 31
This claim covers the period immediately succeeding the fire at the Brush Works, and is a claim for the use of part of the U. S. Works during that period, but for which use the Brush Company had paid the sum of..			
Interest on which from Dec. 31, 1894, to Nov. 1, 1901, was	\$ 12,233 55		
	5,425 75		12,659 30
Amount forward.....			\$339,851 01
2. For money collected from North Avenue Railway, etc., from			
Jan. 1, 1893, to June 30, 1893.....	\$8,969 08		
Interest June 30, 1893, to Nov. 1, 1901.....	4,484 54		
		\$ 12,453 62	
Less amount paid to U. S. Company....	\$6,448 75		
Interest June 30, 1893, to Nov. 1, 1901.....	3,224 87		
		9,673 12	2,780 50
3. Gross profit on amount admitted by Brush Company to have been realized from the business of the Northern Central Railway Company, taken by the Brush Company from United States Company			
Interest July 20, 1896, to Nov. 1, 1901	\$ 1,532 73		
	486 64		2,019 37
4. Gross profits on business admitted by the Brush Company to have been done by it on Pennsylvania avenue and Patterson avenue, 1896 ..			
Interest July 20, 1896, to Nov. 1, 1901	\$ 123 64		
	44 02		123 66
5. Gross profits on earnings admitted by Brush Company to have been made by it from sundry customers of United States Company.....			
Interest July 20, 1896, to Nov. 1, 1901	\$ 2,463 58		
	782 23		2,245 31
			\$349,079 35

"Much of the testimony supposed to support the claim for the items 2 and 5 is found in the case of *Davis et al. v. United States Electric Power & Light Company et al.*, and where these very questions here raised have been thoroughly threshed over by the court in its opinion. 77 Md. 35, 25 Atl. 982. For while there is a nominal change of parties, the complainant, Davis, in the one case, having, by a trade of United States Company stock for Viaduct Manufacturing Company stock, transferred his stock to the present complainant, Cannon, and thus although the matters may not strictly be considered res adjudicata, yet, the facts being the same, although the parties are nominally different,

the decision must be the same in this case as in the Davis Case, except as to such new matter as may have been introduced since then.

"Item 2. The matter of the transfer of the contract for serving power to North Avenue Railway from United States Company to Brush Company is fully considered by the court in Davis v. United States Company, and the conclusion arrived at that the contract was 'lost by a policy which was adopted by the officers of the United States Company, inaugurated for the benefit of that company,' and exonerating the Brush Company from any fraudulent attempt to injure the United States Company by making an independent contract with the North Avenue Company for service. The present claim, by simply extending the period of time for which the claim is made, seeks to open that question anew. If, however, as decided in Davis v. United States Company, the Brush Company had a perfect right to make the contract with the North Avenue Company, it is difficult to see how any claim can be set up against that right now. The contract, however, subsequently entered into between the Brush Company and the United States Company, whereby the United States Company was to furnish the current, and receive in payment 66 per cent. of the amount received by the Brush Company from the railroad, may in this case, which is a bill for an accounting, be a matter of inquiry. This contract and the rate of 66 per cent. appear to have been agreed upon after a consultation between the officers of two companies at a meeting of the executive committee of the United States Company, at which Mr. Baldwin and Dr. Whitridge appeared to act on behalf of the Brush Company, and Mr. Clark, who presided, and Mr. Kellhotz, who was present, but not a member of the board, appeared to advocate the interest of the United States Company. Mr. Kellhotz relates what occurred as follows: 'A general discussion as to the cost of operating the North Avenue Railway Company's generators at the station was entered into for the purpose of determining the proper proportion of the receipts from the said railway company that are due the United States Electric Power & Light Company for operating these generators for the Brush Electric Company. Dr. Whitridge offered the following resolution, which was seconded by Mr. Baldwin: That the United States Electric Power & Light Company agree to operate the railway generators for two-thirds of the total amount charged the North Avenue Railway Company on account of this service, which proposition will be acceptable to the Brush Company. Mr. Clark objected on the ground that the United States Electric Power & Light Company would not receive sufficient compensation for the service rendered. The vote was as follows: Ayes, Whitridge and Baldwin; nay, Clark; and the motion was car-

ried.' Mr. Kellhotz stated to Mr. Clark that he (Kellhotz) thought a 10 per cent. collection would be a proper charge to pay the Brush Company. The contention on the part of the complainant is that, as the above resolution was carried by the majority of the committee representing the Brush interest, the presumption is that it was unjust to the United States Company. The court, however, in speaking of this transaction, says (Davis v. United States Electric Power & Light Co., 77 Md. 48, 25 Atl. 986): 'The proof leaves it somewhat in doubt as to whether that company [United States Company] incurred loss in supplying the power under the new contract; the weight of the evidence, in our opinion, being that it did not. But it is shown that no complaint was ever made to the Brush Company, or to any one, that such was the fact.' The United States Company continued to operate under these terms, and to receive the 66 per cent. of money paid; and the auditor, therefore, does not see any reason which would authorize him in reforming this contract.

"The fifth item, being for money received from various customers of the United States Company, taken from it by the Brush Company: This claim appears to be the same discussed by the court in the Davis Case, pages 45, 46, 77 Md., 25 Atl. 982, in reference to the order that all applications for lights should be referred to Mr. Tudor, secretary of the Brush, as they had formerly been referred to Mr. Baker, general manager of both the Brush and United States Company; and the charge is that Mr. Tudor refused to allow the United States Company to have such lights as justly belonged to it. The court says on page 46, 77 Md., page 986, 25 Atl.: 'We do not undertake to pass upon the correctness of Mr. Tudor's decisions in each of the cases mentioned in the testimony, so referred to him by the secretary of the United States Company. It is sufficient for this case to say that we find nothing that would justify a court in pronouncing that he was influenced in his decision by such motives as were discreditable to himself, or detrimental to the interest of the stockholders of the United States Company.' And the auditor has found nothing in the evidence taken since the Davis Case to show any fraudulent interest or injustice in the dealing on this behalf between the two concerns.

"The First Item of the Account.

"Going back now to those items in the account asked for by the complainant, and which are based upon occurrences since the facts involved in the Davis Case:

"The first item asks an allowance of principal, with interest, less credits, of \$358,510.31; being proceeds of the business conducted from October, 1893, to November, 1894. This claim is based upon the following facts: On October 13, 1893, the Brush Company's works were practically destroyed

by fire, and the Brush Company sought, by whatever means practicable, to immediately furnish lights to its customers, many of which lights were of extreme necessity—such as the arc lights furnished to light the city. Some of these lights were, in the emergency, given to the Maryland Electric Company to furnish current over the Brush wires and poles, for which the Brush got no compensation, but the Maryland Company collected direct from the city for the service; and power was gotten to run a 60-light Brush machine from McElderry's wharf, but what compensation was paid for this power does not appear. The main power for some time after the fire came from power furnished by the boilers and engines of United States Company to Brush electric machines installed by the Brush Company in United States Company's works; and the charge is that immediately after the fire the Brush sent word to the United States Company not to take any more lights until they heard further from them, and that the Brush Company proceeded to install its electrical machines in the United States Company's works, and put blowers on the boilers, and thus stimulated them beyond their normal capacity, to the great injury of them and their engines, and thus served the Brush Company's customers. It was subsequently arranged, some time in the spring of 1894, following, that the Brush Company would pay for this power at the rate of \$1,500 per month. This amount, it is charged, was grossly inadequate, and, as the Brush Company's earnings were almost entirely realized, after the fire, from currents generated at the United States Company's works, its whole gross income from October, 1893, to November, 1894, belongs to the United States Company, less what has been paid them—some 13,000-odd dollars, upon the theory that the burden of proof is on the Brush Company to show what part of its earnings came from the power furnished from United States Company's works, and what from other sources if any, and, failing in so doing, the largest sum is to be charged against them; that, furthermore, at the time of the fire there was claimed as due the United States Company \$30,000, \$15,000 of which was loaned to the Brush Company, and that it was the duty of the Brush Company, immediately after the fire, instead of putting its electric machines in the United States Company's works, to have purchased with this money electric machines for the United States Company.

"First, as to the charge that the United States Company was ordered by the Brush management to take no more lights until they heard further from them. It would appear from the complainant's own witnesses that the United States Company had but little capacity to furnish many more lights than it was furnishing at the time of the fire. Carmady testifies that the capacity of the

United States machines, including two 20-light machines, which could be run on either arc or incandescent lights, but were in the fall of 1893 run on incandescent lights, was about 400 arc lights, and that in October, 1893, they furnished 344 Saturday night lights. It would thus appear that on Saturday nights, at least, the works were furnishing to its customers lights (if not fully) nearly up to its capacity, viz., 344 arc lights and two 20-light machines, which were running on incandescent lights, which would make 'about 400' arc lights—the full capacity of the works. Further, the complainant's witness Georgia C. Bowen, clerk and bookkeeper of United States Company, testifies: 'The day after the fire there were a good many calls for lights, which we did not, as a general thing, supply (but in some cases we did), for two reasons: One was we had an order from the Brush Company not to do anything in the matter of taking lights until we heard further from them; and the other was, it was the fall of the year, and we were full of lights, and I don't think we had much room to take any. The company was of small capacity.' As to the whole of the service being rendered by the United States Company's station from October, 1893, to November, 1894, or for any great part of that time, whereby alone the Brush Company was able to furnish current from which it received any revenue: As stated above, it was testified to that it installed a 60-light machine at McElderry's Wharf. The defendants' witness Slemons testifies that he was employed at the Brush works prior to and after the fire, and that inside of three weeks after the fire the Brush Company, at its own works, had two engines going, capable of and driving 500 horse power; that there were added and going, before the end of the year, one engine capable of driving four Brush machines, of 60 lights capacity, which would be about 240 horse power, and one engine of an incandescent machine of 124 horse power. The complainant's witness Tenley states that it was between five and six weeks after the fire before the Brush works furnished any current. It further appears from the testimony that from time to time in 1894 the electric machines placed in the United States Company's works by the Brush Company after the fire were removed and installed in the Brush works. At just what dates these machines were taken out of the United States Company's works does not appear. But the question is, what was a reasonable compensation to be paid the United States Company for the power furnished to run the Brush Company's machines, so that the Brush Company could serve its customers over its own wires, and whether the rate of \$1,500 per month paid by the Brush Company for this power was a reasonable one. The manner in which this proposition to pay \$1,500 a month was viewed by those representing the minority and adverse interest in the United States

Company furnishes the best evidence of its reasonableness. The complainant, Cannon, testified that he was present at the meeting when this proposition was made, and that he asked if they could not make it \$1,550 a month; that Mr. Clark thought the allowance entirely too low, 'and, as he thought so, I thought so, too, and I made the proposition to try and get \$50 more, and failed.' It would thus appear that the complainant himself only asked for a slight increase over the price named and paid.

'There is a further claim that it was the duty of the Brush Company, representing, as it did, the controlling interest in the United States Company, immediately after the fire, to have purchased, with whatever amount of money was to the credit of the United States Company, machinery, and installed it in United States Company, so that the United States Company could have served the Brush company's customers who applied to it immediately after the fire. It is somewhat uncertain just how much money there was to the credit of the Brush Company at that time—whether thirty thousand or twelve thousand—but it is alleged that it was thirty thousand dollars, and that fifteen thousand dollars was loaned to the Brush Company—some, but how much is not stated, on notes which had been redeemed from time to time, and some on call of long standing. As to the remaining fifteen thousand, Cannon states that, at the time of the meeting to which the said newspaper article refers, a question came up in reference to the ground rent on the United States Company's works, then coming due, and that could be redeemed out of the funds of the company. It appears that this ground rent was so redeemed, and the question is, was it a fact that the Brush Company did not take the money used in redeeming this ground rent, and return whatever amount it held on call, and pay the notes given to the United States Company, and install machinery in the United States Company's works, so that the United States Company could reap the full benefit of the Brush misfortune? As stated in the opinion in *Booth v. Robinson*, 55 Md. 419, the common directors had duties to both companies which they must observe, and to sacrifice the interest of either company to the other would have been a breach of the trust reposed in them. It could not be supposed, even if they had purchased, at a large expense, additional machinery for the United States Company, that the common directors would have been justified in allowing the United States Company to have offered more than a temporary service to the Brush Company's customers, and that when the Brush Company was able to resume business the United States Company would not have been left with the machinery on its hands. It does not appear that the arrangement made with the Maryland Company, which the Brush found fully equipped to come to their as-

sistance, was anything but a temporary arrangement, or that the Brush Company did not, as soon as it was able, resume furnishing lights to the city. The auditor, therefore, does not find that the Brush Company, as represented by its directors, was guilty of that crassa negligentia which would make it liable in not using the funds on hand, at the time of the fire, to install new and additional machinery in the United States Company's works, but, rather, that the weight of the evidence is that it acted wisely for the United States Company in not doing so, under the circumstances.

"Third Item of the Account.

"'Gross profit on amount admitted by the Brush Electric Company to have been realized by it from the business of the Northern Central Railway Company taken by the Brush Electric Company from the United States Company.' It appears that the United States Company had been furnishing the Northern Central Railway with arc lights to light its yards at 50 cents per light per night; and Mr. Wilkens, manager of the railway company, applied to the United States Company for a reduction to 35 cents, but only obtained a concession to reduce to 45 cents. Apparently, this was in the fall of 1894, after which the Northern Central Railway Company made no further efforts for a reduction from the United States Company, as it regarded this reduction as conclusive on the part of the United States Company. Subsequently (apparently in the fall of 1895) the Northern Central Railway Company, contemplating a change from gas to incandescent lights at Union Station, requested a bid from the Brush Company, and subsequently received a request from Mr. Morrison, the manager of the Maryland Electric Company, asking the privilege of bidding on this contract, and the contract was awarded the Brush Company. Mr. Wilkens states the reason why the railway company discontinued the service from the United States Company as follows: 'Several reasons. Chiefly because the Brush Company furnished the arc lights at a lower rate, and because we contemplated introducing incandescent lights at Union Station, and we did not care to make arrangement with two companies for electric lighting, nor to continue the arrangement of receiving incandescent lights through another company; my understanding being that the United States Company only furnished arc lighting.' From the above evidence it would appear that in the letting of this contract the railway company desired to deal with the company capable of furnishing both arc and incandescent lights, which latter class of lights the United States Company was not adequately equipped to furnish, and that both the United States Company and the Brush Company found themselves confronted with a competitor in the Maryland Electric Company, which competition the Brush Com-

pany was alone able to meet, and so made the best terms it could with the railway company.

"Fourth Item of the Account.

"Gross profits on business admitted by the Brush Company to have been done by it on Pennsylvania avenue and Patterson avenue:

1896	\$138 64
Interest	44 02
	<hr/>
	\$182 66

"The contention is that the Brush Company ran its lines on Pennsylvania avenue and Patterson avenue, which streets had been previously occupied by the United States Company, and that, although the United States Company's lines still remained, the company's business was damaged by the Brush Company paralleling its lines on these streets. Samuel Knouse says: 'The United States Company had the first commercial line out Pennsylvania avenue and on Patterson avenue. At present the United States has two arc circuits out Pennsylvania avenue part of the way. One wire goes to Fremont and Pennsylvania avenue, and returns to Patterson avenue; then out Patterson avenue to Gilmor or Stricker. The Brush has a circuit out Pennsylvania avenue to Patterson avenue; Patterson avenue to Carey street, one arc circuit.' Why the Brush Company should be excluded from running its lines a part of the way on the same streets the United States Company had a line on, does not clearly appear to the auditor. The auditor has, therefore, not allowed this claim.

"Upon the whole view of the case, the auditor finds that there is a 'failure to establish the fraudulent design or purpose alleged to have characterized the various acts and transactions done and instigated' by the directors representing the Brush Company, and he has therefore not allowed any of the claims presented by the complainant.

"The auditor was engaged seventeen days in examining the proceedings, reading the testimony, and examining a great number of authorities; one of the parties having submitted for his consideration a brief of 71 pages of typewritten legal cap, and the other, one of 9 pages, besides which the auditor had a great number of interviews with the respective counsel in regard to the case. The auditor has prepared, at the request of the complainant's counsel, Account X, but which he does not adopt as his own. The last account stated by the auditor (Auditor's Account No. 2, filed February 28, 1898) was ratified in part, and excepted to in part. These exceptions have never been heard, as they are dependent on the decision of the questions now brought before the court. As the only funds in the hands of the receivers have been distributed by auditor's account No. 2, to which exceptions are pending, as stated above, the auditor has not stated any account of expenses or court costs, but ap-

pends the following memorandums of his costs. * * * All of which is respectfully submitted. R. F. Brent, Auditor."

Argued before McSHERRY, O. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Charles M. Armstrong and R. E. Lee Marshall, for appellant. Barton, Wilmer, Ambler & Stewart, for appellees.

FOWLER, J. This appeal presents for the second time questions growing out of the alleged maladministration of the affairs of the United States Power & Light Company of Baltimore City by the Brush Electric Company of the same place. Some time prior to January, 1893, one Augustus Davis and others, stockholders of the United States Company, filed a bill in the circuit court of Baltimore City on behalf of themselves and others for a receiver of the United States Company, to prevent it being wrecked, as alleged, by the Brush Company. This was the beginning of the litigation which resulted in the appeal which was disposed of by this court in the case of Davis et al. v. United States Electric & Light Co. et al., 77 Md. 35, 25 Atl. 982. The history of the two companies, and the relations existing between them, are clearly given by Page, J., who delivered the opinion of the court in the case just cited, and we will reproduce it here: The United States Company was supposed to have been incorporated under the general incorporation laws of this state "for the purpose of manufacturing electricity for illuminating and for use as a power, and for all other purposes to which electricity or magnetism may be applied, and for buying and selling dynamo electric machines. * * * For a number of years it had been engaged in the business for which it was incorporated in the city of Baltimore. * * * The Brush Electric Company * * * was also incorporated under the laws of this state for the purpose of conducting the same business, and prior to the year 1896 was a rival and a competitor of the United States Company in the city of Baltimore. To prevent the ruinous rate cutting and underbidding which were the consequences of this rivalry, the Brush Company in that year became the purchaser of a majority of the stock of the United States Company, on the invitation of the latter company or its stockholders. The affairs of the United States Company seem to have been conducted to the satisfaction of both the companies until November, 1891, when the troubles began which form the subject of complaint. The bill [in the Davis Case] alleges that an election was held by the stockholders of the United States Company, at which was chosen a board of directors, a majority of whom were persons principally interested in the affairs of the Brush Company, appointed by that company to carry out a policy dictated by the Brush Com-

pany, as follows, viz.: First, to conduct the affairs of the United States Company 'in the interest of, and in order to feed, the Brush Company, at the expense of the stockholders not interested in the said Brush Company; second, to permit it to earn only an income sufficient to provide for its running expenses, and then to close up the affairs of the United States Company, and discontinue with its operations, whenever it shall be found to be to the interest of the Brush Company.' " All the charges made against the Brush Company as well as the facts alleged to sustain them, were denied by that company; and it was averred in the answer of the Brush Company that, so far as the officers and members of the Brush Company had taken part in the affairs of the United States Company, they had been governed not only by the desire to give value to the Brush Company's large interest in the United States Company, but to deal fairly and honestly with all concerned.

The case of Davis v. The United States Company, *supra*, came before this court on the first appeal on the bill, answer, and a large amount of testimony; and we held that the plaintiffs were not entitled to relief, and affirmed the decree of the circuit court of Baltimore City dismissing the bill. It appears that, very soon after the former bill was dismissed, Mr. A. G. Davis, one of the plaintiffs in that case, transferred 217 shares of his stock, of the par value of \$21,000, to Thomas J. Cannon, the plaintiff in this case, for \$500; but Mr. Davis does not remember how this stock was paid for—whether in cash or in certain stock of another company. At any rate, whatever may have been the consideration paid by Mr. Cannon, he has filed this bill as a stockholder or member of the association of the United States Company, reaffirming the charges made in the former bill, and adding others of the same character, against the defendant the Brush Company. The bill filed in the case now before us alleges, in general terms, that for the purpose of using the United States Company for its own purposes, and fraudulently intending, when it was for the interest of the defendant company, to destroy the plaintiff company, the plaintiff company was so mismanaged that it became insolvent, and the prayer is, among other things, for an accounting upon the basis of a partnership; that a receiver be appointed to take charge of, protect, and preserve the partnership property, etc., pending a final decree, and to take such steps as may be necessary, and to wind up the business, etc., under the decree of the court. Receivers were eventually appointed, and finding that owing to the crippled condition of the company, and the sharp competition for business to which it was subjected, it could no longer continue its business with profit, they asked and obtained leave to sell. The property was sold, and the net proceeds of sale, together with the

earnings of the business while in the hands of the receivers, were distributed among general creditors and bondholders in September, 1897. In the eighth paragraph of the bill the allegation of the plaintiff is that, believing that the United States Electric Power & Light Company was a body corporate—the same being held out as such—he purchased and still holds 217 shares of the stock of said company, but that he has lately been informed that said company is not a corporation, but a partnership, and that the members of said company stand in the position and are subject to the liabilities of partners.

It is conceded by both sides, and, indeed, the circuit court of Baltimore City so decided, and there has been no appeal from its decree in that respect, that neither of the two supposed corporations, by the consolidation of which the United States Company was formed, had ever been legally incorporated, and that hence the consolidated company itself had no legal existence as a corporate body. And therefore the first and the only question of law presented by this appeal is, what is the legal relation existing between the stockholders, so called, of the United States Company—including, of course, among such stockholders, the Brush Company, which owned three-fourths of the United States Company's capital stock? The contentions of the plaintiff on this branch of the case are three: First, that the Brush Company, in consequence of controlling and managing the property and business of the United States Company, stood in the relation of an agent to said United States Company and its members, and owed to it and them the duties of that relation, and was subject to its liabilities; or, second, if not an agent, then the members of the United States Company, including the Brush Company, were partners *inter sese*; or, third, if neither an agent nor a partner, whatever name may be given to such an association as the members of the United States Company constituted, the Brush Company is directly responsible to those members for the acts complained of in this suit.

Remembering that the bill in this case is filed by one of the so-called stockholders of an illegally formed corporation, it seems to us very clear that the first two of the plaintiff's contentions cannot be maintained. In the first place, it is nowhere in this case pretended that any of the stockholders of the United States Company ever intended to assume the responsibilities of an agent or a partner, or, indeed, any other responsibility than that of a stockholder in a regularly and legally incorporated company under the laws of Maryland. Under these circumstances, the managing stockholders or members of the United States Company cannot be held as agents, for there is no evidence to prove the fact of agency, nor does the law imply such a relation under the circumstances of this case, nor can they be held as partners

inter sese. In the case of *Waring v. Natl. Marine Bank of Baltimore*, 74 Md. 278, 22 Atl. 140, attention is called to the recognized distinction between a partnership between the parties themselves and a partnership as to third parties, which arises by operation of law. "But the question," said the court, "of partnership inter sese, is one of intention, and it may be laid down as a general rule that no such partnership can exist against the consent and intention of the parties. *Bull v. Schuberth*, 2 Md. 55." See, also, *London Ass'n v. Drennen*, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688; *Paul v. Cullum*, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430. It is apparent from the evidence disclosed by the record not only that no partnership was intended, but that everybody connected with the United States Company contemplated the formation of a corporation. The charter, or what was supposed to be a valid charter, is filed as one of the exhibits with the bill. It is but equitable, therefore, that the rights of the stockholders or members of the unincorporated association, as between themselves, should be governed by the terms and conditions and limitations set forth in the paper which they believed and understood to be a charter; that is to say, upon the articles, conditions, and provisions therein set forth, "and subject in all particulars to the limitations relating to corporations" formed under the general laws of this state. If we are correct in this conclusion, it follows that the rights of the United States Company and the Brush Company must be determined precisely as if both corporations, instead of only the Brush Company, had a legal corporate existence. We then have before us the same question which was presented in the case of *Booth v. Robinson*, 55 Md. 419, where it was held that the directors of the controlling company and the controlling company itself can be only held answerable for fraud, or such gross negligence in the management as amounted to fraud, and that the burden of proof in establishing such mismanagement was upon the plaintiffs.

The only remaining question, then, is whether the proof in this case, in view of what we have said in disposing of a similar appeal in 77 Md. 35, 25 Atl. 982, is sufficient to sustain the allegations of the bill now before us. We have already referred to the fact that the allegations of fact of the present bill are to the same general effect as those of the bill in the former appeal, and the facts relied on in some instances are the same as those adduced to support the allegations of the former bill, together with additional facts not before brought to the attention of the court. This branch of the case presents questions of fact, and they have been so fully examined and considered by the learned auditor of the circuit court in his report, which was adopted by the court below after a careful examination of the testimony on which it was based, that we do

not deem it necessary to do more than state our conclusions, based on our own examination of the record.

In the first place, then, let us state the grounds upon which the plaintiff bases his claim against the defendant company for nearly \$350,000. In his report the auditor reduces them to five general heads, and these five items are the same as those relied on by the plaintiff in Account X, which was stated at his request. They are as follows:

(1) Total earnings of the Brush Company from all sources from October 13, 1893, to December 1, 1894, together with interest, amounting to \$339,851.01. On October 13, 1893, it appears from the testimony that the plant of the Brush Company was destroyed by fire, and the plaintiff alleges that immediately thereafter the United States Company was ordered by the Brush Company not to take any more business until further orders by the latter company, and that thereupon the Brush Company took possession of the United States Company and its works, and used them for the benefit and advantage of the Brush Company from October, 1893, to November, 1894, to the great detriment and loss of the United States Company. After an examination of the testimony produced to sustain this item of the claim, we entirely agree with the conclusion reached by the auditor and approved by the court, refusing to allow this part of plaintiff's claim below. It appears from the testimony of the plaintiff himself that when the question was considered by the directors of the United States Company—a majority of whom, it is claimed, really were representing the interests of the Brush Company, and were put in the directorate for that purpose by the latter company—the sum of \$1,500 per month was fixed upon as a reasonable rate per month to be paid by the Brush Company for the use of the power of the United States Company in running the Brush Company's machines. The plaintiff objected to this allowance, and asked if they (the board) could not make it \$1,550 per month. The plaintiff testified that Mr. Clark thought the allowance of \$1,500 per month was entirely too low, "and [quoting] as he thought so, I thought so, too; and I made the proposition to try to get \$50 more, and failed." Under these circumstances, it is difficult to believe that the plaintiff and those representing the minority and adverse interest in the United States Company thought at the time that the amount actually allowed and paid by the Brush Company was unreasonably small, as there was only a demand for the small additional sum of \$50. The clerk and bookkeeper of the United States Company testified that, the day after the burning of the Brush Company's plant, "there were a good many calls for lights, which we [the United States Company] did not fill, for two reasons: One was we had an order from the Brush Company not to do anything in the matter of taking lights un-

til we heard from them; and the other was, it was the fall of the year, and we were full of lights, and I don't think we had much room to take any. The company was of small capacity." But in addition to this it abundantly appears that the Brush Company immediately after the fire installed a 60-light machine at McElderry's wharf, and one of the defendants' witnesses testified that he was employed at the Brush works prior to and after the fire, and that inside of three weeks after the plant was destroyed the Brush Company had at its own works two engines going, capable of driving 500 horse power, and that before the end of the year two other engines were going—one of about 240 and the other of 124 horse power. The claim, therefore, that the United States Company furnished the whole or any considerable part of the service to the Brush Company from October, 1893, to November, 1894, is far from being sustained by the testimony. Without further comment, therefore, upon this item, we are satisfied that the amount agreed upon and paid, viz., \$1,500 per month, for the use of the power furnished by United States Company to the Brush Company, was fair and reasonable. Nor do we see that there was anything unfair or fraudulent in the action of the majority of directors of the United States Company in using the money of the United States Company in redeeming the ground rent on the United States Company's works, instead of purchasing and installing machinery in the United States Company's works so that it could, as alleged, "reap the full benefit of the Brush Company's misfortune," for, as it turned out afterwards, the United States Company was unable, even under the energetic management of the receivers, to compete with its rivals for business. Two other companies besides the Brush Company were in the field, and it necessarily followed that in the face of such competition the weakest company would go under.

(2) The second item of the plaintiff's claim against the defendant the Brush Company relates to the receipts from the North Avenue and Lake Roland Elevated Railway Companies from January 1, 1892, to June 30, 1893. The claim on the part of the plaintiff is that the United States Company is entitled to the whole of the money derived by the Brush Company, with interest thereon, amounting to \$13,453.62, because the Brush Company fraudulently deprived the United States Company of the contract to serve the power to the railroad companies. This is substantially the same claim set up in the former appeal (77 Md. 35, 25 Atl. 982), where it was held that the contract was "lost by a policy which was adopted by the officers of the United States Company, inaugurated for the benefit of that company," and that the Brush Company was not guilty of any fraudulent attempt to injure the United States Company. The auditor also disallowed the plaintiff's claim based upon the theory that 66 per cent.

of the cost of operating the generators of the North Avenue Railway Company was an unjust discrimination against the United States Company. Upon the testimony in the record quoted by the auditor, and for the reasons given by him in his report, we entirely agree with him that this claim was properly disallowed. Speaking of this same transaction, we said in 77 Md., 25 Atl.: "The proof leaves it somewhat in doubt as to whether that company [the United States Company] incurred loss in supplying the power under the new contract; the weight of the evidence, in our opinion, being that it did not. But it is shown that no complaint was ever made to the Brush Company or to any one that such was the fact." "The United States Company," says the auditor, "continued to operate under these terms, and to receive the 66 per cent." He, therefore, as we have seen, refused to allow this second item of the plaintiff's claim, and we think he was right.

(3) The third item is for gross profits on amount admitted by the Brush Company to have been realized by it from the business of the Northern Central Railway Company, alleged to have been unfairly taken from the United States Company by the Brush Company. This item amounts to \$2,019.37. We have examined the testimony adduced to support this part of the plaintiff's claim, and, without discussing it in detail, we think it was properly disallowed.

(4) The fourth item of the plaintiff's claim is for gross profits on business admitted by the Brush Company to have been done by it on Pennsylvania Avenue and Patterson Avenue in 1896, amounting to \$182.66. This item appears to be based upon the theory that, inasmuch as the United States Company was the first to extend its lines on those streets, the Brush Company had no right to use them to serve its own customers. Surely the fact that the Brush Company owned a controlling interest in the United States Company did not destroy the right it would otherwise have had to honestly and fairly compete with the United States Company. We know of no principle of law regulating corporations situated as these two were which would sustain this contention of the plaintiff.

(5) The fifth and last item of the plaintiff's claim is thus stated by him: Gross profits on earnings admitted by the Brush Company to have been made by it from sundry customers of the United States Company, diverted from it by the Brush Company, viz., 40 per cent. on \$6,158.94, amounting to \$3,245.81, including interest. A claim similar to this was discussed in the former appeal, in reference to the order that all applications for lights should be referred to the secretary of the Brush Company. It was held in 77 Md., 25 Atl., that the weight of testimony was to the effect that, in deciding which company should take a contract, a reasonable

fairness was observed. "We do not undertake," continued the court, "to pass upon the correctness of * * * the decision in each particular case so referred. It is sufficient to say that we find nothing that would justify a court in holding there was anything fraudulent on the part of the Brush Company or its alleged representative." This was the conclusion reached on the testimony before us in the former appeal, and we have failed to find any evidence taken in these proceedings which would justify a different conclusion now.

It follows from what we have said that we entirely agree with the learned court below, and the order appealed from will be affirmed.

The report of the auditor accompanying the account which was ratified discusses the facts so fully and clearly that we will request the reporter to include it in the report of this case.

Order affirmed, with costs.

EAST BROOKLYN BOX CO. OF ANNE ARUNDEL COUNTY v. NUDLING.

(Court of Appeals of Maryland. Jan. 22, 1903.)

SERVANT—ACTION FOR INJURIES—DECLARATION—SUFFICIENCY.

1. A declaration by a servant for injuries, averring that they were due to the defective manner in which certain machinery had been set up, of which he then had no knowledge, and which he, "from lack of knowledge of machinery," could not, by due care, have ascertained, is not demurrable, as showing contributory negligence in undertaking the service when he knew nothing of machinery; it not appearing from the declaration that plaintiff was not an infant, or that he had not just been employed in the particular service, without any knowledge, or means of knowledge, of the risks incident thereto.

Appeal from circuit court, Anne Arundel county.

Action for personal injuries by Aloysius Nudling against the East Brooklyn Box Company of Anne Arundel County. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Robert Moss and Daniel R. Magruder, for appellant. James W. Owens and Wm. J. Kennedy, for appellee.

PEARCE, J. There is but a single, narrow point for determination in this appeal, arising upon a demurrer to the declaration; and it is not without interest, though it may be briefly disposed of. While affirming the ruling appealed from, it is due to the appellant's counsel to say that their views of the law were presented with much force.

The suit was brought by the appellee to recover damages for injuries alleged to be due to negligence of the appellant in pre-

maturely starting a steam split saw, while the appellee, one of its employes, was engaged in filing the saw. The trial resulted in a verdict for plaintiff, under instructions to which no exceptions were taken by either party. The declaration alleges that plaintiff's injuries were received "through the premature running and operation of the saw; that the premature running and operation of said saw was due to the defective and unskillful manner in which the same, and the connecting pulleys, belt, and shafting, had been erected and suffered to remain, of which the plaintiff then had no knowledge or information, and which the plaintiff, from lack of knowledge of machinery, could not, by the exercise of due care, have ascertained; and that the accident was not due to any fault or want of care on the part of the plaintiff, who used due care and caution." The demurrer is based upon the insertion in the declaration of the words we have italicized, and the contention is that the effect of these words is to charge the plaintiff with contributory negligence in undertaking a service which resulted in injury to him by reason of his self-confessed "lack of knowledge of the machinery" which he undertook to put in order. It is true that one entering an employment impliedly represents "that he is competent to perform the duties of the position which he seeks, and competent to apprehend and avoid all dangers that may be discovered by ordinary care and prudence," provided he is "apparently of sufficient age, physical ability, and mental caliber to perform the service." Bailey's Master's Liability for Injuries to Servants, 133. And where there is an opportunity for proof, it may be presumed, in the absence of proof to the contrary, that the plaintiff comes within these requirements. But there is nothing in the declaration to show the plaintiff's age, intelligence, or physical capacity, when he was employed, or for what service, or what opportunity he had to acquire any knowledge of the condition of the machinery which operated the saw. He may have been an intelligent adult, and have been for a long period in the service of the defendant, and may have been familiar with all the alleged defects which rendered it dangerous to file the saw while at rest, though the demurrer admits that he had not such familiarity; but, for aught the declaration discloses, he may have been an infant of immature years and understanding, or he may have been employed for the first time for that particular service, without any knowledge, or means of knowledge, of the risks incident thereto. If the testimony in the case warranted the claim that he was guilty of contributory negligence, or that his injuries were due to the negligence of a fellow servant, barring his recovery, these questions could and should have been raised by prayers. Where the declaration clearly shows that the plaintiff was guilty of contributory

negligence, advantage may be taken by demurrer, and an allegation in the declaration that he used due care will not save the declaration from being bad. 5 Enc. Plead. & Prac. 10. But the true rule for this case—the rule indicated by sound reason, we think—is well laid down in *Rumpel v. Oregon Short Line R. R.* (Idaho) 35 Pac. 700, 22 L. R. A. 725, which is closely analogous to the present case in its legal aspect. There the plaintiff, in his complaint, alleged that he was compelled to, and did, pass under one of the cars of a train which was blockading a street crossing, and that the train suddenly started, and injured him. The court said that at first sight it would appear that the plaintiff had pleaded himself out of court, as it would be difficult to conceive a condition of things existing where it would not be negligent to pass under one of the cars of a freight train; but, upon full consideration, the court concluded by saying, "We are not prepared to say, however, that under this complaint a state of facts could not be proven which would entitle the plaintiff to recover, and therefore we sustain the court in overruling the demurrer." We think this decision was grounded on common sense and in sound legal discrimination. In the case before us, when the proof was gone into, a state of facts was developed, as appears from the prayers incorporated in the record, with which we have nothing to do, but which resulted in a verdict for plaintiff, without any exceptions being taken by either party, either as to the admission of testimony, or as to any instructions offered; and it would be difficult to imagine stronger confirmation of the reasoning of the Nevada court in the case cited.

Judgment affirmed, with costs to the appellee above and below.

MCGAW et al. v. GORTNER et al.

(Court of Appeals of Maryland. Jan. 23, 1903.)

VENDOR AND PURCHASER—CONTRACT TO CONVEY—EXERCISE OF OPTION—SPECIFIC PERFORMANCE—JURISDICTION.

1. Code Supp. art. 16, § 188, provides that where any person dies, leaving real estate, and not leaving personal estate sufficient to pay his debts, the court, at the suit of his creditors, may decree that the real estate shall be sold to pay his debts. A husband and wife contracted to give plaintiffs an option for six months on a certain tract of land lying outside the state, and within the six months, but after the death of the husband, plaintiff elected to buy, but the wife and heirs of the husband refused to convey. Held that, as plaintiffs had not elected to buy during the husband's life, their claim for damages for refusal to convey was not a debt due from the husband, entitling plaintiff to sue under the statute quoted.

2. Where a bill was filed against certain heirs to subject local lands of a decedent to the payment of a claim against decedent for failure to fulfill a contract to convey land lying outside the state, and service was had by publication, as authorized by Code, art. 16, § 103, the bill could not be converted into one for specific per-

formance, since the court would have no jurisdiction of the subject-matter of such a bill.

3. Where jurisdiction of nonresident defendants in a bill to subject the lands of their ancestor to plaintiff's debt is obtained by publication, they are not in court for any other or different purpose, and such jurisdiction could not be retained to make the bill one for specific performance.

Appeal from circuit court, Prince George's county, in equity; Geo. C. Merrick, Judge.

Bill by George K. McGaw and others against Mary A. Gortner and others. From a decree for defendants, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Thomas M. Lanahan, Charles H. Stanley, and Frank Gosnell, for appellants. Wilson & Clagett and J. F. Strieby, for appellees.

PAGE, J. The appellants in their bill of complaint charge: That one William J. Gortner, being seised of certain lands in the state of West Virginia, contracted and agreed with them as follows: "Baltimore Dec. 21, 1894. In consideration of One Dollar and other valuable consideration the receipt of which we hereby acknowledge, we, William J. Gortner, husband and Mary A. Gortner wife agree to sell and deed to Geo. K. McGaw, Chas. T. Davis and Jas. B. Ramsay, one-half interest in all lands in Nicholas Co. West Virginia now standing in the name of, or belonging to William J. Gortner and Mary A. Gortner aforesaid for the sum of \$6,250⁰⁰/₁₀₀, and the said Geo. K. McGaw, Chas. T. Davis and Jas. B. Ramsay agrees to buy the same and pay the sum aforesaid for the one-interest within six months from date hereof, provided after a personal inspection of said land within the six months, they the said Geo. K. McGaw, Chas. T. Davis and J. B. Ramsay is satisfied with the value thereof, or in other words we William J. Gortner and Mary A. Gortner his wife agree to give Geo. K. McGaw, Chas. T. Davis and J. B. Ramsay an option for six months on one half interest in our holdings of lands in Nicholas Co. West Virginia for the sum of \$6250⁰⁰/₁₀₀. It being further agreed however that should the said Geo. K. McGaw, Chas. T. Davis and J. B. Ramsay elect to purchase under this option it is hereby understood that the land aforesaid are to hold and develop if possible for the equal and just account of all in such manner and at such times as may be agreed by us all and to our mutual advantage. Selins Grove Dec. 24th 1894. W. J. Gortner. M. A. Gortner." That a part of the "further consideration" for said agreement was that the complainants should pay the taxes due at the time on the lands—the same to be refunded if the complainants failed to purchase—and that they did, in consequence, pay the same, amounting to \$190.96. They

further allege that within the six months they did examine the lands, and elected to purchase, and so notified the widow and heirs at law of W. J. Gortner, who had died in the meantime, but they refused, and still refuse, to receive the purchase money tendered them, and convey the land to them. W. J. Gortner died in January, 1895, leaving no personal estate in the state of Maryland, but seised and possessed of a tract of land situate in Prince George's county. The claim of the complainants, as set out in the bill, is that they have a right to subject the real estate in Maryland to the payment of whatever may be due them for the non-performance of their contract, which they charge to be \$12,000, and pray they may have such relief, and all "such other as the nature of their case requires." They also pray for an order of publication against the appellees as nonresidents, directing them to appear. On the expiration of the time mentioned in the order, the appellees appeared and answered, denying some of the averments of the bill, and that the complainants are entitled to the relief for which they pray. The lower court on final hearing dismissed the bill, and from its decree this appeal was taken.

The main question in the appeal is, had the lower court jurisdiction over the case made by the bill? The contract between the parties is not one of sale and purchase, but simply of an option for a limited period. The parties themselves so understood the agreement, for they so declare in the instrument itself—"in other words we [Gortner and wife] agree to give [McGaw et al.] an option for six months." Without these words, the contract can only be construed as an option. It bound Gortner to accept the price and convey the land in the event that McGaw, within the six months, should elect. Until such election was made, there was no such obligation upon the Gortners, and, if the six months expired without such election having been made, there was an end of the matter, and the contract would not be binding on any of the parties. During the six months within which the election could be made, the Gortners were bound to keep the property unsold; they having agreed, for a valuable consideration, to maintain their control over it, so that they could convey if the appellants elected to purchase, and paid or tendered the purchase money. These principles are fully supported by the authorities, and by the decisions of our own court in *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; *Thistle Mills v. Bone*, 92 Md. 47, 49 Atl. 37; *Maughlin v. Perry*, 35 Md. 352. The cases to which we have been referred by the appellees are not in point. They are not those in which a valuable consideration was paid by the other party for the offer.

It seems to be clear, therefore, that Gortner, having died before any election was

made, was not at the time of his death, nor ever was, under any legal obligation to receive the purchase money and convey the property, and therefore there cannot be any claim against him individually for a breach of the contract. And if this be correct, this case cannot be brought within the operation of the 188th section of article 16, Code Supp. The words of that section are as follows: "Where any person dies, or shall have died leaving any real estate in possession, remainder or reversion and not leaving personal estate sufficient to pay his debts, and costs of administration, the court on any suit instituted by any of his creditors, may decree that all the real estate of such person, or so much thereof as may be necessary, shall be sold to pay his debts." Here the court is empowered, whenever there is no personal estate sufficient to pay the debts of a decedent, to decree a sale of the real estate at the suit of "any of his creditors." The suit must therefore be instituted by a "creditor"; and its object and purpose, the payment of the "debts" of the decedent. A fundamental condition of fact upon which the court may exercise jurisdiction under this section is that there is a debt due by the decedent in his lifetime; that is, one for which the decedent could have been sued at the time of his death. There is nothing in conflict with this to be found in the case of *Van Bibber v. Reese*, 71 Md. 611, 18 Atl. 893, 6 L. R. A. 332. There the court said this act "makes the land descended or devised liable to be sold for the payment of any demand due by the decedent," and much stress was laid upon the words "demand due" at the argument, as supporting the contention of the appellant that the court had authority, under the facts of this case, to decree the sale of the land of the appellees located in this state. But by the most strained construction of the words they cannot be held—especially in the connection in which the learned judge employed them—to mean more than what was in fact a subsisting claim against the decedent at the time of his death, and could not include any right or demand that should arise after his death against his estate, or any portion of it. Now, as we have shown, Gortner was under no obligation to sell and convey the property, for the reason that up to that time the appellants had not exercised their right of election. He was bound to keep the land in such a condition, as to the title, that, if the election were made in time, the appellants could get the benefit of the option. But he himself was never under any obligation to sell and convey; nor at any time during his life were the appellants in any wise bound to accept the deed, had it been offered.

But the counsel for the appellants suggested that the bill be "converted into a bill for specific performance," and asked this court to remand the cause, under section 28 of article 5 of the Code. It cannot be contended

that the present bill may possibly be regarded as a bill for a specific performance of the contract. A single reason for this statement is sufficient. The land that is the subject of the contract is situate in the state of West Virginia, and a bill for specific performance could affect only that particular property. The scope of the present bill, as set forth in the record, is to subject other property of Gortner, situate in the state of Maryland, to a sale for the payment of what is claimed to be due from him to the appellants. To change the scope of the bill so as to make it one for specific performance would be to permit them to substitute an entirely new bill, in which the parties defendant are nonresidents, and the property to be affected is situate out of the state. The bill in the present record makes out a case in which, inasmuch as the land to be affected lies in the state, though the defendants are nonresidents, the court could acquire jurisdiction by an order of publication under section 105 of article 16 of the Code. They are now in court only by virtue of the order of publication, and this informed them that the only purpose of the bill was to obtain a decree for the sale of the land situate in Maryland. "They cannot be considered as in court, and parties to the suit, for any other or different purpose, or for any purpose not necessarily arising out of the object of the bill as stated in the order of publication." *Fox v. Reynolds*, 50 Md. 572. The remanding of the case, with liberty to the appellants to convert the bill into one for specific performance against the heirs of Gortner, all of whom reside out of the state, could, therefore, accomplish no good purpose. After the amendment the defendant would not be in court for the purposes of the new bill, and there would be no process by which they could be brought in. The object of the order of publication affecting an absent nonresident is to notify and warn him to appear and defend his rights, and "is simply a statutory mode of conferring upon the court power to pass judgment on property, the subject-matter of suit within its jurisdiction, when the owner is beyond the reach of its process." *Dorsey v. Dorsey*, 30 Md. 534, 96 Am. Dec. 633. The proposition of the appellants, therefore, implies that nonresident defendants who have been brought into a case by order of publication are to be regarded as in court to answer another and entirely different proceeding, in which, without the appearance of the defendants, the court has no jurisdiction. This, we think, is not within the authority of statute or reason. To so decide would have the effect of deceiving the defendants who appeared and answered for the special purposes of the suit mentioned in the order of publication, and would require the court to make decrees it could not enforce. In fact, the absence of that power is a good test by which to try the jurisdiction of the court. A decree requiring the conveyance of West Virginia property by

nonresidents who are not personally, but only constructively, before the court, would be nugatory. "Chancery can have no jurisdiction where it can give no relief." *White v. White*, 7 Gill & J. 210.

It follows from what has been said that the decree must be affirmed. Decree affirmed; the appellants to pay the costs.

BRISTOL et al. v. SKERRY et al.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

MARRIED WOMAN—RIGHT OF ACTION—PARTIES—INTEREST OF HUSBAND.

1. Since the passage of section 11 of the married woman's act (2 Gen. St. p. 2014, § 11), a wife may bring a suit for the protection of her property in her own name, without joining her husband as a party to the suit. This statute enables the wife to sue as a feme sole, but does not require her to do so. If she desires to make her husband a party to the suit, she must follow the mode of procedure observed before the adoption of section 11, and sue by her next friend, making her husband a defendant.

2. A husband has an equity in lands to which his wife holds title, which this court will recognize. He has power, by refusing to join in her deed, to prevent her from conveying her lands; and if a child be born during the coverture, and the husband survives the wife, he will take an estate by the curtesy (complete) in lands whereof she died seised of an estate of inheritance.

3. Having this equity, he is a proper party to a suit brought by the wife to protect her lands. It is, however, misjoinder to make him co-complainant with his wife. If he is made a party, it should be as defendant.

(Syllabus by the Court.)

Bill by Anna C. Bristol and Samuel A. Bristol against Amory T. Skerry and others. Demurrer to bill sustained.

W. A. Stryker, for demurrant. Smith & Brady, for complainant.

GREY, V. C. The bill in this case is filed by Anna C. Bristol and Samuel A., her husband, alleging that Anna is the sole owner in fee simple of a farm in Hunterdon county. The bill charges that the defendants, by increasing the height of their milldam, have caused the natural flow of a river to be checked, and the waters thereof to flow back upon the lands of the complainant wife, to the continuous and permanent injury of her lands. The defendants demur to the bill because the husband, Samuel A. Bristol, is made a party complainant, when it does not appear anywhere in the bill that he has any interest in the matters in dispute. This is the sole ground upon which the demurrer was argued.

Before the passage of the married woman's act of 1852, a married woman might have been interested in lands in two different ways: She might have had the legal title to lands come to her by deed, devise, or descent. In land of which his wife became so seised of an estate of inheritance, the husband was

instantly vested of an estate by the curtesy initiate. The wife's property became liable to be taken for the payment of the husband's debts, and also to his disposition, for he could convey his wife's lands, at least, during the coverture, and in case a child was born, and the husband survived the wife, during his life. The obvious inequity of this situation led to the creation of a peculiar equitable interest for the protection of the wife from the distresses occasioned by the rigid rules of the common law. This was the other way in which a wife might, before the act of 1852, have an interest in lands. This interest originated by marriage settlement, by deed, or by devise, creating a trust for the wife's separate use, with powers enabling her to deal with the property. She was deemed to be, with respect of such property, a feme sole. Her interest in the lands so set apart for her benefit was called her "separate estate." Her action in protection of such property, or attacks upon it by others, was within the cognizance of the equity courts. *Tullett v. Armstrong*, 1 Beav. 21. A caustic review of the origin and growth of this separate estate of the wife, from the point of view of a common-law jurist, may be found in the opinion of Chief Justice Beasley, speaking for the Court of Errors and Appeals, in the case of *Perkins v. Elliott*, 23 N. J. Eq. 527.

While this was the state of the law, a husband who might have had an estate by the curtesy initiate in lands wherein his wife held title was held to be a necessary party to any bill filed respecting those lands. The mode of procedure then was that the wife, when seeking to protect her separate property, sued by her next friend; making her husband a party defendant, in order that he might contest, if he wished, her claim that the property in question was in fact her separate property, and show her claim to be incompatible with his marital rights, for she might have held the title, and the husband would then have had a curtesy. *Story*, Eq. Pl. sec. 63; *Sigel v. Phelps*, 7 Sim. 239; *Wake v. Parker*, 2 Keen, 59. Though Sir John Leach, in *Smyth v. Myers*, 3 Madd. 475, in a suit where a wife had a separate estate, and sued, naming her husband as next friend, granted a motion made by the plaintiff to strike out the name of a husband as next friend, and make him a coplaintiff, declaring that, although the wife's claim to separate property was against *jus mariti*, yet the husband, by joining as coplaintiff, would admit the statement in the bill that the property in question was the separate property of the wife, and that this would answer all the purpose of making him a defendant. Under the earlier cases a bill filed by husband and wife as co-complainants was held to be the suit of the husband alone, and the wife was not bound by any of the allegations in such a bill in any future litigation. See, in *Johnson v. Vall* (1862) 14 N. J. Eq. 426, and cases

there cited, an interesting discussion of the subject by Chancellor Green. In 1852 the married woman's act destroyed the common-law estate of tenancy by the curtesy initiate. *Porch v. Fries* (1867) 18 N. J. Eq. 208. But as it gave the wife no power to dispose of her lands without the husband's joining in her deed, the husband's estate by the curtesy might still arise, upon her death seised of an estate of inheritance; a child having been born of the marriage. *Id.* 209; *Naylor v. Field* (1861) 29 N. J. Law, 292. Since the passage of the married woman's act of 1852, making lands, the legal title to which stands in the wife's name, free from the husband's control or debts, such property has also come to be designated the "separate estate" of the wife. Although the married woman's act of 1852 destroyed the husband's estate by the curtesy initiate in lands wherein his wife held title, he yet has control over her disposition of those lands, for she has no power to convey them unless he joins in her deed; and he still has a possibility that a child may be born of the marriage, and that he may survive his wife, and thus become seised of an estate by the curtesy complete. Since the passage of that act the husband has been declared to be a necessary party to a suit begun by a wife, through a next friend, for her separate estate. Objection was made to the nonjoinder of the husband, and it was declared to be well taken. *Tunnard v. Littell* (1872) 23 N. J. Eq. 269, following *Johnson v. Vall*, *ubi supra*, holding that the husband is a necessary defendant. The husband's interest even in the distinctly separate estate of the wife was in these cases held to be sufficient to make the wife's suit defective unless he was made a party defendant. In *Johnson v. Vall* the husband appeared as next friend of the wife, but was not joined as a party in the bill, either as complainant or defendant. The case was presented on an order to show cause why an injunction should not issue, etc. It was held that, although the husband was a necessary party, it would be a misjoinder to make him a plaintiff, and that he must therefore be made a defendant. In *Barrett v. Doughty* (1874) 25 N. J. Eq. 379, the bill was filed by husband and wife as co-complainants. A demurrer *ore tenus* because of the misjoinder of the husband as complainant was allowed, and it was ordered that he be made a defendant. In *Tantum v. Coleman* (1875) 26 N. J. Eq. 131, to a bill filed by a wife, a plea setting up the coverture, and the nonjoinder of the husband as complainant, was held to be bad, because he was neither a necessary nor a proper party complainant with her. In *Paulison v. Van Iderstine* (1877) 28 N. J. Eq. 310, a bill by husband and wife as co-complainants, filed in respect to the wife's separate estate, was held to be a misjoinder.

The uniform course of decision up to the year 1877, in cases such as that presently un-

der consideration, declares that the husband was a necessary party, but that it was a misjoinder to make him a co-complainant with his wife. He must be made a defendant. While this was the state of the law, the revision of the married woman's act (Revision 1877, p. 638, § 11, now 2 Gen. St. p. 2014, § 11) was enacted. This statute enable a married woman to maintain an action in her own name, without joining her husband therein, for the recovery of all damages done to her separate property, and gives her the same remedy for the protection of such property as if she were an unmarried woman, and declares that in any proceedings it should be sufficient to allege such property to be her property. Since this statute, it has been held that the husband is not a necessary party to a suit brought by a wife to protect her property, and demurrers to bills of complaint filed by the wife because of the nonjoinder of her husband as a party in such suits have been overruled. *Castner v. Sliker* (1887) 43 N. J. Eq. 9, 10 Atl. 493; *Young v. Young* (1889) 45 N. J. Eq. 41, 16 Atl. 921. The reasons for holding the association of the husband with the wife as co-complainant to be a misjoinder have been somewhat shaken by the effect of the statute of 1852, which destroyed the husband's estate by the curtesy initiate in lands to which the wife held title, and thus left him less ground of dispute with his wife as to whether the lands affected by her suit were in fact her separate property, held in trust for her, or lands to which she held title. The cases of *Johnson v. Vail*, *Barrett v. Doughty*, and *Paulson v. Van Iderstine*, ubi supra, decided after the act of 1852, however, all hold that it is a misjoinder to associate the husband as co-complainant with the wife in a suit to protect lands owned by her. The grant of power to the wife to sue alone, without joining her husband in her suit, given by section 11 of the Revision of 1877 (now 2 Gen. St. p. 2014, § 11), if acted upon by the wife by suing alone, would seem to relieve the procedure from the presumption above referred to, which held a suit brought by husband and wife to be the suit of the husband only, and not binding on the wife. The power given to the wife by section 11 is, however, a mere enabling act. She is empowered, but not required, to sue in her own name, without making her husband a party. If she sues without him, she may do so in her own name, as sole complainant, under the power given her by section 11. If she desires to make him a party, she must follow the practice established by the modes of procedure in such cases before the enactment of section 11, and sue by her next friend, making her husband a party defendant.

It is claimed by the demurrant that the husband has no interest in the subject-matter of the suit, and that he cannot properly be a party to it. This view cannot be accepted. The statutes of 1852 and 1877 did

not deprive the husband of all interest in his wife's property. They secured its enjoyment to her, and enabled her to sue as a feme sole to protect it; but he still has an equity which this court will recognize, and which makes him, though not a necessary, yet a proper, party to his wife's suit. He still has power to prevent his wife from conveying her lands, for her deed made without his joining in making it is a nullity. If a child be born during the coverture, and he survives his wife, he will yet take in them an estate by the curtesy complete. If his wife succeeds in this suit, the permanent value of her lands, and consequently of the husband's possible interest, will be increased. If she fails, the value of the husband's equity may be lessened. Equity has recognized his interest as worthy of its protection. In *Speakman v. Tatem*, 48 N. J. Eq. 136, 21 Atl. 466 (affirmed on appeal), a husband had joined a wife in conveying her lands to a trustee. His marital right in her real estate thus conveyed was held to form a sufficient consideration for a postnuptial settlement by which an interest was secured to the husband, and his rights under that settlement were enforced. The practice since the married woman's act of 1852 seems to be established, that, in a suit for the protection of a married woman's property, her husband should not be joined with her as a co-complainant. *Johnson v. Vail*, and cases above cited. The husband is not a necessary party to such a suit, since the Revision of 1877, but is a proper party defendant, by reason of his interest in the subject-matter of the suit.

The demurrer must therefore be sustained on the ground of the misjoinder of the husband as co-complainant with his wife, with costs to the defendant, and leave to the complainant wife to amend by striking out the name of the husband as complainant. If she wishes to make her husband a party, it must be as a defendant, and in such case her suit must be in the name of her next friend as complainant.

DECKER et al. v. PANZ et al.

(Court of Chancery of New Jersey. Feb. 16, 1903.)

ACTION AGAINST WIFE—SETTING ASIDE OF DEED—HUSBAND AS DEFENDANT.

1. Inasmuch as a husband's power of veto over the wife's conveyance of her own land enables him to retain in his wife's name the title to any lands of which she may be seised during coverture, so that in case she dies seised of an estate of inheritance, a child having been born of the marriage, an estate by curtesy vests in him, the husband is a proper party defendant in a suit against the wife to set aside a deed to her.

Suit by Alice Decker and others against Helen M. Panz and another. On motion to strike out the name of Jacob Panz as a defendant. Motion refused.

The original bill in this cause was filed by Austin R. Decker, in his lifetime, against Helen M. Panz and Jacob Panz her husband; alleging that, while weak in body and mind, the complainant was induced by the defendant Helen, by promise which she has in no way fulfilled, to convey to her a house and lot in Vineland. The bill prays that the deed to the defendant Helen may be declared to be null and void; that it may be decreed to be delivered up to be canceled, etc.; that Helen and Jacob, her husband, may be decreed to reconvey the premises to the complainant clear of all incumbrances by them, or any one under them; and that Helen and Jacob may be decreed to pay the costs. On petition the defendants were permitted to defend separately. At this stage of the case, before answer filed, the sole complainant departed this life, on the 25th of September, 1901. Ignorant of this fact, the defendants on the 30th day of September, 1901, filed separate answers. When the answers were filed, there was, by reason of the death of the sole complainant, no party in court to whom these answers could be responsive. An order of revivor was afterwards made, substituting the heirs at law as complainants in the place of the decedent. After the order for revivor was made, a stipulation between the new complainants and the defendant Helen M. Panz agreed that the answer of the defendant Helen M. Panz, previously filed, should stand as an answer in the revived suit. The defendant Jacob Panz now moves that his name be stricken from the bill of complaint as a party defendant, for the reason that he is not a proper or necessary party to the suit, that he is not interested in the subject-matter or objects of the suit, and that the complainants are not entitled to any relief against him.

Leverett Newcomb, for the motion. William E. Zellers, opposed.

GREY, V. C. (orally). The bill makes a husband and wife defendants with respect to the wife's ownership of the title to the lands described in the bill, with a prayer that a deed previously made to the wife may be decreed to be a nullity, and that the husband and wife may be decreed to "reconvey the premises to the complainants free and clear from all encumbrances," etc. The motion to strike out the husband as a defendant is based on the claim that he is neither a necessary nor a proper party, and that he has no interest in the object of the suit. The relation of a husband to his wife's separate estate, and his status as a party in a suit touching the same, were fully discussed in a recent opinion in this court in the case of *Bristol v. Skerry*, 54 Atl. 135. That was a case where the husband's status as a co-complainant with his wife in a suit regarding her separate property was challenged as a misjoinder. In the case presently under

consideration, the status of the husband as a party is criticised on somewhat the same grounds advanced in *Bristol v. Skerry*, namely, that the husband has no place, even as a defendant, in a suit relating solely to a wife's separate estate. In the premises the bill alleges facts which the complainants claim entitle them to have the defendant husband and his wife execute a deed of reconveyance, and they pray for a decree to that effect. While the husband has no legal estate in lands the title to which is owned by the wife, yet he has an equity which makes him a proper party in any suit affecting those lands, and which makes him a necessary party in any suit where the relief sought involves the execution of a deed by the wife conveying those lands. Her deed, even of her own lands, without her husband's signature, is a nullity. This power of veto over the wife's conveyance of her own lands survived the married women's act of 1852, and all its subsequent amendments, and appears to be all that is left of the estate formerly known as "tenancy by the curtesy initiate." The existence of this power in the husband enables him to retain in his wife's name the title to any lands of which she may be seised during the coverture, so that in case she dies seised of an estate of inheritance, a child having been born of the marriage, an estate by the curtesy complete instantly vests in the husband.

The motion to strike out the name of the husband as a defendant must therefore be refused, with leave to the husband to respond to the revived suit.

BITTLE v. CLEMENT et al.

(Court of Chancery of New Jersey. Feb. 16, 1903.)

PURCHASE OF PROPERTY—UNEQUAL CONTRIBUTIONS—PRESUMPTION—EVIDENCE—SALE OF INTEREST—NOTICE TO PURCHASER.

1. Where two brothers purchase land jointly, and their contributions are unequal, there is a presumption whereby each party holds a share in the property according to his contribution.

2. Where two brothers purchased land jointly, their contributions to the purchase price being unequal, and they were both very ignorant men, the fact that the deed was made to both generally, and that one who survived the other charged taxes paid to himself and his brother's estate in equal portions, did not overcome the presumption that each held a share according to his contribution.

3. Where the purchaser at execution sale of the interest of a decedent in certain land which had been conveyed to the debtor and another generally had notice that the share of the debtor was not one-half, he was entitled to no greater portion than the actual share of the debtor.

4. Rents accruing after the death of a decedent and before the exercise of a power of sale go with the title of the land to the heir or devisee, and not to the executor, or to the purchaser under the power.

¶ 4. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 283, 541.

Suit by B. R. Bittle against Herbert I. Clement and others. Decree for complainant.

Watkins & Avis, for complainant. Robert S. Clymer and Robert C. Sparks, for defendant H. I. Clement.

GREY, V. C. (orally). After hearing the arguments of counsel, I am satisfied as to what the decree should be without further consideration. The circumstances of the case are as follows: The bill is filed for the partition or sale of 87 acres of land lying in Gloucester county, purchased from Harper Davis and wife by the complainant, Benjamin R. Bittle, and his brother, Daniel Bittle, by deed dated March 1, 1893, made by Davis and wife to Benjamin R. and Daniel Bittle. In payment of the purchase-money price Benjamin paid \$1,250 and Daniel \$550, and they jointly gave a mortgage for the residue, amounting to \$2,000. On August 31, 1900, Daniel died testate, devising all his lands to Benjamin, and appointing him sole executor of his will, which was duly proved before the surrogate of Gloucester county. On the 28th of June, 1901, Herbert I. Clement recovered a judgment against Daniel's executor, and, because Daniel's estate was insufficient to pay his debts, the executor obtained an order to sell Daniel's real estate, and under this order advertised and sold Daniel's interest in the 87 acres above named. At the time of the sale, and before putting up the property at auction, notice was given that Daniel had paid but \$550 of the purchase money, and that Benjamin R. had paid \$1,250 of it, and that all Daniel's interest in the equity of the farm was in the proportion which \$550 bore to \$1,250. The defendant Herbert I. Clement, who had the judgment against Daniel's estate, bought in the farm with notice of this fact. The complainant, Benjamin R. Bittle, sets up the above-mentioned facts in the bill of complaint, and prays that a partition of the premises may be made between him and the defendant Clement according to their respective rights therein—that is, that he, the complainant, may have $\frac{25}{38}$, and the defendant Clement $\frac{11}{38}$ parts thereof; or, if it be found impracticable to divide the property, then that it may be sold, and the proceeds of sale divided between the parties according to their several rights therein. There is but a single matter of dispute raised by the answer of the defendant Clement. He insists that the complainant, Benjamin R. Bittle, is not entitled to an interest in the property in the proportion of $\frac{25}{38}$ parts to $\frac{11}{38}$ parts held by the defendant, but, on the contrary, asserts that the complainant's interest amounts only to the one equal half part, and that he, the defendant Clement, acquired by his purchase and is entitled to the other equal half part. The defendant joins in the prayer for partition or sale on the basis of the shares alleged in his answer.

The testimony offered proves that the com-

plainant paid on account of the purchase money \$1,250, that his brother, Daniel Bittle, paid on account of the purchase money but \$550, and that the balance of the purchase money was secured by a mortgage given by both on the premises. At the sale at which Clement purchased Benjamin announced that at the time of the purchase of the farm the purchase money, which was \$3,800, was secured in part by bond and mortgage given by Daniel and Benjamin for \$2,000, and that of the balance Daniel had paid \$550 and Benjamin \$1,250, and that Daniel's interest in the equity in the farm was in the proportion in which the sum paid by Daniel, \$550, stood to \$1,250, paid by Benjamin, and that Benjamin claimed to hold an interest in the equity in proportion to his payment of the purchase money. This notice was given at the sale, and the defendant Clement does not deny that he received the notice, and made his purchase subject to the information thus given. It appears by uncontradicted testimony that some years before the transaction here involved Daniel and Benjamin, who were brothers, owned their property in common. During this period there was no definition of the proportionate ownership of the brothers. No account was kept or taken to show what either contributed to the common property, nor what either took from it for his own use. There was no written agreement between them on the subject. They simply held and used their property in common. After a period of common ownership, they made a division, whereby Daniel took a mortgage for \$2,000 for his several property, and Benjamin took a mortgage for \$1,300, with an allowance of \$700 in cash to him for his several property. The balance of the common property was not then divided. There is clear proof that before the brothers purchased the property now in dispute they had arranged to hold the mortgages and the balancing \$700 of cash as the several property of each. When they purchased the property now in dispute, the proof shows they used this several property of each to pay for it. Each paid out of his own separate ownership, and not out of the joint ownership. In paying for it, Daniel contributed out of his private and individual funds \$550, and Benjamin out of his private and individual funds \$1,250. There is no denial whatever of this condition of facts, and it must be accepted as true, unless it be assumed that Benjamin Bittle, who testified to it, simply perjured himself on the witness stand. He is a very ignorant man. He knows how to write his name, and can recognize papers which he signed. He knows very little about business methods, but when under examination and cross-examination he frankly answered all questions, whether the answers were favorable or unfavorable to his interests in this suit, and gave the impression of a person who was speaking the truth. Benjamin is supported in his statement that

the contributions were as stated by the testimony of Mr. Vanneman, who heard Daniel Bittle make admissions in conversation, which came in an entirely natural way, to the effect that Daniel had contributed but \$550 and Benjamin had contributed \$1,250 of the purchase money. It thus appears that their contribution to the purchase money on this piece of land was in unequal proportions. There was no agreement between Daniel and Benjamin as to their several interests in the purchase, nor any arrangement whereby the one who contributed the most agreed that the other should equally share with him in the purchase. In such cases, unless the parties stand to each other in the relation of parent and child, or husband and wife, the law raises a presumption called a "resulting trust," whereby each party holds a share in the property purchased according to his contribution to the purchase money. The result of the transaction was that, when these brothers thus purchased the land in question, Daniel had an interest in it as \$550 stood to \$1,250, which latter amount Benjamin contributed to the purchase, and that sum represented Benjamin's share. There is no testimony showing that this arrangement was in any way changed. No conveyance or declaration of trust, or of their several interests, affecting the property, took place between them.

There is some proof which favors the defendants' contention that the brothers held in equal shares the property purchased. The fact that the deed was made to both generally is some evidence of that, and so is the charging of taxes, etc., by Benjamin against Daniel's estate in equal portions. But as to the effect of the deed, the proof is that these brothers, though contributing to the purchase in the proportions named, and evidently intending to own the property in those proportions, were very ignorant men, and it is hardly to be believed that they could or did understand the legal effect of a deed to joint grantees. So the charging of taxes, etc., in Benjamin's account, is of some force to show that they held in equal shares; but this is merely inferential proof, and ought not to be held to overcome the uncontradicted showing of the truth that the parties in fact purchased and paid for the property in the shares and proportions above mentioned, and that they have never since in any way arranged a division of either the land or the profits thereof as equal owners each of one-half part.

The payment of the proportionate shares of the purchase money by the several parties being established beyond dispute, a resulting trust assigning to each a quantity of interest in proportion to his payment arose, and should have effect, unless some definite act of the parties is proven, which establishes by equally forceful evidence some change in their relations to the property, whereby each was to hold a different share.

The defendant insists that they arranged that each should hold an equal half part; but this testimony does not effectively prove his claim. The defendant Herbert I. Clement bought Daniel's share at the executor's sale with full notice that Daniel's interest was in the proportion as \$550 stands to \$1,250, those being the sums contributed by Daniel and Benjamin, respectively, for the purchase of the property. The defendant Clement is equitably entitled only to that proportion which Daniel would have been entitled to had he been the defendant in this partition.

The result is that a sale should be ordered, and that the proceeds over and above the payment of the mortgage and costs should be divided in the proportion that \$550 stands to \$1,250. That is, the defendant Clement should have $\frac{11}{36}$ parts and the complainant, Benjamin Bittle, $\frac{25}{36}$ parts of the net proceeds of the sale.

There is a matter which appears in the orphans' court account of Benjamin as executor of Daniel Bittle, as to the disposal made of the rents of Daniel's lands since his death, and before his executor made sale of them. Rents accruing after the death of a decedent, and before the exercise of a power of sale, go with the title to the land to the heir or devisee, and not to the executor, or to the purchaser under the power. These rents appear to have been accounted for in the executor's account. There are also credits in that account which ought not to be there. The matter is of small importance, and has not been raised in argument, and can probably be settled without further controversy in this case.

I will advise a decree as above indicated.

MONMOUTH COUNTY ELECTRIC CO. v. CENTRAL R. CO. OF NEW JERSEY et al.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

MORTGAGES—AFTER-ACQUIRED PROPERTY—LIEN—PRIORITY.

1. Where a corporation, after giving a mortgage covering existing and after-acquired property, which was duly recorded, placed poles and wires belonging to it on the land of another by agreement with him, the mortgage was a lien prior to any claim of the landowner.

Suit by the Monmouth County Electric Company against the Central Railroad Company of New Jersey and another. Decree for complainant.

L. M. Garrison, for complainant. J. L. Conover, for defendants.

EMERY, V. C. At the hearing of the cause my conclusion was announced, that the complainant, as purchaser at foreclosure sale (or the grantee of such purchaser), was entitled to be subrogated to the rights of the mortgagee in the foreclosure suit, to the ex-

tent claimed; that is, the amount paid by the purchaser at the sheriff's sale (\$250,000). This seemed to me then to be the clear effect of the decisions from *Parker v. Child*, 25 N. J. Eq. 41, and *Chilver v. Weston*, 27 N. J. Eq. 439, to *Boorum v. Tucker*, 51 N. J. Eq. 135, 149, 26 Atl. 456; *Pettingill v. Hubbell*, 53 N. J. Eq. 584, 32 Atl. 78. I do not change my views upon further consideration. The question reserved was whether the mortgage was a lien, prior to any claim of the defendants, upon poles and wires erected upon defendant's property subsequent to the execution of the mortgage, by an agreement between the mortgagor company and defendant. The mortgage covered all existing and after-acquired property of the mortgagor company, and was duly recorded before the execution of the agreement between the mortgagor company and the defendant. Under the agreement, the poles and wires were erected on defendant's lands, and, as I construe its effect, they were the property of the mortgagor company, and they still remained its property at the time of the foreclosure. The mortgage expressly covered all after-acquired property, and under our decision the mortgage is, in equity, a lien upon these poles and wires afterwards acquired, which is prior to mortgagee or judgment creditors subsequent in date to the mortgage. *Smithurst v. Edmunds*, 14 N. J. Eq. 408 (Ch. Green, 1862), approved *McFarland v. Stanton Mfg. Co.*, 53 N. J. Eq. 650, 33 Atl. 962, 51 Am. St. Rep. 647 (Err. & App.); *Cumberland Nat'l Bk. v. Baker*, 57 N. J. Eq. 231, 40 Atl. 850 (V. Ch. Grey, 1898). The defendants have no lien upon this after-acquired property, either by the agreement or otherwise, and have only the right to purchase it at a valuation, or to require its removal on the termination of the agreement, which has already expired.

There must be a decree in favor of the complainant, requiring defendants to redeem or be foreclosed.

POLHEMUS v. PRISCILLA.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

JUDICIAL SALES — CONFIRMATION — IRREGULARITIES — ACCEPTANCE OF DEED — STATUTES — REPEAL.

1. Act Feb. 16, 1891 (P. L. p. 24), providing that judicial sales of land should be confirmed notwithstanding irregularity in the publication of the notice of sale, when the officer making the sale certifies under oath that the sale was otherwise regular, and for a fair price, and the court is satisfied that the interests of the parties were not injuriously affected by the irregularity, was not repealed by Act June 14, 1898 (P. L. p. 535), amending the acts approved March 25, 1874, and March 17, 1887, relating to publication of notices of sales of land under judicial proceedings, and changing the publications required.

2. The act of 1891 (P. L. p. 24) was not a mere validating act, applicable to past sales only, but in providing that "all sales" made

by order of any court "shall be confirmed" plainly refers to future sales.

3. Where a sheriff's sale is required to be confirmed by the court, he cannot require the purchaser to accept a deed until confirmation has been obtained.

Petition by Abraham V. D. Polhemus, sheriff, for decree to compel John B. Priscilla to accept deed and complete his purchase at a sheriff's sale. Denied without prejudice.

Alan H. Strong, for petitioner. Willard P. Voorhees, for respondent.

EMERY, V. C. On this application I reach the following conclusions:

1. The act of February 16, 1891 (P. L. p. 24), directing confirmation of sales by the court in cases like the present, was not repealed by the act of June 14, 1898 (P. L. p. 535), amending the previous acts of 1874 and 1887, relating to publication of notices of sales of lands. The act of 1891 was not an amendment to the sales act, but was intended to apply only to that class of cases in which, by previous statutes or practice of the court, confirmation of the sale by a court was necessary. The only statute requiring this was the statute relating to bonds and mortgages and foreclosure sales of March 12, 1880 (P. L. p. 255; Gen. St. p. 2111, § 4), and perhaps sales in partition in chancery or orphans' court. The statute of 1891 did not at all extend to or cover that large class of public sales upon which no confirmation by court is necessary. This statute was, therefore, one of special application, and did not repeal the previous provisions of the general acts of 1874 and 1887 as to sales of land. Neither was it repealed by the subsequent general act of 1898, changing the publications required. The statute of 1891 can be read in connection with the act of 1898, and both made effective. Thus read together, the statutes still require the sheriff to make advertisement according to the law of 1898, but, if there is a defective advertisement, then, if the sale is one which is subsequently to be confirmed by the court, the court may, under the conditions prescribed by the act of 1891, confirm the sale, notwithstanding the defect in advertisement. The claim that the act of 1891 was repealed by the act of 1898 is, for these reasons, not sustained.

2. The act of 1891 is not a mere validating act, applicable to past sales only. The language of the act plainly refers to future sales. "All sales made by virtue of any order, judgment, or decree of any court of record of this state, shall be confirmed by the court," etc. It is certainly prospective, whether or not it be retrospective. The plain language covers sales that are to be thereafter confirmed, and without limiting the confirmation to sales previously made. The act is not an act to validate sales, but an act concerning defective advertisements. There is nothing in the title or act to indicate that the adver-

¶ 3. See *Judicial Sales*, vol. 31, Cent. Dig. § 59.

tisements concerning which the statute legislates were past advertisements. I think, therefore, that the present case is within the act, and the petitioner is entitled to the benefit of it.

3. The only relief I can give the sheriff on this petition is to have the sale confirmed under the act of 1891. The respondent was not bound to accept a deed until a confirmation under this act had been made, and a deed tendered after confirmation. The right of the sheriff to proceed to specific performance is based on the fact, and only on the fact, that he has fully complied with his duty as an officer executing a statutory power, and thereby is entitled to call on the purchaser to complete the sale upon his part. It may be, however, that the parties have raised on this application all the questions intended to be raised, if a deed should be tendered after confirmation under the act of 1891; and, if so, I may, by consent of the purchaser, now order the acceptance of the deed after confirmation, with the same effect as if a tender had been made after confirmation. If he does not consent, the present application will be denied, except as to the confirmation of the sale, but without prejudice to a renewal of the application on tender of the deed after confirmation of sale.

COLUMBIA COUNCIL, NO. 77, JR. O. U. A. M., OF MATAWAN, N. J., v. BELMAR BUILDING & LOAN ASS'N.

(Court of Chancery of New Jersey. Feb. 18, 1908.)

BUILDING AND LOAN ASSOCIATIONS—FORGED CERTIFICATES OF STOCK—RECEIPT OF PAYMENTS—ESTOPPEL TO DENY MEMBERSHIP.

1. One who held a forged certificate of stock in a building association, and also valid certificates, made payments of dues on them all to the association's secretary, who had issued the forged certificate, and who had no authority to receive payments for the company. The secretary turned the money over to the treasurer, who was ignorant of the existence of the forged certificate, and who, supposing the payments to be made on the valid certificates, credited them thereon as advance payments, which, under the by-laws, were allowable. The treasurer was the only officer entitled to receive payments for the association. *Held*, that the association was not estopped to deny membership by virtue of the forged certificate.

Bill by Columbia Council, No. 77, Jr. O. U. A. M., of Matawan, against the Belmar Building & Loan Association, to establish membership in the association. On bill, answer, replication, and proofs. Bill dismissed.

J. C. Conover and A. E. Arrowsmith, for complainant. Frank Durand, for defendant.

EMERY, V. O. Complainant's counsel have not submitted any briefs, and the cause will not be held any longer for them. The complainant has no claim for membership in the association based on the forged certificate itself, and the only question in the cause is

whether the receipt of dues by the defendant from the complainant took place under such circumstances as to estop the defendant from denying membership under the forged certificate. The dues which were paid included the regular payments upon valid shares held by the complainant, as well as payments upon the shares represented by the forged certificate. The treasurer of the company, to whom the payments were turned over by MacDermott, the secretary, who issued the forged certificate, had no knowledge that the payments were made on these forged certificates, and credited the entire payments to the account of the valid shares, taking them to be payments in advance. Under the by-laws there was nothing to prevent payments in advance, as the payments (article 13, § 3) were to be made "on or before" certain days fixed. No payments were ever credited to the account of any shares represented by the forged certificates. Under these circumstances, no estoppel to deny the validity of the forged shares, or the right to membership based on them, can arise. Membership, in such case, could be rested only on the ratification of the illegal issue by receiving payments thereon, and the consequent estoppel against subsequently denying membership as the effect of the payments and receipt. But ratification of a previous illegal or unauthorized act never arises, unless the act claimed to be a ratification is done with knowledge of the previous invalidity or irregularity, or of the facts from which they result. The treasurer in this case was the only officer entitled to receive the payments for the company; and even assuming that he had authority, by their mere receipt, to ratify an illegal or void issue of certificates (which I do not intend to decide), the payments made on the fraudulent shares were by him intended to be received and were received and credited as payments on the valid shares, and without knowledge on his part of the existence of the forged shares. There was, therefore, no ratification by the company, and no estoppel to deny the validity of the certificate can arise. The payment by complainant on account of the shares represented by the forged certificate was actually made to MacDermott, who was the secretary of the company. He undoubtedly knew of the forgery, for he was the person who issued the certificate to complainant. But as secretary he had no authority to receive the payments for the company, and the payment to him by complainant for the purpose of turning over to the treasurer must be considered to have been made to him as the agent and for the convenience of the complainant, and it was at complainant's, and not defendant's, risk, that the payments were turned in by MacDermott, and credited by the treasurer as payments made on the valid shares only. The company cannot be held in this case as estopped, by MacDermott's dealings with com-

plainant, from denying the validity of the shares.

The bill of complainant seeking to establish its membership by virtue of this forged certificate and its alleged payments thereon must be dismissed. The dismissal, however, will be without prejudice to any action which the complainant may have at law for the repayment of the amounts paid on the forged shares or otherwise.

RILEY v. FITHIAN et al.

(Court of Chancery of New Jersey. Jan. 23, 1903.)

EQUITY—PLEADING—BILL—TRUSTEE—TERMS OF TRUST—DILIGENCE—COSTS.

1. In an action by a trustee to recover trust property alleged to have been wrongfully obtained by the defendant parts of the bill narrating the origin and terms of the trust and the parties thereto should not be stricken out as immaterial.

2. An allegation in the bill in an action to recover property of which complainant claims to have been defrauded that he consulted his counsel as to the transactions, and directed his counsel to investigate the facts to enable him to take legal steps for relief, should not be stricken out, as it tends to show diligence and explain delay, and is not prejudicial to the defendant.

3. The insertion, in a bill by a trustee to recover trust property, of a copy of a letter written by complainant's counsel to defendant before suit, stating counsel's views as to the legal basis of complainant's claim, and suggesting an "adjustment without recourse to the courts," is proper, as being matter for consideration in the allowance of costs.

Action by Franklin Riley, trustee, against Francis R. Fithian and others. Motion to strike out parts of bill. Refused.

Clement H. Sinnickson and W. A. Logue, for complainant. E. A. Armstrong and David J. Pancoast, for defendants.

GREY, V. C. (orally). This matter may be presently disposed of, as the elaborate arguments of counsel on both sides have fully discussed every view which may be taken of the points in dispute. The bill of complaint is filed by a trustee, who devotes the first 12 or 13 pages of the bill to a definition of the origin and character of his trust. The principal defendant is Francis R. Fithian, who is alleged on the face of the bill to have been the agent of the complainant, whom he employed to sell the trust property. The other defendants are parties claimed to have been associated with Mr. Fithian in the doing of the acts alleged to be wrongful. The bill alleges that the trustee employed the defendant Fithian to effect a sale, and charges that he and those he associated with him have wrongfully retained part of the trust property, and have sold and retained the profits of another part; that these acts were concealed from the complainant (trustee), and have resulted in great loss to the trust estate. The trustee complainant states the

details of the transactions so far as they have come to his knowledge, and asks a disclosure of all the incidents whereby the title of the trust property has been disposed of, and an accounting for, and the payment back to the trustee of, the profits of the trust property wrongfully retained, and also a reconveyance of the portion of the trust lands, which, it is alleged, have been wrongfully obtained by the defendant Fithian for his personal use.

The bill of complaint is challenged under the 213th rule, in three particulars: The first is as to the 12 or 13 pages in which the trustee narrates the origin and the terms of his trust. The criticism made of this portion of the bill is that it is wholly immaterial as to whether the complainant is trustee or not; if he is, it is wholly immaterial what the terms of his trust are; that the gravamen of his bill is the demand that the complainant should have an accounting from his agent employed to dispose of his property; and it is insisted that the origin and nature of the trust under which the complainant holds the lands in question may be wholly left out without any detriment to the complainant's case. An examination of the bill of complaint indicates that the narration of the origin of the trust under which the complainant holds the trust property is necessary, in order to show who are the cestuis que trustent, who, in proceedings affecting the trust property, should be made parties, unless the securing of their appearance is greatly inconvenient or practically impossible. The Court of Appeals settled this in the case of *Tyson v. Applegate*, 40 N. J. Eq. 311. To strike out the history of the origin of the trust would leave the complainant declaring that he was a trustee, without disclosing his trust, or showing who were entitled to the benefits of it. The narrative of the creation of the trust is somewhat extended, but the transactions out of which the trust grew were themselves both complicated and voluminous. They cannot be stricken from the record without crippling the complainant's statement of his cause of action. The above objection to the bill must be overruled.

The next criticism of the bill of complaint is that it contains an allegation that there was a consultation between the complainant and his counsel touching the transactions involved, and a direction by complainant to his counsel that they should make such inquiry as to the facts as might be necessary to enable him to take legal steps for relief. This is objected to as irrelevant. The obligation upon a party who thinks he has reason to believe he has been defrauded of property is to make diligent inquiry, and pursue his remedy before the defendants, if they be in fact fraud doers, may so act as to change the nature of the title or involve persons who are innocent as to the fraud. If, upon the face of the bill of complaint, it appears that the complainant has supinely slept after

warning of his danger, he might be liable to a charge of laches from a party who, because of this negligence, might have become a bona fide purchaser of the property. The insertion of a clause tending to explain delay in procedure, or to show diligence, while not of vital importance, is in no way prejudicial or embarrassing to the defendants. It should not be stricken out of the bill.

The third criticism of the bill of complaint is the insertion therein of a copy of a letter written by the counsel of the complainant to the defendant Fithian at or about the ending of a correspondence between them regarding the subject-matter of the present lawsuit. The objection is that this letter is wholly irrelevant and immaterial as a part of the complainant's statement of his cause of action; that it is in the nature of a law brief, and has no proper place in the bill of complaint. The letter in question is a statement by complainant's counsel to the defendant Fithian of his view of the legal basis of complainant's claim, and expresses a willingness to confer for "adjustment without recourse to the courts," etc. It occupies about one page of the bill. In equity costs are not necessarily awarded to the successful party in the final decree. The showing on the face of a bill of complaint that previous to its filing the defendant had been warned of his equitable duty, and requested to perform it, is a pertinent allegation. The complainant, if successful in the cause, may appeal to the fact that the defendant contested the suit with previous warning of the legal basis of the complainant's claim, as a justification for the allowance of costs.

None of the specified criticisms of the bill of complaint can be sustained. The motion to strike out is therefore refused, with costs.

CONGLETON v. SCHREIHOFFER et al.
(Court of Chancery of New Jersey. Feb. 3, 1903.)

BANKRUPTCY — STATUTES — CONSTRUCTION — CONVEYANCES — DELIVERY — PREFERENCES — GRANTEE — KNOWLEDGE OF BANKRUPT'S INSOLVENCY.

1. Bankr. Act, § 67, par. "e" [U. S. Comp. St. 1901, p. 3449], provides that conveyances by a bankrupt within four months prior to filing the petition in bankruptcy, with intent and purpose on his part to hinder, delay, or defraud his creditors, shall be void as against such creditors, except as to purchasers in good faith and for a present consideration. *Held*, that such act referred only to transactions which were previously void under the statute of frauds, and hence a conveyance by a bankrupt to a bona fide creditor for a precedent debt, by way of preference, was not invalid thereunder.

2. Where a preferred creditor of a bankrupt had been previously examined in the bankruptcy proceedings in regard to the conveyance, such creditor's evidence was admissible against her in a subsequent action to set aside the conveyance in a state court.

3. Where a bankrupt was examined in the bankruptcy proceedings concerning an alleged preference, his testimony given there was only admissible as against an alleged preferred creditor in an action in the state court to set aside such preference as affecting the bankrupt's credibility as a witness in the state court.

4. Defendant loaned money to her brother, as a temporary loan, which was renewed for several periods, of six months each, until 1896, during which the brother was solvent. Interest was paid on the note until July, 1900, when defendant requested security, and the brother informed her that he would give a deed of certain lots for the note, which defendant agreed to accept. Nothing was said as to the brother's finances, and he executed a deed of the lots to her August 8, 1900, and had same recorded the next day. He filed a petition in bankruptcy August 17th, and was adjudicated a bankrupt on September 17th, after which defendant obtained the deed from the register's office, having previously been informed thereof by her brother. *Held*, that the facts were insufficient to show that at the time of the conveyance she had knowledge or reasonable cause to believe that her brother was insolvent, or that he intended the deed as a preference.

5. The deed was delivered when the grantor left it for record, and therefore the title to the property did not vest in the bankrupt's trustee, under Bankr. Act, § 70, subd. 5 [U. S. Comp. St. 1901, p. 3451], vesting in such trustee property which prior to the filing of the petition the bankrupt could have transferred, or which could have been levied on by judicial process.

Bill by Jerome T. Congleton, as trustee, against Jacob Schreihoffer and another, to set aside a conveyance as an alleged preference by a bankrupt. Bill dismissed.

W. T. Day and J. E. Howell, for complainant. E. S. Black, for defendants.

EMERY, V. C. Complainant, a trustee in bankruptcy of Jacob Schreihoffer duly adjudicated a bankrupt by the United States District Court, files this bill to set aside a conveyance made by the bankrupt to defendant Elizabeth Steigert. The deed was dated and acknowledged August 8, 1900, and recorded August 9, 1900. The petition in bankruptcy was filed August 17, 1900, and the date of adjudication of bankruptcy was September 17, 1900. Under the United States bankrupt act of 1898, § 70 [U. S. Comp. St. 1901, p. 3451], the trustee is, *inter alia*, "vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. * * * Section 60, par. "b" [U. S. Comp. St. 1901, p. 3445], also provides "that if a bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting thereon, shall have had reasonable cause to believe that it was intended thereby to

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 259.

give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Section 67, par. "e" [U. S. Comp. St. 1901, p. 3449], also provides that the conveyances of the bankrupt's property made within four months prior to filing the petition, "with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present consideration, and all property of the debtor conveyed," etc., "as aforesaid shall * * * be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and claim the same by legal proceedings or otherwise for the benefit of creditors." Conveyances of property made by the debtor within four months prior to the filing of the petition against him, and while insolvent, which are void against creditors by the law of the state where the property is situate, are also declared void under the same section of the bankrupt act; and the property conveyed passes to the assignee, and may be reclaimed and recovered by him for the benefit of the creditors of the bankrupt.

The bill alleges (1) that the deed in question was without consideration and fraudulent as against creditors; and (2) that the consideration, if it existed, was that of an existing debt, and the conveyance was a preference avoided by the bankrupt act, because the bankrupt was then insolvent, and the grantee had reasonable cause to believe that the deed was intended by the bankrupt to give a preference. Upon the hearing it was also claimed (3) that the deed was not delivered to or accepted by the grantee until after the filing of the petition in bankruptcy, and it was, therefore, under the act, ineffective against the trustee's title.

As to the first claim—that the deed was intended to defraud creditors—the evidence clearly establishes that the bankrupt owed Mrs. Steigert, his sister, \$500 for money borrowed some years before, upon which he had been paying the interest, and that the deed in question was for the purpose of paying the note, which was surrendered upon the receipt of the deed by the grantee. The property conveyed is not worth the amount of the note, \$250 being the only value given in the evidence. At the time of the conveyance the debtor was insolvent, and, as I conclude from the evidence, intended a preference by the conveyance, but under our laws such preference is not a fraud upon creditors. Complainant's counsel contend that such conveyance by a bankrupt by way of preference is itself a fraud upon creditors, under the bankrupt law, and can be avoided by the trustee, under the sixty-seventh section [U. S. Comp. St. 1901, p. 3449], because Mrs. Steigert was not a purchaser in good faith and for a present consideration. I can-

not give my assent to this construction. The language used in this section is the same used in the statute of frauds, and I take the section to be intended to reach transactions of the same character, and to give to the trustee the same right which creditors had under that statute to set aside fraudulent conveyances. Its language cannot be construed as intended to make acts which were not previously fraudulent against creditors frauds on creditors under the bankrupt act. Preferences fraudulent under the act are described in the sixtieth section [U. S. Comp. St. 1901, p. 3445], and remedies therefor are provided. These sections would have been unnecessary if every conveyance for a precedent debt was a fraud upon creditors under the act. No authority has been cited by counsel for this contention as to the construction of the act.

Second. The trustee's right to recover the property from the creditor, Mrs. Steigert, as an unlawful preference, depends upon the proof that at the time of the conveyance the debtor was insolvent, and the creditor, or her agent, "had reasonable cause to believe that it was intended thereby to give a preference." The proofs sufficiently establish, as I have said, that at the time of the transfer the debtor was insolvent, and the dispute on this branch of the case relates to Mrs. Steigert's having reasonable cause to believe that a preference was intended. The only evidence on this question is that of the debtor and the creditor, the two witnesses called by the trustee. Both of these witnesses had been previously examined under oath in the bankruptcy proceedings in regard to the conveyance, and the evidence then given by both witnesses is offered in addition to the evidence of both regularly taken on this hearing. The evidence in the bankruptcy proceedings was taken in October, 1900, shortly after the conveyance, and in some respects differs from the evidence on this hearing, which occurred nearly a year later. The evidence of Mrs. Steigert, taken in the bankruptcy proceedings, relating to the transfer, being offered entire as an admission against her, is also admissible, as having the effect of evidence in her favor, and as evidence on this hearing of facts there testified to by her bearing on the present issues. Best, Evid. sec. 520; 1 Jones, Evid. § 295. She is a woman of little or no business experience; seems to have had no business transactions whatever, except with relatives (her brother and daughter), to whom she has loaned the comparatively small sum received from her husband's estate. Her memory at the present hearing was defective, especially in the matter of dates, which are of importance; and, as to her evidence, I am inclined to think that, where her evidence taken here differs materially from the evidence taken in the bankruptcy proceedings, the latter is more reliable. I see no reason whatever to doubt her honesty in either ac-

count. The evidence of the debtor, taken on bankruptcy, stands on a different footing as to its admissibility against Mrs. Steigert. His statements there made are not admissible against her as evidence of the truth of the statements there made, if they contradict his present statements, but only for the purpose of affecting the reliability of the evidence here given by him. 2 Jones, Evid. § 861, and cases cited in note 9. The distinction is of importance in the decision of the case because the debtor's testimony given here as to the circumstances of giving the deed differed in some respects (claimed by counsel to be material) from the evidence given in the bankruptcy proceedings, and upon the arguments the statements in the bankruptcy proceedings were treated as evidence of the truth of the facts then stated, and not as merely affecting the credibility of the witness' present statement.

Taking this view of the legal relation of the evidence given before me, and the evidence given in the bankruptcy proceedings by the bankrupt and the creditor, I conclude that the situation disclosed by the entire legal proofs against Mrs. Steigert upon the point now under investigation, viz., the circumstances of giving the deed, and her knowledge or cause to believe that it was intended as a preference, is substantially as follows: Mrs. Steigert, upon the death of her husband, eight years ago, came into possession of a small sum of money, \$500 of which she loaned to her brother, the bankrupt, about two years after her husband's death. He was then carrying on business as a butcher in Newark. The loan was to be paid in six months, and a note for that period was given, as it was not intended by Mrs. Steigert as a permanent loan. It was not paid at maturity, and a new note for another six months was given. This note was also renewed by a similar note, and the same course as to renewals was continued down to 1896, when the last note for six months was given, and this was the note surrendered on receiving the deed. No renewal was given after 1896, because the brother informed his sister that it was not necessary, and she accepted his statement. Interest was paid on the notes, usually once a year, and when the sister asked for it. For some time previous to July, 1900, when she received her last interest, Mrs. Steigert, on getting her interest from her brother, urged him to pay the money; but the brother did not do so, saying that he did not have the money then. At this time he owned real estate in Newark, one of the places in which he did business, and other real estate, worth, in all, from \$7,000 to \$9,000 (or \$1,000 to \$3,000 above the mortgages), and also conducted a business in the market. The sister's urgency from time to time to pay the money borrowed was not due to any apprehension on her part of his then or immediate insolvency, but to the fact that the loan had run so long,

and that she wanted the money to lend to her daughter, who had already some of her money on mortgage. She urged him to sell some property and give her the money. In July, 1900, when she came for her interest, she again urged her brother, as she said in the evidence in bankruptcy, "to give me the money, or give me something that I can stand by." She says she did this because he had not given her any note for the "last couple of years." The brother then said, "I will give you the deed for my lots in the rear"; and she says, "Of course, I was then satisfied." The debtor owned property in Newark running from Eighteenth street to Nineteenth street, and the "rear lots" referred to were unimproved property fronting on Nineteenth street. On the Eighteenth street front, buildings were erected; and the whole property was, to some extent, used together, by means of the rear entrance on Nineteenth street. Nothing appears to have been said at this time about the date for conveying the property, and no further conversation took place in reference to the conveyance until after the deed was executed by the bankrupt (August 8, 1900), and left by him for record at the register's office. The deed was executed at the same time that he made several other conveyances and transfers, comprising substantially all his property; and he then stopped the business of marketing, and it was continued by his sons, to whom he transferred it, in the same places where he had transacted business. The debtor evidently intended the conveyance as a preference to his sister, but he also intended it, I think, to carry out his promise made to her in July to convey the rear lots to her for her debt. After the conveyance (the exact time is in dispute, and will be hereafter considered), the sister visited her brother's family in Newark, and while there her brother came home; and he then told her that he had made the deed to her, and that it was at the register's office, and she could get it in about two weeks, or in about three or four weeks. Both witnesses give both sets of dates. He told her to bring over the note when she came to get the deed. She came to Newark subsequently (about October 10th, and after the adjudication of bankruptcy, is the date which I would fix upon the entire evidence), and obtained the deed herself from the register's office. She then at once delivered the note to her brother, who had accompanied her to the door of the office, and who had given her a card to receive the deed. At no time, up to the delivery of the deed, did she have any conversation with her brother about his debts to others or about his financial condition, nor did she know that he had stopped business. This is her statement and her brother's, and, aside from the fact that there is no evidence impeaching the statement, I think the whole course of the brother's conduct indicated that up to the time of recording the deed he did

not give his sister any information about his failing circumstances. He had apparently taken advantage of her inexperience to get from her, and continue for years, at the risk of his business, the original loan, which was to have been repaid in a short time; and, in order to continue the loan after her repeated requests to pay it, he would have been more likely to conceal than to disclose his business debts.

The statement principally relied on by complainant as evidence of Mrs. Steigert's personal knowledge of the debtor's insolvency at the time the deed was received by her is the debtor's statement in the bankruptcy proceedings that he told her "she had better secure herself, and take this deed for her note." Whether this was in July, when he paid the interest, or at the first interview after the deed was executed, is not clear from the debtor's statement, but this statement was not made by the bankrupt when examined on this hearing; and, as it was denied by Mrs. Steigert, the statement of the debtor in the bankruptcy proceedings cannot be now considered against her as evidence given here, or as evidence of the truth of the statement. Nor does it, in my judgment, amount to such a statement by the debtor in reference to his financial condition as to charge her with reasonable cause to believe that he was then insolvent. At the furthest, it could only give rise to a suspicion of insolvency, and suspicion is not reasonable cause for belief.

Complainant's counsel further claim that, even if Mrs. Steigert had no personal knowledge, the knowledge of the debtor was in this case chargeable to her, because he was her agent in the execution and delivery of the deed, and his knowledge is chargeable to her. The facts proved do not establish an agency of the debtor to this extent. Mrs. Steigert, in arranging for the deed at the conversation in July, acted for herself; and she acted for herself in the interview which took place after the deed was executed and left for record, when she was informed that the deed had been executed and left for record for her. It was at this interview that the arrangement to accept the deed which had been executed, and to deliver the note therefor, was made. In this transaction Mrs. Steigert acted for herself, and the debtor was not her agent; and his knowledge of his own insolvency, previous to or up to the time of her agreement to accept the deed which had been left for record, is not chargeable to her.

Complainant claims that, even if Mrs. Steigert had no actual knowledge or information that a preference was intended, the circumstances connected with the transfer were unusual, and were such as put Mrs. Steigert upon inquiry as to her brother's financial condition, and that, having failed to make such inquiry, she is therefore chargeable with notice of insolvency. These circum-

stances are that she agreed to take and did take the deed for the land without any examination of it by herself or counsel to see what it conveyed, or whether the title was good; that she does not know how many lots it conveyed, or their value, or whether it was incumbered. She left everything to her brother, she said, and did not ask or inquire into anything. The deed does not, in fact, convey the entire lots on Nineteenth street, but only the front of the lots. The bankrupt's property ran through from Eighteenth to Nineteenth streets, and the Eighteenth street front had been built up, while the Nineteenth street front—100 feet or a little more—was unimproved. In this situation of the property, by the "rear lots," which Mrs. Steigert agreed to accept, she understood, I think, the lots on Nineteenth street, running to the usual depth of the city lots there—about 100 feet; and it is quite probable that in July, when he promised to convey the "rear lots" to his sister, the bankrupt intended to convey lots to the usual depth. But in making his transfers of property on August 8th he intended, as he now says, to convey to one Hauser (another creditor) the property from the Eighteenth street front through to within about 20 feet, or less, of the Nineteenth street line. By a mistake of the scrivener the deed to Hauser conveyed lots 100 feet deep, leaving about 80 feet of the rear of the Nineteenth street lots, which were unconveyed, and this became vested in the trustee. This mistake in Hauser's deed was not known to the bankrupt until after the adjudication in bankruptcy. He does not seem to have informed his sister that her deed conveyed only the front of the Nineteenth street lots, nor does she seem to have been informed of it until after the receipt of the deed and the examination in bankruptcy. The circumstances show sufficiently, I think, that Mrs. Steigert relied entirely on her brother to carry out his agreement to transfer the rear lots to her, and supposed he was doing so fairly and according to the spirit of his promise. This confidence the bankrupt abused by conveying only a portion of the rear lots, and without informing her of this when he secured the delivery of his note. But her confidence in her brother was not unreasonable; nor, under the circumstances, do I think she was put on further inquiry. She knew what the "rear lots" were, in the ordinary meaning of the words, which she was entitled to accept; and her failure to make those inquiries about the title or incumbrances or descriptions which might be usual in case of purchase from a stranger cannot be said in this case to be due to anything else than the confidence she placed in her brother that he was carrying out his promise in good faith. So far, therefore, as complainant's claim depends upon the grantee's belief, or cause of belief, that the debtor was insolvent, and a preference was intended, I

conclude that no case has been made out by the proofs.

The third point in the case is whether the deed was delivered to Mrs. Steigert before the filing of the petition in bankruptcy, August 17th. She did not actually receive it from the register's office until about October 10th, as I conclude from an examination of all the evidence on this point; but she had previously been informed by her brother that the deed was there for her, and had arranged to come over for it, and bring the note for delivery when she received the deed from the register. The complainant's claim is that the delivery of the deed took place when Mrs. Steigert actually received it from the register, and that it certainly did not take place before her agreement to accept the deed, when informed that it was at the office. This interview was, it is claimed, after the filing of the petition, and the actual delivery was after the adjudication. In either event, and if the delivery did not, in law, take place before the filing of the petition, the transfer, being a preference, is avoided by the bankrupt act (section 70 (5) [U. S. Comp. St. 1901, p. 3451]). The question, therefore, is when, upon the facts of the case, did the delivery of the deed, in law, take place—upon its delivery for registry, upon Mrs. Steigert's acceptance when informed that it was at the office for her, or only upon its actual delivery to her? Upon the question of the effect of the delivery by the grantor of a deed at the register's office for registry as being a delivery to the grantee, the Supreme Court held in *Jones v. Swayze*, 42 N. J. Law, 279, 283 (1880), that where, upon the facts of the case, it appeared that a chattel mortgage was filed, with the knowledge and consent of the mortgagor, for the benefit of the mortgagee, in pursuance of a previous promise made by the mortgagor to secure the mortgagee, the delivery of the mortgage to the mortgagee will be held to have taken place upon the filing of the mortgage for registry, although the mortgagee did not know that it had been executed or filed until after a subsequent mortgage upon the property had been executed. In reference to the delivery of deeds, all courts seem to agree upon the fundamental principle that the question of delivery is one of fact, and resolves itself into a question of intention. Courts, however, differ in regard to the presumption or inference as to this intention to be primarily drawn from particular facts or circumstances connected with the delivery, and especially as to the inference to be drawn from the delivery of the deed by the grantor for registry without the knowledge of the grantee. Our Supreme Court, after a critical examination of the decisions, disapproved the rule followed by some courts—that in such cases an actual acceptance of the deed by the grantee, by words or acts indicating his assent, after knowledge that it has been left for registry, is necessary in order to justify the conclusion of a delivery, and held, with

the English and other courts, that where a deed is for the benefit of the grantee, and by the delivery to a third person (the register or other), not the agent of the grantee, the grantor parts with all control over the deed, a delivery will be presumed to take place from the instant of the delivery to such third person, and, as between grantor and grantee, this presumption continues until it is rebutted by proof of refusal to accept. The legal theory is that the law will presume, if nothing appears to the contrary, that a man accepts what is for his benefit. And in reference to the facts authorizing the inference of benefit by the deed, *Jones v. Swayze* holds that, where it is shown that the deed in question is a mortgage executed in pursuance of a previous general promise made by the mortgagor to the mortgagee to secure the mortgagee, the mortgage will be presumed to be for the benefit of the mortgagee. This rule declared in *Jones v. Swayze* has never been questioned and has been recently approved in this court. *Schlicher v. Keeler*, 61 N. J. Eq. 394, 396, 48 Atl. 393 (Reed, V. C., 1901). Applying this rule to the present case, it would seem that the delivery of the deed to Mrs. Steigert must be taken as effectual from August 9th, when it was left for record. Upon being informed of the delivery, she had the right to refuse to accept, but, as the evidence shows, she did not refuse, but, on the contrary, assented to the delivery and execution of the deed. This assent was, of course, subject to the risk of having the deed avoided by the trustee, under the bankrupt act, if at the time of the delivery for record she had reasonable cause to believe that the grantor was insolvent and that a preference was intended; but under the rule as to the time delivery takes effect, laid down in *Jones v. Swayze*, as applied to the facts of this case, the title passed on the delivery for record. It should, moreover, be noted that, even if the rule requiring assent or acceptance by the grantee as essential to a delivery and to the transfer of title be held applicable, the conclusion upon the evidence in the cause must be that this assent of the grantee was given before the filing of the petition in bankruptcy. The only evidence in this hearing fixing the time of the first interview between Mrs. Steigert and the bankrupt after the delivery of the deed for record is that of the bankrupt, who says two or three times that he thinks it was three or four days after the deed had been executed. The petition was filed August 17th—eight days after the registry. The debtor's accuracy or reliability in fixing this date is shaken by his statements that the interview was, "maybe," two weeks before he got the note, which date was in October; but the effect of destroying his credibility on this point is to leave the case without any satisfactory evidence on this point, and, as complainant has the burden of proving that the interview was after the

filing of the petition, his case falls. Mrs. Steigert herself cannot fix the date of this interview, and as to whether it was before or after the filing of the petition in bankruptcy, upon all the evidence, I conclude that it has not been shown by the complainant that the petition was filed before her notification and acceptance of the deed.

A decree dismissing the bill will be advised.

CARSON v. CARSON.

(Court of Chancery of New Jersey. Feb. 18, 1908.)

CUSTODY OF CHILD—MISCONDUCT OF PARENT—HABEAS CORPUS.

1. In habeas corpus, under P. L. 1902, p. 261, §§ 9, 12, by a father to obtain the possession of his children from his wife, living separate from him, under the provisions of section 9, that the rights of both parents, in the absence of misconduct, are equal, and the welfare of the children shall determine the custody, the fact that a wife, who left her husband's house because he ordered her to do so, and who had not been asked to return, remained separated from him, does not show such misconduct on her part as to deprive her of the custody of their children of tender years, where, in the opinion of the chancellor, their happiness and welfare would be promoted by awarding the custody to her.

Habeas corpus for the possession of children on petition of James H. Carson against Sadie E. Carson. Denied.

Winsford S. Angleman, for petitioner. Samuel S. Swackhamer, William R. Codington, and Francis J. Blatz, for respondent.

EMERY, V. O. The statutory provisions which govern this application are sections 9 and 12 of the "act concerning minors, their adoption, custody and maintenance." Revision 1902 (P. L. p. 264). The procedure is under section 12; the husband and wife living in a state of separation, and the minor children being brought before the chancellor on habeas corpus. The section requires the custody of the minors in such cases to be awarded as the chancellor may deem expedient. The principle or rule which is to control the chancellor's view of the "expediency" is the one stated in the ninth section, viz., that the rights of both parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession. This was the rule which was especially enforceable in proceedings upon habeas corpus, by express provision of the act of March 26, 1896 (P. L. p. 171). This was also the rule under the provisions of the divorce act, relating to the custody of children. Revision 1874 (2 Gen. St. p. 1271, § 27). The statutory declaration of the rule controlling custody was first made in 1871 (P. L. 1871, p. 5, § 6), and did not introduce a new rule for the courts of equity, but was merely

a declaration of legislative approval of the general rule previously adopted by the courts of equity in proceedings upon habeas corpus or otherwise. *English v. English*, 32 N. J. Eq. 738, 743 (Err. & App. 1880). The provisions of these acts were consolidated in the act of 1892, and both acts were thereupon repealed (P. L. 1902, p. 270). In relation to children under the age of seven years, the statutes, previous to the act of 1896, had express provisions giving to the mother of the children preferential rights. P. L. 1860, p. 437; P. L. 1861, p. 458; P. L. 1892, p. 158. These prior acts were repealed by the act of 1896 and the general repealer of 1892 (P. L. 1902, p. 270).

Considering the welfare and happiness of the children as the object to be secured by the decree or order in this case, I reach the conclusion, upon all the evidence, that the custody of the children should, for the present, be awarded to the mother. Petitioner's counsel claims that the wife was guilty of misconduct in leaving her home with the children, and that therefore, under the statute of 1902, he is entitled to the custody of the children, as his common-law right. To this claim there are two answers: First. The welfare of the children is the object of the statute, and the provision as to misconduct of either party was intended to give a preference to the innocent party, and to impose upon the party charged with or found guilty of misconduct under the statute the burden of overcoming this preference, and showing that, notwithstanding the misconduct and the inequality of rights, still the welfare of the children requires an award of the custody to the party guilty. Second. The character of the misconduct charged in this case is not such as to affect the mother's love and affection for her children, but arises entirely from differences between the husband and wife, as to which each may be in some fault. I do not now decide this point, as it is not necessary. This was the situation in the *English Case*, where both parents were in fault, and the wife remained separate from her husband without legal justification, but was nevertheless awarded the custody of the children. *English v. English*, 32 N. J. Eq. 738, 747 (Err. & App. 1880). Misconduct, in this statute, means such conduct as to deprive the spouse of a moral right to the custody of his or her children. *Id.*, 31 N. J. Eq. 543, 547 (Runyon, Ch., 1879), affirmed on this point in 32 N. J. Eq. 747. In the present case the weight of evidence shows that the wife left the house because she was ordered out by the husband, and, even if it should be considered that her apprehensions as to her safety in living with her husband are not well founded or are exaggerated, the husband has made no effort to secure her return, nor does he now ask or seem to desire it. Her remaining away, under the circumstances, cannot be considered as such "misconduct" as to deprive her of the custody of her

¶ 1. See Divorce, vol. 17, Cent. Dig. § 783; Parent and Child, vol. 37, Cent. Dig. § 22.

children, where it is best for their welfare. They are still of tender years, and need a mother's care and oversight. The petitioner could not himself take care of them, as he is engaged from home in his daily work, which he pursues industriously. No suggestion has been made as to how he proposes to supply the mother's care and attention which his children need, and I think I should be taking a great risk with the happiness and welfare of these children if I deprived their mother of their custody.

The prayer of the petition will therefore be denied, and the children will be remanded to the custody of the mother. Order as to access of the husband to the children is reserved for further consideration on application. An order to this effect will be advised on the day to which the hearing was adjourned, and the production of the children before me on that day will not be necessary.

O'BRIEN et al. v. MUSICAL MUT. PROTECTIVE AND BENEVOLENT UNION, LOCAL NO. 14, NAT. LEAGUE OF MUSICIANS et al.

(Court of Chancery of New Jersey. Feb. 11, 1903.)

VOLUNTARY SOCIETIES — REVOCATION OF CHARTER — JURISDICTION OF COURT — MEMBERSHIP — PROPERTY RIGHTS — UNINCORPORATED SOCIETIES — RESTRAINT OF TRADE.

1. Where the charter of a local voluntary society has been revoked by its superior general body, no court will, in the absence of a question of property right, exercise jurisdiction in the matter until the remedies by an appeal within the society have been exhausted.

2. The rights of membership evidenced by a charter granted to a local voluntary society by the general body are not in any sense themselves property rights.

3. The rules and regulations as to membership in a voluntary association do not, in any proper sense, confer a property right.

4. If a general voluntary association refuses to continue association with a local association, both being unincorporated, a court of equity cannot, in the absence of any question of property right, enforce the continuance of the relation voluntarily assumed.

5. Where one of the alleged objects of a voluntary musical association was to secure, so far as practicable, the control of the employment of musicians within the respective districts of the local societies, and the exclusion from such employment of those not members, the courts will not interfere to compel the continuance of association of the societies, or of membership therein, the object of which is an unjustifiable interference with the freedom of contract and of trade.

Bill by Alfred O'Brien and others for an injunction against the Musical Mutual Protective and Benevolent Union, Local No. 14, National League of Musicians, and others. Application for preliminary injunction denied.

Peter J. McGinnis, for complainants.
George S. Hilton, for defendants.

EMERY, V. C. This is an application on behalf of complainants, claiming to be the local association in Paterson of the American Federation of Musicians (a labor union), to enjoin the defendants, who also claim to be the local association for Paterson, from acting or holding themselves out as members of the federation. The state of facts presenting the question for decision is substantially as follows: On January 31, 1902, the American Federation of Musicians, a general or national federation, granted to the seven complainants and one Shannon a charter as a local association (No. 179) of the federation in Paterson. The American Federation and the local were both unincorporated or voluntary associations. In the application for the charter jurisdiction or exclusive authority for the local association was claimed or asked for the territory within 10 miles of the Paterson City Hall in all directions except in a southerly direction, and in that direction to the city line. The constitution of the federation (article 7) provides that the local shall be entitled to such jurisdiction as they claim at the time of applying for the charter, but the "certificate of affiliation," which is the only charter granted, purports to grant a certificate of affiliation to the applicants, the complainants Shannon and their successors, "to constitute a local association for the purpose of a thorough organization of the federation of all musicians," and the association, being duly formed, is authorized to initiate members according to its own by-laws. The certificate appears to have been issued by the executive council or board. This board (By-Laws, § 6) has a general supervision of all matters pertaining to the federation. The executive board, after an investigation and report by the secretary, as to the circumstances of issuing the charter, made an order on June 7, 1902, that the charter for the local association (No. 179) be reopened for 80 days, to allow all musicians in its jurisdiction an opportunity to join as charter members. The privileges and fees of charter members are different from and more favorable than those of members admitted subsequently. This order to reopen the charter was not at once obeyed by the officers of the local, but it was subsequently complied with, after the secretary of the federation, on September 18, 1902, had directed the secretary of the local association to reopen the charter for 30 days, publishing a notice in the local papers. The secretary of the federation further stated that failure to comply with the direction to reopen the charter would cause suspension of the charter. Complainants, in their bill, challenge the validity of this order to reopen the charter; but, as they acquiesced in the order, published the notice required, and did reopen the charter, this objection cannot be considered as a ground for preliminary injunction. It appears by the defendants' affidavits that one object in reopening the charter was to allow

the admission as charter members of a local association then existing in Paterson known as "Local No. 14, National League of Musicians," and whose members (149 in number) are defendants in this suit. This Local No. 14 is incorporated under the laws of New Jersey. The reopening of the charter was for the purpose of allowing applications for admission of the defendants and other musicians on the basis of charter members of the association. The certificate of affiliation was granted, as has been stated, to complainants, "for the purpose of a thorough organization of the federation of all musicians," and the power to prescribe conditions of membership is in terms given by the constitution to the association duly formed. Under these terms the A. F. of M. would seem to have the right to supervise the original organization for the purpose of procuring a charter, and would, as I am now inclined to think, have the right in a proper case to direct the opening of the charter, and to supervise or review the proceedings for organization on the reopening. The executive officer of the district in which the local is situated has (By-Laws, § 8) charge of the organization of associations within his district, and this officer attended at Paterson for the purpose of supervising or giving directions as to the application for membership under the reopening of the charter. This officer, as he says in his affidavits, directed that the members of the association of musicians in Paterson called the "Musical Mutual Protective and Benevolent Union, Local No. 14, National League of Musicians," should be allowed to apply and be admitted in a body as charter members. Complainants deny that these directions were given, but for the purpose of this application the defendants are entitled to the benefit of their statements under oath. The application was made in this form by the president and secretary of Local No. 14 on behalf of the body, and thereupon the complainants, being the officers, or some of the officers, named under the existing charter, refused or declined to allow the admission of the members of the Musical Union as charter members under this application. The claim of the complainants is that under the by-laws and charter of the American Federation of Musicians, the admission must be of each person separately, and under application of the form presented by the rules or by-laws of the association. By reason of this action refusing the admission of the members of the Local No. 14 in a body upon the reopening of the charter, the charter granted to complainants was revoked. By what officer the formal revocation of the charter was actually made does not appear with exactness by the affidavits on either side, but the fair construction of all of the affidavits is that the charter was revoked by the executive officer of the district, and that his action was approved by the president of the A. F. of M., who, under the by-laws (sec-

tion 1), exercises a general supervision over the affairs of the federation, and decides cases of emergency. Under the by-laws (section 6) an appeal lies from the decision of an executive officer to the executive board, which is composed (Const. art. 8) of the president, vice presidents, secretary, and executive officers of the districts, and a further appeal lies from the decision of the executive board to the convention of the federation. No appeal from the decision revoking the charter has been taken, nor have complainants taken any steps, or intimated any intention, to prosecute an appeal within the association, although notice of the revocation of the charter was received about November 1, 1902, two months before the filing of this bill. Subsequently to this revocation, the A. F. of M. granted a charter (as Local No. 248) to the defendants, the M. M., etc., Association; and these defendants now claim to be members of the A. F. of M. for Paterson and vicinity.

An opportunity was given to the complainants' association to join this local in a body, but they did not accept this offer. The complainants, being the original charter members (except Shannon), claiming under the original charter or certificate as No. 179, and that its revocation is illegal, now apply, individually and on behalf of the members of their association (numbering about 100), to enjoin the Local No. 14, and all of its individual members (about 150), parties to the suit, from organizing as a local of the American Federation in Paterson, or in the territory claimed to belong exclusively to complainants, and from continuing this organization or advertising as such, and from applying to the trade unions of Paterson for recognition as such association. The American Federation is not a party to the suit, but one Bierre, the executive officer of the district, is made a party, and an injunction against him is asked. He is a nonresident of the state. While the complainants have paid the sum of \$37.50 to the American Federation as the charter fee, and this sum has not been tendered back, the complainants have had the privilege of coming in under the new association organized by defendants under the direction of the A. F. of M. without payment of any additional fee. This suit, however, is not brought by complainants against the American Federation to recover this money, nor is it brought to assert against the defendant local association any right to funds or other property, or to the use or enjoyment of any property, real or personal. No right of property is, therefore, involved in the case, unless the right of membership is to be called property. It is claimed by the bill and affidavits that this membership of the A. F. of M. through its local association carried with it certain advantages and privileges to the individual members, resulting from the practice of labor or trade union organizations, especially in Paterson, to employ no musicians except

those connected with the American Federation; and it is also claimed that the deprivation of this membership will expose the individual members of complainants' association to a pecuniary loss by reason of the subjection to posting or denunciation by trade unions as "scabs," or "unfair," and to the penalty of being blacklisted by labor organizations generally throughout the United States and Canada.

If the association were incorporated, there would be two valid objections to the use of an injunction for the purpose of compelling the American Federation (if a party to the suit) to continue and to recognize the membership which, rightfully or wrongfully, it has dissolved: First. Rights of membership in incorporated voluntary associations are, under the settled practice in this state, and where no right of property of the alleged member is involved, to be determined by the Supreme Court on applications for mandamus to admit to membership. *Sibley v. Carteret Club*, 40 N. J. Law, 295; *Zeliff v. Knights of Pythias*, 53 N. J. Law, 536, 22 Atl. 63 (Sup. Ct. 1891). These cases are cases where the individual member who was, as he claimed, wrongfully expelled, applied for restoration. In the present case the local association is the member of the American Federation, and the membership in the A. F. of M. is effected only through membership in the local. The constitution (art. 3, § 1) expressly provides that the local associations are the members of the American Federation. In the second place, where the question is one of membership merely, and the decision involves a matter of discipline or application of the rules and regulations of the association, and not of property right, no court, either of law or in equity, will exercise jurisdiction until the remedies by appeal to the authorities of the association under its rules have been exhausted. *Zeliff v. Knights of Pythias*, supra. The only cases which have come under my observation where the courts afford relief to a person claiming membership in an incorporated association who has not exhausted his right of appeal upon the question of membership within the order, are those where the person claiming membership claims also, as a result of membership, some distinct individual property right, under a contract or other obligation of the association with him as a member. *Supreme Lodge v. Eskholme* (Err. & App. 1896) 59 N. J. Law, 255, 35 Atl. 1055, 59 Am. St. Rep. 609. In these cases, which involve a recognized property right, the right of membership is decided by the court as incidental to the contract or obligation of the association; but where the question is one of settling the general status as to membership for all purposes, as between the complaining party and an incorporated association, the remedies for restoring to membership provided by the association itself must be first exhausted. Where the association is unincorporated, the

personal relation between the members is analogous to that of partners; and the legal remedy by mandamus, which is appropriate for the purpose of restoring the relationship arising from membership in a corporate body, would seem to be inapplicable, and in such associations it may be that the proper procedure to protect the common property rights of a member expelled in violation of the regulations of the order is by an injunction restraining interference with his use and enjoyment of such common rights. But the rule requiring prosecution of appeal or other remedies within the order or association itself before application to a court of equity is one which seems to be applicable to all associations, whether incorporated or unincorporated, where the question is one merely of membership, irrespective of the enforcement of a property right. In some courts the exhaustion of the remedies within a voluntary association is required before a court of law or equity will interfere for their protection, even when a right of property is involved. *Oliver v. Hopkins* (1887) 144 Mass. 175, 10 N. E. 776; *Grand Lodge K. of P. v. People ex rel. Waldeck Lodge*, No. 136, K. of P., 60 Ill. App. 550, cited in *Supreme Lodge of Order of Select Friends v. Raymond* (Kan.) 47 Pac. 533, 49 L. R. A. 379. Other courts take a different view. Cases cited *Niblack, Acc. Ins. & Benef. Soc.* pp. 156, 215 (inter al.); *Loubat v. Leroy*, 40 Hun, 546.

Complainants claim that the charter confers a property right, the right being the exclusive right of membership in the federation within a certain district, and the right to the use of the name of the association. But, manifestly, the charter, or more properly "the certificate of affiliation," does not convey or purport to convey any property right, either in the name or otherwise, but is only the method by which, under their rules and regulations, the right of membership in the federal association and in the local is evidenced. These rights of membership evidenced by the charter are not, in my judgment, in any sense themselves property rights, but are personal rights only. A member of a local association may have or acquire, as against the federation, rights which are recognized property rights, such as a right to a share of its funds, or to the use or enjoyment of its common property; but the rules and regulations as to membership cannot, in any proper sense, be properly said to confer a property right, and are essentially, in their nature, only rules and regulations describing or defining the method of their voluntary association, with its terms and conditions. Being thus personal rights only, and being also purely voluntary, the enforcement of such rules and regulations governing mere membership, and such of the relations and privileges of the members and of the local and national associations as do not involve property rights,

must be left entirely to the association itself, and the penalty of expulsion, which it may enforce. But courts, either of law or equity, do not, on the application of either or any party, enforce, either by decrees for specific performance, injunction, or otherwise, the continuance of the association or the performance of duties and privileges, which, under their rules, the members or the association, national or local, as mere members, owe to each other. A recalcitrant member or local may be dismissed for violation of the rules of the association. A member of an association improperly expelled may, by action of the courts, be protected in his rights to the common property. But the mere continuance of the relationship itself, as between all concerned, is voluntary, not legal. If a member or local desired to withdraw, the withdrawal could not be prevented by injunction or otherwise, on the theory that the agreement of membership created a contract for the performance of the duties resulting from membership, which a court would enforce by compelling the performance of the rules regulating the duties. And if the national or general association refuses to continue association with a local, whether for a valid or an invalid reason, a court of equity cannot, in the absence of any question of property right, enforce the continuance of the relations voluntarily assumed. In this respect the rights of members of an unincorporated association differ from those of the members of an incorporated association. As was said by Lord Cranworth in *Forbes v. Eden*, L. Rep. 1 H. L. Scotch App. 568 (1867): "Save for the due disposal and administration of property, there is no authority in the courts, either of England or Scotland, to take cognizance of the rules of a voluntary association, entered into merely for the regulation of its own affairs. * * * There is no direct power in the courts to decide whether A. or B. holds a particular station according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the court must make itself master of the question necessary to enable it to decide whether A. or B. is the party entitled." This was a case involving alleged rights of membership in a voluntary religious association, but the general principle thus laid down has ever since been followed in relation to the merely personal rights of membership in all voluntary associations. *Rigby v. Connol*, E. L. R. 14 Ch. Div. 482, 487 (*Jessel*, M. R., 1880); *Baird v. Wells*, 44 Ch. Div. 661, 675 (*Stirling*, J., 1890); 1 *Bacon*, *Benef. Soc.* sec. 108 (2d Ed.).

There is another objection to giving the aid of a court of equity to the enforcement in any manner of this alleged privilege of exclusive membership. One of the objects, if not the principal object, of a labor union association, such as the complainants claim to

be, and the main result of membership in it, is the control or regulation by the association or combination of the individual action of its members in matters of contract or trade relating to their occupation or profession. The design of these common regulations controlling individual members is to secure, so far as practicable, or as is deemed advisable by the common association or body, the control of the employment of musicians within the respective local districts, and the exclusion from such employment of those who are not members—"non-union men," as they are called. Complainants' bill and affidavits allege the advantages and benefits of the membership for this purpose of excluding others from employment within this district, and that this membership gives to defendants these advantages which they wish to secure for themselves. If their claim is well founded, the court, by compelling the continuance of the membership, and enforcing by injunction or otherwise the agreements as to exclusive jurisdiction and rights of membership adopted by this voluntary association, would, as it seems to me, give a compulsory legal sanction to those rules and regulations of a voluntary association or combination of individuals which are intended to impose restrictive conditions on the individual right of contract and on the conduct of a trade, and to secure within a certain district the monopoly, so far as possible, of a particular kind of labor. While these rules and regulations made between the members or the locals of a trade union association for the purpose of restricting or tending to restrict the freedom of contract or of trade may not be unlawful, they are certainly altogether voluntary, as between the persons who enter into them, either personally or through local associations; and courts will not, either directly or indirectly, compel their performance. To compel, by injunction or otherwise, the continuance of association or of membership in these voluntary trade unions, either local or general, would, in my judgment, result in enforcing the performance of their restrictive regulations, and it would, therefore, be an unjustifiable interference with the freedom of contract and of trade.

For both these reasons the application for injunction will be denied.

HENRY et al. v. SIMANTON et al.

(Court of Chancery of New Jersey. Feb. 10, 1903.)

VOLUNTARY ASSOCIATIONS—INSOLVENCY AND RECEIVERS — INCORPORATION — POWERS — FOREIGN CORPORATIONS—CREDITORS.

1. Laws 1896, c. 185, § 118, entitled "An act concerning corporations," provides that Act 1875 entitled "An act concerning corporations," "except so far as herein expressly re-enacted, is hereby repealed." Act 1899 provides that the chancellor may wind up voluntary asso-

clations in the manner provided for winding up insolvent corporations under Act 1875. *Held*, the provisions respecting the winding up of insolvent corporations contained in Act 1875 being substantially re-enacted in Act 1896, its effect was to continue them in force, notwithstanding the repealing clause, so that they could be adopted by Act 1899.

2. Where no notice of an intention to incorporate had been given at a meeting of a grange, and the debts of the grange in controversy were not contracted in the course of its legitimate corporate business, creditors of the grange were entitled to file a bill for the purpose of winding up its business as a voluntary association, even though their debts were contracted after its incorporation.

3. Where it appears from a creditors' bill to wind up a voluntary association that one of the creditors is a foreign corporation, but it does not appear that it has been authorized to do business in the state, but there are other creditors joining in the bill who are entitled to file the same, the bill cannot be challenged on demurrer.

4. A single transaction, entered into within the state by a foreign corporation not authorized to do business in the state, does not amount to doing business in the state, so as to disenable the corporation to sue in its courts.

5. A grange was organized for the primary purpose of establishing a store where general merchandise should be sold and exchanged for the benefit of its members. The business was conducted by a superintendent under his name. The executive functions of the grange were in the hands of three trustees. Several notes signed by the trustees had been given in the course of its business, interest being paid out of the funds of the association. The association became insolvent, and creditors holding notes filed a bill under Act 1899, giving to creditors of a voluntary association the right to apply to the chancellor for an injunction and the appointment of a receiver to wind up the business, etc. *Held*, that the court had jurisdiction to appoint a receiver and grant an injunction under Act 1899.

6. Act 1876 (2 Gen. St. p. 1644), providing for the incorporation of granges, declares that the trustees shall be a body corporate, with only the ordinary powers incidental to all corporations, viz., to have a common seal, to sue and be sued, hold land, have a capital stock, and make by-laws. *Held*, that debts contracted by an incorporated grange in the transaction of mercantile business are outside of the powers conferred by the statute, and impose a partnership liability on the members.

7. Where a grange becomes incorporated under Act 1876 (2 Gen. St. p. 1644), but there is no effort to become incorporated under any other statute, it does not become a corporation *de facto* for the purpose of transacting mercantile business.

Bill for relief by Abble I. Henry and the South Bend Chilled Plow Company of Indiana, as creditors of the Musconetcong Grange, No. 14, a voluntary association, against William M. Simanton and another, defendants. Decree appointing a receiver and granting an injunction.

Martin Wyckoff, for complainants. I. W. Schultz and S. C. Smith, for defendants.

REED, V. C. This bill is filed by two creditors for themselves and such others as may come in. The relief is sought under the provisions of an act passed in 1899 (P. L.

1899, p. 485), entitled "An act for winding up voluntary associations, and associations with partnership liabilities." The act provides that whenever a voluntary association, carrying on business with partnership liabilities, shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, it shall be lawful for any creditor or member of such association to apply to the chancellor for a writ of injunction and the appointment of a receiver, for the winding up of the business and the payment of the debts of such association. It empowers the chancellor to proceed in the manner provided for winding up insolvent corporations, under the corporation act of 1875. It makes it the duty of the trustees or managers of such association who are served with subpoena to file with the clerk of this court a verified statement of the names of all the members of the association. After the filing of this list, an order is to be made requiring all such members to show cause why the prayer of the bill, namely, that an injunction should not be allowed and a receiver appointed, should not be granted. Any member, upon the return of such notice, may file his or her answer, and proceed to a hearing. The remaining parts of the statute deal with the procedure after the receiver is appointed. In the present case the trustees filed a list of members, and upon the return of the rule to show cause 55 members out of 106 filed answers, and against the remaining 51, who failed to file answers, decrees *pro confesso* have been taken.

In addition to the answers, a demurrer was interposed to the bill. The first ground taken by the demurrant is that the act of 1899 provides that the chancellor in this proceeding may proceed in the manner provided for the winding up of insolvent corporations under the act concerning corporations approved April 7, 1875. It is insisted that there is no act concerning corporations now in existence approved April 7, 1875, because it was repealed by the act of 1896 (page 317). The act of 1875 is repealed by the act of 1896 only so far as the provisions of the act of 1875 are not expressly re-enacted in the act of 1896. The repeal therefore operated only upon those provisions in the act of 1875 which are inconsistent with the provisions of the act of 1896. The methods of procedure in winding up insolvent corporations, contained in the act of 1875, are substantially re-enacted in the revision of 1896. The effect of the revision was to continue them in force. *Sunderland on Statutes*, § 161. The act of 1875 was usable as a standard of procedure, and became a legal rule, apart from its own virtue, by reason of the vitality imparted to it by the legislative reference to it in the later act. I am of the opinion, therefore, that this ground of objection to the bill is not tenable.

The second ground of attack is that the bill, while setting out that the association

¶ 4. See *Corporations*, vol. 12, Cent. Dig. § 2524.

filed a certificate of incorporation at a certain date, does not state whether the debts due to the two complainants arose out of the dealings with the association before or after its incorporation. The point of this objection is that, unless the debts of the complainants accrued before the date of filing the certificate of incorporation, they are not debts of a voluntary association; and that it was the pleader's duty to state as a fact that the debts were incurred while the grange was still unincorporated. But the theory of the bill is that the certificate of incorporation did not protect the members of the grange from liability for debts incurred in the business conducted by the grange, even after its incorporation. The bill asserts that no notice of the intention to incorporate was given at a previous regular meeting of the grange, and, further, that these debts were not contracted in the transaction of the corporate business of the grange. If these facts are so, as I must assume them to be, then any debts incurred by the grange at any time confer upon the creditor a footing to file a bill.

The third ground taken is that one of the complainants, the South Bend Chilled Plow Company, is shown to be disentitled to stand as a creditor, because the bill describes it as a foreign corporation, without showing that it has become equipped to do business in this state. Admitting this to be true, this complainant is not the only complainant. There remains another creditor who was entitled to file the bill. But, indeed, it does not appear from the bill that the South Bend Chilled Plow Company is disentitled to stand as a creditor. It does not appear from the bill that the contract out of which the debt arose was made in the state of New Jersey; and, if it did so appear, a single transaction would not amount to doing business in this state. For these reasons I think the general demurrer challenging the equity of the bill must be overruled.

Upon the hearing upon the bill and answers filed, the following facts appeared: The Musconetcong Grange was organized in February, 1893. Its primary purpose was to establish a store, where general merchandise, such as is usually carried by a country store, should be sold and exchanged for the benefit of the members of the grange. Persons other than members were permitted to deal at the store, but the members were favored in the transaction of the business. The scope of the business was extended from time to time, and included the sale of grass seeds, harvest implements, fertilizers, sheep, etc. The grange also operated a mill and conducted a butcher business. The business was conducted by a superintendent, named Wesley Fleming, under the firm name of Wesley Fleming & Co., adopted at a meeting of the members of the grange held March 30, 1893. The executive functions of the grange were in the hands of three trustees.

On January 11, 1894, the association elected three trustees, and filed a certificate of incorporation, under color of the provisions of an act approved April 21, 1876, to enable grangers of the order of patrons of industry to incorporate (2 Gen. St. p. 1644). The history of the business of the association before incorporation seems to have been this: The store had been in operation before Fleming came to take charge of it. He began the management of the business under a salary on April 16, 1893. A note had already been given to one William M. Simanton for \$1,500. Simanton was one of the trustees of the grange trading as Wesley Fleming & Co., and the note was signed by Royal Milroy, Charles I. Carpenter, and Isaac Woolverton, who were in fact trustees of the association. Interest was paid on this note out of the funds of the association after Fleming took charge. On May 25, 1893, another note was made to Daniel Williamson & Son for \$500, signed by the same makers as trustees, in the same form as the former note. Upon this note interest was paid in the same manner as upon the former note. The note to Abble I. Henry, one of the complainants, was not made until after the certificate of incorporation was filed. It was dated March 31, 1894, and signed by William M. Simanton, Isaac Woolverton, and Absalom Appgar, trustees. Another note to William D. Hill, for \$200, dated April 1, 1894, was also executed by the trustees. Still another note was executed March 31, 1894, for \$200, to Isaac Woolverton, and signed by the same trustees, and sealed with the corporate seal. The note to the South Bend Chilled Plow Company, the other complainant, was made on May 1, 1897, and was signed in the name of the Asbury Mercantile Company, by the treasurer of the company. These are the facts disclosed.

To the settlement of what questions are these facts to be presently applied? What are the points to be settled at this stage of the proceedings? The act, as I have already observed, provides for a subpoena after filing a bill or petition. This subpoena is to be directed to the trustees or managers of the association, who are to file a list of members of the association. Then these members are to be brought into court by rules to show cause why the prayer of the petition or bill should not be granted. The appropriate prayer of the bill is for the appointment of a receiver and an injunction. The facts conferring jurisdiction upon the court to grant such prayer are, therefore, the following: First, the existence of a voluntary association carrying on business with partnership liabilities; second, the fact that such association has become insolvent, or has suspended its business for want of money to carry on the same; and, third, the fact that a creditor, or member of such association, is the complainant who files the bill of petition. It therefore seems to be clear that one who

has been returned by the trustees as a member can contest only the existence of these facts by his answer; at least, it is manifest that the existence of these facts are alone triable at this stage of the procedure. The defendant cannot try the question whether he ever was a member, or was such at the time a debt or debts were incurred. It is, of course, true that each person returned as a member has the right to his day in court to test his or her personal liability to any creditor of the grange. But by the scheme provided by the statute it seems that this must be done by exceptions filed to the report to be made by the receiver of the claims against the association; and as to his liability for any valid debt, the contest must occur when the assessments against each member, in proportion to the debts and expenses, shall be made. In respect to the three matters to which the present inquiry is confined, I am of the opinion, disregarding for the moment the effect of the certificate of incorporation, that it has been proved that there existed a voluntary association having some members, who, either by direct action or by express or implied assent, did business in which the borrowing of money was a part, for the common purposes of such members; that there arose, as to such members, a partnership liability for such debts; that this association did business under the name of W. Fleming & Co., and afterwards under the name of the Asbury Mercantile Company, and that in 1897 it became insolvent, and also ceased to do business for want of funds to carry it on. It also appears that Abbie I. Henry and the South Bend Chilled Plow Company are creditors of these associated members.

The remaining question is whether the certificate of incorporation of the grange relieves the individual members from liability, and imposes it alone upon the corporation. The debts of the complainants were incurred after the certificate of incorporation was filed. I will assume that the certificate of incorporation was regular, although the point is raised that no notice was given or entered in the minutes of the grange of an intention to incorporate, and I will assume that the incorporation was one which cannot be attacked by a creditor who did business with it because of irregularities of organization. *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362. In my judgment, the business conducted by the members of the organization was so entirely aside from the power conferred upon the grange by the statute under which the incorporation was effected that the business must be regarded as partnership, and not corporate. It is perceived that the act under which the incorporation was effected declares that the trustees of the grange shall be a body corporate, with only the ordinary powers incidental to all corporations. The enumerated powers are to have a common seal, to sue and be sued, and to acquire,

hold, improve, and lease or sell land, and to have a capital stock, and to make by-laws. There is no power granted to transact any mercantile business whatsoever. The corporation is a mere club or society, with power to acquire property for club or society purposes. It has no more power to transact a business as a corporation than has an incorporated religious society. The entire business transacted was dehors the grant contained in the act. Mr. Cook remarks: "Where the business for which incorporation is sought is not within the class of business mentioned in the act itself, the attempted incorporation is void, and the participants are liable as copartners." 1 Cook, Law of Stockholders & Corps. p. 316, § 236. Nor was this grange transacting business as a de facto corporation; for while there are statutes under which it might have become incorporated for such purposes, there was no effort made, bona fide or otherwise, to become incorporated under such a statute.

I shall advise a decree appointing a receiver and granting an injunction.

FIELDER v. BEEKMAN et al.

(Court of Chancery of New Jersey. Feb. 11, 1903.)

PARTNERSHIP—RETIRING PARTNER—OVERDRAFT—ASSUMPTION BY PURCHASING PARTNER—AMOUNT OF LIABILITY—ASSUMPTION OF OTHER OBLIGATIONS DUE THE FIRM—LIABILITY TO ACCOUNT—COSTS IN EQUITY.

1. Where one of four partners purchased the interest of a second, assuming as part consideration an overdraft in the account of the retiring partner with the firm, and thereupon a new partnership agreement was formed between the three remaining, by which the property and debts of the old firm were continued as those of the new, the purchasing partner stood in the shoes of the retiring partner with reference to the overdraft, and, as the stock account of the latter exceeded the overdraft, owed nothing to the firm.

2. The purchasing partner afterwards bought the interest of one of the remaining partners, assuming a similar overdraft, which, however, exceeded that partner's stock account. A new partnership was formed between the remaining partners. On the dissolution of this it was agreed that bills receivable should be collected and paid to the purchasing partner, three-fourths to be retained by him, and one-fourth applied to the notes of the last remaining partner. *Held*, that under this agreement the purchasing partner was liable to account for the balance by which the third partner's overdraft exceeded his stock account, one-fourth of such balance to be applied to the fourth partner's notes.

3. He was also liable to account in a similar way for private obligations of the third partner to the firm likewise assumed by him.

4. Where the relief awarded a complainant amounts to \$180, while he sought to recover \$772, each party will be required to pay his own costs.

Bill for accounting by John W. Fielder, Jr., against John D. Beekman and others. Decree for complainant.

¶ 4. See Costs, vol. 12, Cent. Dig. § 372.

James Buchanan, for complainant. John T. Bird, for defendants.

REED, V. C. In conformity with the suggestion at the end of my previous conclusions, the bill in this cause has been amended. The purpose of the bill, in its present shape, is to charge Mr. Beekman with the two overdrafts, one by Dey and the other by William S. Fielder, and certain other accounts receivable, which Mr. Dennis refused to collect. On January 11, 1896, Mr. Beekman bought out the interest of Mr. Dey, one of the then four partners in the business, each owning a one-fourth interest. At that time Mr. Dey had personally overdrawn from the assets of the firm the sum of \$781.16. When Mr. Beekman bought out Dey's interest, he agreed with Dey that he would pay this overdraft. Dey's stock account at that time was estimated on the books of the firm to be worth \$1,750. Mr. Beekman paid Dey for his one-fourth interest in the firm \$1,150, in two checks and one note, besides, as already remarked, agreeing to pay the \$781.16, the amount of Dey's overdraft. The date of the agreement for the purchase of Dey's share, as already observed, was January 4, 1896, and on this date a new partnership agreement was entered into between the three remaining partners, namely, John W. Fielder, William S. Fielder, and John V. D. Beekman. The capital of this new firm was to be the property and assets of the old firm, which it took over. Mr. Beekman, by his purchase of Dey's interest in the property and assets of the old firm, became the owner of a one-half interest in the firm property, and was to have the same interest in the assets of the new firm. The new firm continued its business up to March 2d of the same year. On that date Mr. William S. Fielder had drawn of the funds of the firm \$2,310 in excess of his share. On March 2, 1896, William S. Fielder sold and assigned all his interest in the firm to Mr. Beekman, the latter agreeing with William S. Fielder to pay this sum of \$2,310. By his purchase Mr. Beekman became the owner of a three-fourths interest in the assets of the old firm. Mr. Beekman and John W. Fielder, the two remaining partners, entered into a new partnership agreement, which, although dated March 1st, was obviously contemporaneous with and followed the purchase by Mr. Beekman of William S. Fielder's interest on March 2, 1896. By the terms of this agreement the property of this new firm was to consist of all the property, real and personal and mixed, of the preceding firm. The last firm continued in business until the execution of the dissolution agreement, which became effective on December 18, 1897. By the terms of the dissolution agreement it was covenanted as follows: All bills or accounts receivable, not in the schedules mentioned, and all bills, accounts, and notes receivable which are now charged to

profit and loss, shall be collected by Fergus A. Dennis, for the aforesaid firm, within one year from date, and all sums and other sums of money collected shall be paid to John V. D. Beekman, of which sums of money three-fourths, or 75 per cent., shall belong absolutely to said Beekman, and the remaining 25 per cent., or one-fourth, thereof, shall be paid to the said Beekman for the purpose of paying and satisfying two promissory notes given by John W. Fielder, Jr., and indorsed by the firm of Beekman & Fielder—one in the Princeton Bank for \$410, and one in the National Bank of Hightstown for \$575. Mr. Dennis did not attempt to collect these overdrafts, and for this reason the complainant seeks to have them applied in payment of the notes already mentioned. The purchase by Mr. Beekman of Dey's interest, as between him and Dey, ipso facto discharged all debts due by Dey to the firm. Without any assumption of or release of Dey's overdraft, Beekman himself was precluded from calling upon Dey for any accounting. *Schlicher v. Vogel*, 61 N. J. Eq. 138-162, 47 Atl. 448. The position of Dey, as to the other members of the firm, however, was not affected by Beekman's purchase in any particular, save that such purchase operated as a dissolution of the old firm. Dey was still liable to account, and upon such accounting he, after the payment of the debts of the firm, would have been entitled to a one-fourth interest in the remaining assets, less the amount of his overdraft. If his overdraft had exceeded his stock account, he would have been liable for the amount of his overdraft, less the value of his one-fourth interest in the assets. Stated in another form, the property of the firm, including the overdrafts, after deducting the firm's debts, would have been divisible into four parts, and Dey would have been entitled to a one-fourth, less the amount of his overdraft. Now, Beekman got that interest when he purchased Dey's share in the partnership property. If no new firm had been organized, Beekman's position would have been the same as Dey's had been. He would have been entitled to receive what Dey would have been entitled to receive, had he not assigned; and, as already remarked, Beekman would have been liable upon his assumption only to the extent that Dey would have been liable. Dey would have been liable to pay to the firm only in case his overdraft was in excess of his share. Now, when the firm was reorganized, after Dey's withdrawal, the property and the debts of the old firm was continued as the property and debts of the new firm; the only difference being that Beekman stood in the place of Dey, with his rights and his responsibility. His rights were to receive in settlement what Dey would have been entitled to receive. It thus appears that Mr. Beekman, holding Dey's right to have his interest in the first assets applied upon his overdraft, owed nothing to the firm, either

by reason of his purchase or because of his assumption.

Now, turning to the W. S. Fielder overdraft, much of what has been already said respecting Mr. Beekman's relation to the Dey overdraft can be said of it. After Mr. Beekman's purchase of W. S. Fielder's interest, and his assumption of Mr. Fielder's overdraft, his rights and his liabilities were the same as Mr. Fielder's had been. The difference between the Dey overdraft and the Fielder overdraft is that the latter is in excess of Mr. Fielder's stock account. It is true that there has been no accounting to ascertain the value of Mr. Fielder's interest in the assets. Such an accounting would now be very expensive, and, I think, unnecessary. The stock account of each partner, fixed at the value of \$1,750 for each of four interests, has been carried upon the books of the firm and into the accounts kept by Mr. Beekman in a manner that implies an assent to that sum as an approximate valuation of W. S. Fielder's share. Adopting this as the sum which W. S. Fielder would have been entitled to apply upon his overdraft, it would leave a remainder of \$560 still due from him to the firm. This would have been the sum for which he was indebted to the firm. It is quite clear to my mind that Mr. Beekman's liability for this overdraft can in no view exceed this sum. Of course, it is true that upon a general accounting this result would leave the right to all the remaining assets in the parties other than W. S. Fielder. Neither W. S. Fielder nor his assigns could claim any portion of them. But it is to be kept in view that the present question is not what Mr. Beekman's position would have been were this a general accounting to ascertain Mr. Fielder's interest in the assets of the firm. Mr. Fielder, upon dissolution, might have demanded such an accounting. Instead, however, of having an accounting, the two parties agreed upon a basis of division of the firm property. Mr. Beekman took over the tangible real and personal property of the firm, and assumed the payment of all the debts appearing upon the books. The parties divided \$3,000 worth of bills receivable, each taking \$1,500. Mr. Beekman paid Mr. Fielder \$281 in cash. Then there were certain accounts receivable not included in those already divided. These bills receivable, as already observed, were to be collected by Mr. Dennis. Three-fourths of the amount collected was to be paid to Mr. Beekman, and one-fourth was to be applied to the payment of two notes made by John W. Fielder and indorsed by the firm of "Beekman & Fielder"—one in the Princeton Bank for \$410, and the other in the Hightown for \$575. The present question, therefore, is, how far, under the terms of this dissolution agreement, the complainant retains the right to enforce the assumption by Mr. Beekman of the W. S. Fielder overdraft. Under this agreement the claim of the com-

plainant must rest upon a debt due the firm, and the only debt due the firm in connection with this overdraft is the difference between the overdraft and the stock account. Indeed, it is entirely clear that it was never in the mind of the parties at the time of the execution of the dissolution agreement that Mr. Fielder should be responsible for the entire amount of the Dey and W. S. Fielder overdrafts. It is true that the evidence that there was an understanding between John W. Fielder and Mr. Beekman that, in case Mr. Beekman bought out the interest of Dey and the interest of W. S. Fielder, Mr. Beekman should be discharged from all liability arising from his assumption of those overdrafts, is not certain enough in its character to satisfy me of that fact. But the circumstances themselves surrounding the execution of the dissolution agreement are strongly evidential that these overdrafts were not in the minds of the parties as collectible accounts when the agreement was signed. If Mr. Fielder had supposed that Mr. Beekman owed the firm over \$3,100 for these overdrafts, he would never have consented to the arrangement contained in the dissolution agreement for the payment of these two notes. It is manifest from the testimony that Mr. Beekman was the financier of the firm, and would have to look out for the paper in bank either made or indorsed by the firm. Now, it is absurd to suppose that at the time of the dissolution agreement either party thought for a moment that there was to be collected from Mr. Beekman over \$3,100, one-fourth of which was to be applied to the payment of these notes. If such had been the intention, there would have been an arrangement that Mr. Beekman should directly pay one-fourth upon the notes either then or at the maturity of the paper. Mr. Beekman's liability must rest upon the strict terms of the dissolution agreement, by ignoring the overdraft itself as a debt, but treating the difference between it and Mr. Fielder's stock account as a debt due from Mr. Fielder to the firm, and as such assumed by Mr. Beekman. With some misgivings as to whether even this was within the terms of the dissolution agreement, I have concluded that for one-fourth of this amount Mr. Beekman should account.

There are other balances appearing in an account kept by Mr. Beekman, for which balances it is insisted that he should account. These accounts, although entered in the books of the firm, were really concerning matters relating to the purchase by Mr. Beekman of Mr. Fielder's interest. They were important to these parties only—more particularly to Mr. Beekman—in any settlement of their affairs which Mr. Fielder might demand, he having reserved the right to repurchase property which he had conveyed to Mr. Beekman as a part of the same transaction. These accounts appear in different form, some of the same credits and debits

appearing in each account. Different balances arise from different arrangement of the same items mingled with different items. The stock account and the overdraft figure in these accounts. But apart from the difference between the stock account and the overdraft, of which I have already spoken, I find nothing which I can call "an account receivable" due from Mr. Beekman to the firm. I will qualify this general statement. There do appear certain items of indebtedness of certain debtors to the firm whose debts W. S. Fielder had assumed, and which debts Mr. Beekman assumed when he took over Mr. Fielder's interest. It appears that in purchasing W. S. Fielder's interest, Mr. Beekman purchased some property which W. S. Fielder owned personally. As part of the consideration paid by Mr. Beekman for the entire purchase, he assumed the payment of debts owed by W. S. Fielder, amounting altogether to \$317.50. But only a part of these were due to the firm. The debts due to the firm are clearly bills receivable, for which Mr. Beekman is liable in equity, by reason of his assumption. To save the expense of a reference, I will try to fix that part of these debts which were due to the firm. The conclusion I reach from the explanation given by Mr. Beekman and Mr. J. W. Fielder regarding these debts is that of the assumed debts \$185.50 was due to the firm; the two items for which I have found Mr. Beekman liable to account, namely, \$560 and \$185.50, together amounting to \$745.50. Mr. Beekman should account for one-fourth of this sum, with interest from the date of the dissolution of the partnership, and this one-fourth should be applied upon the notes, according to the terms of the dissolution agreement.

In regard to costs, comparing the scope of the claim made in the bill with the limited scope of the decree advised, I think that equitably each party should pay his own costs.

MOTT v. RUTTER et al.

(Court of Chancery of New Jersey. Feb. 2, 1903.)

MORTGAGES — FORECLOSURE — EVIDENCE — CONTRADICTING WRITTEN CONTRACT —CONDITIONAL TENDER.

1. Where a deed provided that it was subject to a mortgage by the grantor to a third person, and a mortgage given by the grantee for a part of the price obligated the latter to pay the debt secured within five years, with lawful interest, and contained no provision making such payment conditioned on a previous discharge of the prior mortgage by the mortgagee, evidence of a parol contract, by which the grantor agreed to pay such prior mortgage within such time, was inadmissible as contradicting the written contract.

2. Where a grantor was not bound under a deed to pay off an incumbrance on the land as a condition to foreclosing a mortgage for pur-

chase money, a tender of the amount of the mortgage on condition the mortgagee would satisfy the incumbrance was ineffectual.

Suit by James R. Mott against Rose E. Rutter and others. Decree for complainant.

The bill is filed to foreclose a \$450 mortgage, indisputably a purchase-money mortgage. Its execution, delivery, record, etc., are substantially admitted. The defense set up is that at the time of the purchase of the land and the giving of the mortgage by the defendants there was a precedent mortgage on the lands in question and other lands, held by the Provident Life & Trust Company, for the sum of \$7,800; that the complainant, at the time he sold the mortgaged premises to defendants and took the mortgage now in suit, agreed that he would relieve the mortgaged premises from the lien of the Provident Life & Trust Company mortgage within five years, and accept principal and interest in discharge of his own mortgage; that the defendants, at the expiration of the five years, tendered the mortgage money due the complainant, and demanded that he procure the discharge of the lien of the Provident Life & Trust Company mortgage; that the defendants have since made like tender and demand, and that the complainant has always refused to procure the discharge of the prior mortgage; that the defendants have always been ready and willing to pay the complainant's mortgage, and that, under the circumstances narrated, no interest should be allowed, but only the principal sum of his mortgage, \$450, and five years' interest thereon, the amount first tendered him, without costs, etc. The cause came to a hearing on issue joined on the answer.

John B. Slack and Chas. Ewan Merritt, for complainant. Chas. A. Baake and John J. Crandall, for defendants.

GREY, V. C. (orally, after stating the facts). As the answer sets up an affirmative defense not responsive to the allegations of the bill, the defendants asked and were given the right to open the case, carrying with it the burden of proof of the defense alleged in the answer. The deed from the complainant to the defendants conveying the mortgaged premises is produced in evidence; also the mortgage now sought to be foreclosed, which secures part of the purchase money. The deed contains this recital of the terms of the conveyance: "This conveyance is made subject, however, to a \$1,000 mortgage made by James R. Mott to the Provident Life and Trust Company, said mortgage being upon this lot and upon other lots of land in Atlantic City." The deed also contains a covenant of general warranty. On the hearing of the cause the defendants offered to prove a parol bargain between the complainant and the defendants to the effect that the mortgage now in suit was to be payable when the complainant should, within five years, have ob-

[1. See Mortgages, vol. 25, Cent. Dig. § 289.

tained the Provident Life & Trust Company mortgage to be canceled, satisfied, or discharged, and that this had not been done; that the defendants had, at the end of the five years, tendered the mortgage money, and demanded the performance of the alleged agreement to discharge. This testimony was objected to because contradicting the terms of the contract to purchase and pay for the mortgaged premises, as that agreement is evidenced by the deed and the bond and mortgage, which latter declares that the defendant obligor should pay the mortgage money "within five years from the date thereof, with lawful interest thereon," and contained no additional term providing that the payment shall be conditioned upon the preceding discharge by the mortgagee of the Provident Life & Trust Company mortgage. The rule is entirely settled that, in the absence of fraud or mistake, parol contemporaneous testimony cannot be received to vary or contradict the terms of a written contract. *Naumburg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Van Horn v. Van Horn*, 49 N. J. Eq. 328, 23 Atl. 1079 (court of appeals). The defendants insist that this parol proof does not contradict or vary the terms of the written bargain between the parties, but that it is merely explanatory of and consistent with it. The clause above quoted in the deed shows that the defendants took the title subject to the charge of the Provident Life & Trust Company's mortgage, at least to the amount of \$1,000. No dispute or question has been raised here as to any variance in the amount of the Provident Life & Trust Company mortgage. The deed stated that it is made subject to a mortgage of \$1,000 to the Provident Company, while \$28,000 is stated in the answer to be the amount. That mortgage has been dealt with, so far as proof of its amount is concerned, as undisputed by either party, and the point to which all questions and arguments have been directed has been to ascertain whether or not the complainant mortgagee was obliged to cancel or satisfy that mortgage, no matter what its amount. When the written contracts (the deed and the mortgage) were made, the complainant imposed his terms of payment, and informed the defendants that they took his title subject to the preceding Provident Life & Trust Company mortgage. Testimony that they took their title clear of that mortgage, or under a parol agreement that it should be discharged by the complainant, is in direct contradiction of the terms of the deed and mortgage. Such proof is in no way explanatory of the terms of the deed or mortgage; on the contrary, it is in refutation of those terms, and must, therefore, be excluded. The proof of the manner of the tender, very frankly and truthfully given, shows that the tender was made each time upon condition that the complainant should procure the preceding mortgage to be canceled. If that condition might rightfully have been attach-

ed, it would have been a good tender notwithstanding the condition. The doctrine expounded by the cases which Mr. Crandall has cited is good law, in my judgment. But in order to make a conditional tender effective, it must have been the duty of the party to whom the tender was made to have performed the condition which was required of him as precedent to the accordance of the tender. In this case there was no duty upon the complainant to cancel the preceding mortgage, subject to which the defendant mortgagors had taken title; and therefore when the tender was made to him, that the mortgagor would pay off this mortgage, upon condition that the mortgagee should obtain the Provident Trust mortgage to be released or canceled, it was an unlawful condition, one which the complainant was not called upon to perform, and he might rightfully and justly refuse to accept the money on those terms. Nothing in either the answer or the offer of proof proffers any defense of fraud in obtaining the agreement in question, or mistake in its drafting or execution. If such fraud or mistake was to be set up as a defense, it should have been alleged in the answer. There is no such allegation.

The testimony of the complainant stands undisputed. There must be a decree for the principal sum due on his mortgage, with interest from its date, according to the prayer of the complainant's bill. I will sign such a decree.

CONDIT et al. v. BIGALOW et al.

(Court of Chancery of New Jersey. Feb. 8, 1903.)

CONVERSION — TESTAMENTARY POWER OF SALE — RECONVERSION — PARTITION OF WIFE'S LAND — CONVEYANCE TO HUSBAND — RESULTING TRUST — NOTICE TO PURCHASER — PAYMENT OF PURCHASE MONEY — RECITAL IN DEED — STOPPEL BY WARRANTY — RES JUDICATA — BILL TO ESTABLISH RESULTING TRUST — LIMITATIONS.

1. Testator devised the residue of his realty to four devisees in equal shares, naming three of them as executors, and directing them to sell "all or any part" of such realty, and divide the proceeds among the devisees. No sale was had, but a partition was effected by an exchange of conveyances; the deed to the share of one devisee being made by the executors to her husband. *Held*, that the husband did not take an absolute title, on the theory of equitable conversion and reduction of the property to possession as personalty, as the discretionary character of the power of sale given the executors precluded equitable conversion.

2. Even had there been an equitable conversion, the partition amounted to a reconversion.

3. The conveyances made by the husband and wife, forming the consideration of that by the executors to the husband, and absolute title in the husband being inconsistent with the legal obligations of the parties, and recitals in a prior partition conveyance and in a chancery suit between the parties declaring that the husband took in right of his wife, a trust in the husband resulted to the wife and her heirs, subject to his tenancy by the curtesy.

¶ 2. See *Conversion*, vol. 11, Cent. Dig. §§ 67, 69.

4. A purchaser from a husband of land conveyed to the husband by the executors of his father-in-law in consideration of \$1 and conveyances by the wife, the husband joining—the whole transaction constituting an exchange of conveyances to effect a partition of a devise to the executors and wife as tenants in common—is put on inquiry, by the recited consideration and notice that the husband's actual interest as tenant by the curtesy was derived from the father-in-law, as to a trust resulting to the wife in the land conveyed to him.

5. A partition of lands between tenants in common under a will was effected by an exchange of conveyances, the deed to one tenant's share being made to her husband. A prior chancery suit had been instituted by the husband and wife against the other tenants, who were also executors; the bill praying for a recovery of the wife's interest in the devise. A receiver was appointed to lease, collect the rents, and divide the property, and the partition conveyance to the husband was acknowledged before the receiver. The suit was still pending by revivor in behalf of the wife's infant heirs at the time of a sale by the husband. *Held* to be notice to the purchaser that the husband's interest arose under the will, that he had received the land in right of his wife, and that her heirs had succeeded to her interest; and this notwithstanding a 10-year delay by the husband in prosecuting the suit.

6. A recital in a deed executed by a trustee, in derogation of his trust, of the payment of the purchase money, is not sufficient evidence of payment in behalf of the grantees' heirs, as against the cestui que trust.

7. In effecting partition of lands held in common, one tenant conveyed by warranty deed to the husband of the other, and afterwards purchased the interest of the wife's heirs. In an action at law by such tenant against the husband's grantee, estoppel by the tenant's warranty was pleaded, and decided adversely to defendant; judgment being given the tenant for a one-third interest, and he being remitted to equity for further relief. *Held*, in the equitable suit thereupon instituted, that the judgment was *res judicata* on the issue of estoppel.

8. A grantor by warranty deed of lands impressed in the grantee's hands with a resulting trust is not estopped by his warranty from acquiring the interest of the cestui que trust.

9. On December 27, 1838, a deed was made to a husband of realty impressed in his hands with a resulting trust in favor of his wife. The wife died in 1841. On May 4, 1848, the husband conveyed. The wife's infant heirs came of age and conveyed their interests by deeds executed between February, 1855, and September, 1862. The husband died May 29, 1884. In November, 1892, parties claiming under the wife's heirs brought ejectment against parties claiming under the husband's grantee, setting up an entire legal title to all the realty. They recovered a one-third interest, it being adjudged that as to the balance they had no title at law. On January 18, 1895, suit was begun by them in equity. *Held*, that the latter suit was not barred; the statute of limitations not beginning to run against the wife's heirs till the accrual to them of a right of entry on the husband's death, and the action at law being to enforce the same rights as the suit in equity.

Bill by Melville S. Condit and others, as executors of Andrew B. Cobb, deceased, against George Bigalow and others. On bill, answer, replication, and proofs. Decree for plaintiffs.

Mahlon Pitney, for complainants. John W. Harding, for defendants.

EMERY, V. C. The object of this bill is to establish a resulting trust in lands which were conveyed in fee to William C. H. Waddell, under whom defendants claim title. The complainants claim under the wife of Waddell, and allege that the conveyance to Waddell was made for the purpose of a partition or division between the devisees of one Lemuel Cobb, the father of Mrs. Waddell, of some of the lands devised by him to Mrs. Waddell and others, and that the husband, on taking the conveyance of these lands in his name, must be held to have taken the conveyance as trustee for his wife. The legal title of the husband at the time of the conveyance was that of tenant by the curtesy initiate in the undivided interest (one-third) of the lands to which his wife was entitled. If the transaction in which the conveyance to the husband was made was in fact a partition or division by deed between the tenants in common of the fee, it is claimed that the deed should have been made to the wife, and that, if made to the husband, he will (for the interest therein beyond his life estate) hold the legal estate conveyed by the deed as trustee for the wife. That a trust results in favor of the wife is the settled rule, where the wife's money or separate estate pays for land to which the husband takes title. *Lathrop v. Gilbert* (Williamson, Ch.; 1855) 10 N. J. Eq. 344; *City Nat'l Bank v. Hamilton* (Van Fleet, V. C.; 1891) 34 N. J. Eq. 158; *Irick v. Clement* (Err. & App. 1892) 49 N. J. Eq. 590, 27 Atl. 434. And the same rule applies on a partition or division of lands, where the wife, as one of the tenants in common, is entitled to the conveyance, and her husband takes title to her share. *Weeks v. Haas* (Gibson, C. J.; 1842); 3 Watts & S. 520, 39 Am. Dec. 39; *Freeman on Partition*, sec. 406. On this branch of the case the defendants raise the question whether the transaction is to be treated as a partition among the devisees, and claim that, by reason of the directions of the will, it is not to be treated as a partition. The lands were part of the residue of Lemuel Cobb's estate, as to which his will was as follows: "Third. I divide all the residue of my real and personal estate into four equal parts or shares, one share thereof I give and bequeath to Benjamin Howell, of Troy, the husband of my daughter Elizabeth, one other share I give and bequeath to Walter Kirkpatrick, nevertheless in trust for Eugene Kirkpatrick, the only son of my daughter Maria C. Kirkpatrick, one other share I give and bequeath to my daughter Julia Ann [Mrs. Waddell] and the remaining share I give and bequeath to my son Andrew B. Cobb—to have and to hold to each of them their heirs and assigns forever. I do hereby nominate, constitute and appoint my son Andrew B. Cobb, Walter Kirkpatrick and Benjamin Howell executors to this my Testament and last will. I do hereby order and direct my executors hereinabove named

or a majority or the survivor or survivors of them, to grant, bargain and sell all or any part of the residue of my estate called the third item & divide the moneys arising therefrom among the legatees therein mentioned." It is claimed that this direction amounted to an equitable conversion of the residuary real estate, and that the partition of the lands in question (which was the third partition between the devisees) should be considered in equity as a division of the proceeds of sale, and that, the husband being at the time of the partition (1838) absolutely entitled to the wife's personal estate, he should be considered as holding the lands as proceeds of sale and as the proceeds of his own money.

The doctrine of equitable conversion is a branch of the general equitable doctrine of trusts, and has been adopted solely for the purpose of executing trusts, and it is essential to the application of the doctrine of conversion that the property should be subject to a trust or imperative direction for conversion. Where, as in this case, there is no devise of the legal estate to the executors, and their control over the legal estate, which is vested in others, is solely that of a power of sale, the question is whether it is a mere naked power of sale, the exercise of which must be discretionary, or whether it is a power in trust, the exercise of which is imperative. The execution of powers in trust may be required in equity for the benefit of the beneficiaries entitled, but, when the trustee of the power is clothed with a discretion as to its execution, the court will not control the discretion. *Brown v. Higgs*, 8 Ves. 561, 569 (1803); 2 Pom. Eq. sec. 1002, and cases cited; 2 Story, Eq. Jur. sec. 1601. And in order to give rise to an equitable or constructive conversion, the direction to convert must be imperative, and the conversion must not be left to the option of the donee or trustee. *Cook's Ex'r v. Cook's Adm'r* (Zabriskie, Ch.; 1869) 20 N. J. Eq. 375, 379. In this will there is first an absolute devise in fee of the legal estate to the devisees, then an appointment of executors, with a direction to sell following this appointment. The direction is not a direction to sell all his residuary estate, but all or any; and these words, "or any," necessarily imply, as it seems to me, the power or option of selling or not selling some of the land, in their discretion. If the power be construed to be imperative, it can only be upon the theory that all of the real estate must be sold by the executors. If as to any of the real estate the sale need not be made, then, plainly, an option as to conversion exists. Such option might be controlled by the court, in proper cases, for the benefit of the beneficiaries; but, where an option or discretion to be exercised exists, the doctrine of constructive conversion is not applicable. Directions of most positive and imperative character would be required in this case to

deprive the devisees of the legal estate of the right to retain the land, as land, because the proceeds of sale, if any sale be made, are by the will to go to the devisees of the land. It is the more rational conclusion, therefore, that the testator by vesting an immediate fee simple in all his lands in his devisees, by virtue of which they were entitled to immediate possession and enjoyment of the lands upon his death, intended them to have the lands, subject only to a power of sale of any of the lands, if the executors (being three of the four devisees) thought best for the estate to sell; and, if such sale were made, the devisees, and no other persons, should receive the proceeds. This construction of the power to sell as a discretionary and not as an imperative power makes the will, and every word of it, operative, and harmonizes with its general plan.

Another reason why the doctrine of constructive conversion cannot be held effective in this case to convert the land into money is that by the partition an equitable reconversion, as it is called, took place. "By such reconversion the prior constructive conversion is annulled, and the converted property is restored in equity to its original actual quality." 3 Pom. Eq. sec. 1175, etc. Mrs. Waddell and the legatees of the proceeds of sale joined in the series of releases and conveyances which released from the power of sale the shares of the lands devised to the trustees and to Mrs. Waddell. There is no question that her deed in which her husband joined had this effect, and that thereafter the lands conveyed to the trustees were freed from the operation of the power or trust. In consideration of the release to each of the other devisees, Mrs. Waddell was entitled to a release to herself of the remaining lands, and it must be presumed that the conveyance to the husband was intended to be for her benefit. The transaction cannot be considered as in any sense a sale to Waddell by the executors as trustees, for, treated as a sale, it would have been a breach of duty in all three concerned to have given Waddell the absolute interest in the share of lands to which his wife was entitled in consideration of her conveyance to the executors themselves, as individuals, of the wife's interest in the other lands, which it was also their duty to sell for the common benefit of the devisees. The only view of the transaction consistent with an honest intention of the parties to protect the rights of Mrs. Waddell is that a partition between all the parties interested was intended, and that by ignorance or oversight the deed for Mrs. Waddell's share was made to her husband without declaring her right. In one of the former partitions the deed to Waddell did declare that the conveyance was made to him in right of his wife, and in the chancery suit, hereinafter referred to, the final decree made the same declaration as to the lands included in the partition now in question.

The contention of complainant that the deed to Waddell from the other devisees for the interest in the lands to which his wife was entitled on a partition is to be treated in equity as a payment to the husband of money to which he was entitled as his own, under this will, depends, it will be observed, upon the establishment (1) of an equitable constructive conversion of the lands into money by the will; (2) a constructive sale by the executors; and (3) a constructive reduction to possession of the purchase money by the husband—all accomplished by a transaction which on the face of it was plainly intended to be a simple partition of lands, removing them from the operation of the power of sale. The doctrine of equitable conversion, as between husband and wife, in relation to the proceeds of sale of her lands, is never held to be applicable unless a valid sale has in fact taken place. *Frank v. Bolans* (1866) L. R. 3 Ch. App. 717. It does not, in my judgment, extend to a case like this. So far, therefore, as Waddell, the husband, is concerned, and those claiming under him, with notice, the land conveyed must be impressed with a resulting trust in favor of the wife and those claiming under her.

As to notice, I conclude, upon the whole evidence in the case, that John W. Bigalow, to whom Waddell conveyed the premises in fee in 1848, after the death of his wife, had notice that the conveyance to his grantor was made upon a partition or division in which his grantor's wife furnished the consideration—the substantial facts which raise the trust. This notice he received by his own deed, and the inquiries to which it necessarily led. The conveyances to the other devisees and tenants in common were referred to as the real consideration for the conveyance to Waddell; the other consideration—\$1—being nominal. This statement of the consideration of itself suggested a partition or division so strongly as to put a purchaser on inquiry, and Bigalow was chargeable, also, with notice that the actual title which Waddell held, and as to which his conveyance was altogether valid (that of a tenant by the curtesy in the lands), was derived from Lemuel Cobb. Mrs. Waddell had died in 1847, and the deed to Bigalow was made in 1848. Notice to Bigalow was also given by chancery suit pending at the time of the purchase, brought in 1833 by Waddell and his wife against the executors to assert their rights in the lands devised by Lemuel Cobb; the bill praying, among other things, that they might be let into possession of a fair and just share of the testator's real estate so devised to them by the residuary clause of the will, or that the executors or a master might be decreed to make a sale, and that a receiver be appointed. Walter Kirkpatrick was appointed receiver of the lands at the October term, 1835, by an order in the cause which directed the receiver (among other things) to lease and collect the rents for the

lands embraced in the residuary clause, and to divide the lands and personal estate among the persons in interest according to their rights under the will of Lemuel Cobb. The receiver was directed to report his proceedings under the order to the court. The deed to Waddell made in December, 1838, and now in question, was executed and acknowledged before Walter Kirkpatrick, the receiver, who died subsequently, and before the conveyance to Bigalow. Mrs. Waddell died in 1841, and in February, 1848, the suit was revived in the name of her infant heirs as co-complainants. This revivor was prior to Bigalow's purchase (May 4, 1848), and the suit was, in my judgment, notice to Bigalow at the time of his purchase that his grantor's interest in the lands in question arose under the will of Lemuel Cobb, that he had received the same on a division and in the right of his wife, and that the heirs of Mrs. Waddell had succeeded to the interest of their mother in the lands purchased from Waddell. Mrs. Waddell died in 1841—within three years after the third partition of the lands made while the suit for accounting and division was pending. The suit was under the control of her husband, and as her children and heirs at law were infants, whose interests could not be impaired by a mere delay in the prosecution, I think the delay of the husband in the prosecution of the suit from 1838 to 1848 did not operate to deprive the suit of its effect as notice to persons claiming under the husband and adversely to the infant heirs of the wife. Taking the entire circumstances of the case as disclosed by the paper title of Waddell and the chancery suit at the time of the conveyance, there can be no reasonable doubt, I think, that Bigalow was put upon inquiry as to whether the title of Waddell under this partition was not held in trust for his wife. It should also be noted that Bigalow's actual payment of the purchase money has not been proved. The burden of proving such payment is on the purchaser, and the recital of the payment in the deed is not, as against the cestui que trust, sufficient evidence of the payment. 1 *Perry on Trusts*, sec. 219. Defendants are volunteers claiming under Bigalow, as his heirs at law, and they stand, therefore, in his position, as to the claim of bona fide purchase.

A third question—that of alleged estoppel—arises under the following circumstances: Andrew B. Cobb, one of the executors and devisees under the will of Lemuel Cobb, and one of the tenants in common, joined in the execution of the deed to Waddell; and in this deed, which on its face granted an absolute fee in the land, Andrew B. Cobb, covenanted, along with the other grantors, to warrant and defend the lands against himself and all persons claiming under him. Andrew B. Cobb subsequently, and between February 6, 1855, and September 18, 1862, purchased the title and interest of the children of Mrs. Waddell in the lands. He die^d

in January, 1873, and the complainants, as his executors and devisees, are by this bill prosecuting his rights acquired by the deed of Mrs. Waddell's heirs subsequent to his own deed of warranty. The question is whether the subsequently acquired title of the grantor inures to the benefit of the grantee by reason of the warranty, and by way of estoppel against the grantor. In my judgment, the doctrine of estoppel does not apply to this case, and for two reasons: First. In an action at law brought by complainants against defendants to recover possession of the lands, in which action an undivided one-third interest was recovered, the same question as to estoppel under the deed was raised, and was decided adversely to the defendants, in reference to the one-third interest. This decision settles, as between the parties, the law of this case in reference to the alleged estoppel, in a court of law; and upon a purely legal question, such as estoppel, this court would follow the decision at law, made in a suit between the same parties, upon the effect of the deed as an estoppel. And even were not the question thus *res adjudicata*, the opinion of Mr. Justice Magie—that under this deed there was no estoppel at law—should be followed, as an authoritative exposition of the law upon the subject, under our decisions. Second. The title now prosecuted is one claimed or derived originally under and from the grantee of the deed. The *cestuis que trustent* claim under the grantee as their trustee in equity, and an equitable title so derived from a resulting trust imposed on the grantee by the circumstances of the conveyance is a title derived from the grantee, as clearly as if the grantee had, upon the conveyance to him, executed a declaration of trust or a conveyance to the beneficiaries. As to a title derived from the grantee himself, the doctrine of estoppel is, even at law, held not to be applicable. 11 A. & E. Ency. Law (2d Ed.) 412. This is not a question of applying in equity (and as following the law) the legal doctrine of estoppel by warranty, for the purpose of increasing the grantee's estate conveyed by the deed, but the fundamental question here is whether the conveyance of the legal estate was a conveyance in trust. If so, the controlling feature of the case is the enforcement of the equitable trust, and the general rule is that, as against all except bona fide purchasers, the trust will be enforced; and, inasmuch as the rights of the *cestuis que trustent* are assignable, the trust will be enforced in favor of the assignees. The precise question, therefore, is whether the subsequent assignment by the *cestuis que trustent* of their equitable rights to the grantor operates in favor of the trustee grantee, because of the grantor's warranty. Estoppel by warranty is based on the fundamental principles of giving effect to the manifest intention of the grantor, appearing on the deed, as to the

lands or estate to be conveyed, and of preventing the grantor's derogating from or destroying his own grant by any subsequent act. 2 Sm. Lead. Cas. (8th Ed.) 855 et seq.; *Van Rensselaer v. Kearney*, 11 How. 297, 18 L. Ed. 708; *Staffordville Gravel Co. v. Newell* (Err. & App. 1890) 53 N. J. Law, 412, 19 Atl. 209; *Hannon v. Christopher* (Van Fleet, V. C. 1881) 34 N. J. Eq. 459. The enforcement of the trust upon which the legal estate was conveyed to the grantee in this instance executes the entire purpose of the conveyance. The grantor, therefore, should no more be restricted by the doctrine of estoppel from fairly purchasing the *cestuis que trustent's* rights against the grantee which arose from the conveyance, and enforcing their rights, than he should be estopped by the warranty from directly aiding the beneficiaries against the trustee to have the trust declared, if the trustee repudiates the trust upon which the lands are conveyed. That the legal title to the lands should be held by the husband in trust for the wife is the aspect in which a court of equity looks at the transaction as a whole, between all the parties—grantor, grantee, and beneficiary. The enforcement of the trust in favor of the beneficiary, against the grantee and those holding legal title under him, with notice of the trust, is the controlling equitable aspect of the case; and the covenants of the grantor as to title and warranty cannot be made to operate, by estoppel or otherwise, to convey to the trustee any portion of the equitable interest or estates for which the legal title was, by the very circumstances and presumed intention of the conveyance, held in trust.

The remaining defense raised is that of laches in bringing the suit. It is claimed that the statute of limitations is a bar to the suit, and that, even if this statute be not applicable, the delay is a bar. The deed to Waddell was made on December 27, 1838, and Mrs. Waddell died in 1841. Upon her death, Waddell became tenant by the curtesy, and on May 4, 1848, conveyed the lands in question to John W. Bigalow. Mrs. Waddell's infant children and heirs at law came of age subsequently, and conveyances of their interests in the land were made to their uncle Andrew B. Cobb by several deeds executed between February, 1855, and September, 1862. Andrew B. Cobb died in January, 1873, and Waddell, the tenant by the curtesy, died May 29, 1884. The statutes of limitations do not, expressly or in terms, affect equitable suits; but courts of equity, in enforcing equitable rights or remedies, give effect to the statute. The extent to which effect is given to the statute depends somewhat on the nature of the equitable jurisdiction invoked. Where the suit is based on a legal right, and the appeal is to the auxiliary jurisdiction of this court, and equitable aid is sought for the purpose of removing the obstructions to complainant's legal right,

a delay in the application for equitable aid will not ordinarily, or in the absence of special equities, bar the equitable right, unless the legal right is barred. *Burne v. Partridge*, 61 N. J. Eq. 434, 48 Atl. 770, and cases cited pages 436, 437, 61 N. J. Eq., and page 771, 48 Atl. Where the substantive right asserted is one as to which the jurisdiction in equity is concurrent with that at law, the statute of limitations is a bar in equity as well as at law. *Conover v. Conover* (1831) 1 N. J. Eq. 403; *Marsh's Ex'rs v. Oliver's Ex'r* (Green, Oh.; 1862) 14 N. J. Eq. 259. Where the right asserted or the remedy sought is purely equitable, the applicability of the statute depends to some extent upon the special character of the equitable right asserted or remedy sought. If the right claimed rests upon an express or direct and subsisting trust, clearly established, the statute of limitations is not held to be a bar, and such trust will be enforced unless there has been an express repudiation of the trust, and a holding adverse to the trust continued for the time fixed by the statute of limitations. *Allen's Adm'r v. Woolley's Ex'rs* (1839) 2 N. J. Eq. 209; *Starkey v. Fox* (Green, V. C. 1894) 52 N. J. Eq. 758, 29 Atl. 211, affirmed on appeal in 53 N. J. Eq. 289, 34 Atl. 1135; *Stimis v. Stimis* (McGill, Oh.; 1895) 54 N. J. Eq. 17, 33 Atl. 468, and cases cited page 21, 34 N. J. Eq., and page 469, 33 Atl. If the jurisdiction is for the application of remedies purely equitable, such as specific performance, cancellation of instruments, and the like, the period of delay which will be fatal does not depend upon the statute of limitations, but will be considered and determined with reference mainly to the circumstances and effect of the delay in the particular case, and the suit may be dismissed for delay less than the period fixed by the statute limiting the pursuit of legal remedies. The general equitable rule applicable to this class of cases is that which requires vigilance in the prosecution of rights. A late case on the Court of Errors and Appeals (*Lutjen v. Lutjen* [Nov. 1902] 53 Atl. 625) collects and reviews our decisions illustrating the application of the doctrine of laches in cases of this character. The bill in this case was filed to set aside the release of a legacy given to an administratrix, upon the ground of fraud; and, under the circumstances, a delay of nine years and eight months was held fatal. In cases of equitable titles to real estate, courts of equity will apply the period of limitation of the legal estates of an analogous character. 2 Story, Eq. Jur. sec. 1520. Where the trust is an implied or constructive trust, the statute is applicable. *McClane's Adm'r v. Shepherd's Ex'r*, 21 N. J. Eq. 76. And where, by reason of an implied trust, a court of equity declares equitable estate to exist, equity follows the law in applying the bar of the statute to the equitable estates so created. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. (Lord Redes-

dale, 1805) 607, 611, 632, 637, is the leading case upon the application of the statute to equitable estates; *Hall v. Otterson* (Green, V. C.; 1894) 52 N. J. Eq. 522, 28 Atl. 907, and cases cited page 533, 52 N. J. Eq., and page 911, 28 Atl., for the rule that a cestui que trust whose equitable interest is reversionary is not bound to assert his title until it comes into possession. *Thompson v. Simpson*, 1 Dr. & War. 489; *Life Assoc., etc., v. Siddal*, 3 De G. F. & J. 58; 2 Perry, Trusts, sec. 860.

The present case is one where an implied or constructive trust is alleged and has been sufficiently proved. The trust arises from the payment of the purchase money of land, and in equity this trust is made effective by holding that equitable interests or estates in the land, proportionate to or dependent on the proportion of the purchase money paid, are created, or, in technical language, result from the payment. In the present case an equitable estate in fee in Mrs. Waddell, subject to her husband's tenancy by the curtesy, resulted by operation of law from her ownership, subject to this right. During the continuance of the marriage the statute of limitations did not run, in equity, against the wife and in favor of her husband (*Yeomans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631; *Alpaugh v. Wilson*, 52 N. J. Eq. 424, 28 Atl. 722, affirmed on appeal in *Wilson v. Alpaugh*, 52 N. J. Eq. 589, 33 Atl. 50); and after the death of the wife the statute did not run against the children until they arrived at age. The tenancy by the curtesy did not expire until Waddell's death, in 1884. In November, 1892, the complainants brought suit in ejectment against the defendants to recover possession of lands now in dispute, claiming the entire legal title to all of the lands. In that suit it was decided that the plaintiffs were entitled to recover the equal, undivided, one-third part, but that as to the other two-thirds they had no title at law. Final judgment was entered in this action in February, 1894, and the present bill was filed January 18, 1895. The applicability of the statute depends on the question whether this suit is to be considered as substantially one where the object is to establish and enforce an equitable estate or interest in land. If it is, then, following the analogy of the statute of limitations applicable to legal estate, the action is not barred until the right of entry would have been lost on a legal title. Such right of entry accrued on the death of the tenant for life. *Pinckney v. Burrage*, 31 N. J. Law, 21. In my opinion, the suit is essentially a suit to declare the equitable estates which arose out of and resulted from the payment of the purchase money of the conveyance, and to give to the cestuis que trustent the enjoyment of these estates in the same manner and to the same extent they would have been entitled to the enjoyment of the legal estate, had the legal title been made to Mrs. Waddell, who paid

the consideration. The statute should not be applied or begin to run against Mrs. Waddell's heirs or their grantee until after the termination of the life estate of her husband. This relief from the operation of the statute against Mrs. Waddell and those claiming under her from 1838 to the death of the tenant by the curtesy, in 1884, is the exact situation which the transaction would have assumed, had the conveyance of the legal title been made in 1838 to Mrs. Waddell, as it should have been; and neither Waddell, nor those claiming under him in this case, have shown any special equitable circumstances which entitle them to call upon this court to make the equitable titles or interests in the land in question less extensive than the legal title would have been, had it been properly made.

I will advise a decree for complainants.

JEROLAMAN v. JEROLAMAN.

(Court of Chancery of New Jersey. Feb. 12, 1903.)

DIVORCE—DRUNKENNESS—CRUELTY—SEPARATION—DUTY OF HUSBAND—EVIDENCE.

1. Where a separation between husband and wife occurs because of the drunkenness and cruelty of the husband, on failure of the husband to reform, and after such reformation, and within two years, to seek out his wife, and apply to return, giving her reasonable assurances of the sincerity of his reformation, a divorce for desertion is properly granted.

2. Upon an issue as to whether a husband, who had become separated from his wife because of his drunkenness and cruelty, had within two years reformed his habits and offered to resume marital relations, the evidence showed that a person who, at his request, had talked to the wife about a reconciliation, had advised the wife not to live with her husband, and had told him that she had given this advice. The only other witness to prove the husband's reformation was the man who kept the saloon in which the husband was employed, and his statements as to the husband's drinking habits and disposition when drunk were opposed to the weight of evidence. *Held*, that a reformation and desire to return was not sufficiently established.

Petition by Mary A. Jerolaman against William P. Jerolaman. Heard on petition, answer, and proofs. Decree for petitioner.

A. A. Clark, for petitioner. Samuel S. Swackhamer, for defendant.

EMERY, V. O. The evidence in the case showed satisfactorily that the separation of the parties was legally chargeable to the cruelty of the husband. The acts of cruelty proved occurred for the most part, it is true, when the defendant was under the influence of liquor; but for many years, and up to the time of the separation, the condition was habitual. On the final act of cruelty on May 30, 1898, when the husband threatened shooting with a revolver which he had, and pursued his wife, who had taken it from his pocket, with a chair, and out of the house,

she had him arrested. Since that time he has not been at the house, which belongs to the wife, and the separation has continued. The question in the case is whether the separation was continued and obstinate on his part for two years after that time. The separation in this case was, as I have stated, legally chargeable to the husband, and under the rule applied in cases of this character it was the duty of the husband to reform his habits, and after such reformation, and within the two years, seek out his wife, and apply to return, giving her reasonable assurances of the sincerity of his reformation, and of her probable safety in resuming marital relations. *McVickar v. McVickar*, 46 N. J. Eq. 490, 501, 19 Atl. 249, 19 Am. St. Rep. 422 (Pitney, V. O., 1890). Defendant insists that he has established this, but, in my judgment, he has not. He has never himself been at the house, and one of the persons whom he sent to visit his wife—Mrs. Bowers, a clergyman's wife—on visiting the wife, and talking with her about the reconciliation, and the husband's previous conduct, advised the wife not to live with her husband, and returned to the husband, and told him she had given his wife this advice. The only other witness to prove the husband's reformation and desire to return was the man who kept the saloon or store and poolroom in which defendant is employed. This witness' evidence is not satisfactory. His statements as to the defendant's former drinking habits and his disposition when drunk are certainly opposed to the weight of evidence in the case, and, as the substance of his interview is denied by the wife, I am not willing to rely on his evidence as the basis for finding that the wife was in fault for not taking the husband back into her house. The evidence for defendant does show that the defendant at the present time, and for some time past, has not been drinking, but that the reformation commenced before the two years expired is not satisfactorily shown.

I will advise a decree for petitioner.

HOUSTON v. WESTERN WASHINGTON R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EMINENT DOMAIN—EVIDENCE—DECLARATIONS OF OWNER.

1. In an action to recover damages for property taken by a railroad company, declarations of the owner of the land as to its value, and his offer of it at a certain price, and a sale of a portion thereof, are admissible to show his estimate of value.

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

Action by William B. Houston against the Western Washington Railroad Company. From the judgment, defendant appeals. Reversed.

¶ 1. See *Divorce*, vol. 17, Cent. Dig. §§ 127, 122.

On the trial of the cause the following record was made:

"Plaintiff was called as for cross-examination, and was asked this question: 'Q. Was that option on the whole farm?' Offer asked for, and purpose. 'I propose to prove by the witness on the stand that he gave one or more options on the ground which was crossed by the Western Washington Railroad at or about the time of the location of the road over this land, and that he sold a large part of land, including all that covered by the right of way of the railroad, immediately after the location and construction of the railroad, at a better price per acre than its value before the erection and location of the railroad; and for the purpose of showing a greater market value in the land immediately after the location and erection of the Western Washington Railroad, than immediately before. (Objected to as incompetent and irrelevant, and as not the proper measure of damages, and for the further reason it is not proposed to ask the witness the price at which the land was optioned before the occupation by the said railroad and the price at which it was optioned or sold after the construction of the road.) The Court: Objection sustained. Offer overruled. I do not think that would be the proper measure of damages, or throw any light on the issue here. (On request of defendant, exception allowed and sealed.) It is proposed to prove by the witness on the stand by way of cross-examination that for some time prior to the location of the Western Washington Railroad over his land he had been making efforts to sell his land, and that his efforts culminated in an option, executed a short time before the location of the road; to prove what the price was as stipulated in the option, and that with all his special efforts that was the very best price that he was able to obtain in the market for his land; to prove also by him that a few weeks after the location of the road, and before its completion, he sold a large part of the land to the same party, including the entire railroad track, and all that part of his farm which his witnesses have said was injuriously affected by the location of the road—the purpose being to show by this cross-examination, in connection with other testimony already in, that the price for which he actually did sell the land was more than the price he agreed to sell it for in the option; that to be followed by other testimony showing that that increased price was the direct result of the location of this railroad over this man's land, and that it arose from causes which were special to this farm, and not general to the neighborhood; the ultimate purpose being to meet the testimony of the plaintiff already in that the location of the road had depreciated the value of his farm, and also to aid the jury in determining how much the farm was worth immediately before the location of the railroad and how much it was worth immediately after

the location, as affected by that railroad, and in that way aid them in determining whether this plaintiff is entitled to any damages, and, if so, how much. (Objected to as incompetent and irrelevant, and as not the proper measure of damages. Also because the offer is argumentative. It asks the court to find facts not supported by the testimony. It does not offer to show the price at which the farm was sold—) We offer to show also, and meant to include it in the offer as a part of the offer, and for the same purpose, the price at which he actually did sell the land immediately after the location of the road, and before its completion. (Objections renewed, and objected to further for the reason that the offer does not meet the purpose for which it was made.) The Court: Objection sustained, and offer overruled, and, on request of defendant, exception allowed and sealed.' Defendant offers in evidence the record of the deed from William B. Houston to Francis L. Robbins, dated June 11, 1900, conveying a certain tract of land situate in Chartiers township, Washington county, Pennsylvania, which is described. (Objected to as incompetent. This is the deed for the ninety-four acres. Purpose asked for.) 'The purpose is to show the date at which the title passed from William B. Houston. The Court: How is that material to the case?' 'To show it is to be taken into consideration as part of the whole farm in estimating damages, and that we are entitled to any benefits that arose on that part of the farm at that time. The Court: There is no claim at all that you are not entitled to benefits when they are claiming they have been injured.' Offered for the further purpose of showing what the actual consideration was. (Objected to as incompetent and irrelevant.) 'The Court: Objection sustained, and offer overruled. It does not make any difference what the land was sold at by the landowner after the land was taken and appropriated.'"

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ.

S. S. Robertson, M. L. A. McCracken, and W. O. McNary, for appellant. A. G. Braden and C. W. Campbell, for appellees.

MESTREZAT, J. The first and fourth assignments were abandoned on the argument of the case because the errors complained of were not assigned in accordance with the rules of court. In the second assignment of error the appellant complains of the rejection of its offer to show the price at which the plaintiff optioned his land a short time before the location of the railroad and the price at which he sold a large part of it shortly after the road had been located, and before its completion, for the purpose, as we understand, of giving to the jury the plaintiff's own estimate of the value of the land at those dates as evidence of the damages sus-

tained by him in the construction of the defendant company's road over his land. The offer was to be followed by testimony showing that the increased price was the direct result of the location of the railroad over the plaintiff's land, and that it arose from causes which were special to this farm, and not general to the neighborhood. The third assignment alleges error in rejecting the deed, which was offered for the purpose of fixing the price at which that part of the premises was sold which the plaintiff's witnesses testified was injuriously affected by the location of the road. This offer must be considered in connection with the testimony, the exclusion of which is complained of in the second assignment.

Declarations against one's interest, unless made with a view to an adjustment of the differences between the parties, are always admissible against the party making them. For this reason the declarations or acts of a party showing his estimate of the value of his property at or about the time it is taken are evidence to his prejudice in proceedings to assess the damages for land taken under the right of eminent domain. In 10 Am. & Eng. Ency. of Law (2d Ed.) 1154, it is said: "Upon the ground that the admission of a party to his prejudice in a matter material to the issue is always competent, the admissions of the owners of property, the condemnation of which is sought, that the property had only a certain value, have been considered admissible." And in Lewis on Eminent Domain, section 439, the author says: "In regard to the proof of admissions of the parties, the same general rules apply as in other cases. It is competent to prove the declarations of the owner of the property in question as to its value and the price at which he has offered to sell it, and other admissions which are pertinent to the issue." But the question raised here has been considered and determined by this court. In *East Brandywine, etc., R. R. Co. v. Ranck*, 78 Pa. 454—a condemnation proceeding—it was held that the declarations of the owner of the land as to its value, his offer of it at a fixed price, and sale of a portion of it, are evidence on the question of damages, as constituting his estimate of the value. In that case we said, Paxson, J.: "As evidence bearing upon the value of this property, Ranck's own declarations were certainly competent when offered by the company. His offer of it at a fixed price and the sale of a portion of it were facts proper to go to the jury as constituting his estimate of its value. It is true the sale of a portion of the property does not fix with certainty its market value as a whole, but it is an element fair to be considered by the jury. If one-half of the property had been sold for more than he had valued the whole of it prior to the opening of the road, surely the jury would have a right to consider such a circumstance in passing upon his claim for damages." The offers should have been more

explicit, and the purpose of the proposed evidence more clearly stated; but, as we understand the offers, the testimony should have been admitted. As said in the opinion in the *Ranck Case*, "while the evidence referred to was not conclusive, nor perhaps very important, it ought not to have been excluded."

The second and third assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

SHAFFER et ux. v. HARMONY BOROUGH.

(Supreme Court of Pennsylvania. Jan. 5, 1908.)

DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE.

1. For two years a sidewalk had been in a dangerous condition because of holes in the railroad ties, of which it was in part made, caused by decay. Plaintiff knew of such holes, and stepped on a tie, which appeared to be sound, some distance from a hole, and it broke through, and she was severely injured. *Held*, that the question of plaintiff's contributory negligence was for the jury.

Appeal from court of common pleas, Butler county; Greer, Judge.

Action by John E. Shaffer and Josephine Shaffer against Harmony Borough. Judgment for plaintiffs for \$1,550, and defendant appeals. Affirmed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES- TREZAT, and POTTER, JJ.

John H. Willson, Lev. McQuiston, and J. C. Vanderlin, for appellant. S. F. Bowser and A. L. Bowser, for appellees.

FELL, J. The only question argued by the appellants is whether binding instructions should have been given the jury to find for the defendant because of the contributory negligence of Josephine Shaffer. There was a sidewalk on but one side of the street. This walk was made partly of planks and partly of broken stones and cinders. At a place where a driveway leading to a vacant lot crossed the walk, old railroad ties were laid side by side lengthways of the pavement, and covered with fine furnace slag. For two years this part of the walk had been in a dangerous condition because of holes in the ties caused by decay. Of this condition the borough authorities had express notice long before the accident. Mrs. Shaffer knew that there were holes in the ties, and, to avoid them, she stepped on a tie, some distance from a hole, which appeared to her to be perfectly sound and safe. This tie had decayed from the bottom or inside, and the heel of her shoe broke through the crust on the upper surface, and she fell, and was severely injured. Under these circumstances she could not be charged with

¶ 1. See *Municipal Corporations*, vol. 34, Cent. Dig. § 1755.

contributory negligence, unless it be held that the existence of the holes indicated a state of decay which made it unsafe to step on any part of the ties, although their upper surfaces appeared to be sound, and that she should have known this. Evidently the court could not so have held. Whenever there is reasonable doubt as to the inferences to be drawn from the facts established by the testimony, the question of negligence is necessarily for the jury. *City of Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739, is not in point. The plaintiff in that case attempted to cross a high ridge of ice which sloped at an acute angle across the sidewalk. The danger was manifest, and could easily have been avoided. In this case the person injured acted with caution, and attempted to avoid the only danger of which she knew, and in so doing was exposed to a peril of which she had no knowledge.

The judgment is affirmed.

JONES v. SOWERS.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

OPTION CONTRACT—NOTICE OF ACCEPTANCE—WAIVER.

1. Where defendant gave an option on certain coal, to be delivered on notice in writing of an election to take the same, the right to receive written notice could be waived by parol.

2. Where plaintiff had an option for the purchase of certain coal from defendant, and, under the contract, was to send a written notice of the acceptance of the option, and he sent such a notice by an agent, who read it to the vendor, and notified him that it would be served upon him on the date fixed for its acceptance in the option, a statement by the vendor that he would not accept the notice, and that he intended to keep the coal, was a waiver of further notice.

Appeal from court of common pleas, Washington county.

Bill by John H. Jones against Warren Sowers for specific performance. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. W. Irwin and John C. Bane, for appellant. A. M. Todd and J. A. Willey, for appellee.

POTTER, J. This is a bill for the specific performance of a contract for the sale of coal. On May 19, 1899, the defendant, Warren Sowers, executed and delivered to J. A. Ray a written contract for the sale of the Pittsburg vein of coal, underlying a tract of ground containing some 200 acres. He agreed to convey the coal, by good and sufficient deed, clear of incumbrances, provided that on or before March 19, 1900, the said Ray gave him notice in writing of his election to take and accept the said coal, and

paid him therefor the sum of \$20 per acre upon the delivery of the deed and confirmation of title. The course of events with reference to the acceptance of this option is set out by the court below in the third and fourth findings of fact, as follows: "(3) Sometime in February, 1900, J. A. Ray elected to purchase the coal described in said written contract, and, as expressive of that election, signed, at his office, in Pittsburg, Pennsylvania, a writing, which is in words and figures set out below, and sent the same to John Closser, a justice of the peace, who resides in this county near the residence of Warren Sowers, with directions to serve the same upon him. Copy of notice: 'March 19, 1900. To Warren Sowers: I hereby notify you that I elect to take the coal underlying your farm with mining and other rights and privileges optioned to me. J. A. Ray.' (4) In the latter part of February, 1900 (twenty days or more before the expiration of the option to purchase given in said written contract of date May 19, 1899), John Closser, having received this written notice, visited Warren Sowers at his residence to get title papers preparatory to making an abstract of title, and at that time told him that his coal had been accepted, and read over to him the written acceptance signed by J. A. Ray, set out in the third finding of fact supra, and fully explained the matter to him, and also told him that he would be back again on the day the notice was dated (March 19, 1900), to formally serve it on him, when the defendant said he would not be at home, and said he would not let his coal go. He further said that he would not accept notice, and that he should not serve it on him then; that he would be away on March 19, 1900, the day the ten months' option expired." After finding other facts, the court reached the following conclusion of law: "That J. A. Ray before March 19, 1900, elected to take and accept the coal in question as provided in the written contract of date May 19, 1899, and of this the defendant had legal notice, so that the contract of May 19, 1899, became a binding contract for the sale of said coal by the defendant to J. A. Ray, his heirs or assigns." And he further found that the plaintiff was entitled to a decree of specific performance.

It is contended on behalf of the appellant that the notice of an election to purchase the coal was, under the terms of the contract, to be a written notice, and that it could only be served by giving to Warren Sowers a written copy thereof. If the defendant had simply stood upon the letter of the agreement, and if there had been nothing in his conduct to show that he intended to dispense with the requirement of a written notice, or that he intended to prevent the performance of the contract, he would be in a position to question whether the admitted facts as to the service of notice upon him of the acceptance of the contract showed a strict

compliance with its terms. But the conduct of the defendant, as outlined in the findings of fact by the court, was such as amounted to a waiver of his right to receive any other notice than that which was served upon him in the latter part of February. At that time the agent of the other party to the agreement proposed to return upon March 19th and serve upon the defendant a written notice of acceptance, in literal compliance with the terms of the contract. The defendant, however, capriciously and arbitrarily refused to accept any such notice, and said that he would not let his coal go. How could there be any more positive or definite relinquishment of his right to further notice? There is no reason why the right to receive written notice may not be waived by parol. We are not aware of any principle of public policy or of any enactment of positive law which would prohibit such a waiver. "A waiver may be evidenced by express agreement, or by declarations and conduct from which a fair implication of it arises." *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64. Having expressed his intention of repudiating the contract, and having declined to receive any further or written notice of acceptance, it would be unconscionable to now allow the appellant to claim any benefit from his refusal to permit literal compliance with the terms of the agreement as to notice. "A party who dispenses with or prevents performance of a contract cannot take advantage of the nonperformance by the other." *Grove v. Donaldson*, 15 Pa. 128.

The assignments of error are all overruled, and the decree of the court below for specific performance of the contract is affirmed, and this appeal is dismissed, at the cost of appellant.

COVERT et al. v. PITTSBURG & W. RY. CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RAILROADS—ADVERSE POSSESSION—TITLE TO LAND.

1. Where a railroad, having the right to exercise eminent domain, took land as a purchaser from one holding adverse possession, its title became good when the combined adverse possession of the railroad company and its grantor exceeded 21 years.

Appeal from superior court.

Action by Hezekiah Covert and L. M. Covert against the Pittsburgh & Western Railway Company and Thomas M. King, receiver. Judgment for plaintiffs was affirmed by the superior court, and defendants appeal. Reversed.

The evidence tended to show that the land in dispute was a strip of land which the defendant claimed as a portion of its right of way under a deed from a mere intruder on the land. The trial judge refused to instruct that the railroad company could tack its

possession to the possession of its grantor, and thus acquire a good title by 21 years' adverse possession.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES-
TREZAT, and POTTER, JJ.

R. P. Scott, for appellants. John H. Wilson, Lev McQuistion, and J. C. Vanderlin, for appellees.

BROWN, J. The single question raised here is, not whether a railroad company, possessing the right of eminent domain, can acquire title to land by 21 years' adverse possession of it, but whether, as a purchaser of the same for railroad purposes from one holding adverse possession, its title is good, if the combined adverse possession of vendor and vendee exceeds 21 years. The appellant offered testimony tending to prove that John Winter had been in adverse possession of the land in dispute for several years prior to November 9, 1877, when he entered into an agreement with the railroad company, whose successor the appellant became, for the sale of it for railroad purposes. The agreement was followed by a deed for the land on July 23, 1879. This suit was brought December 8, 1897, but the common pleas and superior court were both of opinion that the railroad company could not avail itself of the act of limitations of March 26, 1785, even if the combined adverse possession of Winter, its vendor, and itself had been of the character required by the law, and had continued for more than 21 years. The trial judge instructed the jury that, "if John Winter had occupied and had possession of this land for twelve years, and had sold to some person, not a corporation like a railroad company, and that person had held nine years longer, then the title would have gone, and the two possessions would have come together; but our law does not give a railroad company that right where it enters unlawfully, where it enters without authority of law." The superior court seems to have adopted the same view. In it we cannot concur. The appellant is not claiming a right of way over the land and resisting payment of damages under the plea of the statute of limitations. It stands upon what it asserts is its title to the fee, acquired by purchase, just as a private person might have acquired the land. We need not consider the cases holding that a railroad company, possessing the right of eminent domain, cannot set up adverse possession for the statutory period, when the real owner of the land undertakes to assert his rights in it. The reason that adverse possession cannot be set up in such a case is that the law presumes, when a railroad company takes land for its corporate purposes, it does so under its high right of eminent domain, and not as a willful trespasser, whose trespass may grow into a title. Its enjoyment of the easement so acquired is upon

the condition that proper compensation to the landowner will be made whenever demanded. The law regards such occupancy of the land as by its permission, on the condition stated, and not as the act of a mere trespasser, to whom statutes of limitations may give rights. The simple question now before us is whether a railroad company may purchase land for railroad purposes from one whose inchoate title rests upon adverse possession.

If Winter had owned the land on a title by deed, it would not be contended that he could not have sold to the railroad company, or that it could not have purchased from him; and it seems to be conceded that, if he had been in adverse possession for more than 21 years on November 9, 1877, or July 23, 1879, the railroad company would have taken a good title from him. It seems to be still further conceded—and, if not, it is the law—that if an individual had purchased from Winter during his adverse possession of less than 21 years, he could afterwards count such possession as part of the 21 years upon which he could safely rely as his title against another having a better one, but lost by delay in asserting it. "I have no manner of doubt that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and, if the possession of the two, added together, amounts to twenty-one years, and was adverse to him who had the legal title, the act of limitations will be a bar to his recovery." *Tilghman, C. J., in Overfield v. Christie, 7 Serg. & R. 173.* The purchaser from a trespasser may tack the latter's adverse possession to his own, so as to give title by the statute of limitations. *Hughes v. Pickering, 14 Pa. 297.* But the contention of the appellees is that, though this is the law as to others, a railroad company cannot acquire any rights from a trespasser selling his inchoate title. Why not? The reason of the law in the case of a simple taking by a railroad company possessing the right of eminent domain does not exist when it becomes a purchaser, and "cessante ratione legis, cessat lex." What Winter sold to the railroad company was all he could convey in the land; and, whether his title was good or bad, the law permitted him to transfer it. *Overfield v. Christie, supra.* If he could transfer it to an individual, why not to a corporation possessing the power to purchase? It is true that when he sold he conveyed simply a sprouting title, liable to be cut down by the holder of the better one, but just as certain not to be felled by the blow of any man, if allowed to spread its roots and fully mature after a growth of 21 years. Such was the title purchased by this appellant, and which it claims should now shelter it. The risk was assumed that this title might never become perfect, but the chances were also taken that to the years of Winter's adverse possession of the land the company might be

able to add its own uninterrupted ones, until 21 of them would stand in the way of any, save the commonwealth, who should attempt to enter upon the land. If the testimony offered by the defendant was to be credited by the jury, the railroad company's chances of ultimately acquiring a good title were successfully taken, and the fourth point submitted by it should have been affirmed.

The judgment of the superior court is reversed, as is that of the court below, and a venire facias de novo awarded, that on another trial the view herein expressed may be followed.

MILLER et al. v. MACKEY.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

VENDOR AND VENDEE—EXTENSION OF STREET—CONTRACT.

1. Plaintiffs sued to compel defendant, who had laid out certain lots in a plan, and sold them to plaintiffs, to extend the street on the plan to a main street of the borough. Defendant had agreed with one of the plaintiffs to extend the street when it became possible, but there was no agreement with the other plaintiffs. Defendant had concealed no material facts and made no misrepresentations on the sale of the lots. *Held*, that the evidence was insufficient to sustain a decree compelling defendant to open the street by a deflected course over a lot originally conveyed by defendant to another, but afterwards repurchased.

Appeal from court of common pleas, Butler county.

Bill by Adam Miller and others against Sarah Mackey to compel the opening of a street. Decree for plaintiffs, and defendant appeals. Reversed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES- TREZAT, and POTTER, JJ.

T. C. Campbell and A. E. Reiber, for appellant. H. H. Goucher, for appellees.

FELL, J. In 1867 the defendant was the owner of a tract of land on the south side of Centre avenue, in the borough of Butler, which she laid out in building lots fronting on the avenue and extending south 160 feet to an alley 20 feet wide. In 1873, after she had sold all these lots, she laid out another tract, adjoining the first on the south, into lots, with streets and alleys. On the plan of this tract Walker avenue was the main street. It was 40 feet wide, and extended from the south side of the tract, intersecting cross-streets, 1,125 feet, to the alley in the rear of the lots first laid out. This avenue was at an angle of about 60 degrees with Centre avenue, and ended at the alley 160 feet from it. In order to give the owners of lots on Walker avenue a better means of access to Centre avenue and other streets, the alley west of the former was widened to 40 feet, and extended to Fullerton street, which opened into Centre avenue. Walker

avenue was opened, and lots abutting on it were sold according to the plan, a part of the description of each lot being: "No. — on Mrs. Mackey's plan of lots." In 1887 the defendant purchased from Henry De Wolfe a lot on Centre avenue, which she had before owned and had sold in 1867. The lot was 60 feet wide and extended back to the alley opposite the end of Walker avenue, but was not in line with it, as the avenues were not at right angles. The extension of Walker avenue in a straight course would take the smaller part of this lot and the larger part of two lots to the west, not then nor now owned by the defendant.

In the bill filed it was alleged that the plaintiffs purchased lots on Walker avenue in reliance on the promises of the defendant to open the avenue through to Centre avenue. This averment was not sustained by the testimony. The proofs showed that at different times extending over a period of many years, the defendant had told persons, some of whom afterwards became purchasers, that she intended to have the avenue opened at some future time. Some of these statements were made before and some after she purchased the De Wolfe lot, but with a single exception there was no agreement with a purchaser to extend the avenue, but merely the expression of an intention to have it opened some time in the future. To some of the parties she said that she did not want to pay all the expenses of opening the avenue, and all her declarations were as consistent with an intention on her part to cause it to be opened by the borough as they were with an intention to do it at her own cost. The only one of the plaintiffs with whom it is found by the court that an agreement was made is Andrew Miller, who purchased in 1891, after the defendant had become the owner of the De Wolfe lot. He testified: "I asked her if she would open it [the street] if I purchased, and she said she would open it through to Centre avenue, but she did not know whether she could do it while Mr. Relf lived; and said she did not think he would live long, as he was an old man." Mr. Relf was the owner of a lot west of the De Wolfe lot, the larger part of which would be taken by the extension. By the decree entered, the defendant is ordered to open and extend Walker avenue of a width of 40 feet over and across the west side of the De Wolfe lot to Centre avenue. The enforcement of this decree will deflect the street about 30 degrees from its course, and require the removal of a house occupied by the defendant's tenants.

We find no ground on which this decree can be sustained. There was not an actual dedication of the De Wolfe lot for public use as a street. The defendant never agreed that the avenue should be deflected from its course, and extended through this lot. Her agreement with Andrew Miller was to have it extended in a straight line. This is clear-

ly and unmistakably indicated by her statement to him that she did not know whether she could open the street during the lifetime of the owner of an adjoining lot over which the street would pass. The dedication of the lot did not result by implication of law from the sale of lots on Walker avenue. The sale of lots on this avenue implied a covenant with the purchasers that the avenue should forever remain open as a public thoroughfare, but nothing more. It was then opened and connected at both ends with the system of borough streets. In order to make a better connection at the south end, the defendant had widened the alley to the full width of the avenue on the west to Fullerton street. The avenue was complete, and its length and width and its connections with other streets all appeared on the plan and on the ground itself, and there was no possible reason for the implication of an intention to extend it. A distinct agreement with a purchaser to extend the avenue through the De Wolfe lot might be enforced, but no such agreement was made with any of the plaintiffs. The agreement with one of them—and the only agreement shown—was to extend the avenue, without a change of its course, over the property of others, when it became possible to do so. With the other plaintiffs there was no agreement, but merely the statement of an intention to be carried into effect in the indefinite future. In the sale of lots to them there was no misrepresentation or concealment of material facts which would give rise to an equity that could be enforced in any manner. The plan which entered into and became a part of the description in their deeds showed the division of the land into lots, streets, and alleys. This was notice to them. Moreover, they had knowledge, and no one purchased on the supposition that the defendant owned the land extending on the line of Walker avenue through to Centre avenue, and had dedicated it, or by the sale of lots was then dedicating it, to the public use.

The decree is reversed, and the bill is dismissed, at the cost of the appellees.

MUTUAL LIFE INS. CO. OF NEW YORK v. TENAN.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

JUDGMENT—REVERSAL ON APPEAL—STRIKING FROM RECORD.

1. Where the Supreme Court has declared a judgment against an executor, foreclosing a mortgage, void, the court in which it was entered should strike the judgment and all the proceedings thereunder from the record, so that the record may not be used in the orphans' court to prevent plaintiff in the judgment from participating in the proceeds of a fund derived from the sale of the real estate of the decedent.

Appeal from court of common pleas, Washington county.

Action by the Mutual Life Insurance Company of New York, for use of Robert Scott and J. B. Tenan, against George M. Tenan, executor of Stephen Smith, with notice to M. H. Stevenson, terre-tenant. From an order striking off the judgment, M. H. Stevenson appeals. **Affirmed.**

The court below filed the following opinion:

"We have no doubt that the judgment entered to No. 57, November term, 1897, appearance docket, and the lev. fa. issued thereon to No. 92, November term, 1897, are void, and that the sheriff's sale, and the deed he gave to the purchaser, were without legal effect. If this is apparent from the inspection of the record, we have no doubt as to the power of the court to summarily strike the same from the record, as something that ought not to be there. The only question, then, for us to determine, is whether or not the record shows that the judgment and the decree of this court approving the sheriff's special return are void, or not. There can be no dispute as to what the record shows. It shows a default judgment entered against an executor for want of an affidavit of defense. And the only question, then, to determine, is a legal one; and that is, is such a judgment void—has it any legal effect? What is our authority for saying it is void?

"In the appeal reported in 188 Pa. 239, 41 Atl. 539, the Supreme Court say of this judgment: 'It follows that the judgment so entered in the present case is a void judgment, and must be set aside.' In *Tenan v. Cain*, 188 Pa. 242, 41 Atl. 594, the Supreme Court say of this judgment: 'We have just reversed that judgment as unauthorized and void. It was incapable of supporting an execution,' etc. In *Stevenson's Appeal*, 194 Pa. 259, 45 Atl. 82, the Supreme Court say of this judgment and the proceedings had thereon: 'The judgment, deed, and receipt to the sheriff were all legal nullities, and possessed no efficacy whatever.' With these declarations of the Supreme Court, we think there can be no question as to the legal effect of the judgment in question. If, then, the judgment, the deed, and the receipt to the sheriff were all 'legal nullities and possessed no efficacy whatever,' why should they remain on the record? The answer of M. H. Stevenson to the motion to strike off the judgment filed avers that 'the sole purpose of the present motion is to prevent him from using the records as evidence before the auditor appointed to pass upon exceptions and make distribution in the matter of the account of Wm. M. Jackson, administrator of Stephen Smith, deceased, and he suggests that the granting of said motion would therefore be unfair and inequitable.' Would it not be nearer the mark to say that it would be unfair and inequitable not to grant the motion? If this court finds on its records a judgment and proceedings thereon 'that

are legal nullities and possessed of no efficacy whatever,' in the opinion of the Supreme Court, and that the record of the judgment and of the proceedings thereon is about to be used as evidence in another court, where there might be some question whether or not it could be attacked collaterally, why should not this be a reason to move this court to purge its records? Why should this court withhold its hand in this matter, to allow M. H. Stevenson to offer in evidence in the orphans' court a record which has already been adjudged by the Supreme Court not only a nullity, but not competent evidence to establish the claim which he seeks to establish in the orphans' court? We therefore hold that the judgment entered to No. 57, November term, 1897, and all the proceedings under it, are a nullity, and that the motion to strike off should prevail, and that the respondent, in his answer, has not shown any just ground for our delaying the entry of the decree asked for until he can use the record as it now stands as evidence in the orphans' court.

"Of course, if we were to assume that James B. Tenan had been actually paid his mortgage debt, and that the estate of Stephen Smith owed him nothing, and that he, by the sheriff's sale, was trying to collect a debt not honestly due him, there might be some force in the suggestion that it would be inequitable for this court to grant the motion to strike off the approval of the sheriff's special return. But we can make no such assumption. On the contrary, the fact that the estate of Stephen Smith owes James B. Tenan this mortgage debt has been adjudicated, and there is no claim that he was paid the money covered by the receipt which he gave the sheriff. But more than this, this very money for distribution in the orphans' court, referred to in the respondent's answer, was ordered paid to the executor of the will of Stephen Smith, that he might pay it to James B. Tenan in discharge of his debt. It may be, as stated in the answer, that the respondent has been put to expense, by reason of this sheriff's sale, in preparing his paper books for the Supreme Court in the cases that reached there, by a blunder or inadvertence of this court in entering this judgment; but if, in place of giving notice to bidders at the sheriff's sale that the purchaser would take no title, he had come into this court and called our attention to the blunder we had made in entering the default judgment, we would certainly have quashed the writ of lev. fa., and then struck the judgment from the record, and there would have been no expense for him to have paid. Decrees for default judgments are always prepared by counsel, and are handed up and signed on motion day without much examination; and, as our court rules provide for their being opened or stricken off on cause shown, the election is with the party dissatisfied with the judgment to pursue el-

ther course, and we have no criticism to make of the course the respondent chose to take. We only say that he cannot charge the expenses incurred to 'the unconscionable conduct of James B. Tenan.' He should either charge them to the inadvertence of the court in signing the decree for the default judgment, or to his not calling the attention of this court to the slip it had made, before the sheriff's sale was made.

"And now, June 26, 1902, the motion of James B. Tenan herein filed, an answer thereto of M. H. Stevenson came on to be heard, and was argued, whereupon, upon due consideration, it is ordered, adjudged, and decreed that the judgment of this court entered at No. 57, November term, 1897, and that the decree of this court of date November 12, 1897, approving the sheriff's special return on *levari facias*, issued to No. 92, November term, 1897, on said judgment, which decree is in these words, to wit, 'And now, November 12, 1897, the within return presented and read in open court, and, there being no objections, the same is approved, and the sheriff is directed to present, for acknowledgment, the deed to James B. Tenan,' be, and the same are hereby, stricken from the records of this court as 'legal nullities and possessed of no efficiency whatever.'"

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. H. Stevenson, for appellant. A. M. Todd and J. A. Wiley, for appellee.

MESTREZAT, J. This was an application in the court below to vacate and strike off the judgment entered against an executor for want of an affidavit of defense, and to vacate the decree of the court approving the sheriff's special return of sale on the *levari facias* issued on said judgment. The learned judge granted the motion, and struck from the records the judgment and decree, as being "legal nullities and possessed of no efficiency whatever." On three separate appeals to this court, in litigation involving the validity of the judgment, we have declared it void and of no efficacy whatever. We have also held that the deed and the receipt of the sheriff by the lien creditor were likewise of no force or validity. "The sheriff's sale under the judgment," says Chief Justice Green in *Smith's Estate*, 194 Pa. 259, 45 Atl. 82, "was a void sale, and the deed to the purchaser was a void deed. It not only conferred no title; it was a legal nullity. In other words, the judgment and all the subsequent proceedings were the same as if they had never taken place. They had no existence in any manner which the law could or would recognize." Such was the opinion of this court, after deliberate consideration, upon the validity of the judgment and subsequent proceedings on the *scire facias* issued on the

mortgage. Regarding this opinion as authoritative, the learned trial judge struck from the record the proceedings to foreclose the mortgage. His opinion thoroughly justifies his action. There can be no sufficient reason assigned why a judgment or proceeding adjudged by this court to be void and of no legal effect should be permitted to remain on the record of the court of first instance. Until it is stricken from the record, and its invalidity thus declared, it can and may be enforced by the same or another tribunal. Thus the records of the court may be used as evidence to enforce a claim which this court declares to have no legal existence, or to defeat a claim which is justly and equitably due. Here the correction of the record was resisted by the appellant in order that he might use it to prevent the allowance of the appellee's claim by an auditor appointed to distribute a fund in another court. So long as the record of the common pleas showed a satisfaction of the claim, the orphans' court could not allow it to participate in the distribution of a fund arising from the sale of the debtor's real estate. The judgment and proceeding thereon, declared by this court to be void and of no legal efficacy whatever, would therefore prevent the appellee from enforcing the payment of his claim out of the fund for distribution. The necessity for correcting the record is therefore apparent, and the learned court below was entirely right in granting the motion for that purpose.

The decree is affirmed.

IN RE SMITH'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

ADMINISTRATION—PRESENTATION OF CLAIMS.

1. Where the Supreme Court has declared a judgment void, and the court of common pleas has stricken it off, and all proceedings thereunder, including a sale of the mortgaged premises to the mortgagee, the latter may subsequently present his claim in the orphans' court, on distribution of the proceeds of the sale of the mortgagor's estate.

Appeal from orphans' court, Washington county.

In the matter of the accounting of William M. Jackson, administrator of Stephen Smith, deceased. From a decree overruling exceptions to the auditor's report, M. H. Stevenson appeals. Affirmed.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. H. Stevenson, pro se. A. M. Todd and J. A. Wiley, for appellee.

MESTREZAT, J. The allowance of the claim of J. B. Tenan to participate in the fund for distribution was resisted by the appellant on the ground that it had been paid

by the judgment and proceedings thereon on the scire facias on the mortgage at No. 57, November term, 1899, of the court of common pleas of Washington county. At the instance of Tenan, however, prior to the allowance of his claim by the orphans' court, the common pleas struck from its records said judgment and the decree approving the sheriff's special return on the levavi facias issued on the judgment, and the action of that court has this day been affirmed by this court. 54 Atl. 172. It therefore follows that Tenan's claim was properly allowed out of the fund for distribution by the orphans' court. This court so held in an exhaustive opinion by the late Chief Justice Green in Smith's Estate, 194 Pa. 259, 45 Atl. 82. The right of the appellee to have payment of his claim from the estate of Stephen Smith, deceased, was adjudicated in that case, and, for the reasons given in the opinion, this decree must be affirmed. It is time that litigation arising out of the settlement of this estate should cease. Eight years of persistent effort in the courts of Washington county and in this court should afford ample opportunity to have the rights of the interested parties fully and finally determined. "Interest republicæ ut sit finis litium."

The decree is affirmed.

VANKIRK et al. v. PATTERSON et al.
(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RES JUDICATA.

1. Where an owner of land, who has given an option of sale, sues to have the option set aside for default, and the case has been tried on the merits, and a decree rendered against the complainant, the controversy is *res judicata*, and on petition for an issue to quiet title under Act June 10, 1893 (P. L. 415), where the answer shows that the controversy has been adjudicated, the issue is properly denied.

Appeal from court of common pleas, Greene county; Crawford, Judge.

Action by Edward Vankirk and another against J. G. Patterson and another. From an order refusing an issue, plaintiffs appeal. Affirmed.

The following is the opinion of the court below:

"The petitioners for this rule are asking for an issue under the act of June 10, 1893 (P. L. 415), to try a matter already adjudicated between themselves and the respondents. A bill in equity was filed in this court some time since by the petitioners, asking for the surrender and cancellation of a contract for the sale of the Pittsburg or River vein of coal in and under the petitioners' land in Morgan township, this county. To this bill the respondents answered, and the case was heard in regular order, and followed with a decree dismissing the bill at plaintiff's cost. The case was then carried on appeal to the Supreme Court, where the de-

cree of this court was affirmed. See Vankirk v. Patterson, 201 Pa. 90, 50 Atl. 966. The question determined there was whether or not the sale of the coal was made under the optional contract referred to in this petition. It was held that the contract was binding, and that the respondents had not forfeited their rights under it. Thus the subject-matter sought to be brought up by this rule is *res adjudicata*. Neither this nor the appellate court undertook in that proceeding to say whether or not the act of June 10, 1893, was applicable to a case of this kind, as that question was not raised. My own view is that that act was only intended to apply where one not in possession of land disputes or denies the right of title or right of possession of the person or persons in possession claiming to hold the same by right of title. In short, the object of the Legislature was to provide a simple and speedy remedy to quiet title where adverse claims of title were being asserted against the party in possession. It was not intended to abolish or supersede equity procedure, or the existing remedies for the determination and enforcement of contracts. One who puts on record a contract of sale, or an optional agreement which he may make absolute as a contract of sale, is not thereby setting up an adverse title or right against his vendor in possession. He is simply giving constructive notice of his contractual relations under which he may become the owner of that title. In truth, he affirms the title when he is willing to step in and pay for it. He claims by and through his vendor's title, and not adversely to it. I cannot think the act of 1893 was meant to cover a case of this character. But whether it was or not would not help the petitioners now. They elected to come into a court of equity, and prosecuted their case there on its merits to final judgment in the court of last resort. While that judgment stands, they cannot be heard in a different proceeding in this court on the same facts. The rule will therefore be discharged."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James E. Sayers and H. J. Ross, for appellants. A. F. Sliveus and Willis F. McCook, for appellees.

MITCHELL, J. In Ullom v. Hughes, 54 Atl. 23, it is held that a controversy between vendor and vendee as to compliance or default by the latter in regard to the terms of an option may be the subject of a remedy by rule and issue under the act of June 10, 1893 (P. L. 415). But it was also there held that the act did not supersede or affect any of the former remedies, but only supplied one that was cumulative or additional. While, therefore, the controversy set up by the petition in the present case is *prima facie*

within the statute, yet there is nothing in the act or in the construction given to it in *Ullom v. Hughes* to prevent the application of the general rule of *res adjudicata*. Where there are concurrent remedies, a trial on the merits in any one of them is conclusive of the controversy in all the others. Such was the case here. The present petitioners filed a bill on the equity side of the court to have the option set aside for default by the defendant. The case was heard on the merits, and a decree made against the plaintiffs. *Vankirk v. Patterson*, 201 Pa. 90, 50 Atl. 966. The issue was the same that was sought to be raised again by the present petition, and the court was right in holding the decree a bar on the ground of *res adjudicata*.

It is argued by appellants that the issue should have been awarded, and the question of the former decision raised by plea, and *Del. & Hudson Canal Co. v. Genet*, 169 Pa. 343, 32 Atl. 559, is cited in support. In that case it was said: "And if it should turn out at the trial that the dispute was not over facts, but over the law resulting from them, this would not affect the remedy any more than it would affect an equitable ejectment. The right to the issue having been shown by the possession and the denial of title, the issue goes on to trial on the facts and the law, as in other cases." But it was not meant that the court must go through the vain form of awarding an issue where the facts before it show that there is no dispute now existing. The argument proves too much, for, if pushed to its logical conclusion, it would compel the court to grant an issue, although a similar issue had already been granted, tried, and determined. In the present case the answer set up the prior adjudication of the same cause of action. There was no denial of the identity of the issue asked with that already adjudicated. All the facts appeared undisputed on the record, and the court was as fully in position to render judgment as it would have been with the case before a jury on the plea of former adjudication. Had there been a replication raising any question of fact, or had the facts not appeared affirmatively on the record, the case would have been different, and would then have been proper for an issue, even though at the trial it should turn out, as said in *Canal Co. v. Genet*, that the real question in dispute was one of law only.

Judgment affirmed.

BROCK v. BROTHERHOOD ACC. CO.

(Supreme Court of Vermont. Washington. March 6, 1903.)

LIFE INSURANCE—HAZARDOUS OCCUPATIONS—CATTLE TENDER—MEANING OF TERM—AMBIGUOUS CLAUSES—RULE OF CONSTRUCTION.

1. Where a life insurance policy provided that, if the holder should be killed while en-

gaged in an occupation classed by the company as more hazardous than that written in the policy, the amount of recovery should be diminished, and the occupation of "cattle shipper and tender in transit" was so classed, the term did not include tender of horses in transit.

2. The rule that members of a mutual life insurance company are charged with knowledge of its by-laws does not require that such companies be excepted from the rule that ambiguous clauses in an insurance contract should be construed strictly against the insurer.

Exceptions from Washington county court.

Special assumpsit by James W. Brock, as administrator of Fred W. Frink, deceased, against the Brotherhood Accident Company. From a judgment for the plaintiff, the defendant brings exceptions. Affirmed. Defendant's motion for reargument overruled.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

Dillingham, Huse & Howland and H. W. Kemp, for plaintiff. George W. Wing and John H. Senter, for defendant.

MUNSON, J. The plaintiff's intestate was insured as a barber proprietor, not working. The policy provided that, if the holder should be fatally injured "while temporarily or otherwise engaged in or exposed to a hazard pertaining to an occupation or employment classed by the company as more hazardous" than that written upon the policy, the company's liability should be only that "provided for the class in which such more hazardous occupation or exposure is rated in the manual of the company." The occupation of "cattle shipper and tender in transit" is rated in the manual as more hazardous than that for which the deceased was insured. The deceased was killed while traveling in a box car in charge of a horse in transit. If this employment is not classed in the manual as more hazardous than the insured's usual occupation, this alone will deprive the company of the benefit of the clause relied upon, and it will not be necessary to consider the question presented by the further facts contained in the agreed statement. So the question for determination is whether the term "cattle," as used in defendant's policy, should be construed to include horses. Lexicographers give the word two meanings—one, restricted to domestic bovine animals; the other, covering any live stock kept for use or profit. The first is ordinarily given as its common meaning; the second, as a special signification, less frequent now than formerly. The meaning of the word has come in question in a few reported cases. In *Brown v. Bailey*, 4 Ala. 413, it was held that a declaration for an injury to cattle was not supported by evidence of an injury to mules, as the term did not, in common parlance, include mules. In *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 22 L. Ed. 560, the question arose upon the plaintiff's guaranty of a dealer's drafts

¶ 2. See Insurance, vol. 28, Cent. Dig. § 1870.

against shipments of cattle, and it was held that hogs were included in the term "cattle." The court referred to several English cases where the word was given its broader signification, as showing that this meaning was permissible, and considered that this should be taken as the meaning of the parties, in view of the purpose of the contract and the course of dealing apparent from the evidence. In cases involving the construction of statutes relating to fences, it seems generally to have been held that the word applies to all domestic quadrupeds. 5 A. & E. Ency. Law (2d Ed.) 771. But in *Enders v. McDonald*, 5 Ind. App. 297, 31 N. E. 1056, where a statute of this character was considered, the court reached a contrary conclusion; saying that the word, in its ordinary sense, as used in this country, meant only beasts of the bovine genus. It is certain that in this country the word "cattle" is not ordinarily used as including horses, and it should not be construed to include them as used here, unless the court can properly infer from the purpose of the provision that the parties so intended. It may be that the protection sought by the company would require an application of the provision to horses as well as cattle, but this alone will not justify an inference of mutual understanding. In the construction of insurance policies, it is considered that, inasmuch as the company prepares the contract and selects the language used, provisions restrictive of the general obligatory clause should be construed strictly against the company. *Billings v. Metropolitan Insurance Co.*, 70 Vt. 477, 495, 41 Atl. 516. We think that, in determining the language of a provision like this, the company should select words that will accomplish its purpose without their being given any unusual meaning.

Judgment affirmed.

On Rehearing.

The defendant seeks a rehearing on the ground that the rule of construction applied in arriving at the decision is not applicable to mutual companies. It is held in the cases to which we are referred that the members of a mutual company are charged with knowledge of its rules and regulations. This is undoubtedly an established doctrine, but it comes short of sustaining the defendant's contention. One may be charged with knowledge of a by-law, and yet be entitled to a favorable rule regarding the construction of its ambiguous terms. The reason given for this rule is as applicable to the contracts of companies like the defendant as to those of other companies. It will be seen from the list of cases cited in 3 *Berryman's Insurance Digest*, § 8012, that the rule has been applied to companies of every class, and we have nowhere found any suggestion that its application in the case of mutual companies is inconsistent with the doctrine above stated. We think a further hearing is unnecessary.

Motion overruled.

SCOVILLE v. BROCK.

(Supreme Court of Vermont. Washington.

March 6, 1903.)

GUARDIAN AND WARD—FINAL ACCOUNTING—APPROVAL OF WARD—CONCEALMENT—DECREE—RES JUDICATA.

1. Where a bill to impeach the final account of complainant's former guardian alleged that complainant's approval of the account was obtained by fraud and concealment, and was not binding on complainant, but also showed that the account was approved and allowed by the probate court, and there was no attack on the validity of the decree of allowance, the bill was demurrable, because showing that the decree was res judicata of complainant's rights.

2. An allegation in a bill by a ward to impeach the final account of his former guardian that the guardian did not inform complainant of certain of his rights, and thereby procured complainant's approval of the account, was not equivalent to an allegation that the decree was made because of the orator's approval, and without inquiry, so as to constitute a direct attack upon the validity of the decree itself.

Appeal in chancery, Washington county; Watson, Chancellor.

Bill by William L. Scoville against James W. Brock. From a decree sustaining the defendant's demurrer to the bill, the orator appeals. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, START, STAFFORD, and HASELTON, JJ.

William L. Scoville and Edward H. Deavitt, for appellant. M. E. Smilie, for appellee.

MUNSON, J. The bill alleges, in substance, that the defendant, as guardian of the orator, received certain property decreed to the orator as legatee; that among this property were certificates representing shares of the capital stock and certain debenture bonds of various corporations located without the state; that when the defendant received these shares and bonds they were worth, and could readily have been sold for, more than the par value thereof; that the capital stock and debenture bonds of a foreign corporation are not a proper selection for the investment of trust funds, and that it was the duty of the defendant to refuse this property, or, having received it, to be diligent in disposing of it; that the defendant remained the orator's guardian until the 28th day of July, 1894, when the orator became of age; that on the 30th day of July, 1894, the defendant presented to the probate court a final account of his guardianship, in which said shares and bonds were returned as assets in his hands; that on the same day the orator indorsed on said account a certificate that he had examined and approved it, and that on the 1st day of August following the probate court accepted and allowed said account, and ordered that said securities be delivered to the orator; that the securities were transferred to the orator immediately thereafter; and that most of them were then wholly valueless. The bill complains that it was the duty of the defendant, in settling his ac-

counts with the orator, to disclose to him any facts that might be necessary to inform him as to the full extent of his legal rights and remedies, and to refrain from any deception in obtaining the orator's approval of his final account, and from any deception intended to prevent the orator from calling him to account for his breach of trust, but that the defendant wholly disregarded his duty in these respects, and failed to inform the orator that after four years from the date of said decree the orator would be barred from having a further accounting and from proceeding against the surety on the defendant's bond, and that after eight years no action could be maintained against the defendant as principal on said bond; that defendant used undue and improper influence to induce the orator to approve said account, in that he gave the orator false and fraudulent information, on which the orator relied, and in that he failed to give him the facts necessary to inform him of the extent of his legal rights and remedies; that defendant did not inform the orator that he had a right to object to receiving the property in the form in which it was tendered, but might demand cash in place of it, and, in case of a refusal upon such demand, might have a hearing before the probate court on the questions involved; that the defendant, with intent to prevent the orator from calling him to account, informed the orator that the investments had been made before the property came into his hands, that he was under no duty to change the investments, that he had used due care and diligence in looking after the estate, and that the loss was occasioned by a depreciation of the securities without his fault; that the orator was induced to approve the account and accept the property by his reliance upon these statements, and his belief that the defendant had disclosed to him all the facts necessary to inform him of his rights and remedies, and that the defendant had committed no breach of trust for which he could be called to account; and that his approval and settlement had no effect in bar of his relief, because of this fraudulent procurement. It will be seen from this statement that the accounting is treated as a settlement between the guardian and the ward, and that the orator's approval of the account as rendered is looked upon as the barrier to be removed. But the bill shows that the account was presented to the probate court, and was allowed by it; that the account was so framed as to show what the balance in the guardian's hands consisted of; and that the securities on hand were decreed to the orator. It thus appears that the securities in question were brought to the knowledge of the court, and within the scope of its decree. Without considering the sufficiency of the allegations which charge that the orator's approval was procured by fraud, it is to be noticed that there are no allega-

tions which carry the effect of the alleged fraud into the decree, by showing that the action of the court was based upon the approval. For all that appears, the decree may have been based upon the same inquiry and consideration that would have been had in the absence of any approval. The allegation that the defendant did not inform the orator that he had a right to demand cash, and, in case of a refusal, have a hearing upon the questions involved, does not meet the objection. This is not an allegation that the decree was made because of the approval and without inquiry. Conceding, then, that the orator is not barred by his approval, we come to a consideration of the effect to be given to the decree in a proceeding which does not seek to impeach it. V. S. 2810, upon the construction given it by both parties, makes this final allowance, conclusive between them after the lapse of four years. But independent of any statute, a decree of the probate court is conclusive as to all matters which appear from the records to have been adjudicated, except in proceedings brought directly to correct or annul it. *Rix v. Smith's Heirs*, 8 Vt. 365. An accounting like the one in question is to be distinguished from the accounts rendered for the information of the probate court during the ward's minority. The final settlement of a guardian's account, made on notice after the ward becomes of age, is within the general rules relating to the conclusiveness of judgments. 2 Black on Judg. § 644; 15 A. & E. Ency. Law (2d Ed.) 115; *Garton v. Botts*, 73 Mo. 274. We have seen that the record of this accounting brings the matters complained of within the scope of the decree. So the questions raised regarding the defendant's administration of his trust are *res judicata*, and the determination is conclusive as against this bill.

But the orator says that his bill proceeds upon the theory that it would be inequitable to permit the defendant to set up the decree of the probate court as a defense to the accounting prayed for, for the reason that the defendant obtained the decree through fraud; and it is argued that the defendant is equitably estopped from pleading the decree. Conceding that the adjudication can be thus put aside, this but brings us back to the question already considered. The claim, as here stated, stands upon the assertion that the decree was procured by fraud; and we have seen that the allegations that the orator's approval of the account was so procured are not followed by averments sufficient to carry the effect of that approval into the decree. The allegations of the bill may all be true, and yet the account have been disposed of upon a full hearing of the questions now presented, and irrespective of the approval. We therefore hold the bill insufficient on demurrer, without further inquiry.

Decree affirmed and cause remanded.

**AVERY v. VERMONT ELECTRIC
CO. et al.**

(Supreme Court of Vermont. Chittenden.
March 6, 1903.)

**EMINENT DOMAIN—FLOWING LANDS—EREC-
TION OF DAM—GENERATION OF ELECTRICI-
TY—POWER FOR RAILROAD—PUBLIC USE—IN-
TEREST OF PETITIONER—STATUTES—RIPA-
RIAN OWNERS—RIGHTS OF FLOWAGE.**

1. V. S. c. 159, enacts that one who desires to erect or raise a dam to obtain water therefor, and thereby flow the lands of another, may secure the right to do so if commissioners or the court shall find that the flowing of the lands will be of "public benefit." A petition for the appointment of commissioners, etc., showed that petitioner owned a dam, which he desired to raise in order to generate electricity for the operation of a railroad. *Held*, that the power of eminent domain could not be invoked on the ground of public use, since, while the railroad must serve the public, there was nothing binding petitioner to serve the railroad or to give equal advantages to all.

2. The power of eminent domain could not be invoked on the theory that, if petitioner should fail to serve the railroad or give equal advantages to all, a forfeiture would be worked, since the condition, which make a use public must exist at the time of the taking.

3. A right to flow the land of others cannot be secured, under the statute, in the absence of any showing of a public use, on the theory that the provision is not a right of eminent domain, but merely a statutory regulation of rights common to the riparian owners.

Exceptions from Chittenden county court; Start, Judge.

Petition by Robt. Avery, as trustee, against the Vermont Electric Company and others, for the appointment of commissioners in eminent domain proceedings under V. S. c. 159. From a judgment dismissing the petition, petitioner brings exceptions. *Affirmed*.

Argued before ROWELL, C. J., and TYLER, MUNSON, and STAFFORD, JJ.

Edmund C. Mower, for petitioner. W. L. Burnap and A. G. Whittemore, for defendants.

MUNSON, J. The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of 50 feet a dam now existing on said property, and proposes to use the water power so provided in generating electricity for the operation of the Burlington & Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the constitution. The county court sustained the motion. No objection is taken as to the manner in which the question is raised. It is provided in chapter 159

of the Vermont Statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purposes of this discussion, it will be assumed, without consideration, that a plant for the generation of electricity is a manufactory, within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of eminent domain under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our purpose, for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the petitioner's right by inquiring whether his case is within its terms. A more accurate statement of the question would be whether this is a public use, within the meaning of the constitution, for no finding of public benefit under the statute can avail unless the statute and the constitutional provision are brought together by construction. The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this court in *Re Barre Water Company*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the state that the utilization of our water powers for its production ought to be regarded as a public necessity. We have in the petitioner's brief an extended presentation of the views expressed by other courts in dealing with the question of public use. In considering these opinions, it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in

the hands of those who will put it to the best use; and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the constitution of this state. Our only decision upon the flowage law is found in *Tyler v. Beacher*, 44 Vt. 643, 8 Am. Rep. 398. It was there held that the owner of a gristmill, who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It is said by the petitioner that that case is opposed to the decisions of most of the states which have passed upon the question, and this is true. But we find nothing in the arguments of other courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in *Lewis on Eminent Domain*, sections 178-181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use, within the meaning of the constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify, them. But it is said that the purpose of this condemnation is to provide motive power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this court in *Eldridge v. Smith*, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision in *Tyler v. Beacher* is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of eminent domain to every riparian owner for the maintenance of a mill or manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts, but the more recent doctrine of that state is that the provision is not an exercise of the right of eminent domain, but a statutory regulation of rights common to the riparian owners. It is insisted that the

petition can be sustained on this ground. The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The courts of Massachusetts hold that the Legislature may secure the full value of the stream to the different owners by combining these two interests for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge Redfield in his note to *Allen v. Inhabitants of Jay* (in the *American Law Register* for August, 1873) 12 Am. Law Reg. (N. S.) 481, and sanctioned by the Supreme Court of the United States in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889. We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams. It is true that in *Johns v. Stevens*, 3 Vt. 308, Judge Prentiss seems to assume that it would be within the power of the Legislature to encourage the building of mills by a statute of this character. But in *Adams v. Barney*, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge Redfield said that the land on the opposite side was the defendant's, and that the plaintiff had no right to use it, and that no court or legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill privileges through a statutory regulation of riparian rights. It should be noticed, also, that the argument advanced in support of the statute as thus classified is not coextensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable lands. A dam of moderate elevation may flood the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the state that can be flowed

by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts court supports its position by holding that the mere flowing of land is not a taking of the property—a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words "public use" from the constitution.

Judgment affirmed.

STATE v. MANNING.

(Supreme Court of Vermont. Windsor.
Feb. 25, 1903.)

RAPE—EVIDENCE—INSTRUCTIONS—READING TESTIMONY TO JURY—NEW TRIAL—NEW- LY DISCOVERED TESTIMONY.

1. In a prosecution for rape, where respondent introduced letters claimed to have been written by prosecutrix, in which she stated that defendant was not the guilty party, and that she told her grandmother he was because her grandmother threatened to whip her if she did not tell who it was, etc., it was competent, where the genuineness of the letters was denied, for the state in rebuttal to show that no such threats were made.

2. It was not error for the court, counsel for the state having referred to certain evidence introduced by the state as "real evidence," to instruct that all the evidence in the case was real evidence; that there was no such classification as real or unreal evidence; and that "all the evidence before you is real evidence, to be considered and weighed by you for what it is worth," etc.

3. Evidence that one prosecuted for rape was not at home, as claimed by him, when the rape was committed, may be considered as tending to show his guilt.

4. It was not error for the court, in granting the jury's request that the direct testimony of two witnesses be read to them, to refuse respondent's request that the cross-examination be read also.

On Petition for New Trial.

5. Testimony of a newly discovered witness that at about the time respondent, convicted of rape, had claimed to have received a letter from prosecutrix, in which she admitted respondent was not the guilty party, he had mailed a letter to respondent, written by prosecutrix, was not ground for new trial, because of its unreliability, it appearing that in a subsequent affidavit taken by the state the witness denied having mailed any letter for prosecutrix, etc.

6. On a petition for new trial of a prosecution for rape, respondent, twice convicted, presented the affidavits of three persons tending to show statements by prosecutrix out of court to the effect that he was not the guilty party. The affidavits were not in accord with each other with respect to the conversations leading up to the statements, nor with respect to the statements themselves. Prosecutrix denied having made the statements. The affiants lived within four or five miles of respondent's home, and knew about the case, but did not disclose the testimony to respondent before. The testimony of the officer who took prosecutrix away from the affiants' home tended to show that they had denied knowing anything about the case. *Held*, that the petition was properly denied.

Exceptions from Windsor county court; Stafford, Judge.

Peter Manning was convicted of rape, and brings exceptions. Affirmed. Petition for new trial dismissed.

Argued before TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

Charles P. Tarbell, State's Atty., and A. G. Whitham, for the State. G. A. Davis, for respondent.

TYLER, J. Information for rape upon a girl under 16 years of age. The state introduced evidence tending to show the commission of the crime. The respondent denied the charge, and produced evidence tending to show that at the time alleged he was sick at a house three miles distant from the place where the crime was laid. He also introduced two letters, which purported to have been written by the prosecutrix, and which the respondent testified he received by mail while he was in prison, after a former trial of the case. They stated, in substance, that the writer was sorry the respondent was in prison; that she hoped he would not blame her for it; that he was not the man who assaulted her, but that it was a stranger, who resembled him; that she told her grandmother, with whom she lived, that it was the respondent, because her grandmother had threatened to whip her if she did not tell who it was, and that her father had made a like threat if she told her story differently; also that her grandmother had told her that, if the respondent got out of prison, he would kill her. These letters were in contradiction of her testimony, and it was a material question whether they were genuine, or were manufactured for the purpose of the defense. In rebuttal she denied having written the letters, and disclaimed all knowledge of them. As bearing upon this question, the state's attorney, subject to the respondent's exception, was permitted to inquire of the prosecutrix and of her father and grandmother whether the threats and statements mentioned in the letters were made to her, and the witnesses answered that they were not made.

1. The letters may have been genuine, written by the prosecutrix for the reasons assigned in them; or she may have written them, and, through fear of or favor for the respondent, fabricated the story about the threats; or they may have been forged. These were questions for the jury. It was clearly competent for the state to prove in rebuttal that the threats were not made, in which case one of the other alternatives must have existed, for the prosecutrix could not have truthfully written about threats that had never been made. The respondent's counsel argues that the material parts of the letters were what related to the vital question in the case—the respondent's identity with the man whom the prosecutrix had

charged with the crime; that the threats were not claimed by the respondent as evidence, and that they came into the case only as an incident. But the letters were put in by the respondent as evidence, and, while it is true that what was material in his defense was what they contained in respect to his identity, the state claimed that they were not genuine, but forged. There had been a trial of the case prior to the appearance of the letters, in which it is presumable that the prosecutrix had charged the respondent with the crime, as she did in the last trial; and her evident purpose in writing the letters, if she wrote them, was to exonerate the respondent, and give reasons for having falsely accused him. If the reasons assigned ever existed, the motive for making a false accusation never existed, and this bore upon the genuineness of the letters. The evidence objected to was properly admitted. Steph. Dig. Ev. art. 9.

2. In argument the state's attorney's assistant referred to certain evidence introduced by the state as "real evidence," and the respondent's counsel requested the court to instruct the jury that there was no such legal classification, with which request the court complied, and instructed them that all evidence in the case was real evidence; that nothing comes into a case except what is real evidence; but that there was no such classification as "real" or "unreal" evidence; and said: "All the evidence before you is real evidence, to be considered by you, and weighed for what it is worth in producing an effect upon your minds, one way or the other. Everything that is not real evidence is not evidence at all, and is kept out of the case." To this part of the charge the respondent excepted, but we think it contains no error. It was, in effect, that all the evidence that had been admitted was to be considered and weighed for what it was worth.

3. The part of the charge which is recited in the exceptions upon the subject of alibi was favorable to the respondent, and was a correct statement of the law: "In going along with a consideration of the case you may have occasion to consider the question of an alibi in another connection. That is, if you find that the respondent was not at home that forenoon, * * * it does not necessarily follow that he committed this crime. It does not necessarily follow, if he was not at home, that he was where the testimony on the part of the state tends to show he was, and that he committed this crime. But * * * if you find that this claimed alibi was false—that is, that he was not at home that forenoon, as has been claimed by him—if you find that it is a false or fictitious defense, that is a circumstance you have a right to treat as evidence tending to show his guilt; but the weight to be given to it is wholly for you to determine." To the other part of the charge there was no exception, and we may assume that the jury

were instructed that they must find beyond a reasonable doubt that the alibi was false, and fabricated, and that the respondent was in fact at the place where the crime was committed, as alleged in the information. That the court had previously given instructions upon the subject of alibi is apparent from his introductory remark in the part quoted that the jury might have occasion to consider the subject "in another connection." If there was error in the part of the charge not recited, or in omission to charge, the respondent should have brought it up on the record. In the part recited no error appears.

4. After the case had been given to the jury, they returned to the court room, and asked to have the direct testimony of two witnesses read to them, and the request was granted. The respondent's counsel requested that the cross-examination of the two witnesses be also read, which was refused. It was discretionary with the court whether to grant or deny the jury's request. It was sufficient that he complied with it as made. The respondent had no legal right to have more read than the jury requested.

There must be judgment upon the verdict, sentence, and execution thereof.

Petition for New Trial.

This petition is based upon two grounds. (1) That a newly discovered witness—Rider—will testify that he mailed a letter written by the prosecutrix, and addressed to the respondent, about the time the latter claims to have received the one in question. (2) Newly discovered evidence to impeach the general reputation of Mrs. Fosby, the grandmother of the prosecutrix, for truth and veracity. As the letter was placed in the hands of the respondent's counsel who defended him in the first trial, in March last, and as Mrs. Fosby had been an important witness in that trial, it would seem that all this evidence might with reasonable diligence have been discovered and used at the second trial. This is especially true in respect to Rider, in view of the facts that it is stated in the letter that it would be mailed by some person without the knowledge of the writer's father and grandmother, and that Rider was boarding at the house where, and at the time, the letter was claimed to have been written, so that he was obviously a person to be seen and inquired of at once in order to supply this important piece of evidence; yet it appears that his statement to the respondent's wife and his affidavit were not obtained until the August next after the June term when the case was last tried. It is true that he was in an adjoining county most of the time, but not beyond easy reach. But, apart of all question of due diligence, the testimony of Rider is unreliable. In August, Mrs. Manning, the respondent's wife, obtained his signature to a writing which stated that the prosecutrix requested him

to mail a letter, and that he told her that he would, and in September he made affidavit on application of respondent's counsel that, upon the prosecutrix requesting him to mail a letter one evening, he told her to put it in his coat pocket when she finished it; that he found it there the next morning, and mailed it, and that it was addressed to the respondent. In a subsequent affidavit, taken by the state, Rider denied having mailed any letter for the prosecutrix, but says he saw her writing, and that she told him she was writing to her aunt about finding her a place to work. This is also, in substance, the affidavit of the prosecutrix. We have carefully considered these affidavits and the statements made by Rider to Mrs. Manning and to others, and the circumstances in which they were made, and are of the opinion that any testimony that Rider might give in a new trial of the case would be of but little, if any, value.

A considerable amount of testimony has been given by the respondent and the state bearing upon the question of Mrs. Fosby's reputation for truthfulness. The impeaching and the sustaining testimony are of about equal weight. Mrs. Fosby is evidently a poor and obscure person, with no decided reputation in this respect. Besides, she has testified on two trials of the case, and no attempt has been made to impeach her. While it is the rule, as stated in 1 Bish. Crim. Proc. § 1273, that new trials should be awarded more freely in criminal than in civil cases, here the newly discovered evidence is not so conclusive and decisive in its character as to raise a probability of a different result on another trial. *Doherety v. State*, 73 Vt. 389, 50 Atl. 1113.

Under a supplemental petition, which the respondent has been allowed to file, he presents the affidavits of Harry Dyer, Alta Dyer, and Wm. McGibbon, which tend to show statements made by the prosecutrix out of court, to the effect that the respondent did not commit the crime charged. The three affidavits are not in accordance with each other in respect to the conversations that led to the alleged statements nor in respect to the statements themselves. The prosecutrix, in her affidavit, denies that she made any of them. If made, it is remarkable that the affiants did not disclose them to the respondent's counsel, or to his family, who live four or five miles from them. On the contrary, though they all knew that the statements were in straight contradiction of what the prosecutrix had testified to on one trial of the case in the county court, and knowing that she was going as a witness to the second trial, the testimony of the officer who took the prosecutrix away from Dyer's house to attend that trial tends to show that Mr. and Mrs. Dyer both denied that they knew anything about the case. They deny that they talked with the officer. But, on the whole, we think this testimony,

in connection with that attached to the original petition, does not warrant the granting of a third trial.

Petition dismissed.

STATE v. BARRELL.

(Supreme Court of Vermont. Windsor.

Feb. 25, 1903.)

CRIMINAL LAW—INFORMATION—AMENDMENT —STATE'S ATTORNEY—OATH OF OFFICE.

1. An information filed by a state's attorney may be amended by his successor in office on leave of the court in which the information was filed.

2. The oath of office taken by a state's attorney is for the faithful performance of his duties, and is not an oath to the truth of the allegations set forth in an information filed by him so as to be a bar to an amendment of such information by his successor in office.

Exceptions from Windsor county court; Rowell, Judge.

Henry Barrell was convicted of larceny on an information amended by leave of court, and brings exceptions. Affirmed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Herbert H. Blanchard, State's Atty., for the State. Gilbert A. Davis, for respondent.

WATSON, J. At the December term, 1902, of the county court of Windsor county the state's attorney moved to amend the information which had been filed at the preceding term of court by his predecessor in office. The respondent objected thereto on the ground that, as the present state's attorney did not file the information, he could not amend it. The objection was overruled pro forma, and the amendments were allowed and made, to which the respondent excepted. The case was then tried by jury, and a verdict of guilty rendered. The respondent moved in arrest of judgment for the insufficiency of the information. This motion was overruled, the information adjudged sufficient, and judgment rendered on the verdict; to which respondent excepted.

That an information may be amended both in matters of form and in matters of substance is well settled (*State v. White*, 64 Vt. 372, 24 Atl. 250; *State v. Hubbard*, 71 Vt. 405, 45 Atl. 751); but it is contended that leave for that purpose can be granted only to the state's attorney who filed the information, because it is said to be under his oath of office; and that, his term of office having expired, the legal and proper course for the present state's attorney, if the information was defective in substance, was to enter a nolle prosequi, and then file a new information. In England, at common law, the attorney general was the sole judge of what public misdemeanors he would prose-

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 516.

cute, and he could file an information against any one whom he thought proper to select, without oath or motion, and without any opportunity for the accused to show cause against the proceedings; and the conduct, continuance, suspension, and the dropping the prosecution were left entirely to his discretion. Chit. Cr. L. 345; 4 Black. Com. 309. In this state there is no law requiring the state's attorney to make oath to an information filed by him. He is required to take the oath of office prescribed in the Constitution; but it was held in *State v. Sickie*, Brayton, 132, that it was not necessary for him to state in an information that he informs under his oath of office. The oath of office under which he acts is for the faithful performance of his duties as such officer, but in no sense is it an oath to the truth of the allegations set forth in an information filed ex officio by him, and it constitutes no obstacle in the way of amendments by any state's attorney who may have the matter in charge. Criminal informations are in the name of the state, and only the allegations of the state's attorney who exhibits them, and they are said by Mr. Chitty (1 Chit. Cr. L. 841) to be "analogous to declarations for the redress of a personal injury, except that the latter are at the suit of a subject for the satisfaction of a private wrong," and the former are "for the punishment for offenses affecting the interests of the public." Lord Comyn says (Com. Dig. tit. "Information"): "An information is a declaration of the charge or offense against any one at the suit of the king." And in *Rex v. Wilkes*, 4 Burr. 2553, Lord Mansfield says: "An information for a misdemeanor is the king's suit. The title of the cause is, 'The King against the defendant.' * * * As a subject sues by attorney, so does the king, with a little variation of form for decency." See, also, *State v. White*, above cited. It appears from *Rex v. Wilkes* that generally in England informations for misdemeanors of a public character were brought by the attorney general as an official right, but in case of his absence from the realm, disqualification, disability from sickness, or if the office of attorney general was vacant, the whole business and authority devolved upon the solicitor general, another of the king's counsel; and, except in the difference of his description, the form of the information was the same. In the case last cited, the office of state's attorney being vacant, the information was exhibited by the solicitor general, and before the respondent pleaded the solicitor general was made attorney general, and in that capacity brought into court the information he had filed as solicitor general. Desiring to amend the information, he then directed one of the clerks of court for the crown to apply to a judge for such an order. On notice to the other side, and upon hearing before Lord Mansfield at chambers, the crown being represented by the said clerk, and the respondent

by his solicitor and his clerk in court, it was ordered: "Upon hearing the clerks in court on both sides, I do order that the information in this cause be amended," etc.; and upon writ of error it was held that the information was properly filed by the solicitor general, and that in thus permitting its amendment there was no error. Although the exact question before us was not involved in that case—the attorney general being the same person who as solicitor general had filed the information—yet the course therein pursued, with the discussion and the holdings of the court, is of great value; for it shows that in permitting the attorney for the crown to make such amendments the fact that when he filed the information he was acting under some other official designation was immaterial. Whichever designation, he was the attorney for the crown in that case, and could be granted leave to make the amendment required, and a clerk for the crown could make the motion and obtain the leave. The case of *Attorney General v. Henderson*, 3 Anstr. 714, is very much in point. There the attorney general filed the information, and the solicitor general was permitted to amend it by adding another count. In Michigan the assistant prosecuting attorney was authorized to perform only such duties as might be required of him by the prosecuting attorney, yet it was held in *People v. Henssler*, 48 Mich. 49, 11 N. W. 804, that, in the absence of the prosecuting attorney, the person who in his stead appeared for the people (in that case the assistant prosecuting attorney) must, from necessity, have the power, with the permission of the court, to make amendments to the information. We do not find that this question has before been passed upon by this court, but in *State v. McEacham*, 67 Vt. 707, 32 Atl. 494, where the question was upon the sufficiency of the information upon demurrer, it is said in the opinion per curiam that, owing to the views of the judges, no decision could be made regarding that question, but that, inasmuch as the information of a state's attorney could be amended by his successor in office, both in form and in substance, the judgment would be reversed pro forma, and the case remanded to the county court to be proceeded with. Although it does not appear that the question of a state's attorney's amending an information filed by his predecessor in office was before the court, the disposition of the case is significant in showing how the law regarding it was then understood. Upon principle and authority we think a state's attorney may be permitted to amend an information filed by his predecessor in office, for it is the state acting; and whether it is represented by the same attorney throughout the case, or by different ones in the same office, the law regarding amendments is the same. The motion in arrest of judgment is based upon the information as it was before the amend-

ments were made. No claim is made that it is insufficient as amended.

Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions. Let sentence be pronounced and execution done.

DAVIS v. STREETER.

(Supreme Court of Vermont. Chittenden.
Feb. 25, 1903.)

ASSUMPSIT—COMMON COUNTS—SPECIAL CONTRACT—ABANDONMENT—EVIDENCE—COMMENT OF COUNSEL—EXCEPTION.

1. Defendant cannot except to hearsay testimony, brought out by himself on cross-examination of a witness for plaintiff, the court having promptly declared it to be inadmissible.

2. Comment by plaintiff's attorney, during his cross-examination of defendant, "You are pretty willing to swear to anything," while irregular and improper, was peculiarly within the province of the trial court to deal with, especially where the testimony of plaintiff and defendant concerning matters about which both must have known was absolutely irreconcilable, and was not reversible error.

3. In an action of assumpsit on the common counts, where a verdict has been returned for plaintiff, defendant cannot obtain a judgment non obstante on the ground that the plaintiff's claim was under a special contract not declared on.

4. Where plaintiff's evidence tended to show that she rendered service for defendant in keeping house for him, under a special contract on his part to take care of her and her children, and to marry her, which contract defendant forced her to abandon by ill treatment and refusal to allow one of her children in the house, it tended to support an action on a quantum meruit for work performed for defendant at his request.

5. Evidence tending to show that defendant forced plaintiff to abandon a special contract by ill treatment tended to excuse plaintiff from demanding performance thereunder before instituting an action on a quantum meruit for services performed under such special contract.

Exceptions from Chittenden county court; Start, Judge.

Assumpsit by Louise Davis against Albert Streeter. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

M. G. Leary and V. A. Bullard, for plaintiff. L. F. Wilbur and Cushman & Sherman, for defendant.

HASELTON, J. This was an action of general assumpsit. The plaintiff was a widow with two children, and the defendant was a single man, and owned a farm in Bolton, upon which he lived. A transcript of the entire case was made a part of the exceptions for the purpose of showing the claims of the parties and the tendency of the evidence. The plaintiff claimed, and there was evidence tending to show, that at some time in the fall of 1891 she went to work for the defendant at his house under an agreement

with the defendant to the effect that, if she would do so, and live and work at his house, and help about paying for the farm, he would will or deed her a part of the farm, and board her children and give them a home, and would marry her; that from a time in the fall of 1891 until May, 1901, she was at the defendant's house, working faithfully for him, except during several short intervals, when she was away from his house on account of his ill treatment of herself and her children; that after each of these intervals she returned to the defendant's service upon his persuasion; that her services to the defendant were performed in reliance upon the agreement referred to above; but that about May 22, 1901, by reason of the defendant's ill treatment of her and his refusal to support or have in his house one of said minor children, and his refusal to permit her to carry out the contract on her part or to remain upon his premises, she abandoned the defendant's house and employment, and never returned. In short, the plaintiff claimed, and there was evidence tending to show, that the defendant compelled the plaintiff to abandon such contract. The defendant's testimony tended to show that the plaintiff did not work for him under any such agreement as the plaintiff claimed to have existed; but his claim was, and the testimony on his part tended to show, that the plaintiff worked for him during the time to which her claim for recovery related, or during the same time substantially, under an agreement by which he was to pay her \$1 a week, and board her children and give them a home; that he had fulfilled the contract on his part, settling with her from time to time, and making a final settlement; that he did not in any way abuse her or her children, and that she left his service because she chose to leave it.

The plaintiff called as a witness one May Gokey, who stated, on cross-examination by the defendant, that the defendant on one occasion kicked the plaintiff, and dragged her out of his house. The record then proceeds: "Q. What Streeter told you this? A. Archie Streeter. A cousin to Albert, as far as I know. By the Court: This testimony is not admissible." To this testimony the defendant excepted. The exception, however, cannot be sustained, the defendant himself having brought out this hearsay evidence, and its inadmissibility having been promptly declared by the court. In the course of the cross-examination of the defendant by the plaintiff's counsel the cross-examining counsel said to the witness, "You are pretty willing to swear to anything." The defendant objected to what was so said, and asked to have it spread upon the record, and to be allowed an exception. The request was granted, and the exception allowed. The plaintiff's counsel then said, "Spread it upon the record." To this remark the defendant asked for an exception, which was allowed. A review of the case shows clearly that the

remark, "You are pretty willing to swear to anything," was a comment upon the testimony which the defendant had given, and could not have been understood as a statement or suggestion of matter foreign to the evidence. Yet the remark, not being made in argument, but during the introduction of evidence, was irregular and improper. The irregularity and impropriety were, however, particularly for the trial court to judge of and deal with, in view not only of what was said, but also of the whole previous course of the trial, and of the manner of both the witness and the examiner. The testimony of the plaintiff and that of the defendant concerning matters about which both must have known were so irreconcilable that in the regular course of argument to the jury counsel for either party would have been warranted in claiming that the other party had been testifying in disregard of the truth. *State v. Warner*, 69 Vt. 30, 37 Atl. 246. It cannot reasonably be conceived by this court that, after this case had been duly argued and submitted to the jury, the deliberations of that body were influenced by either of the remarks to which exception was taken. They constituted an incident of the trial which should have been avoided, but there was not reversible error in connection therewith.

The various aspects of the case, as presented by the evidence, were submitted to the jury in a charge to which no exceptions were taken, and the jury returned a verdict for the plaintiff. After the verdict was returned, the defendant moved for judgment in his favor non obstante veredicto on the ground that the entire claim of the plaintiff for service was under special contract, or contracts not declared upon. This motion was overruled, and the defendant excepted. In any view of the case, the motion was properly overruled. In this jurisdiction a judgment non obstante will not be entered in favor of the defendant; at least not where the issues are as they were in this case. *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956; *French v. Steele*, 14 Vt. 479; *Stoughton v. Mott*, 15 Vt. 162. In *Hackett v. Hewitt*, 57 Vt. 442, 52 Am. Rep. 132, judgment for the defendant was rendered on what was called a "motion for judgment notwithstanding the verdict," but, as is pointed out in *Trow v. Thomas*, above cited, the motion on which judgment was rendered in the *Hackett Case* was in reality a motion in arrest of judgment on the ground that it appeared by the writ and declaration that the plaintiff had no cause of action. What was said in this regard in *Gage v. Barnes*, 11 Vt. 195, was outside of the question under consideration, and the pleadings in that case were entirely different than those in the case at bar. However, at the beginning of the plaintiff's testimony evidence was admitted under objection and exception which

fairly presents the question whether there was any evidence on the part of the plaintiff tending to support a recovery under the common counts. Upon consideration of this question, it is held that the evidence hereinbefore referred to tending to show that the plaintiff rendered services to the defendant under a special contract, which the defendant forced her to abandon, was evidence tending to support a quantum meruit recovery under the common counts for work, labor, care, and diligence of the plaintiff done and performed about the business of the defendant, and for the defendant, and at his request. *Stone v. Stone*, 43 Vt. 180; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162; *Derby v. Johnson*, 21 Vt. 17; *Matlocks v. Lyman*, 16 Vt. 113; *Chamberlin v. Scott*, 33 Vt. 80. In so far as the evidence had a tendency to show that the defendant compelled the plaintiff to abandon further performance on her part under the special contract, it tended to excuse the plaintiff from demanding performance thereunder on the part of the defendant before she instituted this action. The cases cited by the defendant as inconsistent with the view here taken are readily distinguishable. The cases so cited are *Myrick v. Slason*, 19 Vt. 121, *Camp v. Barker*, 21 Vt. 469, and *Curtis v. Smith*, 48 Vt. 116.

The trial court rendered judgment for the plaintiff, and that judgment is affirmed.

FAIRBANK et al. v. TOWN OF ROCKINGHAM.

(Supreme Court of Vermont. Windham.
Feb. 25, 1903.)

HIGHWAYS—CHANGE OF GRADE—ABUTTING PROPERTY—DAMAGES.

1. Under V. S. 3357, 3358, relative to the grading of highways, and providing that the selectmen may order the lowering or raising of the roadbed more than three feet, and that, if they are of opinion that owners of abutting property will sustain damages thereby, they shall determine the amount thereof, etc., an owner of property abutting on the road, the grading of which has been altered more than three feet, is entitled to compensation only for the injury caused by the change in excess of three feet.

Appeal in chancery, Windham county; Tyler, Chancellor.

Bill by C. C. Fairbank and others against the town of Rockingham. From the decree, the orator C. C. Fairbank appeals. Affirmed.

Argued before MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

H. D. Ryder and Clarke C. Flitts, for orator. C. H. Williams and Bolles & Bolles, for defendant.

HASELTON, J. This case has once before been in this court, and the jurisdiction of the court of chancery, arising from special facts, was then determined. See this case, 73 Vt.

124, 50 Atl. 802. The only question now before the court is as to the construction of the phrase "such alteration," as used in V. S. 3358, relating to the grading of highways. That section and the preceding one read as follows:

"Sec. 3357. A selectman or road commissioner shall not alter a highway by cutting down or raising the road-bed in front of a dwelling-house or other building standing upon the line of said highway more than three feet, without first giving notice to the owners thereof, of a time when the selectmen will examine the premises, hear them upon the question of making such alteration and damages by reason of such alteration, at which time the selectmen shall attend and hear such owners, if they desire to be heard.

"Sec. 3358. If the selectmen are of opinion that the public good, or the necessity or convenience of individuals requires that such road-bed be altered by lowering or raising the same more than three feet, they may order such alteration to be made, and if they are of opinion that such owners will sustain damage by reason of such alteration they shall determine and award the amount thereof to the owners respectively, taking into account, by way of offset thereto, such special benefit, if any, to such owners as shall accrue to them by reason of such alteration."

It may be observed that an alteration of a highway implies, as a general rule, a change in the course or width of the highway. A mere change in the grade of the roadbed is not ordinarily regarded as an alteration. *Harrison v. Milwaukee*, 51 Wis. 645, 8 N. W. 731; *Bigelow v. Worcester*, 169 Mass. 390, 48 N. E. 1; *Callender v. Marsh*, 1 Pick. 415. This rule seems to have been recognized in this state in *Felch v. Gilman*, 22 Vt. 38, and in *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84. In 1881 the case of *Penniman v. Town of St. Johnsbury*, 54 Vt. 306, was before this court. The trustees of the village of St. Johnsbury had, to the extent of about three feet and six inches, raised the grade of a highway opposite Penniman's house, and Penniman petitioned the county court to appoint commissioners to appraise damages. The case was, however, disposed of on grounds which did not touch the question whether this change of grade constituted an alteration of the highway. On this point the court say: "It is unnecessary to decide whether such a change in the grade as was made would entitle the landowner to additional compensation or not. If such a change would be regarded as an alteration, there was no such alteration made by the selectmen as gives the petitioner the right to demand the appointment of commissioners." Thereafter, in 1884, the statute in question was enacted; and it is evident that, so far as concerns the grade of a highway opposite a building standing thereon, a change of not more than three feet is regarded by the statute as in the nature of ordinary high-

way repairs, and not as an alteration of the highway, and that, in the changing of such grade, an alteration, in the sense of the statute, begins when, and only when, the lowering or raising of the roadbed exceeds three feet. To hold otherwise would be to depart from familiar and salutary rules applicable to the construction of statutes. The statute in question, read in connection with the highway law as a whole, does not require or warrant a holding to the effect that where the roadbed of a highway opposite a building is raised or lowered three feet, and no more, an abutting owner is entitled to no compensation, and that where the grade of the roadbed is changed, say, three feet and one inch, an abutting owner is entitled to compensation for damages resulting from the entire change of grade. Damages, in such circumstances, resulting from a change of grade to the extent of three feet, are to be treated as having been taken into consideration in fixing the compensation allowed to abutting owners upon the original laying out of the highway. A change of grade to the extent of three feet, made for the improvement of a highway, is considered to be made in the exercise of a public right already acquired and paid for.

Decree affirmed and cause remanded.

TERRILL v. TILLISON.

(Supreme Court of Vermont. Chittenden.
Feb. 25, 1903.)

NOTES — CONSIDERATION — FORGED BOND — GOOD FAITH OF PAYEE — DECLARATION OF AGENT — RES GESTE — APPEAL — RECORD — GROUNDS OF OBJECTION — INSTRUCTIONS.

1. If defendant supposed when he executed the note in suit that it was in liquidation of his liability on a bond signed by him, but in fact his name had been cut off the bond and attached to another, about which he knew nothing, and the note was taken by the plaintiff in liquidation of defendant's liability on such forged bond, there was no consideration for the note.

2. Declarations by plaintiff's son, whom plaintiff sent to procure defendant's signature to a note, that the note was to discharge a liability on a bond which defendant had actually signed, when in fact his name had been cut off such bond and attached to a fictitious bond, of which he knew nothing, and the note was given in settlement of his pretended liability on such fraudulent bond, were properly admitted in evidence as part of the *res gestæ*.

3. Where the record does not disclose the grounds on which a motion for a directed verdict was based, exceptions to the overruling of the motion will not be considered in the Supreme Court.

4. The fact that the obligees of a forged bond accepted it in good faith, and incurred a liability in relying thereon, will not operate to render the obligors liable.

5. It was not error to refuse to instruct the jury that the burden of proving a change in a bond was on the defendant; there being no evidence that the bond had been changed, but the evidence tending to show that it was forged.

6. Where one alternative of a requested instruction is bad, the whole may be refused.

Exceptions from Chittenden county court; Start, Judge.

Assumpsit by L. F. Terrill against F. P. Tillson. Judgment for defendant, and plaintiff brings exceptions. Affirmed.

Argued before TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

L. F. Wilbur, for plaintiff. V. A. Bulard and Ellhu B. Taft, for defendant.

WATSON, J. The execution of the note upon which the plaintiff seeks to recover was admitted by the defendant, but he claimed in defense that the note was procured by fraud and was without consideration. In support of this claim, and under exception by the plaintiff, the defendant was permitted to show that in the spring of 1897 the plaintiff, T. S. Whipple, and G. A. Terrill signed or indorsed notes for one Geo. E. Terrill, a son of the plaintiff, to the Howard National Bank of Burlington, to the amount of \$2,000, which they subsequently, and before the execution of the note in question, were obliged to pay; that, before they would so sign or indorse any paper for Geo. E., they required him to secure or indemnify them for so doing, whereupon Geo. E. delivered to them a bond, purporting to be signed by the defendant and five other obligors, for \$6,000, payable to the plaintiff, Whipple, and G. A. Terrill, conditioned that if the notes and papers which they were to indorse for the said Geo. E., not exceeding \$6,000, should be paid, then the obligation should be void, otherwise in force, and stating therein that it was understood and agreed that none of the signers of the bond should be held in an amount greater than \$100; that the body of the bond did not contain the names of any obligors, but that it had the names of what purported to be six signers at the bottom, and among them was the name of the defendant. The defendant's evidence further tended to show that neither the defendant nor any of the other of said apparent obligors ever signed said bond, but that their names had been cut off a bond running to said bank for \$4,000, which they had in fact signed for the benefit of the said Geo. E., and the same had been pasted to the bond first above mentioned; that after the plaintiff, Whipple, and G. A. Terrill had paid the paper which they had so signed to the bank, the plaintiff, seeking to get a settlement of the defendant's supposed liability on the bond for \$6,000, wrote the note in question, and gave it to Geo. E., telling him to get the defendant to sign it, but gave him no other instructions, and that when the defendant gave the note he was informed by Geo. E. that it was to discharge his liability on the said bond running to the bank, and he so supposed, when in fact it was to discharge his liability on the said bond for \$6,000. This evidence, if true, showed that the only consideration for the note was the defendant's liability on a bond

which was never signed by him, nor by any of the obligors whose names were attached thereto, but that their names were cut off another bond which had been signed by them, and pasted to the paper on which was written the body of this bond, without their knowledge or consent. In these circumstances, thus attaching their names thereto was a forgery, in law; the instrument was void; it could afford no consideration for the note in suit; and the evidence was properly received. If this bond is a forgery, it was a fraud upon the defendant thus to procure from him the note in payment of any liability thereunder. The plaintiff made Geo. E. his agent to get the defendant to sign the note, and it was within the scope of his agency, in so doing, to tell the defendant what the note was for. The plaintiff could not, in reason, suppose that the defendant would sign it without such information. The declarations and representations made by Geo. E. to the defendant in that behalf to induce him to sign were therefore within the scope of the agency, constituted a part of the *res gestæ*, and were properly received in evidence. *Kingsley v. Fitts*, 51 Vt. 414; *Mason v. Gray*, 36 Vt. 308; *Limerick Bank v. Adams*, 70 Vt. 132, 40 Atl. 166.

At the close of the evidence the plaintiff moved for a verdict, and to the overruling of the motion the plaintiff excepted. He also requested the court to instruct the jury to render their verdict for the plaintiff, and excepted to the court's failure so to do. This request is but a repetition of the motion—one asked for a verdict at the close of the evidence, and the other at the close of the argument. The record does not disclose the grounds upon which these motions were based, and the exceptions are therefore not considered. *German v. Bennington R. R. Co.*, 71 Vt. 70, 42 Atl. 972.

The third and fourth requests are based upon the contention that, even though the bond be a forgery, if such forgery was without the knowledge or procurement of the plaintiff, and if the plaintiff, Whipple, and G. A. Terrill took it in good faith, and, relying upon it, signed the notes to the bank, and have since paid them, and the note in suit was given by the defendant and received by the plaintiff in good faith in settlement of the defendant's liability on the bond, then the plaintiff was entitled to recover the amount of the note. But notwithstanding these parties thus acted in good faith, if the bond was originally a forgery, it remained so, and afforded no consideration for the note.

The fifth request was to instruct the jury that Geo. E. Terrill was the agent of the signers of the bond in procuring and delivering it to the plaintiff; and the sixth, that the burden of proving a change in the bond or of establishing fraud was on the defendant. There was no evidence tending to show that Geo. E. was acting as the agent of the signers of the bond, and therefore the fifth

request was properly refused. And upon the evidence in the case the bond was either a genuine, valid bond, or it was a forgery. There was no evidence on either side that it had ever been changed. One alternative of the request being bad, the whole request could be disregarded. *Boyden, Adm'r, v. Fitchburg R. R. Co.*, 72 Vt. 89, 47 Atl. 409. Judgment affirmed.

BURTON v. PROVOST et al.

(Supreme Court of Vermont. Bennington. Feb. 25, 1903.)

WILLS—CONSTRUCTION—"REVERSION"—VESTED REMAINDER.

1. Where a testator devised his estate to his wife for life, and at her death the "reversionary interest * * * to belong to and be divided equally among" his daughters and their heirs, the interest in the estate devised to the daughters is a vested remainder.

Appeal in chancery, Bennington county; Munson, Chancellor.

Bill by Mary Gerrans Burton against John M. Provost and others. From a decree for orator, defendants appeal. Affirmed.

Argued before TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

William R. Daley, for appellants. Batchelder & Bates, for appellee.

HASELTON, J. Elias B. Burton, late of Manchester, died testate, leaving surviving him a widow and three daughters, Agnes, Ella, and Fanny; two of whom were married women with children, the third being a widow with no children. The only question in this case is as to the construction of a clause in the will of Elias B. Burton. The fifth and sixth clauses in said will read as follows: "I also will, devise and bequeath to her [his wife] the use and occupancy during her natural life, of the house, buildings and premises belonging to me and occupied by me as a homestead, situated in the village of Manchester, and in the case of the destruction by fire of any of the buildings or property any insurance that may be effected upon said property shall belong and be paid to my said wife, Mary G., for her use and benefit. I will and devise all my money claims not hereinbefore referred to, meaning all notes, mortgages, debentures, bank stock, evidences of indebtedness of every kind and choses in action, I may have at my death, should be held by my executors in trust to keep the same secure and remunerative, and to pay the interest and income arising therefrom to my said wife, Mary Gerrans, during her natural life for her own use and benefit, and at her death the principal remaining of said trust, as well as the reversionary interest in said homestead and premises, to belong to and be divided equally among my said three daughters and their heirs." The precise question raised is whether the interest in the homestead and premises devised to

the daughters is a vested or a contingent remainder. Under the authorities in this state it is clear that the remainder vested in the daughters upon the death of the testator, the enjoyment of the vested estate being postponed. In *re Tucker's Will*, 63 Vt. 104, 21 Atl. 272, 25 Am. St. Rep. 743; *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293, and cases there cited. The rule never to be lost sight of in determining whether a devised estate is vested or contingent is well stated in each of the above-named cases. "No estate will be held contingent unless very decided terms are used in the will, or it is necessary to so hold in order to carry out the other provisions or implications of the will." In *re Tucker's Will*. "Unless the language of the testator, when applied to the circumstances of the case, clearly indicates a contrary intention, the law favors the vesting of remainders on the death of the testators, when the will becomes operative. Such is presumed to be the testator's intention, unless the contrary appears." *Jones v. Knappen*. It is impossible to reconcile all the relevant decisions in all jurisdictions, but the conclusion here reached is in accordance with the general trend of the reported cases. For a very full and satisfactory review of American cases on the question under consideration reference is made to a note to *Goebell v. Wolff* (N. Y.) 10 Am. St. Rep. 464 (s. c. 21 N. E. 388). The clause relating to the remainder, called in the will the "reversionary interest," is of the same effect as though it read: "I give one-third of the remainder to my daughter Agnes and her heirs, one-third to my daughter Ella and her heirs, and one-third to my daughter Fanny and her heirs." Any apparent obscurity is obviously due to an effort towards conciseness of expression. Decree affirmed, and cause remanded.

JANGRAW v. MEE.

(Supreme Court of Vermont. Washington. Feb. 25, 1903.)

ADVERSE POSSESSION—NOTICE—QUESTION FOR JURY—MOTION FOR NEW TRIAL.

1. It is unnecessary for the one occupying land adversely to give notice of his claim to the owner in words, but, if the occupancy and use are exclusive, open, and notorious, and of such a character as to indicate to the owner that it is exercised as matter of right, it is sufficient.

2. It was for the jury to determine whether defendant's occupancy of land claimed by plaintiff was of such a character as to indicate to plaintiff that defendant was claiming it as matter of right, there being evidence tending to establish such fact.

3. A motion for new trial on the ground that the verdict is against the weight of the evidence is addressed to the discretion of the court, and its action is conclusive.

Exceptions from Washington county court: Start, Judge.

¶ 1. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 129, 131.

Ejectment by Oughtney Jangraw against Mary Mee. Plaintiff's motion to set aside a verdict for defendant was overruled, and plaintiff brings exceptions. Affirmed.

Argued before TYLER, MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

George W. Wing and John G. Wing, for plaintiff. T. R. Gordon and F. L. Laird, for defendant.

WATSON, J. This action was tried by jury, resulting in a verdict for the defendant. Before judgment on verdict, the plaintiff moved to set aside the verdict on the grounds: (1) That it was against the weight of evidence, contrary thereto, and not in accordance therewith; (2) that the northeasterly line of the plaintiff—being the line in dispute—was conceded to start from a certain cedar post marking the westerly corner of the defendant's land; and (3) that the evidence in the case had a tendency to show that the disputed premises had been used in common by the parties, and that the defendant's occupation had been by the plaintiff's permission, and not openly, notoriously, and exclusively adverse to him under a claim of right. The only question before us is on exception to the overruling of this motion. The defense was placed upon the ground of title in the defendant, both by record and by prescription. The plaintiff claimed, and the defendant conceded, that the northeasterly line of the plaintiff's lot—the line in dispute—started from a certain cedar post marking the westerly corner of the defendant's land. The defendant's evidence tended to show that from the year 1875 she and her husband owned and occupied the premises now owned by her adjoining the plaintiff's land until the husband's death, about 10 years ago, and that since then she has been the owner thereof, and has occupied them in person or by her tenants; that when the defendant and her husband bought the place in 1875 the line between their land and the land now owned by the plaintiff was indicated on Loomis street by the cedar post, and that there was also a "line board" on the barn; and that in 1879, and as late as 1887 and 1888, a common board fence was there on this line, or portions of it. It is to this line thus indicated that the defendant claims to own. Her evidence tended to show occupancy of the disputed premises and to this line by herself and husband until his death, and by herself or her tenants since; also uninterrupted, exclusive, open, notorious, possession and acts of ownership for more than 15 years, exercised by them; and that the plaintiff never made any objections thereto, nor in acts or words made any claim of right in himself until about four years ago, since which time both the plaintiff and the defendant have claimed to own them, each endeavoring to assert his and her rights therein, which have been constantly disputed and

resisted by the other. It is said by the plaintiff that no notice of any kind of the defendant's claim was given to him, and that the defendant does not claim that she ever said anything to him, or made any claim to the premises in question; also that the acts of the defendant with reference to the disputed premises are consistent with the claim of the plaintiff that the defendant's use of the same was by permission of the plaintiff, and not hostile, adverse, and exclusive. It was not necessary for the defendant to show that she gave the plaintiff notice of her claim in words. It was sufficient if her occupancy and use were exclusive, open, and notorious, and of such a character as would indicate to the plaintiff that she was exercising it as a matter of right. The evidence tended so to show, and it was for the jury to determine. *Willey v. Hunter*, 57 Vt. 479; *Plimpton v. Converse*, 44 Vt. 158; *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695. The only question, then, being whether the verdict was against the weight of evidence, the motion was addressed to the discretion of the trial court, and its action thereon is conclusive. *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77.

Judgment affirmed.

ASELTINE v. PERRY.

(Supreme Court of Vermont. Franklin. Feb. 25, 1903.)

ASSUMPSIT—COMMON COUNTS—RIGHT OF RECOVERY—LIMITATION BY SPECIFICATION.

1. A life insurance agent agreed with a policy holder to pay the company the amount of the first premium, and take the policy holder's notes therefor. After the maturity of one note, the agent sued the policy holder in assumpsit; declaring on the common counts only, and specifying that he sought to recover the premium as such. He introduced the notes in evidence to sustain the specification, and disclaimed any right to recover on the notes. Held that, although the specification was no part of the pleadings, nevertheless plaintiff's right to recovery was limited thereby, and judgment was properly rendered for defendant, though plaintiff, on proper pleadings, could have recovered on the matured note.

Exceptions from Franklin county court; Munson, Judge.

Assumpsit by A. M. Aseltine against William Perry. From a judgment for defendant on a referee's report, the plaintiff brings exceptions. Affirmed.

Argued before TYLER, START, WATSON, and HASELTON, JJ.

Elmer Johnson, for plaintiff. Emmet McFeeters, for defendant.

HASELTON, J. The plaintiff was a life insurance agent. The defendant, through the plaintiff's agency, made application for insurance on his life; and the plaintiff's principal, in accordance with said application, issued to the defendant a policy of life insurance, and

delivered the same to the plaintiff for the defendant. At the time of said application the defendant executed and delivered to the plaintiff two notes, the consideration for which was an agreement that the agent should pay the company, for the insured, the amount of the first premium, which was \$26.20. This the plaintiff did, and held the insurance policy and the notes. In these circumstances, the contract of insurance between the company and the defendant was a complete one, and the notes were valid. *Porter v. Life Insurance Co.*, 70 Vt. 504, 41 Atl. 970. After the maturity of the first note, but before the maturity of the second, the agent brought suit against the defendant in assumpsit, declaring on the common counts only. By his specification he sought to recover the premium as such. He introduced the notes in evidence, but only for the purpose of sustaining his specification. On the trial, which was had before a referee, the plaintiff disclaimed any right to recover upon the above-mentioned notes, but claimed to recover in accordance with his specification only. The plaintiff's claim and specification being what they were, the court properly rendered judgment for the defendant on the referee's report. The case is one in which the plaintiff voluntarily limited his right of recovery by his specification and the position taken by him on trial. *Johnson v. Cate*, 75 Vt. —, 53 Atl. 329. While a specification is no part of the declaration, in respect to subsequent pleadings, it nevertheless circumscribes the scope of the evidence and the plaintiff's right of recovery. *Bank v. Lyman*, 20 Vt. 666, Fed. Cas. No. 924; *Lapham v. Briggs*, 27 Vt. 27. It may be amended as the case develops, and, though not amended in terms, it may be treated as having been amended, if the course of the trial has been such as to permit it to be so treated. *Greenwood v. Smith*, 45 Vt. 37; *Bates v. Quinn*, 58 Vt. 49. Here the specification was not expressly amended, and the claim of the plaintiff and the course of the trial were such that it cannot be treated as having been amended by implication. It is obvious from the record that the plaintiff would have had judgment below for the amount of the matured note, but for the erroneous position which he took on trial. His error cannot be attributed to the court.

Judgment affirmed.

LYNDON SAV. BANK v. INTERNATIONAL CO. et al.

(Supreme Court of Vermont. Caledonia. Feb. 25, 1903.)

ACTION ON NOTES—PLEADING—CORPORATIONS—BY LAWS—INDORSEMENT—EVIDENCE—TRIAL—QUESTION FOR JURY.

1. Under rule 13, providing that in an action on a note, where the defendant intends to deny the execution of the instrument, he must file a written notice of such intent, evidence that par-

ties whose signatures appear upon a note, and who were sued as co-makers, did not sign it as such, is admissible, without notice of intention to dispute the execution of the instrument, since such evidence is merely an explanation of the capacity in which the parties signed.

2. A by-law of a corporation requiring all notes of the corporation to be countersigned by the treasurer and approved by two members of the executive committee cannot affect the validity of a note executed by the corporation without the approval of the two members of the executive committee, where the payee had no knowledge of the by-law.

3. Where, after maturity of a note made by a corporation, an officer of the corporation indorsed it, and the evidence was conflicting as to the circumstances and purpose of the indorsement, the question as to what was the understanding of the parties at the time the indorsement was made was for the jury.

4. Where, after the execution of a note, a third person, not before a party thereto, signs his name upon the back of it in blank, he is prima facie a co-maker, but the real obligation assumed by him may be shown by parol.

Exceptions from Caledonia county court; Munson, Judge.

Special assumpsit by Lyndon Savings Bank against the International Company and others. From a judgment for defendants, plaintiff brings exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Cook & Norton and W. W. Miles, for plaintiff. Young & Young, for defendants.

TYLER, J. Special assumpsit, in which the International Company, G. H. Prouty, O. C. Miller, and H. E. Fulsom are declared against as joint makers of a promissory note for \$5,000, dated June 12, 1886, payable on demand, with interest semiannually. The note is signed by the defendant company, waiving "all right or claim to the statute of limitations." Across the end, upon its face, is written: "J. A. Prouty, O. C. Miller, Ex. Committee." On the back appears: "Waiving demand and notice. H. E. Fulsom. O. C. Miller. G. H. Prouty." The defendants severally pleaded the general issue, the statute of limitations, discharge and release; replication, similitur to first plea, estoppel to second, traverse of third; rejoinder, traverse of replication to second plea, similitur to replication to third plea. No notice was filed denying the execution of the note. The interest was indorsed to August 10, 1901. At the close of the evidence each party moved for a verdict upon the undisputed evidence in the case. A verdict was directed for the defendants, and the case comes here upon exceptions to that ruling.

Defendant Miller was, when the note was executed and when he indorsed it, a director, a member of the executive committee, and the manager of the International Company, which was a duly organized corporation. J. A. Prouty was a director in the company, its

¶ 4. See Bills and Notes, vol. 7, Cent. Dig. §§ 543-544, 1723, 17943.

president, and a member of its executive committee. He died before the suit was brought, and is not mentioned in the writ or declaration as a party to the note. Fulsom was then a director and the treasurer, and he was also a trustee in the plaintiff corporation. He pleaded his discharge in insolvency, and a nonsuit was entered as to him. G. H. Prouty became a director in the company July, 1890, and continued such until September, 1898. The plaintiff introduced the note in evidence, and claimed to hold said Miller as a joint original maker, both by reason of his name appearing upon the end of the note and upon its back. The defendants claimed that Miller's name was not placed upon the face of the note to bind him personally, but as a part of its execution, as required by article 9 of the by-laws of the company, and offered the by-law in evidence to show that fact, and to show that, upon the plaintiff's claim that Miller was a joint maker, the note was never executed by the company—in other words, if placing his name upon the end of the note made him personally liable, then the note was not approved by two members of the executive committee. There being no notice, under rule 13, that the defendants would deny the execution of the note, the plaintiff claimed that, upon the declaration and pleadings, the by-law was not admissible to show how or when the note was executed by Prouty and Miller. The by-law is as follows: "Art. 9. All notes of the corporation shall be signed by the president and countersigned by the treasurer and approved by at least two of the executive committee, and no contract to purchase to the amount of five thousand dollars or more shall be made by the manager without the approval of two or more of the executive committee, and all contracts made by the manager shall be reported to the executive committee once each month." Under the plaintiff's exception, Miller testified that he placed his name upon the face of the note to complete its execution, in compliance with the by-law. Upon this point, we hold that rule 13, which requires a written notice to be filed when the defendant intends to deny the execution of the instrument upon which an action is founded, does not apply to this case, for here the defendants did not deny any signature upon the note in suit, but did claim the right to show the capacity in which the persons signed the note, and their relation to it, for which purpose the by-law and testimony were properly admitted. *Bigelow & Hoagland v. Stilphen*, 35 Vt. 521. It appeared that the plaintiff had no notice of this by-law, unless from the facts that Fulsom was a trustee of the plaintiff corporation when he signed the note as treasurer of the International Company, and that he had previously signed another note for the company in like manner, and, as director of the plaintiff, had approved the note for the plain-

tiff, which discounted it, and owned it when the note in suit was executed.

1. On this point we hold that the defendant, having issued the note, duly signed by its president and treasurer, and having received the money upon it, cannot now repudiate it for the reason, if it existed, that the approval of the company's executive committee did not appear upon the note. This was a rule of the company, and could not affect the plaintiff, which parted with its money in reliance upon the validity of the note. The by-law was directory to the manager, and was for the obvious purpose of restraining him from borrowing money without the approval of the executive committee, and not to render the note invalid in the hands of a holder without notice, for value. But this discussion is unnecessary, for there is nothing in the case to indicate that J. A. Prouty and O. C. Miller wrote their names upon the face of the note for any other purpose than to comply with the by-law.

2. It appears that Fulsom indorsed the note before it was delivered; that in December, 1893, he became insolvent, and that the plaintiff employed one Harris, who was not connected with the bank, to go to Newport and obtain additional signers upon the note; and that Miller and G. H. Prouty wrote their names upon the back of it under that of Fulsom. Harris and the defendants differed in their account of the conversation that took place on that occasion, but, from what was said, from the fact that the plaintiff did not want the money upon the note, but wanted more signers, from the fact that the note was allowed to run, and from other attendant facts and circumstances, the jury might have inferred that it was mutually understood by Miller and Prouty, as officers of defendant company, and by Harris, acting for the bank, that, if Miller and Prouty would sign the note, the bank would forbear its collection, and allow it to run a reasonable time longer. What the understanding was, was a question of fact for the jury. *Ballard v. Burton*, 64 Vt. 337, 24 Atl. 769, 16 L. R. A. 664. What relation Miller and Prouty assumed to the note by placing their names upon it was a question of fact, and not of law. If they became joint makers, no demand was necessary, and this action was properly brought against them. If they were indorsers, it would not be held, as matter of law, that they waived demand and notice by placing their names under the name of Fulsom, who, when the note was executed, signed it as indorser, waiving demand and notice; and if there was an agreement or understanding between the parties that the time of payment should, in consideration of their signing the note, be forborne, there being no time of forbearance specified, it would mean, in law, a reasonable time. What constituted a reasonable time, in the circumstances, was a question of fact for the jury; and, as against Miller and Prouty, the

statute of limitations would begin to run at the expiration of such reasonable time. If they were guarantors, the proof did not support the declaration, and there was a variance, for a guaranty is not a primary obligation, but an undertaking to answer for another's liability, and in that case they were not properly joined in this action.

3. The defendants contend that, to create the relation of joint makers between the parties, the defendants must have signed the note before its delivery, and for a consideration common to all the signers. It is laid down by many authorities that one who indorses his name in blank upon a promissory note after its delivery is not liable as an original promisor, because he did not partake in the original consideration; that, to hold such a signer liable as maker, it must appear that he signed his name pursuant to a promise made at the time the note was given; otherwise, he may not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. It is held that where one thus indorsed a note pursuant to an agreement made with the payee before the note was made, though without the maker's knowledge, the act made him a joint promisor with the maker; it being considered as done at the time the note was made. *McCorney v. Stanley*, 8 Cush. 85; *Bank v. Willis*, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; *Hawkes v. Phillips*, 7 Gray, 284. It is the general rule, held by many courts of last resort and laid down in the text-books, that where a promissory note is indorsed in blank, after its delivery, by any other person than the payee, it is a new and independent contract between the indorser and the holder, upon a new consideration moving between them, and is a contract of guaranty. 2 Rand. Com. Paper, § 829; 1 Dan. Neg. Instr. § 715; Sto. on Prom. Notes, § 133 et seq.; *Goode v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Essex County v. Edmonds*, 12 Gray, 273, 71 Am. Dec. 758; *Howe v. Taggart*, 133 Mass. 284. The reasons for this rule are that the amount of the debt, the time of credit, and the names of the makers of the note are all agreed upon, the note is delivered, and the money passed, without reference to any other person becoming obligated for payment. Afterwards a third person indorses the note in blank. The courts that hold this rule say that he is not liable as a joint maker, because he had no part in the consideration, and the payee accepted the note without reliance upon him. But as was remarked by the court in *Bank of Bellows Falls v. Dorset Marble Co.*, 61 Vt. 106, 17 Atl. 42, it is unnecessary to examine the law in other jurisdictions, for we must be governed by our own decisions until there is occasion to reverse them. And it has generally been held by this court that one not before a party to the note, who signs his name upon the back of it in blank, is *prima facie* a maker, and assumes the same obligations as

if he wrote his name upon the face of the instrument. In *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 788, the rule was extended and emphasized, for it is there declared that it makes no difference that the signing is long after the making of the note, and while it is in circulation, for the reason, as stated by Judge Redfield, that if the signer consents to be thus bound, and induces others to take the note under that expectation, he will be estopped to deny that fact, and will be treated the same as if he had signed the note at its inception. It was, however, held in that case that, the indorsement being in blank, the real obligation intended to be assumed—whether that of maker, guarantor, or indorser—might be shown by parol evidence. In *Bank v. Dorset Marble Co.* this rule was recognized and reaffirmed. In this case the plaintiff's evidence tended to show this situation: Fulsom's name upon the note had become worthless, and the plaintiff wanted new signers, and, through its agent, applied to the defendants, apparently because they were officers of the company, and interested in its behalf. The defendants place their names upon the note for some purpose. Their signatures were evidence of some contract, and parol evidence was admissible to show what it was. By the original contract the plaintiff had taken the company's note, and loaned it money. By the defendants placing their names upon the note, that contract was to continue—the plaintiff to hold the note, and the company to keep the money. The plaintiff claims that the defendants took the place of Fulsom on the note, and that the contract was then to run on indefinitely, and that in this way the defendants became joint promisors with the original makers, and participated in the original consideration in the same manner they would have done if they had signed the note before its delivery. On the other hand, the defendants contend that their liability was that of guarantors. It cannot be held, as a matter of law, that the note taken by the bank, and its subsequent receipt of payments from the committee of the International Company, discharged that company. If the bank, in doing what it did in these respects, did not act in good faith towards Miller and Prouty, and the latter were prejudiced by those acts, then they had a defense, to the extent to which they were thereby damaged. Rob. Dig. 557, 8. If Miller and Prouty were sureties for the International Company, and the plaintiff discharged the company upon receipt of the dividend, without Miller and Prouty's consent, then they were discharged. The fact that Miller, as manager of the defendant company, knew of the vote of the bank, and paid dividends to it, did not estop him or Prouty from taking advantage of the discharge of the company, if it was discharged. The question was whether the bank acted in good faith towards Miller and Prouty, and, if not, whether the latter were

thereby damaged, and these were questions for the jury. It was not necessary for the plaintiff to show by direct evidence that the defendant company requested Miller and Prouty to sign the note. This might be inferred from the fact that they were officers of the company, and from other circumstances attending their placing their names upon the note.

Judgment reversed and cause remanded.

STAPLES v. CITY OF BRIDGEPORT et al.

(Supreme Court of Errors of Connecticut.

March 4, 1908.)

MUNICIPAL CORPORATIONS—POWERS—CONSTRUCTION OF COURTHOUSE—STATUTES—AUTHORIZATION—MANDATORY STATUTE—ORDINANCES—REVOCATION.

1. A city obtained from the General Assembly a resolution (May 24, 1899) that the common council be "empowered to issue bonds for the purchase of lands and for the erection of a building for the city, * * * which building shall be erected under the control of a committee" consisting of certain persons. *Held*, that the resolution was merely permissive as to the erection of the building, etc., and not mandatory.

2. Under resolutions of the General Assembly May 24, 1899, and May 21, 1901, authorizing a city to issue bonds and erect a new city building, the work to be done under the supervision of a committee, after the council had voted to erect the building and issue the bonds, but before any bonds were issued, it might rescind the vote, subject only to the liability of paying whatever debts the committee might have contracted.

Appeal from superior court, Fairfield county; Edwin B. Gager, Judge.

Action by James Staples against the city of Bridgeport and others. From a judgment for plaintiff, defendants appeal. Reversed.

Thomas M. Cullinan and John Cullinan, for appellants. Robert E. De Forest and Jacob B. Klein, for appellee.

TORRANCE, C. J. The plaintiff, a taxpayer of Bridgeport, seeks to restrain the city and its officials and agents from making an appropriation and laying a tax to be expended in remodeling the city hall in said city, and to restrain a committee appointed by the common council to remodel said building from proceeding with said work. The material facts in the case are these: In 1899 and in 1901 the city, at its request, obtained from the General Assembly certain legislation, in the form of two resolutions—one approved May 23, 1899, and the other approved May 21, 1901. The resolution approved May 23, 1899, provides, in section 1, as follows: "That the common council of the city of Bridgeport be and it is hereby authorized and empowered, when in a legal meeting assembled, by a concurrent vote of a majority of the members of said body,

present and absent, subject to the approval or disapproval of the mayor of said city, as provided in the charter of said city, to issue under the corporate name and seal, and upon the credit of the city of Bridgeport, bonds or other certificates of debt, of such denomination as may be deemed for the best interests of the city, to an amount not exceeding in the whole the sum of three hundred thousand dollars, which bonds shall be denominated municipal building bonds, and the same or the avails thereof when sold as hereinafter authorized, shall be applied by vote of said common council to the purchase of land for, and the erection of a building for the departments, charities and police and the city court of Bridgeport, and for the removal of the present city hall belonging to said city, and the erection of a new city hall upon the plot of land, bounded by State, Broad, and Bank streets, where the present city hall now stands, and to perfect the title to such land if it shall be found necessary, which buildings shall be erected by and under the control and supervision of a committee consisting of the mayor, the city hall committee, appointed April 4th, 1898, and three other voters, taxpayers of said city, and not more than two of them to be from the same political party, to be appointed by the mayor, but no portion of said bonds or the avails thereof shall be used for any other purpose whatsoever." The other provisions in section 1, and the other sections of the resolution, have no particular bearing upon the questions in the case. The material parts of the other resolution read, in substance, as follows: That in addition to the bonds which the city was authorized to issue by the resolution approved May 23, 1899, it is authorized and empowered to issue bonds or other certificates of debt "to an amount not exceeding the sum of two hundred and fifty thousand dollars, which bonds shall be denominated municipal building bonds, and the same or the avails thereof, when sold as hereinafter authorized, shall be applied by the vote of said common council for the purposes set forth in said special law, and also for the furnishing of the buildings, and the completion of the grounds and approaches to said buildings, authorized to be constructed by said special law, and under the direction, control and supervision of the committee named in section one of the said special law as amended by section four of this resolution, but no portion of said bonds or the avails thereof shall be used for any other purpose whatsoever." Section 4 of this resolution amends section 1 of the first resolution by striking out the words "the mayor," and inserting in lieu thereof the words "Hugh Sterling"; also by striking out the words "and three other voters, taxpayers of said city, and not more than two of them to be from the same political party, to be appointed by the mayor," and inserting in lieu thereof the words

¶ 2. See Municipal Corporations, vol. 36, Cent. Dig. §§ 324, 325.

"and the three other persons, voters and taxpayers of said city appointed by the mayor June 5th, 1899." It also adds the words "and said committee shall also have the direction, control and supervision of the furnishing of said buildings, and the completion of the grounds and approaches to said buildings." The other parts of said resolution have no bearing upon the questions in the case. In June, 1899, and in October, 1901, the common council and mayor, acting under said resolutions, authorized the issue of the full amount of the bonds therein provided for, for the purposes therein named. Out of the bonds authorized by the resolution of the General Assembly approved May 23, 1899, \$125,000 have been issued by vote of the common council. The remainder have been printed, but not signed or issued, while the bonds authorized by the other legislative resolution have not even been printed. In November, 1901, a new common council was elected, and on the 25th of that month it passed certain resolutions, the substance of which may be stated as follows: (1) That no action shall be taken to remove the present city hall building, or to erect a new one; (2) that no part of the avails of the issue of bonds shall be used for the expense of such removal, or for the erection of a new city hall, nor "except for payment of legal obligations of the city arising from contracts already made and entered into by the committee" designated in the legislative resolutions, and bonds sufficient for that purpose were authorized "to be issued, signed and sold"; (3) that all previous action of the common council inconsistent with the above "is hereby repealed and rescinded"; (4) that the action of the common council in authorizing the issue of bonds under the second of the legislative resolutions is "repealed and rescinded"; (5) that the mayor be authorized to appoint a committee to remodel the present city hall, and adapt it to the needs of the city. The mayor appointed such a committee, and it was proceeding with the work assigned to it when it was stopped by the injunction issued in this case. The alterations in the present city hall, as proposed by the committee appointed by the mayor, will cost more than \$75,000, and the city intends to appropriate \$70,000 to pay for said work, and to lay a tax therefor.

Upon these facts, the controlling question is whether the provisions of the legislative resolutions relating to the city hall are mandatory, or merely permissive; whether they must be carried out, whether the city desires to do so or not, or whether it is left with the city to carry them out, or not, as it sees fit. If they are mandatory in this sense, the judgment of the court below should stand; otherwise not. We think the provisions are permissive, and not mandatory. Both resolutions were passed at the request of the city, and they concern matters in which the city was interested, and the state was not.

The city desired to obtain power to issue bonds for certain specific purposes, and the Legislature granted that power, with the limitations asked for. Under these circumstances, if the Legislature had intended to command the city to do the things authorized to be done, without regard to the subsequent action of the city, or had intended to command the committee to do those things without regard to the action of the city, we should expect to find that intent expressed in no uncertain language, but no such language appears in these resolutions. The resolutions are concerned mainly with the power to issue bonds, and the limitations and restrictions placed upon that power. The buildings are mentioned only incidentally, in describing the purposes for which alone the bonds may be issued and used. The power to issue bonds is granted in these words: "That the common council * * * be and it is hereby authorized and empowered" to issue bonds. This, clearly, is not a mandate, a command, to issue bonds. It is the grant of a power or privilege to do so, to be exercised, or not, as the city sees fit. The intent to compel the city to issue bonds against its will clearly cannot be gathered from this language. The only other language in the resolutions which is or can be relied upon to sustain the plaintiff's claim is the following: "which buildings shall be erected by and under the control and supervision" of the committee designated in the resolutions. Undoubtedly, this does provide that the committee shall have sole charge of the erection of the buildings; but does it also provide that they must be erected, and that the committee must erect them without reference to the action of the city? We think not. To say that the words in quotation marks, when read in connection with the context, embody a legislative mandate requiring the committee to remove the city hall and build a new one, in opposition to the action and wishes of the city and its inhabitants, is to put upon them a very strained construction, and one which they will not bear. The committee is in no sense a committee of the Legislature appointed to carry out some mandate of that body, without regard to the action or wishes of the city. It is, rather, a committee of the city, appointed by the Legislature at the request of the city, through whom, alone, the city could carry out the public improvements it was authorized by the resolutions to make if it saw fit. We think the language last above quoted means no more than this: That if, or provided, the city shall go forward with such public improvements, the work shall be done under the sole charge and supervision of this committee. If the city had never acted under these resolutions, we think it clear that the committee could have done nothing under them. The committee could not act until the city had first acted; but, the city having acted, the claim is made that it cannot sub-

sequently rescind its action. The precise question is whether, after the city has, in effect, voted to remove the city hall and build a new one, and to issue bonds therefor, it can, before substantially anything is done or any bonds issued under its vote, rescind that vote. We think it can. It is under no obligation to remove the city hall and build a new one, nor to issue bonds therefor; and, having voluntarily voted to do so, it may rescind that vote, at least before it has been substantially acted upon, subject only to the liability of paying out of the bonds it is authorized to issue whatever debts and obligations the committee may have lawfully contracted or incurred previous to such rescission. Upon the facts as they appear of record, we think the committee designated in the resolutions has no power at present to remove the city hall or to build a new one, nor will it possess such power until the city shall again decide to go forward with such work. Both parties, in their briefs, concede that, if the committee has no such power, the city might lawfully do what it has been enjoined from doing; and the judgment below is based upon the assumption that the committee has such power. As this assumption is not true, judgment upon the facts as they appear of record should have been in favor of the city.

There is error. The judgment is set aside, and the judgment of this court will be entered as of January 22, 1903. The other Judges concurred.

MARSH, MERWIN & LEMMON v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

LEASES—LIABILITY FOR RENT—CONDITION PRECEDENT—ESTOPPEL.

1. Recovery of rent cannot be had on a lease to a city providing that there should be no liability for rent thereon unless the city council should make an appropriation therefor, no appropriation having been made, though the city had power to make an appropriation, and morally ought to have done so, and though the city had power to bind itself to pay rent before an appropriation therefor.

2. Representations of the agents of a city, before the signing a lease to it, providing that it should not be liable for rent unless the city council should make an appropriation therefor, that the stipulation was merely a formal one, of no binding force, that the appropriation would certainly be made, that the city would pay the rent in any event, and that the city would not rely on the stipulation, do not estop the city to set up the defense of no appropriation, being wholly or largely the expression of matters of opinion and belief.

Appeal from superior court, Fairfield county; Robinson, Elmer, and Gager, Judges.

Action by Marsh, Merwin & Lemmon, a partnership, against the city of Bridgeport, on a written lease for rent. A demurrer to

the answer was overruled by Robinson, J., and a demurrer to the reply was sustained by Elmer, J., and thereupon judgment was rendered by Gager, J., for defendant. Plaintiffs appeal. Affirmed.

John C. Chamberlain, for appellants.
Thomas M. Cullinan, for appellee.

TORRANCE, C. J. The complaint in this case alleges, in substance, that the city of Bridgeport, on the 28th day of September, 1899, leased of the plaintiffs, for the term of three years thereafter, certain premises at an agreed rent, payable "on the 1st days of May in each of the years of 1900, 1901, and 1902"; that the city at once took possession of said premises, and has retained such possession ever since; that by the terms of said lease, on the 1st day of May, 1900, the sum of \$2,580 became due and payable to the plaintiffs as rent, and that the same has not been paid. The answer consists of three defenses, but may conveniently be considered as setting up only one. Considered in this way, the answer admits the making of the lease as alleged, but denies the allegations as to possession and as to liability for rent due, and then sets out the lease in full. The lease purports to be made in behalf of the city "by the committee on city hall of the common council of said city of Bridgeport, duly authorized at a meeting of said common council held on September 18, 1899." The lease contained the following provisions, among others: "It is known and understood by the party of the first part that no money has been appropriated by the board of apportionment and taxation, or by the common council of the city of Bridgeport, for the payment of the rent hereinbefore stipulated, and said party of the second part agrees that, if said board of apportionment and taxation or said common council shall hereafter make a specific appropriation to pay the rent herein provided for, said party of the second part will then pay for the rent hereinbefore stipulated; otherwise the said party of the first part hereby agrees, that neither the said city of Bridgeport, said common council, said committee on city hall, jointly, or any member thereof personally, nor their successors, heirs, executors, administrators or assigns, shall be held or deemed liable by the parties of the first part for said rent or any part thereof. And the said lessee hereby agrees to hire said premises for said term, and to pay the sum therefor as aforesaid, if appropriated as aforesaid." "It is further stipulated by and between the parties hereto, that if no appropriation is made by the board of apportionment and taxation of said city of Bridgeport, or by the common council of said city, before May 1st, 1900, for the payment of the rent provided herein to be paid, this lease shall on the first day of May, 1900, at the option of said lessor become void." The answer also counts upon certain provisions of the charter of the city, which it

is alleged in effect prohibited the city from paying out money, or contracting an indebtedness for any purpose, unless an appropriation or other provision under the charter had been made therefor; and then alleged that no such appropriation or provision for the payment of said rent, as was provided for in such lease, had been made. To this answer the plaintiff demurred, mainly, in substance, on the ground that it appeared therefrom that the lease was a valid lease, and that it was within the power of the city under the charter to provide for the payment of the rent, and that its failure to do so was no defense to this action. The court overruled this demurrer, and the plaintiff filed a reply. The reply admitted the truth of the matters contained in the answer, and then alleged, in substance: (1) That the lease was a valid one, and that provision for the payment of the rent claimed under it might and should have been made by the city; (2) that the stipulation that rent should not be paid unless an appropriation therefor should be made could not avail the city, as the performance of that condition was defeated solely by its own default and fraud; (3) that said lease was entered into by a committee having full power to bind the city by its acts and representations, "and before the signing of said lease said committee represented to the plaintiffs that said clause containing the stipulation that no rent should be paid unless an appropriation was made was a formal one only, and inserted in all contracts of the city, and that it was of no binding force and effect, and that said appropriation would certainly be made, and, if not so made, that said committee had full authority to hire said premises, and said rent would, in any event, be paid by said city, and that said city would not rely upon an attempt to enforce said clause in said contract." "Induced solely by said representations of said city, through its said agents, said plaintiffs signed said lease containing said clause. Said defendant is estopped by said representations from pleading said condition as a defense to said action." The city demurred to this reply, and the court sustained the demurrer. The errors assigned relate mainly to the action of the court in overruling the demurrer to the answer and in sustaining the demurrer to the reply.

This action is not one to recover for the use and occupation of the leased premises by the city. The right of the plaintiffs to recover is based solely upon the covenant to pay rent contained in the lease. Upon the pleadings it is clear that the covenant on the part of the city to pay rent was not an absolute, but a conditional, one. The city agrees to pay the rent, provided a specific appropriation therefor shall be made by a designated board; but otherwise not. Both parties to the lease in effect expressly agree, in writing in the lease, that, unless a certain described appropriation shall be made thereafter, no rent shall be due under the lease.

The making of an actual appropriation of the kind described is thus shown by the pleadings to be a condition precedent to the liability of the city for rent under the lease, and the pleadings admit that such an appropriation has never yet been made. Upon these admitted facts it is clear that the city is not liable for the rent here sought to be recovered, if it can avail itself of the written condition precedent. The plaintiffs, however, by reason of the matters set up in the reply and admitted by the demurrer thereto, claim that the city cannot avail itself of such condition. We think this is not so. That the city had the power to make, or cause to be made, an appropriation or other suitable provision for the payment of rent, and that morally it ought to have done so, is, in substance, one of the matters set up in the reply. Assuming, for argument's sake merely, that the city was in default for not making an appropriation, still it may, under the lease, avail itself of that default, because the plaintiffs have, in effect, agreed in the lease that it may do so. The condition is not that the city shall be liable for failing to make an appropriation, but for failing to pay rent after an appropriation has been made. It is not that the city shall be liable when an appropriation ought to have been made, but only when it has in fact been made. Both parties apparently believed that the city had no power to bind itself to pay rent unless and until an appropriation therefor was actually made by the board of apportionment, and they made their contract accordingly, and by that they are bound. Whether their belief was well or ill founded is of little consequence now.

The only other matter set up in the reply is that just before the lease was signed the agents of the city made the following representations to the plaintiffs respecting the stipulation that no rent should be paid unless the appropriation was made, to wit: (1) That the stipulation was a merely formal one, of no binding force; (2) that the appropriation would certainly be made; (3) that the city would pay the rent in any event; and (4) that the city would not rely upon said stipulation. If these statements are to be regarded as an attempt to establish, at the very inception of the lease, an oral contract in direct conflict with the terms of the writing, the demurrer to them was properly sustained. *Beard v. Boylan*, 59 Conn. 181, 22 Atl. 152; *Gulliver v. Fowler*, 64 Conn. 556, 567, 30 Atl. 852. On the other hand, we do not think these representations can be regarded as the basis of an estoppel. The first is clearly the expression of a mere opinion or belief concerning a matter of law, about which the plaintiffs had as much knowledge as the agents of the city, and on which the plaintiffs had no right to rely. Under such circumstances there can be no estoppel. *Danforth v. Adams*, 29 Conn. 107; *Canfield v. Gregory*, 66 Conn. 9, 17, 33 Atl. 536. The

other three representations are also largely the expression of matters of opinion and belief. They are not representations as to some existing state of facts, but promissory representations as to what the future action of the city would be. Even if we assume that the agents of the city had power to make them, we do not think these representations ought to be held to constitute the basis of an estoppel. *Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Allen v. Rundie*, 50 Conn. 9, 29, 47 Am. Rep. 599. The demurrer to the answer was properly overruled; that to the reply was properly sustained; and upon the pleadings judgment was properly rendered for the city.

There is no error. The other judges concurred.

ALDERMAN v. NEW DEPARTURE BELL CO.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

CONTRACTS—PROMISE TO SELL.

1. A writing, signed by defendant, reciting, "We agree to sell A. our steel turnings for the season 1901 for \$8 per ton, at factory," does not import consideration or a promise to purchase, without which it is a mere promise to sell, subject to withdrawal before acted on by a promise to buy.

Appeal from city court of New Haven; James Bishop, Judge.

Action by Samuel A. Alderman against the New Departure Bell Company to recover damages for a breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

Roger S. Newell, for appellant. Benjamin Slade, for appellee.

HAMERSLEY, J. The complaint alleges that on February 28, 1901, the defendant signed a written agreement, not under seal, in words and figures as follows: "We agree to sell S. A. Alderman our steel turnings for the season of 1901 for \$8 per gross ton, at factory." It does not allege delivery, except as delivery is implied in execution. Assuming that delivery is inferentially alleged, then the complaint alleges that the defendant signed and delivered to the plaintiff the writing described. The court finds this allegation true: "The defendant * * * signed and delivered to the plaintiff, and the plaintiff accepted, a writing offered in evidence;" being the one mentioned in the complaint. The complaint then alleges that on two occasions—first, in April; and, second, in May, 1901—the defendant had in its possession steel turnings, and the plaintiff, at the factory, tendered the price of these turnings, and demanded delivery, which was refused by the defendant, to the damage of the plaintiff. These demands are stated separately, under "first count" and "second count." It is evident that these refusals gave the plaintiff no cause

of action against the defendant unless there was a valid consideration for the promise stated in the writing, or the plaintiff agreed, on his part, to purchase the steel turnings at the price and place and within the time mentioned, before the promise to sell should be withdrawn. No consideration for the writing and no agreement on the part of the plaintiff are alleged. The mere production of the writing in evidence does not prove either a consideration or a promise to purchase. It does not appear from the findings of the court that any consideration was proved, nor that any promise on the part of the plaintiff to purchase was proved, unless proof must be inferred from the detail of evidential matters of doubtful import, or is established by proof of the mere signing, delivery, and acceptance of the writing. Upon this state of the pleadings and proof, the defendant, in argument, claimed, as a matter of law, and asked the court to rule, "that the writing set forth in the complaint * * * did not constitute a contract," but was a mere promise, without consideration, to sell, subject to withdrawal by the defendant at any time before the plaintiff had acted upon it by making a reciprocal promise to purchase, and urged that, applying this law to the evidence, it was clear that the offer to sell had been withdrawn before the plaintiff had acted upon it, and no contract of sale had been proved. The court unqualifiedly overruled this claim of law, refused to rule as requested, and rendered judgment that rests upon a conclusion by the court that a valid contract of sale had been proved. We think the patent error of the court in respect to the interpretation of the writing must have influenced, if it did not altogether control, its conclusion that a valid contract had been proved, and therefore vitiates the judgment based on this conclusion. For this reason, the judgment must be set aside.

The defendant also claims that the only legal conclusion from the subordinate facts as found by the court is that the plaintiff has failed to prove a valid contract of sale. If this were so, the judgment should be reversed, with instructions to the trial court to render judgment for the defendant. This might be a more satisfactory disposition of the case, but the claim of the defendant, while not without plausible support from the record, meets an insuperable difficulty in the peculiarities of the court's findings. In the memorandum filed, specially setting forth the facts on which the judgment is based, as well as in the finding for appeal, the statement of facts found is so interwoven with statements of evidence and of the mental processes of the court that the ascertainment of all the material facts actually found depends to some extent on doubtful inferences. No necessary legal conclusion from facts found by the court can be affirmed unless those facts are stated in the record with reasonable certainty.

There is error. The judgment of the city court is set aside, and the cause remanded for further proceedings according to law. The other judges concurred.

GANNON v. STATE.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

CONSPIRACY TO DEFRAUD—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. In a prosecution for conspiring to defraud G. out of part of the proceeds of a life policy procured by defendant to be issued on the life of G.'s son, it appeared that the son died of consumption within three months. Defendant and another thereupon produced unfounded claims against G., suggesting that the policy was fraudulently procured, and that he, as well as they, was liable to punishment, and obtained two-thirds of the insurance. Defendant, on cross-examination, was asked, to test his credibility, if a physician had not told him that the son had consumption, and answered, "No." In rebuttal, the physician testified that he did inform the son, in defendant's presence, of the nature of his illness. Defendant was convicted. The evidence that he knew of the son's illness was very conclusive. *Held*, that newly discovered evidence, wholly confined to additional evidence in contradiction of the physician's testimony, including the latter's own statement that it was defendant's brother, and not defendant, in whose presence the son was informed that he had consumption, was not ground for new trial.

2. The after recollection of a witness as to some fact omitted from his testimony, or incorrectly stated, is not ordinarily ground for a new trial.

Appeal from superior court, Fairfield county; Milton A. Shumway, Judge.

Michael Gannon was convicted of conspiracy to defraud. His petition for a new trial on the ground of newly discovered evidence was denied, and he appeals. Affirmed.

Stiles Judson, Jr., for appellant. Galen A. Carter, Asst. State's Atty., for the State.

HAMERSLEY, J. A court which has rendered final judgment in a cause tried before it may, upon reasonable ground being shown, grant a new trial in the exercise of that discretionary power, within the limits of law, over their own judgments, vested in courts. Gen. St. (Revision 1902) § 815. Upon an application for this purpose, process is issued citing the opposite party to appear and be heard. This, however, does not make the application an independent action. *Magill v. Lyman*, 6 Conn. 59; *Spear v. Coon*, 32 Conn. 292. The finality of a judgment does not preclude the court that rendered it from entertaining further proceedings in the same action when it is made apparent that injustice has been done. When, however, a judgment has been rendered upon the verdict of a jury, and that verdict is based upon evidence sufficient to support it, and no error in law has intervened in the trial, and no mistake in pleading has occurred, or other mistake or

accident to prevent the party from having a fair trial upon the merits, and the proceedings in the cause have been regular and lawful from its commencement to its close, any legal inference of injustice is excluded. The policy of the law treats it as final for all purposes, and forbids the court which rendered it from entertaining any further proceedings. It is possible that a losing party, by some mistake or misfortune, and without fault of his own, may have been unable to produce on the trial evidence now attainable, which, if produced and believed, would demonstrate the injustice of the judgment, and so a new trial may be granted for the discovery of new evidence of this character. The application is addressed to the discretion of the court (*State v. Brockhaus*, 72 Conn. 109, 111, 43 Atl. 850; *Hamlin v. State*, 48 Conn. 93), and must allege and set forth the evidence produced on the former trial and the newly discovered evidence, in order that the court may see whether injustice has probably been done, and whether the newly discovered evidence is likely to reverse the result. If the adverse party desires to controvert the accuracy of the statement of the former testimony or of the new testimony set forth, or to produce other testimony to be considered with that alleged, he may do so, and for this purpose no pleadings are essential. 1 *Swift's Digest*, 318. Or he may admit the accuracy of the statement of the testimony, both old and new, and for this purpose a demurrer is used. In either case, whether upon the testimony old and new—as found by the court after hearing witnesses—or upon such testimony as set forth in the application and admitted, the court decides in the exercise of a sound discretion whether a new trial should be granted or denied. *Parsons v. Platt*, 37 Conn. 563, 567. This discretion is a legal one; it is controlled by the well-established rules defining the requisites essential to granting a new trial. It may be abused by refusing a new trial where all essential requisites exist and the injustice of the judgment is apparent, and error may be affirmed where the trial court has erroneously held it had no power to exercise discretion. *Wildman v. Wildman*, 72 Conn. 262, 44 Atl. 224. But within these limits the power is discretionary, and its exercise in the denial of a new trial on the ground of newly discovered evidence cannot be reviewed upon proceedings in error. This principle is firmly settled by many decisions of this court, extending from its organization to the present time. *Kimball v. Cady*, Kirby, 41; *Granger v. Bissell*, 2 Day, 364; *Lewis v. Hawley*, 1 Conn. 49; *White v. Trinity Church*, 5 Conn. 187, 189; *Magill v. Lyman*, 6 Conn. 59; *Lester v. State*, 11 Conn. 415; *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Parsons v. Platt*, 37 Conn. 563; *Hamlin v. State*, 48 Conn. 93; *Hart v. Brainerd*, 68 Conn. 50, 52, 35 Atl. 776; *State v. Brockhaus*, 72 Conn. 109, 43 Atl. 850. In the present case the application sets out in

¶ 1 See Criminal Law, vol. 15, Cent. Dig. § 2309.

full the testimony on the former trial, and states the newly discovered testimony as it will be given by witnesses named. No question is made as to due diligence in discovery. The fact that the testimony detailed is the testimony given at the former trial, and that the witnesses named will testify as stated, is admitted by the demurrer. The court before which the first trial was had, upon the facts thus presented for its consideration, refused to grant a new trial. That action cannot be reviewed unless it appears that the court plainly abused its discretion, or did not act within the limits of its discretionary power. The substantial claim of the petitioner is that the denial is not an exercise of legal discretion, but is based on a misapprehension of the real question in issue and the relevancy of the newly discovered testimony to the controlling issue in the case. It is difficult to distinguish this claim from a mere objection to the result reached by the trial court in the exercise of its discretion. Assuming, without deciding, that the claim presents a reviewable question, we think that it is not well founded.

The case is this: The petitioner was prosecuted, with Carey and Hill, for a conspiracy to cheat and defraud John Griffin of \$1,700 of his money by means of certain fraudulent devices. The information alleged that this money belonged to Griffin as part of the proceeds of a check for \$2,500, payable to the order of Griffin, given by a life insurance company in payment of a policy for that amount on the life of Griffin's son, Michael P. Griffin, which had been procured by and through the defendants, and assigned by Michael P. to John. Fraudulent devices set forth consisted of acts and conduct of the defendants in preparation and arrangement for an interview between John Griffin and the three defendants at the Adams House in Bridgeport, and their acts and conduct at that interview, whereby Gannon and Carey obtained \$1,700 of the \$2,500 belonging to Griffin, and he was cheated and defrauded of the same. Among the acts specified were an assertion at this interview, by Gannon and Carey, of unfounded claims of each against Griffin for the payment of money, amounting to \$1,700, and an assertion that the policy was fraudulently obtained from the company, and that Griffin as well as the defendants was liable to imprisonment for the crime. Hill was acquitted, and Gannon and Carey were convicted of the conspiracy charged. Upon the trial it appeared by documentary and other evidence, undisputed by the defendants, that the policy was issued upon the application of Michael P. Griffin, and procured through Hill, an agent of the company, and by Carey, a soliciting agent, who assisted Michael P. Griffin in preparing his application, and that Gannon, a cousin of Griffin, who was then living at Gannon's home, advised Griffin as to the kind of policy he had better take out, and furnished him

with the money to pay the first premium necessary to secure the delivery of the policy. It was also undisputed that the check to Griffin's order was given, and was cashed, and the money was in the hands of Hill as the property of Griffin; that the interview at the Adams House was held; that Gannon and Carey asserted claims against John Griffin, amounting to \$1,700 and upwards, and, as the result of what there took place, carried away with them \$1,700 of said money. Griffin was an ignorant man, who could neither read nor write, and lived upon a small farm in the country. The proof of the conspiracy depended on the inferences to be drawn from the undisputed facts in connection with the means used to obtain from Griffin written authority to get the check cashed, and the evidence as to what actually took place at the interview at the Adams House. This evidence consisted mainly of the testimony of John Griffin on the one hand, and that of Gannon and Carey on the other. If Griffin's story were true, the offense charged was proved; if the stories of Gannon and Carey were true, there might be a reasonable doubt. The truth of Griffin's story hinged largely upon the character of the claims against Griffin put forward by Carey and Gannon. The whole testimony of Gannon and Carey, notwithstanding many direct denials, tends strongly, in view of the conceded facts in the case, to strengthen the testimony of Griffin.

The newly discovered evidence has no direct bearing upon the main contentions of the trial. During Gannon's cross-examination he was asked if in September, some two months before the issue of the policy, one Dr. Lynch had not told him that Michael Griffin had consumption, and answered, "No." The question was asked and admitted to test the credibility of the witness. In rebuttal, the state called Dr. Lynch, who testified that in September preceding the issue of the policy he told Michael Griffin that he had consumption, in the presence of the defendant Gannon. Dr. Lynch was directly contradicted by Michael Gannon and his brother, Edward, whose testimony was somewhat corroborated by three other witnesses. The newly discovered evidence is wholly confined to furnishing additional testimony in contradiction of this statement of Dr. Lynch. Gannon claims that Dr. Lynch's statement touches a material and controlling issue in the case, because it tends to show that he, Gannon, before the issue of the policy, had reason to believe that Michael Griffin suffered from consumption, and this knowledge tends to show that the policy was fraudulently procured, and that the fact of a fraudulent procurement tends to prove the guilt of the accused. The fraudulent procurement was not a fact in issue, and no evidence to prove that fact was received. It is true that the possibility or even probability of a fraudulent procurement is necessarily suggested by the undis-

puted facts in the case, as well as by the controverted facts. The Griffin boy, 20 years of age, unable to pay his first premium, insures his life for \$2,500, immediately assigns it to his father at the suggestion of Gannon, and dies of consumption within three months. Gannon and Carey produce unfounded claims against the father, suggesting that the policy was fraudulently procured, and he, as well as themselves, was liable to punishment, and obtained two-thirds of the amount paid on the policy. The possibility of fraudulent procurement could not be excluded from such a case; it was necessarily there, and might be considered by the jury, as well as other possibilities involved in proving the main issue, in reaching their final conclusion upon the question of guilt or innocence. But the existence of this possibility of fraudulent procurement is not strengthened by the incidental proof of Gannon's knowledge of his cousin's illness two months before the policy was issued, nor weakened by the absence of such proof. With or without such proof, it is in the case with equal certainty. Moreover, the inference of Gannon's knowledge is not materially weakened by the newly discovered evidence. Without that, it appears that for some time during September young Griffin was living with the Gannon family, including the defendant, his mother, two brothers, and a sister; that while there he was ill, and treated by Dr. Lynch; that on one occasion he was accompanied by the defendant, on another by his brother, Daniel, who paid the consultation fee; and that Lynch told young Griffin and the defendant that the illness was consumption.

The newly discovered testimony is that of Lynch himself (the other evidence mentioned is wholly immaterial except as confirming Lynch). He will testify that his opinion was not expressed to young Griffin and the defendant, but instead to Griffin and the defendant's brother, Daniel, who accompanied Griffin to the consultation that took place next after the opinion was formed, and that he did not make such communication to the defendant prior to the issue of the policy. As affecting Lynch's denial of the specific statement made by Gannon on his cross-examination, that Lynch did not tell him of his cousin's illness, the newly discovered evidence may be material, but obviously no ground for a new trial; but, as affecting Gannon's knowledge of his cousin's illness, it is of comparatively slight importance. The inference that the defendant, Gannon, as well as the other members of the household, knew of young Griffin's illness, for the treatment of which he was sent to Dr. Lynch under charge of different members of the family, is almost irresistible, and cannot be greatly weakened if Dr. Lynch's opinion as to the disease was expressed to Griffin and Daniel, instead of to Griffin and Michael. The after recollection of a witness as to some fact omitted from his testimony, or incorrectly stated, is not

ordinarily sufficient ground for a new trial. This rule was applied in *Shields v. State*, 45 Conn. 266, 270, and that case would seem to govern the present one.

We deem it clear that the denial of a new trial does not involve any misapprehension as to the real issues in the case, or the relevancy of the newly discovered evidence to those issues, or any erroneous application of legal principles, and upon reading the testimony upon the former trial, in connection with the new testimony produced, we are satisfied that no injustice is apparent, and that the newly discovered evidence is insufficient to render a different result upon a new trial probable. The denial by the trial court is clearly an exercise of its lawful discretion, and cannot be reviewed upon this appeal, which is in the nature of a motion in error.

There is no error in the judgment of the superior court. The other judges concurred.

CAHILL et al. v. CAHILL et al.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

EJECTMENT—RECOVERY ON POSSESSORY RIGHT—POSSESSION—PRESUMPTION—EVIDENCE—HUSBAND AND WIFE.

1. Plaintiff in ejectment cannot recover on possessory right, merely, but must show legal title.
2. Possession does not create a presumption of grant, establishing a prima facie title, sufficient to authorize recovery in ejectment.
3. Possession and acts of ownership may be proved, with other circumstances, to show a conveyance in fact, the best evidence of which has been lost.
4. On the issue whether the wife or the husband was possessed of the land, it may be shown that he never did anything on or about it, and that she always dealt with it as her own.

Hamersley, J., dissenting.

Appeal from superior court, New Haven county; William T. Elmer, Judge.

Ejectment by James A. Cahill and others against Mary Cahill and others. Judgment for defendants. Plaintiffs appeal. Reversed.

Robert L. Munger, for appellants. Frederick W. Holden and William L. Bennett, for appellees.

PRENTICE, J. Richard and Julia Cahill were husband and wife—married prior to 1877. The plaintiffs are their children, and claim in the latter's right and as her heirs at law. Julia died in 1885. In 1887 Richard married for his second wife the defendant Mary Cahill. Richard died in 1901, leaving surviving him his last-named wife, and leaving, also, a will, which was duly probated. The defendant McMahon is the administrator of his estate, cum testamento annexo. The will gave his widow, Mary, the life use of his estate, and the defendant McMahon the

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 17.

remainder in trust for certain persons and purposes. The defendants thus claim through Richard, under the will. The record title to the property in question was never in either Richard or Julia, but stood in other persons; the last conveyance being to Wallace & Sons, a corporation, which received it in 1873. No deed to either of said couple was shown in evidence, nor was proof of a copy or contents of any such deed produced. The conduct of the case assumed—although the fact is not expressly found in that form—that in some manner, between them, they were in possession of the land and exercised dominion over it during the last 12 years, at least, of their married life. The plaintiffs claimed that the wife was so possessed in her own right, independently and apart from her husband; the defendants, that the husband was. The plaintiffs claimed to be entitled to recover possession in this action (1) upon a title shown in their mother, and therefore in themselves; and, failing in that, (2) upon their possessory rights in succession to their mother dying possessed.

With respect to the last claim, the court very properly ruled, in accordance with the defendants' contention, that the plaintiffs could not recover without first showing a legal title. The court adopted as its ruling the language of Judge Swift in his Digest, vol. 1, p. 507, to the effect that the plaintiffs must recover, if at all, by the strength of their own title, and not by the weakness of the defendants', and that it behooved them not merely to show a better title than the defendants, but a legal title. The plaintiffs concede the correctness, in general, of this principle invoked by the court, but ingeniously contend that it is not a complete statement of the law. Their argument is based upon the existence in the old English common law of certain possessory real actions, and especially the writ of assize, under which an heir or devisee whose ancestor or devisor had died seised of an inheritance was put into possession thereof as against a stranger who had intervened before the heir or devisor had entered, and himself made entry and obtained possession of the freehold. 3 Blackstone's Comm. 184. It is completed by the dictum from Swift's Digest to the effect that our action of ejectment comprehends and answers the purpose of all the old common-law real actions, and the further dictum that, like writs of entry and assize, it will lie for possessory rights. 1 Swift's Digest, 507. The trouble with this argument is that these dicta from Judge Swift do not comport well with his later statements upon the subject of which the passage already referred to is an example, and are in direct antagonism to the repeated utterance of this court. *Talcott v. Goodwin*, 3 Day, 264; *Tracy v. Norwich & W. R. Co.*, 39 Conn. 382; *Bristol Mfg. Co. v. Barnes*, 54 Conn. 53, 5 Atl. 593. In the second of the cases cited we said: "We, however, ought to say

that we regard it elementary law in Connecticut that in this action of disseisin or ejectment the plaintiff must recover, if we recover at all, by the strength of his own title. Ample remedies are provided, by actions of trespass and by proceedings for forcible entry and detainer, for the disturbance of quiet possession, and we see no good reason for any change or mitigation of the familiar rule in respect to proof of title in ejectment." The court did not err in ruling as it did.

The plaintiffs claimed to have satisfied the rule adopted by the court, and to have shown a legal title. They sought to prove by direct evidence the existence of a deed which had become lost. The court found that they did not succeed in this regard. For this finding, assuming that the issue was to be determined by direct proof only, the evidence furnished ample justification. At the eleventh hour, but in time, perhaps, they claimed to have established a title by adverse possession. The court found otherwise, as it was clearly bound to do upon the evidence. The plaintiffs, evidently foreseeing these results, did not stop here in their claims. They made, first, the broad claim that having shown possession in their mother at her death, and for a period of years prior thereto, the court should, in the absence of countervailing testimony, have presumed and found that she had title. This general claim, which has been urged upon us the most vigorously of all the plaintiffs' many claims, was made in the court below and here in several forms, to wit, that Mrs. Cahill's possession was sufficient evidence of title; that therefrom a lawful grant should be presumed; that her possession and repeated acts of ownership were to be presumed to be lawful, and pursuant to a legal title; that such possession would create a presumption that she was the legal owner; that not only the existence of a deed, but all the essentials of a valid one, would be presumed; that this evidence established a prima facie title, which was good and sufficient until overthrown, etc. This claim, in whatever form propounded, was not well made. The subject of presumptions of a grant from possession had an exhaustive discussion in *Sumner v. Child*, 2 Conn. 607. It was there decided that a grant of a corporeal hereditament would never be presumed from possession, however long continued; the whole subject, so far as corporeal hereditaments were concerned, being regulated by the statute limiting the right of entry. The court was far from saying, as we shall have occasion to see later, that a presumption arising from possession and acts of ownership could never be of help in establishing a title. What it did say was that such a presumption could not of itself have the operative effect of creating or establishing a title: that a title could not be presumed therefrom which would have the force and effect of a title proven. So it is that a bare presumption of a title thus made cannot satisfy the re-

quirements of a rule which prescribes that a plaintiff in ejectment must recover by the strength of his own legal title shown, and not by the weakness of his adversary's. Were it otherwise, we should have a rule which was no rule. For what would it profit to say that an ejectment plaintiff may not recover upon proof of a bare possessory right, but must show a legal title, if in the same breath we say that a legal title may be inferred from mere possession? The true office of a presumption from possession and acts of ownership, and its use in proof of title, is clearly indicated in this case of *Sumner v. Child*, 2 Conn. 607. The possession and acts of ownership may, with other circumstances, be proven to perfect the evidence of title. The possession and acts are admitted as secondary corroborative evidence of an actual conveyance, or of some accompanying requisite, of which the original and best evidence is lost. The admission of this evidence assumes the theory of an actual conveyance, and the existence of other evidence of a different character, rendering it probable that such a conveyance was made. It is received as one piece of evidence, which, with other testimony, tends to prove that a conveyance in fact was made, and to enable the trier to find, from the whole evidence, such conveyance in fact. The evidence in question is not received for the simple purpose of creating a presumption which should of itself have operative effect. The presumption to be derived from the evidence is one for evidential effect; that is, it is to be weighed and considered in connection with other testimony, and the presumptions and inferences therefrom, in its bearing upon the ultimate question of fact to be determined, to wit, the question of a conveyance in fact. This distinction which the case makes is an important one, and important in its bearing upon the case at bar. The plaintiffs, as we have seen, endeavored to establish by direct proof the existence of a deed to Mrs. Cahill. In their claims to the court, they not only asked that this fact be found upon such proof, but also that the presumption to be derived from her possession and repeated acts of ownership be weighed in connection with the other facts established, and, upon the strength of the conjoined proof, the fact of her ownership, and that such ownership rested upon a valid deed to her, be found. The request thus made in most explicit terms was fairly within the rule laid down in *Sumner v. Child*, 2 Conn. 607, and so far, therefore, their contention was well made.

The court, however, found as a fact that from August, 1873, until the death of Julia, Richard was in possession of the land, and, of course, by inference, that Julia was not. This finding of fact, if it stands, accomplishes a complete demolition of the plaintiffs' contention. If Julia was not in possession, no presumption from possession could arise in her favor. The finding must

stand, unless it was made without evidence, as it clearly was not, or some error of law or some incorrect ruling upon the admission or rejection of testimony may have influenced it. It is urged upon us that the finding was the result of a legal misconception as to the relation of a husband, married before 1877, to the reality of his wife. A portion of the record is pointed out as indicating a probability, at least, that the finding was made upon the theory of law that possession of a wife's lands necessarily inured to the husband. This claim the finding effectually negatives.

There remains to be considered a ruling upon the admission of testimony to which the plaintiffs attach much importance in this connection. Plaintiffs' counsel sought to prove that Richard had never done anything upon or about the land in dispute; in other words, that he had never exercised acts of ownership. Evidence to this effect was excluded. We see no escape from the conclusion that here was harmful error. The plaintiffs sought to prove that Mrs. Cahill was possessed of the property of and for herself, and altogether apart from her husband, and that her husband, by refraining from all manner of acts appropriate to ownership—whether in his own right or in the right of his wife—indicated the true relation to the property of the parties, between whom, it is to be borne in mind, the question was. Such a situation as claimed might exist, and the plaintiffs, if they could prove it, were entitled to the benefit of it, to enforce and emphasize their contention as to the presumptive existence of the deed sought to be established. Whatever situation the acts of the parties tended to disclose, the plaintiffs were entitled to the benefit of it upon the question of possession directly determined, and thus indirectly upon the question of title. The plaintiffs sought to show that Mrs. Cahill had always dealt with the land as peculiarly her own property, and that her husband had never acted as one having any rights therein. The evidence excluded was clearly not immaterial, as ruled. The court has found in favor of the possession of the husband. A part of the evidence bearing upon the question was ruled out, the court erred, and to the plaintiffs' manifest injury.

We are further impressed, in a study of the finding, with the conviction that the court misconceived the real nature of the particular claim we have been discussing. That is, perhaps, not altogether strange, since so many claims in so many forms were made, and the true basis of claim perhaps little emphasized. The court seems to have confused the claim arising from possession and acts of ownership with the principles of adverse possession. It is quite evident that the fact of possession was regarded as important only in connection with a 15-years continuance and an adverse character. The plaintiffs' claim had no relation to a conclusive pre-

sumption such as 15 years' adverse possession creates. It related to a rebuttable presumption, only, and one which was of an evidential character, merely. *Sumner v. Child*, 2 Conn. 607. It seems quite clear that in this way, also, the plaintiffs did not obtain the full benefit of their rightful claims of law.

There is error, and a new trial is granted. The other Judges concurred, except *HAMERSLEY, J.*, who dissented.

SANFORD v. BACON.

(Supreme Court of Errors of Connecticut.
March 4, 1908.)

WRIT—AMENDMENT—APPEAL—ORDER ERASING CASE FROM DOCKET—EXTENDING TIME OF APPEAL—PLEA IN ABATEMENT.

1. Where a writ omits to state in the ad damnum clause the amount claimed as damages, the court may allow an amendment under Act 1889 (Pub. Acts 1889, p. 61, c. 110; Gen. St. 1902, § 643), providing that "whenever in any civil action the claim for damages as alleged in the writ shall be so stated that the court has no jurisdiction of the cause, such court may allow the writ to be amended," etc.

2. Where an amendment to a writ is allowable, and is filed within the first 30 days of the court, plaintiff is entitled to make it as a matter of right, under the express provisions of Gen. St. 1902, § 639.

3. Where a plea in abatement to an appeal, on the ground that it was not taken in time, is based on facts appearing of record, or on undisputed facts, they should be so stated that the issue raised may be one of law.

4. Where, after rendition of a judgment erasing his case from the docket, and disallowing an amendment to the writ, plaintiff promptly filed notice of appeal, the subsequent entertaining by the court of plaintiff's motions to restore the case to the docket, and for a reargument of the question of the allowance of the amendment, operated to defer the time for filing the appeal, under the direct provisions of Gen. St. 1902, §§ 791-793, until the motions were finally decided.

5. An appeal lies from an order of the city court directing a case to be erased from the docket, under Gen. St. 1902, § 788, providing that "upon the trial of all matters of fact in any cause or action in * * * any city court, whether to the court or jury, if either party thinks himself aggrieved by the decision of the court upon any question or questions of law arising in the trial, he may appeal from the judgment of the court in such cause or action."

Appeal from city court of New Haven; Edwin C. Dow, Judge.

Action by Royal P. Sanford against Charles B. Bacon for fraud, under Gen. St. 1902, § 1099. From an order erasing the case from the docket on the ground that the writ contained no ad damnum clause, and from an order refusing to allow an amendment to the writ, plaintiff appeals. Reversed.

E. P. Arvine and Rufus M. Overlander, for appellant. J. Birney Tuttle, for appellee.

HALL, J. The complaint, containing several counts, alleged an indebtedness of the defendant to the plaintiff of \$255, and that

the defendant had concealed and conveyed away certain property and rights of action to prevent them from being taken on legal process. The writ contained no other ad damnum clause than the words, "The plaintiff claims by force of the statute in such case provided \$—— damages." Upon the defendant's motion, the case was erased from the docket upon the ground that the court had no jurisdiction of the action; and the court refused to allow an amendment filed within 30 days after the return day of the action, showing the amount claimed in the ad damnum clause to be \$400, upon the ground that the court had not the power to allow such amendment. The cases of *Deveau v. Skidmore*, 47 Conn. 19, and *Denton v. Danbury*, 48 Conn. 368, are cited as sustaining the action of the court in refusing to allow the amendment. It was held in these cases that when it appeared from the ad damnum clause, or by the absence of an ad damnum clause, that the court of common pleas, the jurisdiction of which was limited by the amount in demand, had no jurisdiction of the action, that court had no power to allow an amendment changing or stating the amount of damages demanded so that it should appear that the court had jurisdiction of the cause of action. Whether the rule as thus stated could apply to the city court of New Haven, the jurisdiction of which in all civil actions, both at law and equity, when any of the parties reside in that city, is unlimited, excepting as to certain actions concerning land outside of the city limits, we need not decide, since the law as enunciated in those cases has since been essentially changed by statute. *Deveau v. Skidmore* was decided in 1879, and *Denton v. Danbury* in 1880. In 1889 an act was passed by the Legislature which provided that "whenever in any civil action the claim for damages or the value of the matter in demand as alleged in the writ, shall by mistake be so stated that the court to which the suit is brought has no jurisdiction of the cause, such court may allow the writ to be amended as to such claims for damages or value, so as to bring the cause within the jurisdiction of the court, provided that the writ might have been drawn originally as so amended." Pub. Acts 1889, p. 61, c. 110 (Gen. St. 1902, § 643). To say that the words "whenever * * * the claim for damages * * * by mistake be so stated that the court * * * has no jurisdiction," includes only those cases in which a sum below or above the jurisdictional limit of the court is claimed as damages, and not one in which the want of jurisdiction appears by a failure to state in the ad damnum clause the number of dollars claimed as damages, would be to put too strict and narrow a construction upon a remedial statute. Statutes allowing amendments should be liberally interpreted. *Stuart v. Corning*, 82 Conn. 105, 108. The mischief of the common law which the act was designed to cure

† 4. See Appeal and Error, vol. 2, Cent. Dig. § 1895.

was the want of power of a court to allow an amendment when by the absence, through mistake, of a proper statement of the claim for damages, or of the value of the matter in demand, it appeared that such court had no jurisdiction of the matter in controversy. This case comes clearly within the mischief sought to be remedied by the statute. The claim for damages is defective in the omission, by mistake, from the *ad damnum* clause, of the number of dollars claimed as damages. Assuming that by reason of such mistake the court had no jurisdiction of the cause of action thus defectively stated, the statute gave the court the power to allow the amendment. As the amendment was allowable, and was filed within the first 30 days of the court, the plaintiff was entitled to make it as a matter of right. Gen. St. 1902, § 639; *Dunnnett v. Thornton*, 78 Conn. 1, 14, 46 Atl. 158.

The defendant's plea in abatement to the plaintiff's appeal to this court, upon the ground that it was not taken in time, is overruled. Where such a plea is based upon facts appearing of record, or upon undisputed facts, they should be so stated that the issue raised may be one of law. The facts pertinent to the plea in abatement are these: The judgment or order of the city court erasing the case from the docket, and disallowing the amendment, was rendered May 27, 1902, and on the following day the plaintiff filed a notice of appeal. No further steps were taken by him toward perfecting his appeal until after the 23d of the following June. On May 31st the plaintiff, by permission of the court, placed upon the short calendar his motion to restore the case to the docket, and for a reargument of the question of the allowance of said amendment. On said 23d of June the court, having heard the parties upon said motions, denied them. The plaintiff thereupon, on the 25th of June, filed another notice of appeal, and on the 27th of June filed a draft of finding. The trial judge filed a finding of facts on the 29th of September, 1902, and the plaintiff filed his appeal on the 3d of the following October. An amended finding was filed by the judge on the 19th of November. The plaintiff's motions to restore the case to the docket and for a reargument, having been thus entertained by the court, operated to defer the time for filing an appeal, under sections 791, 792, and 793 of the General Statutes (Rev. 1902), until they were finally decided. *Beard's Appeal*, 64 Conn. 526, 535, 30 Atl. 775. An appeal lies, under section 788 of the General Statutes of 1902, from an order directing a case to be erased from the docket. Such an appeal performs the offices of the old motion for a new trial and motion in error. *White v. Howd*, 66 Conn. 264, 266, 33 Atl. 915. An order directing the erasure of a case from the docket was reviewable on a motion in error. *Woodruff v. Bacon*, 34 Conn. 181, 185.

The city court erred in refusing to allow

the amendment filed by the plaintiff, and the case is remanded to that court to be proceeded with according to law. The other Judges concurred.

LESSER v. BROWN et al.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

FRAUDULENT CONVEYANCE—KNOWLEDGE—DATE OF DEBT—EVIDENCE IMPEACHING WITNESS.

1. In an action to foreclose the lien of a judgment against B. on land mortgaged by B. to his brother, and conveyed to his father, while owing the debt for which the judgment was obtained, and owning no other property, and afterwards conveyed, after release of the mortgage, to B.'s wife, evidence is admissible against her to show her knowledge of the fraudulent conveyance, that before the mortgage was given the judgment plaintiff, at the request of the wife, saw B., and in her presence B. offered to give plaintiff a mortgage on the property, saying that he owed considerable, and his creditors threatened to attach, and he wanted to avoid paying them, and that subsequently she asked plaintiff to take the mortgage from B.'s brother, saying she had no confidence in him, and feared that he would defraud them, and that B. owed the brother nothing.

2. The person through whom the conveyance by the judgment debtor to his wife, claimed to be fraudulent, was made, having, as a witness for plaintiff, the judgment creditor, testified that he received \$2,000 from the wife for his conveyance to her, and that he used that money to buy certain lands, plaintiff may introduce the deeds of such lands to witness, showing that they were before the deed to the wife, and thereon obtain a confession from him that he did not know where the money went which he received from the wife.

3. Testimony of plaintiff that in July and August he visited B.'s store to see about his bill, and after the transfers by B. visited B. and his wife to see about this bill, there being no evidence that there had been any other bill, or that plaintiff did any business with B. after September 20th, the date of his fraudulent mortgage of the property, is sufficient, in the absence of evidence to the contrary, to sustain the finding that plaintiff's judgment against B. sought to be enforced against the property mortgaged and conveyed by him, was based on an indebtedness existing September 20th.

Appeal from court of common pleas, Fairfield county; Howard J. Curtis, Judge.

Action by Eli L. Lesser against Abraham Brown and others to foreclose a judgment lien. Judgment for plaintiff. Defendant Lena Brown appeals. Affirmed.

John C. Chamberlain and Carl Foster, for appellant. Stiles Judson, Jr., for appellee.

HALL, J. The plaintiff having, on April 19, 1901, obtained a judgment against Abraham Brown, one of the defendants, and the husband of the defendant Lena Brown, for \$230.68 and costs, filed on the following day a judgment lien upon three tracts of land, which were attached in November, 1900, as the property of said Abraham Brown, in the original action in which such judgment was rendered. On September 20, 1898, said Abraham Brown was the owner of said land, and

on said day, while owing the plaintiff the debt upon which said judgment was based, and while indebted to other persons, he mortgaged said tracts to his brother, Isaac Brown, for the sum of \$1,500, expressed to be subject to certain prior mortgages. On the 26th of April, 1899, said Abraham Brown, by warranty deed, conveyed said parcels of land to his father, Marcus Brown, subject to said \$1,500 mortgage and said prior mortgages. On August 26, 1899, said Isaac Brown, at the request of Abraham Brown, released said \$1,500 mortgage to Marcus Brown, and on July 25, 1900, said Marcus Brown, at the request of Abraham Brown, by quitclaim deed, conveyed said tracts to said Lena Brown. The trial court has found that all of these conveyances were without consideration, and were made in pursuance of a plan for defrauding the creditors of Abraham Brown; that all the parties to said conveyances knowingly participated in such fraud; that during the entire period covered by such transfers said Abraham Brown and his wife, Lena, remained in the possession of said real estate, receiving and using the rents therefrom, without accounting to said Marcus Brown therefor; and that at the time of giving said mortgage to his brother, Isaac, and thereafter during the period covered by said transfers, Abraham Brown was indebted to the amount of \$2,000 beyond his indebtedness secured by mortgage, and owned no other property than that which was so transferred.

Upon these facts the trial court held that the plaintiff was entitled to a foreclosure of the judgment lien upon said land as the property of Abraham Brown. This decision was clearly right, unless the court committed some material error in its rulings upon questions of evidence, or in finding these facts upon the evidence presented. Against the defendants' objection the court permitted the plaintiff, and also one B. Klein, to testify that before the \$1,500 mortgage was given to Isaac Brown the plaintiff, at the request of Lena Brown, saw the defendant Abraham Brown, and that in the presence and hearing of said Lena and said Klein said Abraham Brown offered to give to the plaintiff, without consideration, a mortgage of \$1,200 upon said property, saying that he owed many hundred dollars, that his creditors threatened to attach, and that he wanted to avoid paying them; and that subsequently Lena Brown asked the plaintiff to take the mortgage from Isaac Brown, saying she had no confidence in Isaac, and feared he would defraud them, and that her husband did not owe Isaac anything. This evidence is not open to the objections suggested by defendants' counsel that the admissions and declarations of Lena Brown cannot affect her husband or the other defendants, or that the declarations of Abraham Brown of his intention to defraud his creditors were made in the absence of the alleged fraudulent grantee, or that proof of an attempt to make a fraudu-

lent transfer to the plaintiff is not evidence that subsequent transfers were fraudulent. Lena Brown is the only appellant. As none of the other defendants claim any interest in the property transferred, she alone could be injuriously affected by her admissions. As she was the ultimate grantee, her declarations, as well as those of Abraham Brown in her presence and hearing, showing her knowledge of the indebtedness of Abraham Brown, and of his intention to defraud his creditors, and also her declarations showing her knowledge that the mortgage to Isaac Brown, under which she claimed title, was fraudulent, were clearly admissible as tending to prove her participation in the fraud by which the property in question was conveyed to her. *Tibbals v. Jacobs*, 31 Conn. 428, 432; *Knower v. Cadden Clothing Co.*, 57 Conn. 202, 221, 17 Atl. 580. We think it was for this purpose, rather than to prove a previous attempt to make a fraudulent conveyance of the property, that this evidence was offered and received.

Marcus Brown having testified as a witness for the plaintiff that Lena Brown paid him \$2,000 in cash for the equity in said land, and that he used that money to pay for certain land which he purchased in Waterbury, the plaintiff, before said witness closed his testimony, laid in evidence against the defendant's objection certain deeds showing that the land in Waterbury was purchased before the conveyance by Marcus Brown to Lena Brown in July, 1900, of the property in question, and the witness Marcus Brown thereupon testified that he did not know where the money received from Lena Brown went; that he lost it; that he did not know how he lost it. The evident purpose of the plaintiff was to prove by the testimony of Marcus Brown that the conveyance by him to Lena in July, 1900, was without consideration. The plaintiff was not concluded by the statement of his own witness that he received \$2,000 from Lena Brown as the consideration of that deed, but might prove by proper evidence that the fact was different. *Wheeler v. Thomas*, 67 Conn. 578, 580, 35 Atl. 499; *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152, 169, 50 Atl. 3. For the purpose of showing that the witness was mistaken in saying that he received \$2,000 from Lena, by compelling him to admit, as he practically did, that he could not have received from her, as he had stated, the money used to purchase the Waterbury lots, and that he was unable to account for the money which he claimed he had received from her, these deeds, having been called to the attention of the witness, were properly admitted in evidence. Other rulings upon questions of evidence were so manifestly correct as to require no discussion. The testimony of the plaintiff that in July and August, 1898, he visited Brown's store to see about his bill, and that after the transfers he visited Brown and his wife to see about his bill, and that throughout his

testimony he spoke about his bill, there being no evidence that there had been any other bill, or that plaintiff did any business with Brown after September 20, 1898, was sufficient to sustain the finding that the judgment sought to be enforced was based upon an indebtedness existing on the 20th day of September, 1898, in the absence of any evidence to the contrary.

It is claimed that the trial court erred in finding certain facts, upon which its judgment is based, without evidence, and in refusing to find other facts proved by the evidence. This claim is, in effect, that the court erred in finding that the transfers in question were fraudulent, and in not finding that they were made in good faith, and upon good consideration. The substance of the entire evidence is stated in the additional finding of facts. It would serve no good purpose to discuss it here. Upon an examination of the evidence we are satisfied that the trial court committed no error in finding the facts as stated in the finding, and in deciding, upon the evidence, that the transfers in question were made for a fraudulent purpose in which all of the parties thereto knowingly participated.

There is no error. The other judges concurred.

IVES et al. v. BEECHER et ux.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

JUDGMENT LIENS—DESCRIPTION OF LAND—SUFFICIENCY—CONTINGENT INTEREST—TRUST ESTATES—LEASEHOLD INTERESTS.

1. Gen. St. 1902, § 4149, authorizes a judgment creditor to file a certificate of lien, reciting substantially that a judgment lien in his favor "is hereby placed upon the following described real estate" of the judgment debtor (describing the same). *Held*, that a certificate is not defective for not accurately describing the precise interest of the judgment debtor in the realty sought to be affected.

2. The failure of a judgment lien as to some of the parcels of realty sought to be affected does not destroy the lien as to other parcels.

3. By a will, one-fourth part of certain realty was devised in trust, the income to be paid to testatrix's daughter for life; and, on distribution, all of a certain tract was set out to the trustee. *Held*, that the trust not being a spendthrift trust, but the rights of the daughter being fixed and definite, her interest was such as to be subject to a judgment lien.

4. Under Gen. St. 1902, § 930, providing that leasehold interests shall be subject to execution, a leasehold estate is subject to a judgment lien.

5. In a proceeding to foreclose a judgment lien on parcels of realty, questions relative to the amount or nature of defendant's interest therein will not be determined; the lien attaching to whatever interest defendant may have.

6. Where a will devised property in trust—the income to be paid to testatrix's daughter, and after her death the land to go to the daughter's heirs in fee—there was sufficient *prima facie* foundation for a claim that the devise was void under the statute against perpetuities, and the land devised consequently intestate estate, to entitle a judgment creditor of one

of testatrix's heirs to enforce a judgment lien against the possible interest of the heir.

7. The question of the validity of the clause will not be determined in a proceeding to foreclose the lien, to which none of those interested in sustaining the will are parties.

Case reserved from superior court, New Haven county; Alberto T. Roraback, Judge.

Action by Marie E. Ives, as administratrix, and others, against George H. Beecher and wife. Facts found and case reserved by the superior court for the consideration of the Supreme Court of Errors. Decree for plaintiffs advised.

Henry G. Newton and Harrison Hewitt, for plaintiffs. Charles S. Hamilton, for defendants.

PRENTICE, J. The plaintiffs seek the foreclosure of a judgment lien. The judgment was one against both the defendants herein. The lien was filed upon six separate pieces of property. It is conceded that the defendant Mrs. Beecher owns the three pieces last described in the lien. The defendants deny that she has such an interest in either of the other three pieces as can be taken under a judgment lien. Confessedly, she is not the absolute owner of either. Mr. Beecher has no interest in any of the property, save such as he may have derived as the husband of Mrs. Beecher.

This situation raises preliminary questions as to the validity of the lien in any event. The lien is expressed "to be placed upon the following described real estate" of the defendants. The defendants contend (1) that the lien is invalid, as against the first three pieces, because it does not accurately describe the interest of Mrs. Beecher therein; and (2) that the lien, being invalid as to some of the pieces described, is therefore invalid as to all. We are pointed to no authority in support of these claims, except such as is attempted to be drawn from an assumed analogy to mechanics' liens, and we know of none.

Upon the rendition of a judgment, the judgment creditor acquires, as against all the debtor's real estate and alienable beneficial interests therein not exempt from execution, the right to appropriate, if need be, any or all of the same to the satisfaction of the judgment by such process as the law provides for that purpose. This right of appropriation extends to each parcel of property, to the precise extent of the debtor's interest therein. Prior to 1878 our statutes recognized only one method of enforcing this right. That was by means of a levy of execution. By this process the right, which had before been a general one, became specific as to the property levied upon. The first step of the levy created a specific lien, by means of which the particular property or interest therein was by the completion of the levy sequestered to satisfy the judgment. In the creation of this specific lien, it still remained, if the levy was sufficiently comprehensive,

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1338.

that it attached, as did the original right, to the precise interest of the debtor in the property, and not to his apparent or supposed interest therein; and the purchaser at the execution sale acquired the debtor's title or interest, whatever it was in fact. *Hitchcock v. Hotchkiss*, 1 Conn. 470.

In 1878 the Legislature sought to provide another—more simple and beneficial—process for the enforcement of the general right created by a judgment. Hence the legislation which now appears in Gen. St. 1902, § 4149 et seq. We have heretofore said that this legislation was designed to further the interests of both creditor and debtor, and therefore to be favorably construed to carry out its manifest purpose. *Beardsley v. Beecher*, 47 Conn. 408; *Hobbs v. Simmonds*, 61 Conn. 235, 23 Atl. 962. It is clear, from the purpose and provision of this act of 1878, that it was intended not only to furnish a new process, but, so far as interests in real estate were concerned, one which was to be coextensive in its application with the existing process. Its object, like that of the process by levy, was to create a specific lien upon specific property, through which any unexempt, alienable, beneficial interest therein which the debtor might have might be appropriated to satisfy the judgment. It could not reach interests which the debtor did not have. To be efficient, it must so operate as to reach all that he had, whether apparent or not. The Legislature was evidently looking for a process which should be at once as effective as the old, and at the same time simple, inexpensive, usable by persons not astute in the law, and not likely to be defeated in its ends through technicalities or exacting requirements. Therefore the absence of any requirement, or suggestion of requirement, that the judgment creditor should, at his peril, be able to know, and in fact describe, the precise interest of the debtor, in his attempt to convert his general right into a specific, enforceable lien by the new process. No such pitfall was prepared. The provisions and requirements of the law enacted were the simplest possible. It was framed upon the simple idea of effectuating the general right, as against certain specified property, by means of a recorded certificate, by force of which a specific lien should be created, which should attach to that to which the original right attached, to wit, to the debtor's precise interest, whatever it was, and which could be enforced by foreclosure, and the debtor's interest thus taken. The form of the certificate was prescribed. This form was apparently intended for all situations. It was apparently intended—and the reasons for the intentions are easy to discover—that by virtue of it any interest in lands subject to levy of execution might be reached, and reached without a precise description or general specification of that interest. This intention controls us, as it should, in concluding, as we do, that the plaintiffs' lien was, in

form, sufficient to enable them, by its foreclosure, to take whatever interests, subject to levy of execution, the defendants may have had in the several pieces described.

The second contention—that the failure of a judgment lien as to any piece described in it accomplishes a failure as to all—has less merit. The argument sought to be drawn from an analogy to mechanics' liens wholly fails, since the analogy, in its pertinent points, does not exist. The maxim, "*Utile per inutile non vitiatur*," fully expresses the legal results of the assumed situation. For a case furnishing a closer analogy than those referred to, see *Camp v. Smith*, 5 Conn. 80.

The first three of the pieces of land described in the lien were owned by Sarah L. Maltby at her death in 1871, she having inherited them from her father. She left a will in which she devised one fourth part of the real estate left her by her father to Henry White, in trust and confidence that he would annually pay over the rents, issues, interest, and profits thereof to Mrs. Beecher during her natural life. In the distribution the second of the pieces described in the lien was set out to Mr. White under this trust for Mrs. Beecher's benefit. Mrs. Beecher thus became the cestui que trust of an estate for her life in this piece.

This trust, it will be observed, is not of the kind denominated a "spendthrift trust." It is not one by the terms of which the trustee has a discretion as to what shall be paid over to the cestui que trust. The rights of the latter are fixed and definite, and there is no attempt to limit her power of alienation by her voluntary act, or in invitum by her creditors. Mrs. Beecher's interest is one entirely under her control, and alienable by her. Such an equitable estate, we have repeatedly held, was one which could be subjected to the rights of creditors upon attachment and execution. *Davenport v. Lacon*, 17 Conn. 278; *Johnson v. Connecticut Bank*, 21 Conn. 148; *Bunnell v. Read*, Id. 536; *Middletown Savings Bank v. Jarvis*, 33 Conn. 372; *Smith v. Gilbert*, 71 Conn. 149, 41 Atl. 284, 71 Am. St. Rep. 163. Such being the case, it could, as we have seen, be as effectually reached by a judgment lien.

In 1873 Mr. White gave Mrs. Beecher a lease of this property for the term of her life. The purpose of this instrument is apparent. It sought only to effectuate said trust. If it operated to change in any manner the character of Mrs. Beecher's interest, and create in her a leasehold estate, her interest still remained one which could be taken. Gen. St. 1902, § 930.

It is contended that Mrs. Beecher has an additional interest in this tract of land. It is claimed that the gift over after her life estate was void, it being similar in tenor to those hereinafter discussed, and that this remainder is therefore intestate estate. Mrs. Beecher is one of four children of her mother, Nancy L. Garfield, who was the only heir

at law of Sarah Maltby, her sister, whom she survived. Mrs. Garfield's estate has been duly settled, and all claims against it paid. Mrs. Beecher would thus be entitled to inherit one-fourth of any intestate estate of Sarah Maltby. This is claimed by the plaintiffs to be her interest in the remainder in tract No. 2. We have no need to pass upon this claim. The plaintiffs, as we have seen, have a valid lien upon this land, sufficient to reach Mrs. Beecher's interest, whatever it may prove to be. They are entitled to foreclose it. What quantum of title they will obtain if there is no redemption is not in issue, and we have no occasion to inquire.

Sarah Maltby, by her will, devised another one-fourth of her real estate inherited from her father to said White in trust for the benefit of Josephine L. Hazelton Hill during her life. The language of the trust was identical with that in favor of Mrs. Beecher, already recited. The language creating this devise in trust being concluded, the testatrix added, "and then and after her decease I give, devise and bequeath said fourth part to her, the said Josephine's, heirs forever." In the distribution an undivided one-half interest in both the first and third of the pieces described in the lien were set out to Mr. White under this trust for the benefit of Mrs. Hill, and upon her death to her heirs. The plaintiffs claim that this gift over to the heirs of Mrs. Hill was void, as contravening the statute against perpetuities, and that, as Mrs. Beecher is entitled to inherit one-fourth of any intestate estate of Sarah Maltby, she is the owner of an undivided one-eighth of said first and third pieces, subject to the life estate for the benefit of Mrs. Hill. It is not claimed that Mrs. Beecher has any other interest in these two tracts.

It is apparent that a decision upon the claim thus made involves the construction of Sarah Maltby's will, and such construction we are asked to make. The interests involved in such construction are only in part represented in this case. Those adverse to the claim are not represented at all. While it is quite true that any determination we might reach could not adjudicate the questions thus raised, except as affecting the rights of these plaintiffs as against these defendants, we have no disposition to unnecessarily undertake the office of construing the provisions of this will, which was probated, and distribution made according thereto, more than 30 years ago, in the absence of those representing the interests adverse to the claim made, and upon a statement of facts which is in legal effect an *ex parte* one. The question presented to us is largely an academic one, upon the language of the will. It is not beyond the domain of possibility that facts might exist which would interpolate other considerations into it. Fortunately, we have no need to determine the question propounded to us, further, at most, than to ascertain

whether there is *prima facie* such ground for the claim made as to justify the plaintiffs' right to a foreclosure of their lien upon this land. It is quite clear that Mrs. Beecher might, upon the facts stated, fairly make the claim to an ownership in this property which has been outlined. The plaintiffs were therefore within their rights in filing their judgment lien, and thus seeking by its foreclosure to appropriate to themselves, in satisfaction of their judgment, the possible title which the defendants may have in the land in question. The process, if completed, will give the plaintiffs the precise interest which the defendants have, and no more. If they have any interest, it is a vested, and not a contingent, one. If they have one, the plaintiffs will, in the event that there is no redemption, become substituted as the owner in their stead. What this substitution will succeed in giving to them must be left to the results of the controversy between the contending interests when they shall be brought face to face in proper litigation. It is not for us here to decide.

The superior court is advised to render judgment of foreclosure in favor of the plaintiffs, as prayed for. Costs in this court will be taxed in favor of the plaintiffs. The other Judges concurred.

NEW HAVEN TRUST CO. v. DOHERTY et al.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

CORPORATIONS—LIFE INSURANCE COMPANIES—FUNDS—INVESTMENT—NEGLECTANCE OF DIRECTORS—LIABILITY—ACTION BY RECEIVER—NATURE AND FORM—TENDER OF SECURITIES—ADVICE OF COUNSEL—DAMAGES—BURDEN OF PROOF.

1. Where directors of a life insurance company loaned certain of its funds on security of an unseaworthy vessel, and on certain bonds which were secured by a second mortgage on real estate, and which were worthless at the maturity of the loan, in violation of Gen. St. 1902, § 3564, providing that no loan of the assets of a life insurance company should be made, unless secured by mortgage on unincumbered real estate worth twice the amount of the loan, or by pledge of bonds and stocks having a market value of 25 per cent. in excess of the amount loaned, except government and state bonds, such directors were personally liable for the damages sustained.

2. Where directors of a life insurance company negligently loaned its funds without adequate security, on the insolvency of the corporation an action in tort may be brought by the corporation's receiver against any one or more of such directors who have incurred a personal liability for the loss sustained.

3. Where, in an action by a receiver of a life insurance company against directors for taking inadequate security for a loan, at the time the loan matured all the security taken was worthless, the receiver was not required to tender such security to the directors sued.

4. Where counsel advised directors of a life insurance company that they had authority to make a loan if they believed the security sufficient, such advice of counsel was no defense

to an action by the receiver of the corporation against such directors for negligently making the loan.

5. Where, in an action against directors of a life insurance company for negligence in loaning the company's funds, the receiver proved that defendants had made the loan on insufficient security, in excess of their authority, resulting in a total loss, the receiver was not required to further prove the value of the security at the time of the loan.

6. In an action against the directors of an insurance company for wrongfully loaning the company's funds on improper security, the court was not required to divide the loan into parts, and treat the entire security taken as security for one of such parts, for the purpose of affecting damages recoverable.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by the New Haven Trust Company against John B. Doherty and others to recover damages from defendants, as directors of the Connecticut Life Insurance Company of Waterbury, for their negligent investment of the company's funds. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The averments of the complaint which are denied by the answer are substantially these: The defendants were actively engaged in the management of the company, etc., and it was their duty to see that its assets were safely invested and preserved. The defendants caused the money of the company to be loaned upon an indorsed note secured by the mortgage of a vessel. No payment of the note has been made, and the maker and indorsers are unable to pay the same. The vessel mortgaged was an improper and inadequate security for the same, and is now worthless. The defendants wrongfully and negligently failed to obtain proper and sufficient security for said loan, or any security such as the statute requires; and, by reason of their said failure and neglect, the sum loaned, with all interest thereon, has been lost to the company.

The denials of the answer were accompanied by the affirmative allegation that the loan was secured, in addition to the mortgage, by certain bonds, as collateral therefor, of a par value of more than 25 per cent. above the amount of said loan, and the defendants and other agents of the company made reasonable investigation as to the amount and value of said security and collateral, and the defendants believed that said bonds had at the time of said loan a market value of more than 25 per cent. in excess of the amount of said loan, and the defendants believed that said loan, and the payment thereof, were fully secured by the security received. This allegation was denied by the reply.

The judgment, at the request of the defendant Platt, specially sets forth the facts found, as follows: This action was brought pursuant to an order of this court in an action of Frederick A. Betts, insurance commissioner, against said insurance company,

entered January 10, 1900. Said company carried on the business of life insurance in said Waterbury from January 16, 1894, to July 14, 1898. During the whole of said period said Doherty was the secretary of said company, and from January 16, 1894, to July 12, 1897, the said Platt was president, and from September 20, 1897, to July 26, 1898, was first vice president, of said company; and during the whole of said period from January 16, 1894, to July 14, 1898, both the said defendants were members of the board of directors—sometimes called the "executive committee"—and were actively engaged in the management of said company, in the investment of its funds, the collection of its income, and in the general management of its affairs, and it was their duty to see that its assets were safely invested, collected, and preserved.

On or about March 21, 1895, the defendants caused \$9,815 of the money of said company (being the amount of the note hereafter mentioned, less discount at 6 per cent. for 111 days) to be loaned to S. A. Dutton, and accepted therefor on behalf of said company his promissory note for that sum, dated March 14, 1895, payable to the order of himself 4 months after date, and indorsed by him, and also by H. M. Munsell and M. I. Munsell, and also accepted from him, in behalf of said company, as security for said note, a mortgage deed dated March 22, 1895, of a certain vessel, known as the "Jessie B." The defendants also, in behalf of said company, accepted as additional security for said note \$10,000, face or nominal value, of the bonds of the Waterbury Land Improvement Company of Waterbury, Conn., from one S. P. Williams. Said note, when due, was duly presented for payment, and payment thereof refused, and was duly protested for nonpayment, and no part thereof has ever been paid. Said vessel, when mortgaged as aforesaid, was registered and located in the state of New York, and was wholly inadequate security for said note, and when the same became due was worthless, and has so remained. At the time said loan was made and said bonds accepted as aforesaid by the defendants, said bonds did not have a market value of 25 per cent. in excess of the amount loaned thereon as aforesaid, and, when said note became due, were worthless. The defendants took no other security for said loan than that above stated, and negligently and wrongfully failed and omitted to obtain proper and sufficient security therefor; and by reason thereof the whole of said loan, with interest thereon, has been lost to said company. The plaintiff has been damaged thereby the sum of \$14,280.83. As a conclusion of law from these facts, the court finds that the plaintiff is entitled to recover from the defendants said sum.

The finding for appeal states the subordinate facts found, bearing upon the conclusion of negligence, and such other facts as

are material to the presentation of questions of law arising in the trial.

Henry Stoddard, William H. Ely, and Lucien F. Burpee, for appellants. Henry C. White and Leonard M. Daggett, for appellee.

HAMERSLEY, J. (after stating the facts). A director of a stock corporation, when acting for it in the conduct of its business, is its agent, and indirectly the agent of all the shareholders. Like every agent, he may be personally responsible to his principal for negligence or misconduct in conducting the business intrusted to him. Ordinarily directors, acting in good faith and within the scope of their authority, are not liable for the disastrous consequences of a mere mistake in judgment. But there is no general rule of liability for wrongful neglect in the exercise of such agency, applicable to directors as a class by themselves, independently of the law which prescribes and defines the duties and liabilities of agents. The duties and liabilities of directors must depend in each case upon the terms of their agency and the particular circumstances of the case. The fact that their services are gratuitous, when it is a fact, may have some weight. The fact that they have put themselves in the position of dealing as directors with themselves as individuals; that the funds in their charge are not committed to them for ordinary business operations, but have been contributed to the corporation by others in the trust and confidence that they will be safely invested and preserved to meet the liabilities incurred to the contributors, and which must arise in the near or far distant future, as in the case of savings banks and life insurance companies; that they act in excess of their authority or of the powers of the corporation; that they act in violation of the plain prohibition of statute law—together with other circumstances, may each effect the kind and degree of care required by law of a director in making or approving a particular investment, and his liability for any loss thereby caused.

In the present case the defendants were the principal officers of a life insurance company, actively engaged in its management and the investment of its funds, and presumably paid for their services. By virtue of their positions as principal officers, they were also directors. As officers they arranged for and carried out, and as directors they approved and voted for, an appropriation of the company's funds as a loan upon insufficient security, and in violation of section 2887 of the General Statutes (Rev. 1902, § 3564), forbidding the making of any loan without taking the security therein prescribed.

Under these circumstances, the duty of the defendants in respect to the loan was analogous to that of a trustee in respect to an

investment of the trust fund in a manner unauthorized by the terms of the trust. Mere good faith was not sufficient. At the very least, they were bound to exercise diligence in investigating as to the value of the securities and safety of the loan, and ordinary care and prudence in acting on the facts known to them. *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 357, 50 Atl. 887; *Id.*, 74 Conn. 468, 474, 51 Atl. 130; *Allen v. Curtis*, 26 Conn. 456, 461; *State v. Washburn*, 67 Conn. 187, 34 Atl. 1034; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 138, 23 Atl. 708; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866; *Lewin on Trusts*, p. 766; *Briggs v. Spaulding*, 141 U. S. 132, 147, 11 Sup. Ct. 924, 35 L. Ed. 662; *Hun v. Cary*, 82 N. Y. 65, 70, 71, 37 Am. Rep. 546.

The money in charge of the defendants as officers and directors was, in view of the provisions of its charter, held by the corporation under limitations of investment analogous to those imposed by law upon a trustee in the investment of trust funds; and, in recognition of this trust relation, the statute had further restricted the power of the trustee by forbidding any loan "unless such loan shall be secured by mortgage of unincumbered real estate worth at least double the amount loaned thereon; or by pledge of bonds or stocks as collateral, having a market value at least twenty-five per cent. in excess of the amount loaned thereon: provided however, that such life insurance company may make such loans upon pledge of United States government bonds, and bonds of the state of Connecticut, at par."

The power of the corporation in the investment of its money, imbued for this purpose with the characteristics of a trust fund, was limited; and the authority of the defendants as its agents was likewise limited. In exceeding their authority by making the loan in question, under the circumstances of this case, the defendants surrendered the protection given them as agents acting in good faith within the scope of their authority, and assumed a personal responsibility to the corporation in respect to their unauthorized act. So far as they could be regarded as acting as agents, they were bound at least to exercise the diligence, care, and prudence which a man of ordinary prudence would exercise under such circumstances to secure a loan whose actual safety would make their act in fact, as well as intention, beneficial to their principal. In making a loan which was actually unsafe, without exercising this diligence, care, and prudence, they acted wrongfully and negligently, and became personally liable for the resulting loss; and the corporation had a right of action against them to recover the damage caused by their wrongful and negligent act. The action sounds in tort, and may properly be brought against any one or more of the officers and directors who may have incurred the personal liability.

The wrong which is the ground of this action consists in the unlawful appropriation of the plaintiff's money, whereby the same, and all beneficial use thereof, has been lost to the plaintiff. The amount of the money and interest so lost as the direct result of the wrong must therefore measure the damage. The acquirement of the indorsed note, mortgage, and bonds was a part of the transaction which establishes the wrong, and, if the company had in fact received any benefit from this acquirement, the amount of that benefit might go in reduction of damages; but, being worthless at the time and ever since the four months for which the loan was made expired, it is immaterial in this action whether or not the company or receiver has formally offered to hand over the worthless securities to the perpetrators of the wrong. It is also immaterial what questions might arise, had the receiver affirmed the wrongful act, and accepted for the company the worthless securities. He has not done this. He could not do it without a violation of his duty, and such violation cannot be implied from the performance of his duty in bringing this action to recover the damage resulting from the wrong.

The questions now discussed were substantially covered by our opinion in granting a new trial of this cause upon a former appeal. 74 Conn. 473, 51 Atl. 130. The trial court properly applied the law thus indicated for its guidance in a new trial. It follows that the court did not err in holding the defendants liable, notwithstanding it was proved and found by the court that they acted in good faith, and did not err in assessing the damages, or in refusing to hold that the difference between the amount of money appropriated to the loan and the market value at the time of the loan of the bonds received as collateral security was the true measure of the damage caused by the wrong.

The disposition of these two grounds of error necessarily disposes of such other claims under the assignments of error as depend on the decision of the main question.

The claim is made that the court erred in drawing the conclusion of careless and negligent conduct from the subordinate facts found. This claim is unfounded. The conclusion is one of negligence under all the circumstances of the case, and subject to the well-established rules governing any review of the action of a trial court in such case. We have carefully examined the facts known to the defendants, and upon which they acted, and other facts of the transaction, as set forth in the finding. They certainly are not inconsistent with the conclusion drawn by the court that the defendants did not exercise a reasonable degree of prudence and business judgment, but acted wrongfully and negligently. Counsel for the defendants cannot seriously complain of this conclusion, unless the fact that the defendants were acting beyond the scope of their authority is elimi-

nated; but they claim that this fact should be eliminated because it appears that the defendants took the advice of counsel as to the power of the corporation to invest its funds in this loan, and were advised that it had power, and therefore the defendants were to be regarded as acting within their authority, and the standard of duty applied to their conduct should have been that applicable to agents acting in good faith within the scope of their authority. The court properly overruled this claim. The bonds were secured by a second mortgage on land, and the maker had no assets except the land so mortgaged. The bonds, at par value, were just equal to the amount loaned. The statute defining the power of the corporation over the investment of its quasi trust funds says that no loan shall be made, unless secured by a first mortgage upon land worth twice the amount of the loan, or by the pledge of bonds as collateral having a market value at least 25 per cent. in excess of the amount loaned. If this loan is treated as secured by mortgage on real estate, it is clearly unauthorized, because the mortgage is a second mortgage; if treated as secured by the pledge of bonds, it is clearly unauthorized unless the bonds had a market value of at least 25 per cent. in excess of their par value, because the bonds pledged have a par value just equal in amount to the loan.

The advice of counsel, as applicable to the loan in question, was this: The loan is within the power of the corporation, and authorized by the statute, if you believe, in good faith, that the land mortgaged to secure the bonds has a market value equal to the amount of the first and second mortgage and a sum equal to 25 per cent. of the amount of the bonds pledged. It is true that where the power of a trustee in dealing with a trust fund is doubtful, requiring some legal knowledge for the correct understanding of its limits, courts have held that the trustee might be entitled to some protection when acting under the advice of counsel. But the general principle is otherwise, and advice of counsel cannot avail where the terms of the trust are plain and explicit. *Lewin on Trusts*, s. p. 366; *Watts v. Girdlestone*, 6 Beaven, 188, 190; *Ames v. Parkinson*, 7 Beaven, 379. Indeed, it is difficult to imagine an instance of any kind where one charged with a specific duty can negligently violate that duty with impunity by simply obtaining from some attorney advice which is obviously repugnant to the plain facts of the case.

The material facts not admitted, on which the judgment was founded, were properly found under the issues framed by the allegations and denials of the complaint, amended answer, and reply.

The court did not err in overruling the defendants' claim that there was a fatal variance between the pleadings and the proof. Nor did it err in holding, if that ruling can

be regarded as material, that no presumption exists that a conference of a majority of the directors is a regular board meeting, and that legal notice has been given to the absent directors, when no record of the conference has been made. There may be a presumption, in support of a record produced in evidence, in the absence of testimony to the contrary, that a meeting duly recorded was rightly called. But there is no presumption that directors do not confer except at a regular board meeting. When a majority of directors confer, the inference, from the fact that the conference was not recorded, that other directors were not notified to attend, is as permissible as an inference from the fact of the unrecorded conference that they were notified to attend.

The plaintiff having proven that the defendants made a loan upon insufficient security, and in excess of their authority, resulting in total loss, the court did not err in refusing to hold that it was incumbent upon the plaintiff to prove the exact value of the securities at the time of the loan.

The court did not err in refusing to divide the loan into two separate loans, and treat the whole of the collateral as security for one of these loans, for the purpose of affecting the rule of damages or for any purpose.

The appeal contains numerous claims for the correction of the finding. It needs no correction. The printed transcript of testimony included in the appeal record serves only to illustrate the exceeding fairness and substantial sufficiency of the finding. An inspection of the whole record fails to show any material fact found without evidence, or that any fact claimed is excluded from the finding which is material to the presentation of questions of law, and has been found proven by the court, or treated in the trial as an admitted or undisputed fact.

There is no error in the judgment of the superior court. The other Judges concurred.

JOSEPH BERNHARD & SON v. CURTIS.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

LANDLORD — FAILURE TO DELIVER POSSESSION TO TENANT—DAMAGES—ELEMENTS OF DAMAGE—PLEADING—EVIDENCE.

1. A complaint against a landlord, averring the making of a lease to plaintiff from the 1st of April in a certain year, and in effect alleging that defendant refused to put plaintiff in possession, was sufficient, in the absence of a demurrer, to sustain a judgment for substantial damages, though it did not expressly allege that defendant agreed to deliver possession April 1st.

2. After default, the burden rested on defendant to prove any facts which would show he was free from any liability.

3. Gen. St. 1902, § 742, provides that in any hearing for damages after default suffered, or after demurrer overruled, defendant shall not be permitted to offer evidence to contradict any allegations of the complaint, save such as relate to the amount of damages, unless he shall have given written notice to plaintiff of his intention

so to do. *Held* that, where a landlord was unable to give the tenant possession at the commencement of the term because of the holding over of another tenant, and the lessee sued for damages, the landlord, in a hearing for damages, could not raise the question as to whether a wrongful holding over by the former tenant would relieve the landlord from liability where he had given no notice of such defense under the statute.

4. The fact that, at the commencement of the term of a lease to plaintiff, another tenant was in rightful possession of the premises, would not prevent plaintiff from recovering substantial damages.

5. In an action by a lessee against his landlord for failure to deliver possession at the commencement of the term, plaintiff is entitled to recover the difference between the rent agreed to be paid and the value of the term, together with such special damages as the circumstances may show him to be entitled to.

6. The special damages must be limited to such as are the direct and natural result of the breach of contract, since such damages are presumed to have been in the contemplation of the landlord.

7. The lessee is entitled to recover his reasonable costs for all steps necessarily taken by him in order to protect himself from loss or to diminish the loss resulting from failure to obtain the premises.

8. The lessee is entitled to recover damages sustained by him owing to all proper acts of preparation made by him to occupy the premises.

9. The leased premises being a store, the lessee is not entitled to recover expenses incurred by him in procuring another store merely for the purpose of carrying out his original plan of opening a certain business in the town.

10. Plaintiff leased a store from defendant, but before commencement of the term defendant informed him that the tenant in possession claimed to be entitled to occupy the store for the term for which it had been leased to plaintiff, and that the only chance of obtaining possession depended on the result of an action against the tenant in possession. *Held*, that in an action for failure to deliver possession plaintiff could not recover for expenditures made by him toward the occupancy of the store after the time when he was notified of the situation as to the tenant in possession.

11. Plaintiff could not recover for losses sustained by depreciation in value of all goods which he had on hand before he obtained the lease, but might be allowed the loss sustained by reserving goods for use in the store.

12. Expenses incurred by plaintiff in renting and fitting up another store, if necessary in order to protect him against loss from proper acts of preparation for the occupancy of defendant's store, were proper elements of damage.

13. In determining the loss sustained by reason of the purchase of fixtures to fit up the new store, the value of such fixtures should be deducted from the proper cost thereof.

14. No part of the expenses incurred by the lessee merely for the purpose of providing himself with another store equally well adapted to the business as that of the defendant should be allowed.

Appeal from superior court, Litchfield county; Ralph Wheeler, Judge.

Suit by Joseph Bernhard & Son against Lewis F. Curtis. From a judgment for substantial damages, defendant appeals. Reversed.

The complaint, dated May 10, 1897, alleges, in substance, that on the 9th of February,

¶ 5. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 453.

1897, the defendant leased to the plaintiffs a certain store on Main street, in Bridgeport, for the term of three years from the 1st of April, 1897, at the annual rent of \$900, payable monthly in advance; that the plaintiffs on April 1st demanded possession, and went upon the premises to take possession "as provided in said lease," but that the defendant failed, refused, and neglected to put the plaintiffs into possession, and has neglected to perform any of the terms of said lease.

Paragraphs 5 and 6, added by way of amendment in August, 1899, are as follows:

"The plaintiffs leased said store for the purposes of establishing and conducting a large millinery business therein, and so notified the defendant at the time of signing said lease, and the plaintiffs had on hand at the time of signing said lease a large stock of millinery goods * * * of the value of \$15,000, to be used in said business; and by reason thereof notified the defendant that unless they obtained possession of said premises, as provided in said lease, they would suffer a large monetary loss.

"The plaintiffs, confiding in the covenants of said lease, after the signing thereof, also purchased and manufactured a further stock of millinery goods, and shipped them and a portion of the stock previously on hand, and reserved to be used in said business, to Bridgeport, Conn., and made contracts with various persons to manage and conduct said millinery business, and, by reason of the defendant's failure to fulfill the terms of said lease, the plaintiffs were obliged to expend large sums of money in hiring and fitting up two other stores in which to dispose of said stock and to fulfill said contracts, and, by reason of the defendant's said failure to fulfill said lease, said stock of millinery goods * * * became of little or no value to the plaintiffs, and they were obliged to dispose of them at a great loss or sacrifice."

Ten thousand dollars damages are demanded.

A copy of the lease was attached to the complaint.

It was agreed by the parties that the case should be heard in damages, after a default, upon the evidence taken at a former trial, to which objections might be made during the reading of the evidence and upon the argument of the case, to be ruled upon by the court in its memorandum of decision. No notice was filed by defendant under section 742, Gen. St. 1902.

It appears that the plaintiffs were engaged in importing and selling, at wholesale, millinery goods in New York City. In the winter of 1896-97 they purchased in Europe, for the firm, goods to the value of \$2,500, and before April 1, 1897, purchased other goods in New York, of the value of \$2,000, all of which they reserved from their wholesale stock in New York, for the purpose of opening a retail millinery store in Bridgeport.

On February 9, 1897, the plaintiffs, after

certain negotiations with the defendant, in which they informed him that they intended to establish a large and up to date millinery business in Bridgeport, and had made certain purchases of goods in Europe therefor, entered into a written lease with the defendant for a store on Main street, in Bridgeport, for the term of three years from the 1st day of April, 1897, at the rent stated in the complaint. The plaintiffs did not state to defendant that they intended to purchase or manufacture goods before entering into possession of defendant's store. At the time of the execution of this lease, and until the following August, the defendant's store was the only available one in that section on Main street.

Immediately upon the execution of the lease the plaintiffs made a verbal agreement with one Mary E. Hogan that she should manage their business for one year from March 1st at \$30 a week, and on March 1st signed a written contract with her containing those terms. On the 22d of February the plaintiffs had measurements made of defendant's store, and thereafter ordered fixtures and furnishings therefor at a cost of \$827.24, which were made after the 26th of February.

Subsequent to February 26th the plaintiffs hired a store on State street, in Bridgeport, for the month of March, in which to store, manufacture, and arrange stock for the opening of the Main street store on April 1st, and to this store, before April 1st, shipped goods of the value of \$3,370.97 reserved for the Bridgeport store, and afterwards, in the months of April, May, and June shipped to this store goods of the value of \$1,120.56, and also expended before April 1st a large sum of money in the manufacture of hats and in preliminary work at the State street store, and in New York for the Bridgeport business.

At the time the lease was executed by the defendant to the plaintiffs, one Harris was in possession of the defendant's store, having taken a written lease thereof from the defendant for one year from April 1, 1896. On February 22d the plaintiffs were informed that Harris claimed to have a further verbal lease until February 1, 1898, and that he did not intend to vacate the store until that date. The plaintiffs thereupon, on the 25th of February, saw the defendant, who informed them that Harris had no verbal lease; that he, the defendant, would institute a summary process proceeding to dispossess Harris; that "under such proceeding a tenant holding over could legally be dispossessed in six days, but that sometimes it was attended with some difficulty." On February 26th defendant's counsel wrote the plaintiffs that the defendant had seen Harris; that the latter said he intended to stay; and that, while the defendant would do what he could to get possession, the plaintiffs must take note of the situation. The defendant afterwards

commenced an action of summary process against Harris, which was not carried to a successful issue, and Harris remained in possession until the following August.

The plaintiffs tendered to the defendant the rent on the 1st of April and of May, and demanded possession. The plaintiffs further leased the State street store for the month of April for \$50, and on the 8th of May leased that store and paid the rent for the same for one year from March 1st, being unable to obtain a lease of it for one month.

The plaintiffs opened their millinery business in the State street store on or about April 1, and continued business there until August 1, 1897, and used there the fittings and furnishings ordered for the defendant's store. In July the plaintiffs leased a store on Main street from the 1st day of August, 1897, for one year, at a rent of \$1,050, called the "Coughlin Store," and transferred to that store the fixtures and furnishings used at the State street store, and were put to the further expense of \$800 in altering and fitting that store for the millinery business. Mary E. Hogan continued in the employ of the plaintiffs in their business in the State street and Coughlin stores upon the terms of plaintiffs' said contract with her. Other material facts are stated in the opinion.

Curtis Thompson and Arthur D. Warner, for appellant. Jeremiah D. Toomey, Jr., for appellees.

HALL, J. (after stating the facts). Although the complaint does not expressly allege that the defendant agreed to deliver possession of the leased premises on the 1st of April, it describes a cause of action sufficient, in the absence of a demurrer, to sustain a judgment for substantial damages. It in effect alleges that, in violation of the terms of the lease made a part of the complaint, the defendant refused to put the plaintiffs in possession of the store. After the default, it was only necessary for the plaintiffs to prove the averments of the complaint as to the extent of their damage. The burden rested upon the defendant to prove any fact which would show that he was free from any liability. If he desired, upon the hearing in damages, to raise the question of whether a wrongful holding over by Harris would relieve the lessor from liability, he should have given notice of that defense; as required by section 742, Gen. St. 1902, and should have proved it. In the absence of a finding that Harris' possession after April 1st was wrongful, and with the burden of proof thus upon the defendant, we must regard Harris' possession as lawful. The fact that he was rightfully in possession under a verbal lease from the defendant does not prevent the plaintiffs from recovering substantial damages. Cohn v. Norton, 57 Conn. 480-490, 18 Atl. 505, 5 L. R. A. 572.

The correct rule of damages in actions of

this character is stated in Cohn v. Norton to be that "the plaintiff is entitled to recover the rent paid, and the difference between the rent agreed to be paid and the value of the term, together with such special damages as the circumstances may show him to be entitled to"; and, citing the leading case of Hadley v. Baxendale, 9 Exch. 341, it is said that, as in ordinary cases of breaches of executory contracts, the essence of the rule is "that the defendant must in some measure have contemplated the injury for which damages are claimed. If it was the direct and natural result of the breach of the contract, he did contemplate it; but if the injury did not flow naturally from the breach, but the breach combined with special circumstances to produce it, then the defendant did not contemplate it, unless he had knowledge of the special circumstances"; and that there may be cases in which, from the nature of the transaction and the character of the business in which the party is engaged, the defendant will be deemed in law to have contemplated the injury for which damages are claimed, although not expressly informed of the special circumstances which may have contributed to produce it.

In Jordan, Marsh & Co. v. Patterson et al., 67 Conn. 473, 480, 35 Atl. 521, 523, in speaking of the special damages recoverable for breach of contract, it is said that, speaking generally, they must "be confined to such as result from the circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract"; and in Lewis v. Hartford Dredging Co., 68 Conn. 221-236, 35 Atl. 1127, that special damages which the parties ought in reason to have foreseen, as the probable and direct result of special circumstances which were or ought to have been known to the defendant, may be recovered.

The rule as thus stated accords with that laid down in Hadley v. Baxendale, 9 Exch. 341, that the damages recoverable are "either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

It may be added that mere notice to a lessor of the facts from which special damages may arise upon a breach of his contract does not necessarily render him liable for the special damages which afterwards result therefrom. To render him so liable, the knowledge of the lessor, or the facts surrounding the making of the lease, must be shown to have been such that it may be fairly inferred therefrom that he consented to assume the enlarged responsibility and risk of such special damages. 1 Sedgwick on Damages, sec. 159 (8th Ed.); Wood's Mayne on Damages, sec. 41; Hale on Damages, p.

62; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Snell v. Cottingham*, 72 Ill. 161.

Other rules of law applicable to the case at bar are that the plaintiffs may recover the reasonable cost of steps necessarily taken in order to protect themselves from loss, or to diminish the loss, from proper acts of preparation to occupy the defendant's store (1 *Sutherland on Damages*, p. 148); that the plaintiffs assumed the risk of loss from all liabilities not incurred by them in good faith (*Cohn v. Norton*, 57 Conn. 480-493, 18 Atl. 595, 5 L. R. A. 572); that all damages which they could have avoided by the use of due diligence are not to be regarded as the proximate results of the defendant's acts (*Jordan, Marsh & Co. v. Patterson et al.*, 67 Conn. 473-481, 35 Atl. 521); and that those injuries and losses, for which a recovery is sought, not necessarily resulting from the defendant's wrongful act, but following it as natural and proximate consequences, and termed special damages, must be specially alleged, so that the defendant may be apprised of the nature of the loss actually sustained, and be prepared to go into the inquiry (*Bristol Mfg. Co. v. Gridley*, 28 Conn. 211, 212; *Lewis v. Hartford Dredging Co.*, 68 Conn. 221-236, 35 Atl. 1127).

The items of damage allowed by the trial court in the present case, and which go to make up the judgment of \$1,540, are the \$800 paid by the plaintiffs for the alterations and fixtures for the Coughlin store, and the \$400 paid for rent of the State street store after the plaintiffs ceased to occupy it. The defendant objected to proof of these items of damage, and afterwards claimed that they should not be allowed, and further claimed that there could be no recovery for loss by reason of expenses incurred after the plaintiffs were informed of the claims of Harris and of his refusal to vacate the defendant's store on the 1st of April.

From the fact that the judgment is based upon these two items, as well as from certain rulings and statements of the trial court appearing upon the record, it would seem that damages were assessed upon the theory that the plaintiffs, independently of their right to recover for any loss they may have sustained by reason of preparations made to occupy the defendant's store, were entitled, upon the facts alleged and found, to a judgment for the loss growing out of the expense incurred by them in procuring another store, equally suitable with the defendant's, in which to conduct the millinery business.

As indicating such view of the case, the trial court says that the plaintiffs were required to "give up entirely their purpose of establishing a business in Bridgeport for the present, and immediately dispose of their stock of goods or dispose of and arrange to protect themselves in respect to the fixtures on hand or ordered, or they might pursue such a course as they did, for the purpose of

locating themselves on Main street, as soon as opportunity afforded. They chose the latter course. It was a proper and reasonable one, if they were determined to carry on business in Bridgeport in the future; * * * that the defendant must be held to have understood that damage would result if the plaintiffs could not use the fixtures (ordered for the defendant's store) in the Curtis store, or if, in order to get an equally but no more desirable store on Main street, they had to purchase additional fixtures or pay a bonus to get possession;" that "in the natural course of the events, in order to obtain the object of their lease—the use of a store on Main street, and as near the Curtis store as possible—the plaintiffs were driven almost necessarily to this expenditure," that is, of the \$800, for additional fixtures for the Coughlin store; that "in July the plaintiffs, finding the State street store unsuitable for their business, and in pursuance of their original purpose of obtaining a store on Main street," leased the Coughlin store; and again, that one of the steps taken to protect themselves from loss was "the hiring of the Coughlin store, which was in pursuance of their original purpose of establishing a business in that section of the city."

It is true that the trial court has found that the plaintiffs "were justified in ordering the fixtures (for defendant's store), and in some reasonable preparation for the opening of business in the Curtis store on the 1st day of April, by the purchase and reservation of stock, and in a small amount of manufacture * * *," and that "their steps taken to protect themselves from loss, growing out of reasonable preparations, * * * including the hiring, fitting, and vacating the State street store, and the hiring and fitting up of the Coughlin store, were reasonable and proper." But the record does not state that the plaintiffs were justified in sending the \$3,371 worth of goods to the State street store in March, after, as the court finds, the doubt arose as to the possession of the defendant's store, nor is it found what part, if any, of these goods were purchased or manufactured after the 9th of February, when the lease from the defendant was executed, nor does it clearly appear what loss, if any, the plaintiffs sustained by having purchased the fixtures for the defendant's store, nor indeed whether they were in fact purchased before the 26th of February. Evidently it is not meant by this part of the finding that the entire expense of hiring, fitting, and using the State street and Coughlin stores was reasonable and proper in order to protect the plaintiffs against loss from preparations to occupy the defendant's store on April 1st, since but a part of such expense is allowed to the plaintiffs by the judgment, and since it clearly appears from other portions of the finding that these stores were rented and used by the plaintiffs largely, if not wholly, for a different purpose, namely, for carrying out their

original design of conducting a retail millinery business in Bridgeport.

The plaintiffs are not entitled to recover expenses incurred by them in procuring another store merely for the purpose of carrying out their original plan of opening a millinery business in Bridgeport. They cannot recover them as general damages because, by the premises of an ordinary lease, the lessor does not undertake, upon failure to deliver possession, to furnish other premises equally well adapted to the lessee's use at an expense beyond the market value of the leased premises. The limit of the general damages which a lessee may recover, who is thus denied possession, is the actual rental value of the leased premises for the term, and not the amount which the lessee under special circumstances may have been compelled to pay to obtain similar premises. If such actual value of the term is no greater than the rent agreed to be paid, the general damages, in the absence of any payment of rent, are nominal, but, if rent has been paid, then the amount of the rent so paid. If such actual value is greater than the rent agreed to be paid, the general damages are the difference between the agreed rent and such actual value, plus the amount of rent actually paid.

Nor can the plaintiffs recover as special damages the expense incurred in procuring another store merely for the purpose of establishing a business in Bridgeport. First, because, from the mere fact that when the lease was executed by the defendant he was informed that the plaintiffs intended to establish a millinery business in Bridgeport, and had made certain purchases of goods therefor, it cannot reasonably be supposed that the defendant contemplated, as probable results of a breach of his contract, and as risks assumed by him, that the plaintiffs might sustain losses by renting, merely for the purpose of establishing such business in Bridgeport, an unsuitable store on State street, paying \$400 rent therefor after they had ceased to occupy it, and hiring another store on Main street, requiring the expenditure of over \$1,600 for fixtures, \$800 worth of which would be valueless to the plaintiffs beyond rendering such store equally suitable with the defendant's for carrying on such millinery business; and, second, because it is not alleged in the complaint that the plaintiffs suffered any loss or incurred any expense in procuring another store equally suitable with the defendant's in which to carry on their projected millinery business, or that they did procure such a store. In fact, such suitable store was not obtained until after the present suit was brought. The only special damages alleged in the complaint are those arising from expenses incurred by the plaintiffs in protecting themselves from loss from preparations made prior to April 1st to occupy the defendant's store, and from depreciation in the value of goods purchased

or manufactured for the Bridgeport business before April 1st. If the plaintiffs did not in fact make any preparations for occupying the defendant's store for the expense of which he can be held liable, they cannot, assuming the value of defendant's store to have been no greater than the rent agreed to be paid under these allegations, recover for any expense incurred in procuring another store in which to conduct their business. By this we do not mean that the plaintiffs may not recover, under the allegations of the complaint, such part of the expense of carrying on the millinery business in Bridgeport as was necessarily incurred by them in protecting themselves from loss from proper expenses of preparation to occupy defendant's store.

Assuming that the actual rental value of the defendant's store was no greater than the rent agreed to be paid, the real question then to be decided upon the hearing in damages was, what loss, for which the defendant can be held liable, did the plaintiffs sustain by reason of their alleged preparations to occupy the defendant's store? and not, what expense did they incur in order to procure another store equally as good?

Upon the record before us, the judgment rendered cannot stand as a measure of the loss resulting from such preparations: First, because, as we have said, it seems to be based upon, or to include a different loss than that resulting from, such preparation; and, second, because it does not clearly appear that there were acts of preparation to occupy the defendant's store, and losses resulting therefrom, which would render the defendant liable to the amount of the judgment rendered.

In his memorandum of decision the trial judge says "the plaintiffs have been permitted to give in evidence every special circumstance from which they thought a claim for special damages might arise." While the finding states that the plaintiffs proved a depreciation in value of goods not sent to Bridgeport, and in goods manufactured in Bridgeport after the 1st of March, and that there was evidence tending to show a loss of 25 per cent. on the \$3,371 worth of goods sent to the State street store, and that it may be assumed that the fixtures purchased for the defendant's store could have been sold for 60 per cent. of their cost, the judgment is not based on these losses. And while it is found that the hiring, fitting, and vacating the State street store, and the hiring and fitting up of the Coughlin store, were reasonable and proper steps to protect the plaintiffs from loss growing out of reasonable preparations, and that the plaintiffs acted in good faith in making preparations for their spring opening, and in steps taken to facilitate the disposal of their goods and protect themselves from loss, it nowhere appears what the court regarded as reasonable acts of preparation—excepting, perhaps, the purchase

of the fixtures for the defendant's store, the cost of which are not included in the judgment—nor just when the acts, which the court may have considered reasonable acts of preparation, were performed.

Again, certain of the expenses incurred and losses sustained which are described in the finding cannot properly be regarded as arising from acts of preparation to occupy the defendant's store, and for which the defendant can be held responsible.

The plaintiffs cannot recover for any loss sustained by reason of expense incurred after February 26th to occupy the defendant's store. On that day they were fully informed as to the claims of Harris; that he refused to surrender possession on the 1st of April, and that their only chance of obtaining possession later depended upon the determination, by an action of summary process, of the disputed question of whether Harris had a verbal lease. With these facts before them, they were notified in writing by the defendant's counsel that, while the defendant would do what he could to get possession, they must take note of the situation. The only fair interpretation of this language, under the circumstances then existing, is that the plaintiffs could no longer act in reliance upon the agreement that they should have possession on April 1st. In *Cohn v. Norton*, supra, it was said, "Again, if these liabilities were incurred after the plaintiff knew that it was doubtful whether he could have the store, * * * they were incurred in bad faith, and he assumed the entire risk." In that case, as in this, the plaintiff, after he had learned the facts, was informed that the defendant would do all he could to get possession.

It does not appear that the defendant made any such promise to deliver possession after April 1st as would have justified the plaintiffs in incurring, after February 26th, any liabilities, at the defendant's risk, with the view of obtaining possession at such later date, nor is it alleged in the complaint that the defendant made any such promise, or that the plaintiffs suffered loss by reason of the breach of any such promise.

The plaintiffs should not be allowed for loss sustained by depreciation in value upon all the goods which they had on hand before obtaining the lease from the defendant. The defendant was not a party to the purchase of such goods. It is not alleged that he knew of their purchase, nor is it found that he had any other information concerning them than that the plaintiffs had made certain purchases in Europe. There may, however, be allowed the loss, if any, caused by reserving or keeping, from February 9th to February 26th, for use in the defendant's store, or by shipping to Bridgeport for that purpose between those dates, such portion of those goods as it may be shown the defendant, when he signed the lease, knew or should in reason have apprehended would be

so kept or shipped; as well as any loss which may have been sustained by the plaintiffs by the purchase or manufacture of such amount of goods, between those dates, for use in the defendant's store, as it may be shown the defendant, when he signed the lease, knew or should have apprehended would be so purchased or manufactured. And so, too, there may be an allowance for any other loss, alleged in the complaint, caused by any act done, or expense incurred, by the plaintiffs between said dates in making proper preparations to occupy the defendant's store, which loss, upon the facts, it may reasonably be supposed the defendant, when he signed the lease, contemplated as the probable result of a breach of his contract.

If any part of the expense of renting, fitting up, and using the State street and Coughlin stores after February 26th, or of conducting a millinery business in them after that date, was necessarily incurred in protecting the plaintiffs against loss from the proper acts of preparation between February 9th and February 26th, above described, the loss occasioned by such expense should be allowed; but, in determining the loss sustained by the purchase of any fixtures for that purpose, the value of such fixtures left on hand should be deducted from the proper cost thereof, and no part of any expense incurred by the plaintiffs merely for the purpose of providing themselves with another store equally well adapted with the defendant's for the millinery business should be allowed.

As the damages do not appear to have been assessed in accordance with the rules above stated, the case is remanded for a reassessment of damages. The other Judges concurred.

PAGININI v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CARRIERS—INJURY TO PASSENGERS—NEG-LIGENCE.

1. It is not negligence per se for a motor-man to open the gate on the front platform of a trolley car before the car has come to a full stop.

(Syllabus by the Court.)

Error to circuit court, Hudson county.

Action by Michael Paginini against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

Vredenburg, Wall & Van Winkle, for plaintiff in error. Hudspeth & Puster, for defendant in error.

FORT, J. The defendant in error had a verdict in the Hudson circuit for alleged in-

juries resulting from his being thrown from the front step of a car of the in error. The injury resulted while the car was moving. His testimony was that the car upon which he was standing was the street at which he was expected to be discharged; that he went forward because of the crowded condition of the car, to the motorman, and asked why he had not stopped; that the motorman made no reply, but proceeded to bring the car to a stop, and opened the gate for him to alight; that he then rested one foot upon the step and the other upon the platform, holding the gate with one hand and his violin case with the other; that, thereupon, the motorman, instead of stopping, suddenly put on the power, and he was thrown from the car and injured. This was his testimony. There was a motion to nonsuit, but this, we think, was rightly refused. Another error is assigned upon an exception taken to the refusal of the court to charge the following request of the defendant, as well as to what the court did charge, viz.: "That it was negligence on the part of the plaintiff to step on the front step of this car before it had stopped, and, if that contributed to the accident, he cannot recover." This is what the court said in charging the jury on this request: "That is true, gentlemen. He could not step upon the front step of the car until after it had stopped, unless somebody opened the gate. He certainly knew whether the motorman opened the gate. If the motorman opened the gate, or any one in authority upon that car opened the gate, and he stepped down, why, it would be a negligent act upon the part of the company—if the motorman opened the gate, it would be a negligent act."

It seems impossible to sustain this charge and uphold the verdict. It cannot be but that the jury received the impression from this language that, from the mere fact that the motorman opened the gate, there was a negligent act on the part of the defendant company. This conclusion is irresistible, when taken in connection with some of the statements previously uttered by the judge in the charge. He had already said: "(a) If that is true, gentlemen—if the motorman before that car came to a stop opened the gate—then, by his evidence, he violated one of the rules of the company, and he was negligent in opening the gate and allowing the man to get off before the car stopped." "(b) Did the motorman open that gate and thereby invite the passenger to alight while this car was in motion, or did some one else?"

Taking all these statements of the court together, it must appear that what the court told the jury was that it was negligence for the motorman to open the gate—that it amounted to an invitation for the plaintiff to get off while the car was in motion—and that such negligence was imputable to the defendant company, and that, as a matter of law, the plaintiff, being, of course, free from neg-

ligence, could recover. We are unable to give assent to this view of the law. It cannot be said, as a matter of law, that it was negligence per se for the motorman to open the gate before the car came to a full stop; nor can it be said that the opening of a gate by a motorman while the car is moving is an invitation to a passenger to alight from a moving car. This would no more be true than would the act of a conductor in opening the rear door of the car, as it was about to come to a street and stop, be an invitation for a passenger to get up and step off the car by the rear platform while the car was still in motion. Passengers take obvious risks. *Coleman v. Second Avenue R. R. Co.*, 114 N. Y. 609, 21 N. E. 1064. Because a motorman opens a gate before a car comes to a stop, that will not excuse a person in jumping off a car before it comes to a stop. The mere opening of the gate will not raise a presumption of actionable negligence against the defendant company.

For these errors of the trial court, the judgment is reversed, and a venire de novo awarded.

NEW YORK & N. J. TEL. CO. v. CONNOLLY.

(Supreme Court of New Jersey. Feb. 24, 1903.)

APPEAL—REVIEW.

1. This court will not review the decisions of district courts upon questions of fact. It can only look to see if there is any legal evidence upon which the judgment might be based.

2. In the present case the evidence was held sufficient, under this rule, to support the finding and judgment of the court below.

(Syllabus by the Court.)

Certiorari to First district court of Jersey City.

Certiorari by the state, on the prosecution of Patrick Connolly, against the New York & New Jersey Telephone Company to review a judgment. Affirmed.

Argued February term, 1903, before DIXON and HENDRICKSON, JJ.

Randolph Perkins, for plaintiff in certiorari. Corbin & Corbin, for defendant.

HENDRICKSON, J. The plaintiff in certiorari has brought up for review the judgment of the First district court of the city of Jersey City, recovered against him by the defendant company for damages by the cutting of its subway cable at the junction of Grand street and Pacific avenue, in that city. The plaintiff and one Van Keuren were engaged, with about 60 men in their employ, laying along Grand Street a six-foot sewer, and the allegation is that on or about August 6, 1901, while digging out the sewer trench, some of the men thus employed, by means of picks with which they were working, cut through the plank covering and the foot square wooden duct below it con-

taining the cable and wires of the company, severing six or seven of its wires. The interruption of communication was noticed at once, and on that day and the next repairs were made involving an expense of \$126.92. The court below found as facts from the evidence that the plaintiff and his joint contractor, by their servants and employes, did the acts complained of causing the injuries, and that these acts constituted negligence for which the plaintiff was liable, and he thereupon gave the judgment under review.

The rule is well settled, and is not disputed in this case, that this court will not review the decisions of the court below on questions of fact. *South Brunswick v. Cranbury*, 52 N. J. Law, 298, 19 Atl. 787. It can only look to see if there was legal evidence before the court below upon which its judgment might be based. It will not reverse, though the evidence might lead this court to a different conclusion. *Brunswick v. Cranbury*, *ubi supra*; *Brown v. Ramsay*, 29 N. J. Law, 117; *Jeffrey v. Owen*, 41 N. J. Law, 260; *Mon. Park Ass'n v. Warren*, 55 N. J. Law, 598, 27 Atl. 932; *Jersey City v. Tallman*, 60 N. J. Law, 239, 37 Atl. 1026.

But it is contended for the plaintiff in certiorari that there is no evidence of such legal force and verity that it should be held sufficient to justify the judgment under the rule as cited. It is true that there is no direct proof as to how, when, or by whom the cutting of the cable was done; the evidence on these points is largely circumstantial in character. We have examined the evidence on both sides with great care, as we have also the discussions of it in the briefs of counsel. We deem it unnecessary to discuss the evidence in detail in the opinion. As a result of our examination, we have reached the conclusion that there was sufficient evidence, under the rule herein stated, to support the findings of fact and the judgment based thereon of the court below.

The result is that the judgment below is affirmed, with costs.

ATLANTIC CITY v. DEHN (two cases).

(Supreme Court of New Jersey. Feb. 24, 1903.)

OMNIBUS DRIVER—COMMON CARRIER.

1. Proof that a person was the driver of a "licensed bus" in a city does not show him to have been a common carrier, and thus legally bound to carry passengers.

Albert Dehn was convicted of two violations of an ordinance of Atlantic City, and brings certiorari. Conviction set aside.

Argued November term, 1902, before GARISON and GARRETSON, JJ.

U. G. Styron, for plaintiff in certiorari. Harry Wooton, for defendant in certiorari.

PER CURIAM. These two cases were argued together. In the first case, which was

No. 111, ~~as the~~ list, there was a conviction under ~~five~~ ^{one} ~~beance~~ for refusing to carry passengers ~~chase~~ ^{for} fare. The testimony fails to show ~~the~~ ^{that} the prosecutor was one of the class named in the ordinance, namely, that he was in the ~~business~~ ^{business} of driving an omnibus for fare. He ~~may~~ ^{may} have been in private employ.

In No. 112 there is a conviction for refusing to carry a passenger. The proof is that the plaintiff in error was the driver of a "licensed bus." There is nothing in the proofs to show that this compelled him to be a common carrier.

In each case the conviction is set aside.

KLAUS v. MAYOR, ETC., OF JERSEY CITY.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CHANGE OF STREET GRADE—DAMAGES—LACHES.

1. When a city is about to change the grade of a street on which a building stands, the fact that the owner of the building secures such a modification of the proposed change as will result in less injury to him does not bar his right to damages for the change actually made.

2. Under the circumstances of this case the relator's right to relief is not barred by laches. (Syllabus by the Court.)

Application by the state, on relation of Henry Klaus, for writ of mandamus to the mayor and aldermen of the city of Jersey City. Writ to issue.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

Bedle, Edwards & Lawrence, for relator John W. Queen, for defendants.

DIXON, J. Under an agreement with the Erie Railroad Company Jersey City lowered the grade of Grove street at its intersection with Eleventh street, on the corner of which a building of the relator stood. The work was done in the summer of 1899, and resulted, the relator claims, in damage to his property and the property of adjoining owners. He therefore asks for a mandamus to compel the city authorities to have a proper award made for the damages so caused. The city resists the application on the ground that the relator assented to the change, and also has been guilty of laches in pursuing his remedy.

What the relator assented to, as shown by the evidence, was a modification of the proposed change, which he thought would result in less damage to his property; but it does not appear that he assented to forego his right to compensation for whatever damage the modified change would cause.

On the question of laches, the case shows that on June 6, 1899, the board of street and water commissioners referred the matter to the commissioners of assessments to ascertain the damages and benefits resulting

from the change of grade, and that the present proceeding was instituted in May, 1902. Evidently, during a part of the interval, the relator was justified in expecting that the commissioners of assessments would proceed to perform the duty thus devolved upon them, and it does not appear that during the residue of the interval, or indeed at any time, anything occurred which would change the situation to the detriment either of the city or of property owners. Under these circumstances we think the delay should not bar relief.

These objections being put aside, the case is governed by *Clark v. The City of Elizabeth*, 61 N. J. Law, 565, 40 Atl. 616, 737, and a peremptory mandamus should be issued.

DAUM v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

STREET RAILWAYS—INJURY TO LABORER IN STREET—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY—WITNESS—IMPEACHMENT.

1. Plaintiff, engaged in work on the public street which necessitated his kneeling on defendant's track to hand boards down into a trench, was injured by defendant's car, which came upon him, without warning, contrary to the usual custom, which was for those in charge of the car to ring a gong when approaching the point where plaintiff was at work. Plaintiff looked before kneeling, and there was no car in sight. He did not look again, and the car came around the curve, 250 feet distant, about a minute later, and struck him. *Held*, assuming that the company was under no duty to give a warning of the approach of the car, whether it was negligent in failing to do so, having once assumed such duty, was a question for the jury.

2. Whether the plaintiff was guilty of contributory negligence, in failing to look repeatedly for approaching cars, was a question for the jury.

3. In an action against a street railway for injuries to a person working in the street, the absence of proof that plaintiff's employer had a right to prosecute any work on the street does not justify the conclusion that plaintiff was a trespasser as to defendant, there being nothing in the record to show that the presence of defendant's tracks in the street was authorized.

4. There is no presumption that the prosecution of a work by a corporation in the public streets is unauthorized and its employees trespassers.

5. In an action against a street railway for personal injuries, one of plaintiff's witnesses having testified on cross-examination that he had once been injured by one of defendant's cars, a question, "Did you present any claim to the company?" was properly excluded.

6. A question asked the motorman, "Do you know whether [plaintiff] saw you?" was properly excluded.

7. A written statement, signed by one of plaintiff's witnesses, offered for the purpose of impeaching his testimony, no foundation having been laid, was properly excluded.

Error to court of common pleas, Hudson county.

Action by John F. Daum against North Jersey Street Railway Company. From a

judgment for plaintiff, defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Vredenburg, Wall & Van Winkle, for plaintiff in error. Simpson & Lillis, for defendant in error.

GUMMERE, C. J. This action was brought to recover for personal injury received by the plaintiff under the following circumstances: He was an employé of the Hudson County Gas Company, which at the time when he received his injury was engaged in laying a gas main through Summit avenue, in the city of Jersey City. For the purpose of laying the main the company had opened a trench in the street, about four feet wide, between the westerly curb line and the tracks of the defendant company, the east line of the trench being about three feet distant from the nearest rail of the car track. The duty of the plaintiff was to carry pieces of lumber from a point where it was piled to the trench, and there deliver it to other employés, who were at work in the trench, and who used the lumber for the purpose of blocking up the gas main in order to keep it level. It was while engaged in doing this work that he received the injury on account of which the suit was brought. The evidence produced by the plaintiff shows that for the purpose of delivering these pieces of timber, or braces, to his fellow workmen, he went upon that part of the street between the trench and the car track, and knelt down there with his back to the tracks, and with one of his feet upon or over the nearest rail, and that, while engaged in handing the braces to the men in the trench, one of the cars of the defendant company came by and ran over his foot. It further appeared that the plaintiff, when he knelt down, looked in the direction from which the car approached, and that at that time there was no car in sight; that he did not look again before the accident happened; that the accident occurred about a minute after he knelt down; that the car came into Summit avenue at "Five Points," which was about 250 feet distant from the point where the plaintiff was kneeling; that no warning was given of the approach of the car, either by the ringing of a gong or otherwise; and that it was the custom of those of the defendant company's employés who were operating these cars to ring a gong when approaching the point where the gas company's servants were at work.

At the close of the plaintiff's case there was a motion to nonsuit, upon the ground that no negligence was shown on the part of the defendant company or its employés, and upon the further ground that it affirmatively appeared that the plaintiff contributed by his own negligence to the injury which he received. This motion was refused by the

trial judge, and the first assignment of error is directed to this refusal.

Assuming, but not admitting, that it cannot be said, as a matter of law, that it is the duty of a street railway company to give notice to persons working in a public highway, in dangerous proximity to its tracks, of the approach of its cars, it is at least a question for the jury, and not the court, whether, when the company assumes such a duty, its failure to perform it in a given instance is not negligence. And that was the situation in the case before us. As has already been stated, it was the custom of the defendant's employes, who were operating its cars, to ring a gong when approaching the place where the servants of the gas company were at work. It is further contended, on the point that no negligence was shown on the part of the defendant or its employes, that, so far as the proofs showed, the gas company was prosecuting its work in the public street without right, and that consequently the plaintiff was a trespasser on the track of the defendant. But if absence of proof on the subject justifies the conclusion that the gas company was without authority to do the work in which it was engaged, it must also be concluded that the presence of the defendant's tracks in the street was unauthorized, for there is an entire absence of proof on that subject also. Consequently, notwithstanding the unwarranted action of the gas company (if it was such), the plaintiff was not a trespasser so far as the defendant company was concerned.

But we do not consider that want of proof on the subject justifies the conclusion that the gas company and its employes were not lawfully prosecuting the work in which they were engaged. In the absence of proof, there is no presumption either in favor of or against such a conclusion. There being no evidence that the plaintiff was a trespasser upon the track of the defendant company, it was not entitled to have its responsibility to him limited to injuries which were willfully inflicted.

We conclude, therefore, that it could not have been said, as a matter of law, at the close of the plaintiff's case, that there was no evidence upon which the negligence of the defendant company could have been predicated.

Nor do we think, as the case then stood, that the trial judge would have been justified in taking it from the jury upon the ground that contributory negligence on the part of the plaintiff had been conclusively shown. Although he was bound to use reasonable care for his own safety, this did not require him to look continuously for the approach of a car. To have done this would have made it impossible for him to perform his work. He knew that he was in a place where he was safe, except when a car was passing. He knew, too, that it was the custom, when a car was approaching, for the motorman to

ring his gong as a warning, and he had a right to expect that this warning would be given to him. Having looked, when he knelt down near the track, for the purpose of ascertaining whether a car was approaching, it was a question for the jury to determine whether it was negligent in him, under the existing circumstances, not to make another observation during the minute which elapsed before the accident occurred. *Harmer v. Reed Apartment, etc., Co.* (N. J. Err. & App.) 53 Atl. 402.

The second assignment of error is directed at the action of the trial court in overruling a question asked of one of the plaintiff's witnesses upon cross-examination. The witness, having stated that he himself had on one occasion been injured by one of the defendant company's trolley cars, was asked, "Did you present any claim to the company?" and, on objection being made, the question was overruled. It seems manifest that this question was immaterial. The contention is that it called for an answer which would have shown bias on the part of the witness, thereby affecting his credibility. But the mere fact that he did or did not present a claim to the company could not have had any such effect. If the witness had presented a claim, and his claim had been refused recognition, this fact might have tended to show bias; but the question asked did not call for the disclosure of any such fact. It was properly overruled.

The defendant produced as a witness the motorman who was operating the car which ran over the plaintiff. He testified that, as the car approached the point where the accident happened, the plaintiff was facing him, and appeared to him to see the car. He was then asked by the defendant's counsel this question: "As you came along, do you know whether this man Daum [the plaintiff] saw you?" This question was overruled on the ground that the witness could not know whether the plaintiff saw him, and this ruling is the ground of the third assignment of error. The trial judge properly excluded this question. The witness had already testified that the plaintiff appeared to him to see the car, and this was the limit to which he could truthfully go in his testimony. He could not know, absolutely, whether the plaintiff did or did not see the car.

The fourth assignment of error, and the last which is argued on behalf of the defendant company, is directed at the ruling of the trial judge in excluding a written statement, signed by one of the plaintiff's witnesses, with his mark. The statement was offered for the purpose of impeaching the witness, the facts set forth therein being said to be contradictory of evidence given by him on the witness stand. But in order to make it competent, for the purpose for which it was offered, it was necessary for the plaintiff in error to have first inquired of the witness whether he had not made a statement, set-

ting forth the facts which were contained in it, and this was not done. Neither was it shown that the witness had any knowledge of what the statement contained when he signed it. It was not written by him, he was unable to read, and it does not appear that it was read over to him. The statement was properly excluded.

The assignments of error relied upon by plaintiff in error being without substance, the judgment under review should be affirmed.

CALLAGHAN v. LAKE HOPATCONG ICE CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

INJURY TO SON—ACTION BY FATHER.

1. Where a son, who stands in the relation of a servant to his father, is disabled by the tortious act of another, the father may maintain an action per quod servitium amisit against the tortfeasor, and therein recover the damages sustained by him during the son's lifetime, notwithstanding that in consequence of the same tortious act the son dies at a later time.

(Syllabus by the Court.)

Action by Philip G. Callaghan against the Lake Hopatcong Ice Company. Demurrer to declaration. Overruled.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

B. W. Endicott, for plaintiff. Colle & Duffield, for defendant.

PITNEY, J. This is an action of tort, and in the declaration the plaintiff is described as "Philip G. Callaghan, the father of William H. Callaghan, a minor, deceased." There is no averment that the plaintiff has letters of administration upon the estate of his son. The declaration sets forth that the defendant employed the said William H. Callaghan to work in and about a certain icehouse and the structures connected therewith, for hire, paid by the defendant to the said William H. Callaghan, and that by reason of the negligence of the defendant in and about the construction and operation of the machinery and appliances of said icehouse the said William H. Callaghan received certain personal injuries, from which he afterwards died; that at the time of his death he was a minor, under the age of 21 years, and that the plaintiff is the father of the said William H. Callaghan, and by reason of the premises was forced to expend, and did necessarily expend, certain moneys for medical attendance upon the son between the time of his injury and the time of his death, and certain other moneys in and about the burial of the son; and that as the father of the said William H. Callaghan the plaintiff has been deprived of his services from the date of his injury until the time when he would have attained the age of 21 years, and has sus-

tained great damage, etc.; whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, who is the father of the said William H. Callaghan, to demand and have of and from the defendant the several sums above demanded, etc.

To this declaration a general demurrer has been interposed, on the ground that no action can be maintained for the recovery of damages by reason of the tortious killing of a human being, excepting only the action that is permitted by statute to be brought by the administrator for the benefit of the widow and next of kin. Gen. St. p. 1188, §§ 10-12. It is entirely settled that, except for the statute, no civil action lies for the damage caused by the death of a human being. *Grosso v. Delaware, etc., R. Co.*, 50 N. J. Law, 317, 13 Atl. 233; *Myers v. Holborn*, 58 N. J. Law, 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606; *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. Law, 142, 42 Atl. 416. But in the present declaration there is no claim for compensation by reason of the death of the plaintiff's son. It appears that death did not result instantly from the injury sustained, as in the *Grosso Case*; but, on the contrary, that the plaintiff's son lived for some time after he was hurt. The claim is (a) for the cost of medical attendance during his life; (b) for the burial expenses; and (c) for the loss of the services of the son from the date of the injury until the time when he would have attained the age of 21 years.

For the burial expenses it is plain there can be no recovery. They could not be recovered even by the personal representative. *Consolidated Traction Co. v. Hone*, 60 N. J. Law, 444, 38 Atl. 759.

As to the loss of services, we are of opinion that a father may recover these, if a son who stands to him in the relation of a servant is disabled by reason of the tortious act of another, notwithstanding that in consequence of the same act the son dies at a later time. The damages, however, must, of course, be confined to the period of the son's life, and will not extend to his expected majority, if death sooner occurred. The action for damages, per quod servitium amisit, pertains to the relation of master and servant, and not to the mere relation of parent and child. *Coon v. Moffet*, 3 N. J. Law, 583, 4 Am. Dec. 392; *Van Horn v. Freeman*, 6 N. J. Law, 322; *Sutton v. Huffman*, 32 N. J. Law, 58; *Ogborn v. Francis*, 44 N. J. Law, 441, 43 Am. Rep. 394. In an action tried before Lord Ellenborough in 1808, where a part of the damages claimed by a husband was for the loss of consortium of his wife, who was injured through defendant's negligence, and died from her injuries about one month later, the learned judge instructed the jury to limit these damages to the period that intervened between the time of the accident and the time of the wife's death. *Baker v.*

Bolton, 1 Campb. N. P. 493. In 20 Am. & Eng. Encyc. Law (2d Ed.) tit. "Master & Servant," p. 184, the rule is thus expressed: "In case the servant dies shortly after the infliction of the injury, the right of the master to recover is limited to the loss of services sustained between the time of the accident and the death of the servant."

With respect to the expenses alleged in this declaration to have been necessarily incurred for medical attendance upon the injured son, we see no reason why they may not be recovered, if the relationship of master and servant existed, notwithstanding the doubt intimated on this point in *Hall v. Hollander*, 4 Barn. & Cres. 660. In actions for seduction of a daughter and servant, the lying-in expenses are commonly allowed to be recovered. 2 Chitt. Plead. 643, and note.

The declaration before us shows that the party injured was the plaintiff's minor child, and that by reason of the hurts sustained through defendant's negligence the plaintiff has been deprived, during some period, of the son's services. The right of the father to the son's services is to be presumed from the minority of the latter, unless emancipation appears. *Van Horn v. Freeman*, 6 N. J. Law, 322; *Noice v. Brown*, 39 N. J. Law, 569. Although the declaration shows that at the very time of the occurrence in question the son was in the employ of the defendant, for hire paid by the defendant to the son in that behalf, it does not follow that the son had been emancipated. The employment under the defendant may have been for a limited time and purpose.

The plaintiff is entitled to judgment on the demurrer.

ELLIOTT et al. v. MORELAND.

(Supreme Court of New Jersey. Feb. 24, 1903.)

NOTE—INDORSEMENT—SURETYSHIP—CROSS-EXAMINATION.

1. The signature of a third party on the back of a promissory note, before it was put in circulation by the maker, neither expressed nor implied any contract, but a contract might be shown by evidence.

2. The evidence in this case is not sufficient to show a contract of suretyship.

3. When a party produces in evidence his books of original entry, the defendant is entitled to cross-examine him as a party as to the entries therein without any subpoena duces tecum for that purpose.

(Syllabus by the Court.)

Certiorari to district court.

Action by Avery M. Elliott and others against Johanna Moreland. Judgment for plaintiffs, and defendant brings certiorari. Reversed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

George P. Rust, for prosecutor. Addison P. Rosenkrans, for respondents.

GARRETSON, J. The plaintiffs brought suit to recover the amount due on a promissory note made by Moreland Bros. to the order of Elliott Bros. & Co., the plaintiffs, and indorsed by Johanna Moreland, one of the defendants. The suit is against John Moreland and Leonard Moreland, partners as Moreland Bros., and Johanna Moreland, who is a married woman. John and Leonard Moreland having been adjudicated involuntary bankrupts, the action was dismissed as to them, and judgment rendered against Johanna Moreland for the amount of the note. This judgment she seeks to have reversed.

The note arose under the following circumstances: The firm of Moreland Bros. was indebted to the plaintiffs for paints and materials delivered to them between July 12 and October 18, 1901, and made this note to pay the bill. Johanna Moreland indorsed the note before its delivery under the following circumstances: The note was made and signed by Moreland Bros., and tendered to the plaintiffs, who refused to accept it without "additional security." One of the Moreland Bros. thereupon took the note to his mother, the defendant Johanna Moreland, and told her to sign it, with which command she complied, and the note was then again tendered to the plaintiffs, who further asked for and obtained a certificate signed by Johanna Moreland that the note in question was a genuine business note, given for value received, and that there is no defense to the same either in law or equity. The note was irregularly indorsed by a married woman before its acceptance by the payee. In *Building Society v. Leeds*, 50 N. J. Law, 399, 18 Atl. 82, 5 L. R. A. 353, it was held that the signing of a nonnegotiable note by a third party while such note is in the hands of the maker of it, does not, when passed to the payee, import per se any contract on which a suit will lie, and that the production of such a note without proof other than itself will not sustain an action against such indorser. *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, holds that the signature of a third person on the back of a negotiable note before it was put in circulation by the maker neither expressed nor implied by its own intrinsic signification any contract whatever on the part of such indorser. Parol evidence was held to be admissible to show what the agreement between the parties was.

The plaintiffs in this case claim that Johanna Moreland signed the note as surety, and to prove the contract of suretyship rely upon two circumstances: First, the making of the certificate above mentioned; second, that some of the items of the bill which the note was given to pay went into the construction of a house belonging to her, and that by accepting the note the payees postponed payment for these items for so long a time that they lost their right to file a lien claim for them upon her building. As to both of these circumstances there is not a word of testimony to show

that by them, or by reason of them, the indorser intended to enter into a contract of suretyship. The certificate is a true statement of the attitude of the makers of the note towards the payees, and, as to the loss of the right to file a lien claim, the note was for a bill of goods that had already been furnished to the makers, and was owed for by them. No portion of it was due by the indorser. No consideration moved to her.

The plaintiff being a married woman, no contract of suretyship would be binding upon her unless it appeared that she obtained something of value for her own use or for the use, benefit, or advantage of her separate estate. Gen. St. p. 2017, § 26. While the judge below found as a fact that some of the items of the bill went into the indorser's building, yet she nowhere admitted this fact, and in truth disputed it, so that the finding of this fact could not be evidence to prove that because of it she agreed to become surety on the note.

The judge also certifies that on the trial the plaintiffs never had any conversations with the indorser in regard to signing the note and the certificate. There is not sufficient evidence to prove that the indorser entered into any contract of suretyship.

The plaintiffs having contended that some of the items of the bill for which the note was given went into a house of the defendant's, for which a lien could be had, and that thereby a special consideration arose to her, she should have been allowed to cross-examine the plaintiff as a party as to the entries in his book of original entry without any subpoena duces tecum for the purpose. This was denied to the defendant. In this there was also error.

The judgment below will be reversed, with costs.

FRENCH et al. v. SCHOONMAKER.

(Supreme Court of New Jersey. Feb. 24, 1903.)

STATUTE OF FRAUDS—VERBAL CONTRACT FOR SALE OF DEBT.

1. A verbal contract, whereby defendant agreed to purchase for \$845 a claim, held by plaintiff's testator, against a third party, on condition that testator would reduce the claim to a judgment, to be assigned by him to defendant, is within the sixth section of the statute of frauds (2 Gen. St. p. 1603), which declares that a contract for the sale of goods, wares, and merchandise for the price of \$30 and upwards shall be void unless in writing.

Action by Sarah J. French, executrix, and Theodore F. French and another, executors, against William H. Schoonmaker. On demurrer to declaration. Judgment for demurrant.

This action is brought to recover damages for the breach of a contract, which is thus set out in the plaintiffs' declaration: "The

defendant bargained for and agreed to purchase from Phineas M. French [plaintiffs' testator], in his lifetime, a certain claim of the said Phineas M. French against the Plainfield Poultry Farm Company, amounting to the sum of \$945.11, with interest thereon from the 23d day of September 1890, and to pay to the said Phineas M. French the amount of the said claim, on the consideration that he, the said Phineas M. French, would put the claim in judgment, and make an assignment of the said judgment, when obtained, to him, the said defendant; and the said Phineas M. French, at the special instance and request of the said defendant, then and there agreed to sell to the said defendant the said claim for the amount of the said claim, and to put the said claim in judgment, and to make an assignment of the said judgment, when obtained, to him, the said defendant." It is expressly alleged in the declaration that the entire agreement sued upon was by parol, and not in writing.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

W. S. Angleman, for plaintiffs. Craig A. Marsh, for defendant.

GUMMERE, C. J. The contract sued upon is for the purchase and sale of a chose in action, a debt due from the Plainfield Poultry Farm Company to the plaintiffs' testator; and the ground upon which the demurrer is rested is that such an agreement is invalid under the sixth section of the statute of frauds (2 Gen. St. p. 1603), which declares that a contract for the sale of goods, wares, and merchandise for the price of \$30 and upwards shall be void unless in writing. The question whether an agreement to assign a debt due to the assignor, whether it be a simple contract debt or a debt of record, is a contract for the sale of goods, wares, and merchandise, within the meaning of the statute, was set at rest in this state by the decision of the Court of Errors and Appeals in the case of *Greenwood v. Law*, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688. In that case an agreement to sell and assign a bond and mortgage was held to be such a contract, and the ground of that decision is thus stated in the opinion: "The words 'goods, wares, and merchandise,' in the sixth section of the statute, are equivalent to the term 'personal property,' and are intended to include whatever is not embraced by the words 'lands, tenements, and hereditaments' in the preceding section." The fact that, by the terms of the agreement this chose in action, which was a simple contract debt when the agreement was made, was to be transformed into a debt of record before being assigned, does not change the transaction from a sale to a contract for the furnishing of work, labor, and materials by plaintiffs' testator to the defendant. The thing contracted for—the

¶ 1. See *Frauds, Statute of*, vol. 23, Cent. Dig. § 144.

debt due from the Plainfield Poultry Farm Company to plaintiffs' testator—was in existence when the contract was made. Assuming that this debt was "materials," and that the putting of it into judgment by the deceased was "work and labor" done on it by him, this work and labor was done by him upon his own property, for his own benefit, in order to make it salable. It did not transform the debt into a different entity. It merely made an alteration in its form. The thing to be assigned remained after judgment what it was before, viz., a debt due from the poultry company to the deceased. The mere alteration of the form in which the debt existed did not operate to make the contract an agreement for work, labor, and materials. *Pawelski v. Hargreaves*, 47 N. J. Law, 334, 336, 54 Am. Rep. 162. And the very wording of the contract shows that the parties to it understood and intended that it was for the purchase and sale of a chose in action, and not one for work and labor to be done and performed and materials to be furnished by the plaintiffs' testator for the defendant. By that contract the defendant, on his part, "bargained for and agreed to purchase from the said Phineas M. French a certain claim of the said Phineas M. French against the Plainfield Poultry Farm Company," and the said Phineas M. French, on his part, "at the special instance and request of the said defendant, agreed to sell to the said defendant the said claim."

The contract sued upon being within the prohibition of the statute, the demurrant is entitled to judgment.

CONWAY v. VEZZETTI et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

NEGLIGENCE—FAILURE TO SECURE DERRICK—INJURY TO BOY.

1. A derrick, fastened by a head rope to the floor beams of the upper story of a building which defendants were constructing, stood within a fence inclosing part of the sidewalk adjoining the building. From the head of the derrick a guy rope extended downward, and was secured to a barrel filled with sand standing in the roadway near the curb. While plaintiff, a boy seven years old, was seated at or near the edge of the sidewalk, within two or three feet of the guy rope, a crowd of boys came to the premises after the workmen had left, and hung on the guy rope, swinging the derrick. Either because of their weight or because of the cutting of the head rope by rubbing against a beam, it broke, and the derrick swung over into the street, knocking down the fence, and injuring plaintiff. *Held*, that no negligence on defendants' part was shown.

Action by Walter Conway, an infant, who sues, etc., against Bernard Vezzetti and Charles Vezzetti. Verdict for plaintiff. On rule to show cause. Rule made absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Young & Arrowsmith, for plaintiff. Vredenburgh, Wall & Van Winkle, for defendants.

PER CURIAM. This was an action of tort, and resulted in a verdict for the plaintiff. Defendants were building contractors, engaged in constructing a building in Jersey City. The front of the building stood on the building line of the street. A fence inclosed a part of the sidewalk about six feet wide adjoining the building; thence the sidewalk extended about nine feet to the curb. Within the fence, leading toward the building, was a derrick, which was fastened to the floor beams of an upper story by a tie rope. From the head of the derrick a guy rope extended downward and outward to the street, being secured to a barrel or barrels filled with sand that stood in the roadway near the curb. Plaintiff was a boy seven years of age, and at the time of his injury was seated with a companion upon a pile of lumber at or near the edge of the sidewalk, eating candy. He was within two or three feet of the guy rope. On October 25, 1901, about 5:15 p. m., after the defendants' workmen had left the premises, a crowd of boys, variously estimated at from 10 to 20 in number, came there, and began hanging on the guy rope and swinging the derrick. They continued to do so until, either because of their weight or because of the cutting of the head rope by rubbing against a floor beam, the head rope parted, the derrick swung over into the street, broke down the fence, and struck the plaintiff, knocking him senseless, and fracturing his nose.

We think there was no evidence entitling the jury to say that the defendants had been wanting in due care in respect to making the derrick secure. We have not considered the question whether the defendants owed any duty of care to the plaintiff under the circumstances, or whether, had negligence on their part appeared, it could have been deemed the proximate cause of the accident.

The rule to show cause will be made absolute.

COLE v. ATLANTIC CITY et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CERTIORARI BY TAXPAYER—EMPLOYMENT BY CITY.

1. Under the ordinances of Atlantic City, approved May 31, 1902, and July 15, 1902, the compensation of a counselor employed to assist the city solicitor in pending or prospective litigation is to be paid by the city solicitor out of his salary, and consequently a taxpayer is not entitled to question by certiorari the validity of a resolution of the council employing a counselor for that purpose.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Clarence L. Cole, against Atlantic City

and Godfrey & Godfrey to review resolution of the common council. Dismissed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

George A. Bourgeois, for prosecutor. D. J. Pancoast, for defendants.

DIXON, J. The prosecutor, as a resident and taxpayer in Atlantic City, seeks to set aside a resolution of the city council passed November 24, 1902, providing for the employment of the law firm of Godfrey & Godfrey to assist in certain litigation, pending or prospective, in which the city is concerned.

On examining the situation, we think the prosecutor has no such interest in the matter as would justify our interference at his instance. Under the act for the government of cities, approved April 3, 1902 (P. L. p. 284) adopted by Atlantic City May 6, 1902, one of the municipal officers is a city solicitor (section 31), and the council has power (section 14, par. 36) to prescribe by ordinance his duties and compensation. In the exercise of this power, the council, by ordinance approved May 31, 1902, ordained that the salary of the city solicitor should be \$4,000 per annum, and that, if it should be necessary to secure the services of a counselor at law in the conduct of litigation wherein the city might be engaged, his services should be paid for by the city solicitor out of his salary. After the adoption of this ordinance, Mr. Wootton was appointed city solicitor. Evidently, in this condition of the municipal laws, Messrs. Godfrey & Godfrey must look to the city solicitor for their compensation, under the resolution of November 14, 1902. The city treasury is not to be burdened therefor.

In reaching this conclusion we have not overlooked the fact that by ordinance approved July 15, 1902, fixing the salaries of various city officers from July 8, 1902, the salary of the city solicitor is declared to be \$4,000 per annum, and no reference is made therein to the requirement that he should pay for legal assistance. We see no inconsistency in these ordinances, and regard the substance of the earlier ordinance as being still in force.

The writ should be dismissed for want of interest in the prosecutor, but without costs.

BARNERT v. BOARD OF ALDERMEN OF CITY OF PATERSON et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

MANDAMUS—OPENING STREET—ASSESSMENT.

1. By virtue of a municipal ordinance for opening a street, the relator's land was taken, and the residue of his land was assessed for benefits, and he paid the assessment under the belief that all rights necessary for opening the entire street had been acquired by the municipality.

Afterwards he discovered that all necessary rights had not been acquired. *Held*, that prima facie he was entitled to mandamus directing the municipality to acquire the omitted right.

(Syllabus by the Court.)

Application by the state, on the relation of Natham Barnert, for writ of mandamus to the board of aldermen of the city of Paterson and another. Writ awarded.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

George S. Hilton, for relator. Michael Dunn, for the city. Corbin & Corbin, for the railroad company.

DIXON, J. By an ordinance approved March 5, 1894, the authorities of Paterson laid out Godwin street from Graham avenue to East Eighteenth street, and directed that it should be opened as thus established. This street crossed the railroad of the New York, Susquehanna & Western Railroad Company. In pursuance of the ordinance the board of street openings of the city reported awards for damages and assessments for benefits, with respect to all property affected except that of the railroad company. Among the property thus affected was land of the relator, and upon an adjustment of his awards and assessments he paid to the city a balance of \$868, besides interest. Subsequently, under a city ordinance, the street was graded, curbed, and guttered, and the assessment therefor on the relator's land was paid by him. He then discovered that, as no award had been made to the railroad company, the street had not lawfully been opened across its property, and he soon afterwards applied to the board of aldermen to take the necessary steps to open the street across the railroad. An ordinance for this purpose, presented to the board in August, 1900, was defeated.

These facts, we think, show prima facie a clear right in the relator to have the street opened to the extent indicated by the ordinance of March 5, 1894. So much seems necessary to give him the benefit for which his land and money were taken. To enforce this right, he now asks for a writ of mandamus. The objections urged against the allowance of such a writ come from the railroad company, and are: First, that the municipal proceedings for the opening of the street are, as against the company, invalid; and, second, that the question whether new proceedings to open the street across the railroad should be taken is one addressed to the discretion of the board of aldermen, and hence the board cannot, in deciding it, be controlled by mandamus.

The first objection is evidently not conclusive, for, if true, it can be obviated by new proceedings.

The second objection depends upon the truth of the first, and, if it be so supported, it is certainly formidable, but perhaps, un-

der the peculiar circumstances of the case, not fatal. Whether it should prevail is, we think, a matter deserving to be put in such form as will permit of its decision in the court of last resort.

To that end we award an alternative mandamus.

**NORTHWESTERN MUT. LIFE INS. CO.
et al. v. BREAUTIGAM.**

(Supreme Court of New Jersey. Feb. 24,
1903.)

DECEIT—DECLARATION.

1. In an action for deceit it is proper to aver in the declaration the circumstances under which the fraudulent representations were made, and the manner in which the plaintiff was prejudiced by relying thereon, so that it may appear judicially to the court that the fraud and the damage sustained to each other the relation of cause and effect.

(Syllabus by the Court.)

Action by the Northwestern Mutual Life Insurance Company and others against Frederick C. Breautigam. Demurrer and declaration overruled.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Frank E. Bradner, for plaintiffs. Edward H. Murphy, for defendant.

PITNEY, J. In an action of tort, the declaration recites that one Stout and others had applied to the Chancellor of this state for a writ of injunction to restrain the plaintiffs from prosecuting an action at law to recover the amount due upon a certain promissory note made by said Stout and others and held by the plaintiffs; that said Stout and others consented that, if an injunction were granted, they would execute and deliver to the plaintiffs a bond, with good sureties, conditioned that they should pay to the plaintiffs any amount of money that might thereafter be found by the Court of Chancery to be due to the plaintiffs upon said promissory note, with the costs of the action at law and of the suit in chancery; and that the plaintiffs agreed to accept such bond, and consented to the grant of injunction, and thereupon the said Stout and others obtained from the Chancellor an order for an injunction, restraining the plaintiffs from prosecuting the said action at law upon the said promissory note, upon condition that the complainants should first execute and deliver to the plaintiffs a bond in the penal sum of \$4,000, containing a condition in the form above mentioned, to be executed by two sureties whose sufficiency should be approved by one of the special masters of the Court of Chancery, and which bond should be first accepted by the plaintiffs; and the declaration avers that the defendant, in order to induce the plaintiffs to accept a bond executed by him as one of the sureties, falsely and fraudulently rep-

resented to the plaintiffs that he was worth above the sum of \$4,000 in real estate in the state of New Jersey after all his debts and liabilities were paid; that the plaintiffs, relying upon this representation of the defendant, assented to him as a surety upon the bond, and accepted a bond with the defendant as a surety thereon; that in truth and in fact the defendant was wholly insolvent and unable to pay his debts, and was not worth the sum of \$4,000, in real estate in the state of New Jersey, above his debts and liabilities; that his debts and liabilities exceeded in amount the value of any real estate that he owned, that any real estate then owned by him was heavily incumbered by mortgages and taxes, and that there was no equity therein; and that the defendant knew that he was insolvent and unable to pay his debts, and that he was not worth in real estate in the state of New Jersey the sum of \$4,000 or any other sum above his debts and liabilities. The declaration then avers that afterwards a final decree was made in the Court of Chancery in the said cause between Stout and others, complainants, and the plaintiffs as defendants, wherein it was decreed that there was due upon the promissory note in question the sum of \$2,000, with interest, and also certain sums for costs; that the plaintiffs have been unable to collect the amount due upon that decree from the said Stout and others, and that they, the said Stout and others, are wholly insolvent; that the plaintiffs, upon notice to the defendant, have applied to the Chancellor for relief against the defendant as surety upon the bond, and that the Chancellor has granted leave to the plaintiffs to prosecute an action at law against the defendant as a surety upon the bond. The concluding averment of the declaration is that, by reason of the premises, the plaintiffs have wholly lost the amount due upon the promissory note, and have also lost the costs sustained by them as aforesaid.

To this declaration a general demurrer is interposed, on the theory that, if the declaration sets forth a cause of action, it is one that is founded upon contract only, and not upon tort. With this contention we do not agree. The declaration sufficiently shows that the plaintiffs consented to an injunction restraining their action at law, in consideration of a bond executed by the defendant and others, conditioned that the obligors should pay the amount ascertained by the Court of Chancery to be due upon the claim that was the subject-matter of their action at law; that the plaintiffs accepted this bond on the strength of the defendant's representation that he was worth above \$4,000 in New Jersey real estate after all his debts and liabilities were paid; that this representation was false, and known by the defendant to be so, and that in fact the defendant was wholly insolvent. Fraudulent misrepresentations, thus made and thus relied upon, furnish ground for an action of deceit, provided it

appear that the plaintiff was damaged thereby, and not otherwise.

In *Byard v. Holmes*, 34 N. J. Law, 296, it was held that in an action of this character the plaintiff must show with reasonable certainty in his declaration, not only what the fraud was by which he has been injured, but also its connection with the alleged damage, so that it may appear judicially to the court that the fraud and the damage sustained to each other the relation of cause and effect, or at least that the one might have resulted directly from the other.

In the present declaration the proceeding at law and in chancery that led up to the giving of the bond, and the subsequent proceedings that fixed the liability thereon, and the fact of the insolvency of the obligors, are set forth for the purpose of showing the causative relation borne by the defendant's fraudulent representations to the damage that the plaintiffs have sustained.

The plaintiffs are entitled to judgment on the demurrer.

STATE v. WHITEHEAD et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CRIMINAL LAW—INSTRUCTIONS.

1. In the trial of a criminal case, it is error for the trial judge to say to the jury that they may consider the fact that the public, in a certain locality, think the defendants guilty, as corroborative of the particular facts proven in the case.

(Syllabus by the Court.)

Error to court of quarter sessions, Middlesex county.

Vernon Whitehead and Georgianna Van Doren were convicted of crime, and bring error. Reversed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

George S. Silzer, for plaintiff in error. John S. Voorhees, for the State.

FORT, J. The defendants in this case were convicted of adultery at the Middlesex quarter sessions.

There are several assignments of error relating to the admission of testimony and to the charge of the court. But one of these exceptions need be considered, as it is sufficient to require a reversal.

The defendants' counsel requested the court to charge the jury as follows: "I ask your honor to direct the jury that they must only consider the case upon the evidence and in the language in which your honor charged a jury recently in another case; * * * that it must not be upon suspicion and guesswork." On this request, the judge charged the jury as follows: "There is no question about that. The jury understand that we are here to try the case upon the evidence.

It won't do, because of a general relation of intimacy between these parties, to say that therefore upon one or more of these special occasions they have been guilty of adultery. If you have a general impression in your mind that they were guilty, or if you have an idea that the public in Washington think that they are guilty, because they are too intimate, that must not have anything to do with your verdict, excepting so far as it goes to corroborate the particular proven facts and circumstances clustering about this particular occasion which has been selected by the prosecutor for the time upon which he relies for the conviction." The last clause of this response to the request of the defendants' counsel to charge is clearly erroneous. We know of no condition that can arise in the progress of a trial when it is proper for the court to state to the jury that they may consider facts not proven in the case in reaching a verdict upon the question of the guilt of the defendant upon trial. If the judge had charged the request as asked, by simply saying, "I charge that," there would have been no error, and that was all that was required or called for by the request. It is impossible to believe that this statement by the court did not give the jury the impression that they had a right to consider the fact that the people about Washington had an impression that the defendants were guilty of the offense charged, and that under certain conditions they might consider that fact as evidential against the defendants in reaching their conclusion. We know of no authority for such a statement, and judgment is reversed, and a new trial granted.

REED et al. v. HACKNEY et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ADVERSE POSSESSION—DOWER INTEREST.

1. When a widow after the death of her husband remains in possession of lands of which he died seised, or to which she has not released her right of dower, it is in law presumed to be her possession, in right of her dower, until dower is assigned.

2. If the husband in his lifetime has conveyed the land by a deed, in which his wife did not join, and she, after the first husband's death, marries the grantee, who lives with her upon the premises, the possession is the possession of the wife until her dower is assigned, and not the possession of the husband.

3. Such possession by the grantee cannot be set up, by those claiming under him, as a possession which will draw to it the possession of an adjoining tract, left in the possession of the widow of the first husband (and over which her right of dower extends), in order to support a title to such adjoining tract by adverse possession.

(Syllabus by the Court.)

Action by Leonard Reed and others against John W. Hackney and others. Verdict for plaintiff. Rule to show cause discharged.

Argued November term, 1902, before the

CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

ELI H. Chandler and Geo. A. Bourgeois, for plaintiffs. Wm. M. Clevenger and Thompson & Cole, for defendants.

VAN SYCKEL, J. This is an action of ejectment brought to recover possession of about $4\frac{1}{2}$ acres of land in the county of Atlantic.

At the opening of the trial below, the plaintiffs disclaimed title to the southerly half of said tract, and claimed title only to the northerly half. The plaintiffs traced their title back to James Adams, who derived his title from Thomas Adams by a deed dated in 1827, which was produced in evidence. The trial court properly construed this deed as a conveyance of the northerly half of the lot therein described. In proving title, the plaintiffs gave in evidence, among other things, family history and relationship, which was objected to as incompetent because it had not been set forth in the bill of particulars of title furnished to the defendants. This bill of particulars is not in the printed case, and the court is without accurate knowledge of what it contains. In *Graham v. Whitely*, 26 N. J. Law. 254, Chief Justice Green pronounced the rule to be that, if the bill of particulars merely specifies the documentary evidence upon which the party intends to rely, including the will of W. B., the party is not thereby restricted to a claim of title by devise, nor prevented from establishing by parol a title from W. B. by descent. There was, therefore, no error in permitting the plaintiffs to show that they are the descendants and legal heirs of James Adams, who, so far as appears in the case, died without having disposed of the locus in quo, either by deed or by will. The plaintiffs' evidence shows that the title which inhered in James Adams passed to them as his heirs at law. But in an action of ejectment the plaintiff must trace his title back to some one who is shown to have been in possession, or, failing in that, he must show that his grantor acquired title from the original proprietors. If they succeeded in that, they established a *prima facie* title, which put upon the defendants the burden of showing a better title. In *Troth v. Smith* (N. J. Sup.) 52 Atl. 243, the plaintiff's paper title was derived from the heirs of Jeremiah Leeds, and it was held to be sufficient, in support of their possession, to show that upon their petition commissioners were duly appointed by a court of competent jurisdiction to divide the said lands among the heirs, and that said commissioners, in the execution of their duty, did make the division, which was of record. To show possession in James Adams, the plaintiffs offered in evidence a deed from Jeremiah Adams to James Adams, dated in 1808, for an 18-acre tract of land known as "Buzzards Roost," adjoining the

locus in quo. To the admission of this deed objection was made on the part of the defendants, but the trial court permitted the bill of particulars to be amended, and also held that, it being competent to prove by parol possession in James Adams, this deed must be regarded as an aid to that proof, and not as a conveyance strictly in the chain of plaintiffs' title to be set out in the bill of particulars. In this respect the objection was properly dealt with.

James Adams died in 1834. *Jemima*, his widow, died in 1873. This suit was commenced in 1900.

There was some evidence to show that James Adams was living on the Buzzards Roost property when he died, and that the locus in quo was in the same inclosure. James Adams left his widow *Jemima* surviving him, and she remained in possession of the house on Buzzards Roost until 1872, when she removed, and died in the following year.

Under these circumstances the court properly charged the jury that the deed to James Adams for the locus in quo was sufficient *prima facie* evidence of the plaintiffs' title derived from James. James Adams conveyed Buzzards Roost to John Adams, through whom defendants claim, in 1833, but *Jemima* Adams did not join in this deed. *Jemima* Adams, therefore, after the death of her husband James Adams, was presumably in possession of both tracts in right of her dower, and until dower was assigned, of which there was no proof.

It does not appear that John Adams had any paper title to the locus in quo from James Adams, or from any one having a paramount title to that of James, and there are no facts shown to justify the presumption of such a conveyance. The defendants must therefore stand on a title by adverse possession. During the life of *Jemima*, whom John married after the death of James, the possession of John was not adverse. *Jemima* was entitled to retain possession until her dower was assigned in the lands of James Adams, and therefore, up to the time she removed from the premises in 1872, no time had run against the title of the plaintiffs. When the sheriff, by virtue of an execution against John Adams, sold his interest in the said lands in 1842, John had no paper title to the locus in quo, and no possession which could draw to it the possession of the locus in quo. The fact that John, after his interest in the lands was sold by the sheriff in 1842, remained in possession with *Jemima*, the widow of James, whom he had married, gave John no such possession as, if continued, would be adverse. It was, in contemplation of law, the possession of *Jemima* Adams in right of her dower, and not the possession of John. John had the right to live there with his wife, and the heirs of James could not, until her dower was assigned, have succeeded in evicting him. There-

fore adverse possession, to support the defendants' title, could not have begun to run until after 1872. Whether, since that date, the defendants and those under whom they claim had been in such continuous, open, notorious, and hostile possession for 20 years as constituted a title by adverse possession, was a question of fact, which was submitted to the jury with proper instructions. The verdict for the plaintiffs was not so clearly against the weight of evidence as to justify this court in setting it aside.

The rule to show cause should be discharged.

STATE v. BARTHOLOMEW.

(Supreme Court of New Jersey. Feb. 24, 1903.)

EMBEZZLEMENT—PUBLIC OFFICER—INDICTMENT—DUPLICITY—DEMURRER—MOTION TO QUASH.

1. An indictment under section 167 of the crimes act (P. L. 1898, p. 840), which charges a person holding an office of public trust with the embezzlement of "money, property, and securities," as stated disjunctively in the statute, is not bad for duplicity; the rule being that to state in an indictment the successive gradations of statutory offenses conjunctively, when they are not repugnant, is allowable.

2. It is sufficient in such indictment to charge the embezzlement to be of money, without specifying any particular coin or valuable security. Value need not be stated, except where it is the essence of the offense. P. L. 1898, pp. 878-882.

3. Where the defendant was charged as treasurer of the borough of D., instead of collector of D., the latter being his official title, it appearing that under the borough laws the collector was required to act as treasurer of the borough, and as such to collect, have, hold, and receive all moneys raised by taxation, etc., the indictment was *held* sufficient, in view of the provision of the criminal procedure act which forbids the reversal of a judgment on an indictment for any defect therein, except such as may have prejudiced the defendant in maintaining his defense upon the merits.

4. In an indictment for a statutory crime, it is sufficient to charge it in the words of the statute, without other statement of facts, when the offense is thereby described without ambiguity or uncertainty.

5. Although the indictment may not show that the grand jury which presented it was held in the county where the venue is made, yet if it appear by the caption and the record that the grand jury was impaneled and sworn before the court sitting at the county town, and that afterwards it reported the indictment to the same court and was discharged, the indictment will be held good.

6. A single demurrer or plea to two or more separate indictments is irregular, and will be stricken out.

7. The motions to quash the indictments in this case, four in number, which were removed into this court by certiorari, were denied, and the record remitted for trial.

(Syllabus by the Court.)

Certiorari to court of quarter sessions, Monmouth county.

Frank S. Bartholomew was indicted for embezzlement, and demurred, and filed mo-

tion to quash. From an order overruling same, he brings certiorari. Motion to quash denied.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Thomas P. Fay, for plaintiff in certiorari. John E. Foster, for the State.

HENDRICKSON, J. The plaintiff in certiorari is the defendant below to four different indictments, which have been removed into this court from the Monmouth quarter sessions. They charge the defendant with various embezzlements of the moneys and property of the borough of Deal, in said county, while serving in the office of treasurer or collector of the borough. The plaintiff has demurred to the four indictments by a single demurrer. He has also pleaded to the jurisdiction in the four cases by a single plea. The demurrer and plea are for this reason improperly pleaded, and will be stricken out.

The defendant has, however, presented with the reasons filed a motion to quash, which is a statutory method of raising objections to the indictment. P. L. 1898, p. 881, § 44. In the record these indictments are respectively numbered one, two, three, and four. I will so refer to them in the opinion.

One of the grounds of invalidity urged against Nos. 1 and 2 is that they are bad for duplicity in charging three distinct offenses, to wit, the embezzlement of "money, property, and securities." In section 167 of the crimes act (P. L. 1898, p. 840), upon which the indictments are presumably based, the same words appear in the disjunctive form. Where a statute makes two or three distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has in many cases been ruled they may be coupled in one count. Wharton, Cr. Pl. & Pr. (9th Ed.) § 251. To state the successive gradations of statutory offenses conjunctively, when they are not repugnant, is allowable. Id. § 162; State v. Price, 11 N. J. Law, 203. There is no repugnancy here. The successive statements of the three classes of property charged to have been embezzled is in the language of the statute, and the embezzlement of anything in any one of these classes constitutes the offense charged. But such a defect, if it existed, would be amendable under section 34 of the criminal procedure act (P. L. 1898, p. 878). Larison v. State, 49 N. J. Law, 256, 9 Atl. 700, 60 Am. Rep. 606.

After the indictment No. 2 charges the embezzlement of "certain money, properties, and securities committed to his keeping as treasurer of the borough of Deal aforesaid," it proceeds as follows: "Viz.: the sum of three hundred and eighty-six dollars and nine cents, of the value and amount of \$386.09,

† 2. See Embezzlement, vol. 18, Cent. Dig. § 42.

belonging to," etc. This, it is contended, is faulty, as not stating what was embraced in the valuation, and as not describing the things embezzled with sufficient certainty. We think the count plainly charges the embezzlement of money, specifying the amount and value thereof, and also property and securities, without stating their value. It is no longer necessary to state value, where not of the essence of the offense. Cr. Proc. Act (P. L. 1898, p. 878) § 33. It is sufficient, also, to charge the embezzlement to be of money, without specifying any particular coin or valuable security. *Id.* p. 882, § 47.

The indictments numbered 1 and 2 also charge the defendant as "then and there holding an office of trust and profit under the authority of a public corporation existing under the laws of this state, to wit, the office of treasurer of the borough of Deal," etc., and then with the embezzling of certain money, etc., "committed to his keeping as such treasurer of the borough of Deal aforesaid." The point is raised that there is no such office of trust and profit as treasurer of the borough of Deal. The borough was incorporated in 1898 (P. L. p. 49), subject to the general borough laws. The borough acts (P. L. 1897, p. 285; P. L. 1900, p. 400) provide for the office of collector, and clothe him with the like powers and duties that belong to the collectors of the several townships, and in addition thereto it is provided that he shall act as treasurer of said borough, and shall collect, have, hold, and receive all moneys raised by taxation, etc. We think the averment that plaintiff was holding an office of trust, profit, etc., to wit, the office of treasurer of the borough of Deal, in view of the statutory language here recited, made it unmistakably clear to the defendant that he was in fact charged as holding the office of collector of the borough; and, this being so, the indictment in question should not be quashed in view of that provision of the criminal procedure act which forbids the reversal of judgment on any indictment for any imperfection or defect therein, except such as may have prejudiced the defendant in maintaining his defense upon the merits. Section 136. This view finds support in *State v. Munch*, 22 Minn. 87. In that case an indictment charging that the defendant, being then and there a person employed in the public service of the state as treasurer of the said state, and intrusted as such treasurer, etc., while it contained no direct and explicit averment that he was state treasurer, was considered sufficient, as it was impossible not to understand from the indictment that such was the fact.

Another point raised in the reasons is that indictments 1 and 2 do not show from what source or for what purpose the officer received the money or how the borough became entitled to it. The answer to this is that the statute has defined the crime in question to be complete when such officer shall embezzle

any of the money, etc., committed to his keeping, with intent to defraud the state, county, city, borough, etc.; and the indictments in this respect follow the exact words of the statute. In an indictment for a statutory crime it is sufficient to charge it in the words of the statute, without a particular statement of the facts and circumstances, when the offense is thereby described without ambiguity and uncertainty. *State v. Startup*, 39 N. J. Law, 423; *State v. Stimson*, 24 N. J. Law, 478; *Com. v. Welsh*, 7 Gray, 324. Embezzlement is a distinct offense, of a character well understood, the essential elements of which are not involved in uncertainty, so that the indictments under discussion are clearly within the rule stated. *Goodhue v. People*, 94 Ill. 87.

This answer will apply, also, to a further point raised, that the indictments fail to charge conversion by defendant to his own use.

The point is raised as to indictment 3, which is based on section 168 of the crimes act, that it does not describe the collector as "having taxes to collect," nor show that the money embezzled, etc., was received for taxes. This is unnecessary. The statute referred to does not require it. The words of the statute are to the effect that the collector who shall embezzle, etc., any money received or collected by him for the borough, etc., shall be guilty, etc.

Another point is that two offenses are charged in the use of the words "embezzle and retain in his hands." This is merely charging in the conjunctive the words that appear disjunctively in the statute. This is not duplicity, as we have already shown.

A point is also made that some of these indictments represent a mere duplication of the same charge. They set out, however, the embezzlement of differing amounts on different dates; and we must assume, looking at the indictments alone, that each charges a distinct offense.

Other points are raised as to indictments 3 and 4; but they are either met by what has been already said, or are so clearly without substance as to render discussion unnecessary.

The point was made against all the indictments that they are defective in not showing that the grand jury was held in the county of Monmouth. The indictments begin: "Monmouth county, to wit, the grand inquest of the state of New Jersey, in and for the body of the county of Monmouth." This is in accordance with the established form, and, when read in connection with the caption and record of the proceedings, shows the opposite of the proposition suggested. The caption shows that the grand jury was impaneled and sworn at Freehold, in said county of Monmouth, before the court of oyer and terminer of that county, and that it presented these bills later to the same court and was discharged. This justifies the conclusion that

the grand jury was held and its indictments found within the county of Monmouth. *Com. v. Fisher*, 7 Gray, 492; *Smith v. State*, 28 Tenn. 9.

The motion to quash is denied. The record will be remitted to the Monmouth quarter sessions for trial.

O'REILLY v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

RAILROADS—RELIEF DEPARTMENT—RELEASE.

1. Rule 58 of the defendant's relief department reads as follows: "Should a member or his legal representative make claim or bring suit against the company, or against any other corporation which may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries on account of injury or death shall operate as a release and satisfaction of claims against the company and any and all the corporations associated therewith in the administration of the relief departments for damages received from such injury or death."

Held, that the judgment intended by that rule is a judgment awarding the plaintiff some damages.

(Syllabus by the Court.)

Certiorari to Trenton district court.

Action by Bridget O'Reilly against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff brings certiorari. Reversed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

James L. Kelly and Clarence S. Biddle, for plaintiff. Charles E. Gummere and Alan H. Strong, for defendant.

DIXON, J. Thomas O'Reilly was killed on January 18, 1899, while in the performance of his duties as an employé of the defendant company. At that time he was a member of the relief department of the company. Afterwards, his administratrix, the plaintiff here, brought an action against the company to recover damages under our death act, but on demurrer to her declaration final judgment was rendered for the defendant. Afterwards she brought the present suit to recover \$250 claimed to be due as benefits under the rules of the relief department, and the defendant insists that the judgment above mentioned bars her claim by force of rule 58, which is recited at the head of this opinion.

The question for decision is whether a judgment on demurrer is the kind of judg-

ment intended by that rule. We think it is not. The meaning plainly expressed in every clause of this rule, except that now under consideration, is that the employé injured, and the representatives of an employé killed, shall not receive both compensation for the injury or death, and benefits from the relief department; and to effectuate this purpose it is declared that a claim for compensation shall suspend a claim for benefits, and the satisfaction of either claim shall discharge the other. Among these clauses is that now to be construed, namely, "Any compromise of such claim or suit (for compensation), or judgment in such suit, shall preclude any claim upon the relief fund." Here the judgment intended is coupled with a compromise of the claim or suit, and a compromise implies, not a total defeat of the claim, but an adjustment which gives the claimant at least part of his claim—an adjustment in which the parties agree upon the sum to be paid. Bearing in mind the general purpose of the regulation and this collocation of compromise and judgment, we think the judgment intended is one by which the claimant recovers some compensation for the loss alleged, and not one which turns on the mere form of pleading.

The judgment of the district court to the contrary should be reversed, and the record remitted to that court for a new trial.

DAVEY v. ERIE R. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

DECLARATION—DEMURRER.

1. Where a declaration in an action of tort for negligence is demurred to, even though it be inartistically drafted, still, if it allege with sufficient certainty facts that show a legal duty, and the neglect thereof on the part of the defendant, and a resulting injury to the plaintiff, without fault on his part, it is not demurrable.

2. A ground of demurrer suggested in the brief, but not assigned among the causes of demurrer served, will not be considered.

(Syllabus by the Court.)

Action by Jane Davey against the Erie Railroad Company. Demurrer and declaration overruled.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Joseph M. Roseberry, for plaintiff. George M. Shipman, for defendant.

FORT, J. This is a demurrer to a declaration. The declaration contains two counts. The counts are inartistically drawn, and each is confused by unnecessary amplification, but neither count is sufficiently faulty to sustain a general demurrer.

The first count is based upon the alleged careless management of a locomotive engine by the servants of the defendant, such negli-

gence resulting in hot ashes, burning coals, etc., falling upon the combustible material upon the right of way of the defendant company, and setting fire to such combustible materials thereon, and then spreading to the standing timber, etc., on the plaintiff's land.

The second count is founded upon the allegation of negligence in the defendant in the way it kept its roadbed and its adjacent land on the right of way; the averment being that the defendant failed "to keep its said strip, parcel, or tract of land * * * free from combustible materials, so that fire should not be occasioned by reason of hot ashes, burning coals, * * * falling and settling thereon from out of said locomotive engines, and to take reasonable care to guard against the escape of fire which might be occasioned thereby."

These counts each sufficiently charge a duty and the neglect thereof upon the part of the defendant company. *Salmon v. D. L. & W. R. R. Co.*, 38 N. J. Law, 5, 20 Am. Rep. 356.

It is insisted upon the brief of the demurrant that the declaration does not describe or locate the lands of the plaintiff with sufficient certainty. This may be true, but, as no such ground for demurrer is found in the causes of demurrer in the record, it is not, decided.

The demurrers are overruled, with costs.

BACON et al. v. BOARD OF CHOSEN FREEHOLDERS OF CUMBERLAND COUNTY.

(Supreme Court of New Jersey. Feb. 24, 1903.)

MANDAMUS TO CHOSEN FREEHOLDERS—REPAIR OF ROADWAY.

1. Where the legal obligation of a board of chosen freeholders to put a roadway in fit condition for public travel is not clearly shown, its enforcement by mandamus will be denied.

(Syllabus by the Court.)

Application by the people, on the relation of Alonzo T. Bacon and others, for writ of mandamus to the board of chosen freeholders of the county of Cumberland. Rule to show cause discharged.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Walter H. Bacon, for relators. Samuel Iredell, Samuel H. Richards, and Thomas E. French, for respondents.

GARRISON, J. The relators, as taxpayers, ask for a writ of mandamus to compel the board of chosen freeholders of the county of Cumberland to put a roadway in fit condition for public travel.

The relators may maintain this action. *Ferry v. Williams*, 41 N. J. Law, 332, 32 Am. Rep. 219.

The facts are that the bridge and roadway in question were built by private capi-

tal, under legislative sanction (P. L. 1864, p. 588), and were operated as such until 1871, when they were bought by the defendant, the board of chosen freeholders of the county of Cumberland. A statute passed in that year (P. L. 1871, p. 308) authorized this acquisition by the freeholders. One of the objects set forth in the title of this act was "to convert the road of the said bridge company which is appurtenant to the said bridge into a public highway," and one of the provisions of the statute was "that upon the execution and delivery of said conveyance, the said road of said company, now appurtenant to said bridge, shall be deemed to be, and shall become, and shall be worked and managed as a public highway, the same as if said road had been laid out and established, according to the provisions of the general road act; and that upon the execution and delivery of said conveyance, the existence of the said the Maurice River Bridge Company as a corporate body, shall become extinguished."

A new bridge was built by the county in 1888, and this structure is not claimed to be either deficient or out of repair. The controversy is over the duty of the board of chosen freeholders to put the road in question in a condition fit for public travel.

It is evident from the testimony taken under this rule that what is required of the freeholders is not merely to repair the roadway, or to maintain it in the condition in which it was when it became a public highway, but to reconstruct it upon a higher grade. The imposition of this duty upon the freeholders, and its enforcement by mandamus, implies that the following propositions are established: (1) That the roadway is in legal contemplation an appurtenant to the bridge, rather than a public road; (2) that by force of the act of 1871 the road did not become a public highway, as distinguished from an appurtenant to the bridge; (3) that the purchase of the bridge and road by the county imposed upon it the duty of reconstructing the road notwithstanding the legislative declaration of the future status of the road; (4) that the duty of the freeholders, if it exists, is not merely to maintain or repair, but to reconstruct; (5) that this is the legal duty of the freeholders regardless of its discretion in the premises.

Of these propositions not one can be said to be free from doubt unless the act of 1871 so clearly defines the future status of the road as to leave no doubt that it was intended to sever it from the bridge, and establish it as a public highway, as if laid out under the general road act (3 Gen. St. p. 2803). Inasmuch, however, as the township in which the road lies is not a party to this proceeding, no opinion that involves its liability is intended to be expressed, especially as the present matter must be disposed of upon a general rule that is inseparable from the prerogative writ that is invoked.

namely, that, where a clear legal obligation to perform an act has not been shown, the performance of such act will not be enforced by the mandatory process of the court. The legal obligation of the defendant in the present case being, to say the least, doubtful, the writ of mandamus will not issue.

The rule to show cause is discharged.

STATE v. SHUTTS.

(Supreme Court of New Jersey. Feb. 24, 1903.)

LARCENY—INDICTMENT—PROPERTY SUBJECT—ERROR—REVIEW.

1. An indictment for the larceny of chickens, if intended to be under section 158 of the act for the punishment of crimes (P. L. 1898, p. 837) should contain allegations sufficient to show that the offense is not that defined in section 162 of the same act.

2. Whether, since the enactment of section 162, Crimes Act (P. L. 1898, p. 839), chickens are the subject of larceny under section 158, Crimes Act (P. L. 1898, p. 837), quære. Upon a writ of error to review a judgment in a criminal case the court will only consider such matters as have been called to the attention of the state either by assignment of error or specification of causes; and a general exception to a charge is only available when error is assigned upon the objectionable portions.

(Syllabus by the Court.)

Error to court of quarter sessions, Monmouth county.

Frank Shutts was convicted of larceny, and brings error. Reversed.

Argued before GUMMERE, C. J., and VAN SYCKEL, GARRISON, and GARRETSON, JJ.

Wesley B. Stout, for plaintiff in error. John E. Foster, for defendant in error.

GARRETSON, J. This case is before the court upon writ of error, and it seems to be assumed by the plaintiff in error that it is so under section 136 of the criminal procedure act of 1898 (P. L. 1898, p. 915), which provides that "the entire record of the proceedings had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error," etc.; but an examination of the printed book fails to disclose any return by the judge other than the ordinary and formal return to the writ of error.

The proper practice upon a return made in accordance with section 136 is indicated by the Court of Errors and Appeals in the case of *State v. Young* (N. J. Err. & App.) 51 Atl. 940.

By section 137 of the same act it is provided that, "where a plaintiff in error shall elect to take up the entire record with his writ of error as herein provided, he shall specify the causes in the record relied upon for relief or reversal and shall not be confined to his bill of exceptions or required to assign error thereon and he shall serve a copy of the causes so relied upon for relief or re-

versal" upon the representative of the state within a specified time. And the case of *State v. Young*, supra, holds: "The clear implication is that the review is to be confined to matters of which the state is apprised, either by assignment of error or specification of causes." In the present case no specification of causes of reversal has been served.

It is further provided by section 140 of the criminal procedure act that "it shall be lawful to take a general exception to the charge of the court to the jury without specifying any particular ground or grounds for such exception and without specifying what portions of said charge are excepted to and it shall be the duty of the judge to settle a bill of such exception and to sign and seal the same to the end that the same may be returned with the writ of error to the court having cognizance thereof." And section 141 provides: "It shall be lawful where such general exception has been taken to assign any error or errors of law upon any portion of the charge so excepted to." The case before us does not disclose any general exception to the charge upon which the judge settled a bill of exception or signed and sealed the same.

Under the criminal procedure act (Gen. St. p. 1154, § 170 [Laws 1894, p. 246]) the return to the writ is to be of the indictment, with all things touching the same, including the entire proceedings had upon the trial, and is so certified by the trial court; and the court, on hearing, was required by this statute to look at the entire record of the proceedings, including the testimony and the weight thereof, and was authorized to reverse the judgment and grant a new trial where it appeared from the entire record of the proceedings that the plaintiff in error sustained manifest wrong or injury. *Roesel v. State*, 62 N. J. Law, 240, 41 Atl. 408.

The criminal procedure act of 1898, in section 136, supra, omits the words "or upon the evidence adduced upon the trial," so that since that act the court upon review does not pass upon the weight of the evidence, and only upon its admission or rejection, or upon the direction of the judge as to its legality, and that only when brought before the reviewing court in the manner indicated above.

We are therefore confined in this case to a consideration of the record of the judgment, and to such bills of exception as were duly signed and sealed at the trial.

There were 13 assignments of error, as follows: (1) Because the judgment was given for the state, and against the said Frank Shutts, when by law of the land the judgment aforesaid should have been given to the said Frank Shutts. (2) Because the trial judge refused to quash the indictment. (3) Because the said court admitted the testimony against said defendant, which was illegal and contrary to law. (4) Because the said court refused to admit testimony on the part of the defendant, which in law he should have done. (5)

Because the testimony was such that it showed that the defendant was not guilty, and the verdict should have been accordingly. (6) Because the judge charged the jury contrary to law. (7) Because the judge charged the jury contrary to the proof in the case. (8) Because the court refused to charge the jury as requested. (9) Because the jury found the defendant guilty of grand larceny, to wit: "The defendant is guilty of grand larceny as he stands charged in the indictment." (10) Because the said indictment is not signed by the foreman of the grand jury. (11) Because the verdict or finding is against the clear weight of evidence. (12) Because the verdict or finding is contrary to the evidence and the law. (13) Because, for divers other reasons, the said judgment is erroneous and contrary to law.

The fifth and eleventh assignments of error are upon the findings of the evidence, and cannot be considered. The eighth is not founded on any request to charge with respect to any matter whatever. The tenth exception is not well taken; the indictment need not be signed by the foreman of the grand jury. *State v. Magrath*, 44 N. J. Law, 227. The sixth, seventh, and twelfth have no exceptions or specifications to sustain them, and are not in themselves specifications of causes for reversal. The third and fourth are to the admission and rejection of testimony, and an examination of all the exceptions to such admission and rejection fails to disclose any error in the rulings of the trial court. The first, second, ninth, and thirteenth exceptions are such as will raise any questions appearing on the face of the indictment and the record of the judgment.

The plaintiff in error was indicted for that he "seven bags of chickens of the value of twenty dollars of the goods and chattels of J. A. S. then and there being found unlawfully did steal, take and carry away." The indictment also contained a count for receiving stolen goods. The verdict of the jury was "that they find the defendant guilty of grand larceny as he stands charged in the indictment." The judgment was "that the defendant be confined in the state's prison at hard labor for the term of two years."

Section 158 of the crimes act (P. L. 1898, p. 837) provides: "Any person who shall steal of the money or personal goods and chattels of another * * * shall be guilty of a misdemeanor if the price or value of the article, property or thing be under twenty dollars; and if the price or value of the article, property or thing be of or above twenty dollars shall be guilty of a high misdemeanor."

The penalty for a high misdemeanor, as prescribed by section 217 of the crimes act (P. L. 1898, p. 854), is a fine not exceeding \$2,000 and imprisonment not exceeding seven years. The penalty for a misdemeanor, by section 218 (P. L. 1898, p. 854), is a fine not exceeding \$1,000 and imprisonment not exceeding three years.

The case was tried upon the theory that the indictment was found under this section of the statute. Evidence was produced as to the value of the chickens taken. The judge charged the jury as follows: "This defendant is indicted upon an indictment charging him with grand larceny, petit larceny, and a count charging him with receiving those goods, knowing them to have been stolen. Under this indictment, and under certain circumstances which we may or may not find, he could be convicted of either one of those offenses, or entirely acquitted. In the first place, you should convict him if you believe him to be guilty of grand larceny. Grand larceny consists of a theft of goods worth as much or more than \$20 in value. You could convict him of petit larceny, which consists of a theft of goods in value less than \$20, or you could convict him of receiving those goods with a guilty knowledge that they had been stolen, and in that case it makes no difference whether the goods were worth \$20 or less. The first thing for you to determine, if you determine that he is guilty beyond a reasonable doubt, is what he is guilty of. Were these chickens worth twenty dollars? If they were, and he should be convicted, you should say he was guilty as charged in the indictment. If in your verdict you say this: 'He stole those chickens, but they were not worth \$20,' then you should say he was guilty of petit larceny. You understand, if you find that the value of the goods was \$20, then you should say he was guilty as charged in the indictment; and if less than \$20, then you should say that he is guilty of petit larceny. Now, suppose you find that he did not steal, but received the goods knowing them to have been stolen, then you will simply say that you find him guilty of receiving the goods, but he would not be guilty of stealing."

The plaintiff in error claims that chickens are not included within the terms "money or personal goods and chattels" used in section 158, supra, because of the provisions of section 162 of the crimes act (P. L. 1898, p. 839), which is as follows: "Any person who shall carry away or unlawfully appropriate with intent to steal any turkey, goose, duck, chicken or other domestic fowl by whatever name known or designated, the property of another, shall be guilty of a misdemeanor." The indictment attempts to follow the ordinary common law form for larceny, which is the offense defined in section 158. Whether, since the enactment of section 162, chickens are no longer the subject of larceny under section 158, need not now be decided. It may be suggested, however, that possibly section 162 applies only to domestic fowls when alive, and that when killed and a subject of merchandise they may be included under the denomination of personal goods and chattels in section 158. If chickens are the subject of larceny under section 158, the indictment charging that defense should contain words of sufficient description to exclude the appli-

cation of section 162. Under that view this indictment would be defective in that particular. The words of criminal import in section 162 are "carry away or unlawfully appropriate with intent to steal"; the words used in the indictment are "steal, take and carry away." We consider, however, that the indictment is defective in the description of the property taken, whether regarded under the 158th or the 162d section.

The indictment found is not sufficient to charge the offense set out in section 162, because it is clearly a charge under section 158. It should contain allegations sufficiently clear to apprise the defendant that he is charged with the offense under section 162, and not under section 158. The words in section 162 are "carry away or unlawfully appropriate with intent to steal," and these are not equivalent to "steal" in section 158. It should also be alleged in the indictment that the chickens carried away or appropriated with intent to steal are domestic fowl, so as to distinguish them from other fowl called chickens, which are not domestic fowl. There should be no allegation of value, because the offense does not depend upon the value.

The indictment found is not sufficient, as an indictment for larceny under section 158, because, the carrying away or appropriating with intent to steal of chickens having been made an offense by section 162, if it should be claimed that chickens of certain sorts, or in certain conditions, are still subjects of larceny under section 158, the sort or condition should be specified, so that the defendant may be informed under which section he is accused.

We consider, moreover, that the description "seven bags of chickens of the value of twenty dollars" is defective, whether regarded under the 158th or 162d section. Chickens are usually regarded by number or weight. The expression used in indictment conveys no idea of the number or quantity of chickens taken. The property taken cannot be described by what it is enclosed within, because that gives no idea of the extent of the goods taken. Wharton Cr. Pl. & Pr. (8th Ed.) § 206. If the indictment is for larceny, the value of each article should be stated. Wharton, supra; State v. Stimson, 24 N. J. Law, 9; Stephens v. State, 53 N. J. Law, 249, 21 Atl. 1038.

The judgment of the sessions should be reversed.

SHELMERDINE v. LIPPINCOTT.

(Supreme Court of New Jersey. Feb. 24, 1903.)

PLEADINGS—CONFESSION OF JUDGMENT—WARRANT OF ATTORNEY.

1. Under section 123 of the practice act (2 Gen. St. p. 2554), a writing annexed to a pleading, without being referred to in the body of the pleading as so annexed, cannot be resorted to for the purpose either of enlarging or limiting the averments of the pleading.

2. Under the "Act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments" (1 Gen. St. p. 172), a warrant of attorney for confessing judgment that is included in the body of a promissory note is not void. The act is limited by its title so as merely to prohibit the use of such a warrant of attorney in the entry of a judgment in the courts of this state.

(Syllabus by the Court.)

Action by William H. Shelmerdine against Charles K. Lippincott. Demurrer to replication overruled.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Edward Dudley, for plaintiff. Henry I. Budd, Jr., for defendant.

PITNEY, J. The declaration sets forth that on a certain date before the commencement of this suit, in the court of common pleas No. 4 for the county of Philadelphia, in the state of Pennsylvania, by the consideration and judgment of that court, the plaintiff recovered against the defendant a judgment for \$51,556.28, with costs, which judgment still remains in that court in full force and effect, in no wise satisfied, reversed, or annulled, and that the plaintiff has not yet obtained execution thereof; whereby an action hath accrued, etc. Appended to the declaration is a bill of particulars purporting to set forth a copy of the exemplified record of the judgment upon which the declaration is founded.

By section 123 of the practice act (2 Gen. St. p. 2554), it is enacted that, if any writing whereof a copy is annexed to the declaration be referred to in the body of the pleading as so annexed, the copy shall cure any defect by reason of the insufficient setting forth of the same in the body of the pleading. Whether a judgment is such a writing as comes within the purview of this section is a question not now raised, for the declaration before us does not refer to the judgment record as annexed, and in the absence of such a reference it is well settled that a bill of particulars is no part of the pleading, and resort cannot be had to it for the purpose either of enlarging or limiting the averments of the pleading. Harrison v. Vreeland, 38 N. J. Law, 366; Brown v. Warden, 44 N. J. Law, 177; Metzger v. Credit System Co., 59 N. J. Law, 340, 36 Atl. 661; Snyder v. Merchants' Ins. Co., 59 N. J. Law, 69, 34 Atl. 945; Voorhees v. Barr, 59 N. J. Law, 123, 35 Atl. 651; Melick v. Foster, 64 N. J. Law, 394, 45 Atl. 911.

Among other pleas filed by the defendant is one setting up "that he was not served with process in the suit, if any there were, in which the said judgment, if any there be, was obtained; that he did not appear to said suit in person or by attorney; and that he was not resident nor present within the jurisdiction of the court in which the said judgment was rendered

at any time pending the said suit, or when judgment was rendered therein." To this plea the plaintiff replies: "That the said judgment was duly entered without suit, by confession, according to the laws of the state of Pennsylvania, under and by virtue of a power of attorney, upon a certain promissory note made by the defendant to the plaintiff, and to be performed in that state, in manner and form as follows." And the replication then sets forth in full the promissory note in question, included in the body of which is an authorization for any attorney of any court of record of Pennsylvania or elsewhere to appear for the defendant and enter judgment against him for the sum specified in the note, with costs of suit, with or without declaration, and with release of errors. To this replication defendant has interposed a general demurrer, and in support thereof relies upon the well-established rule that, notwithstanding the Federal Constitution, a judgment rendered in a state court has no force or effect beyond the territory of the state, if it appear that the defendant was not served with process in the action wherein the judgment was rendered, did not appear therein, and was not within the jurisdiction of the court. But the replication avers that the judgment now in question was duly entered without suit, by confession, in accordance with the laws of the state of Pennsylvania, and under and by virtue of the power of attorney that is set forth in the replication. As this instrument authorized any attorney to appear for the defendant and enter judgment against him, the replication as a whole sufficiently avers that the judgment was duly entered by an attorney under the authority thus conferred.

The defendant relies upon the case of *Grover & Baker Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670. But in that case it appeared that the bond and warrant authorized any attorney to enter the judgment, and it appeared that the judgment was entered against him in Pennsylvania by the prothonotary, without service of process or appearance in person or by attorney, under a local law permitting that to be done. The question under consideration, therefore, was not whether the power of attorney authorized any attorney to make the appearance, but whether it authorized the judgment to be entered without such appearance. That is a very different case from the present, for the averments of the replication now under criticism include a statement that the attorney appeared. If any inference to the contrary can be drawn from what appears upon the transcript of judgment as contained in the bill of particulars, the point can only be taken upon the trial, for the reason already given. A rejoinder in proper form, denying that an attorney appeared for the defendant, or containing other averments appropriate to the

facts of the case, would enable the defendant to present the defense relied upon, if there be doubt of his right to do so under the plea of nul tiel record that has already been filed.

The defendant further insists that, because the warrant of attorney for confessing judgment was included in the body of the promissory note, the warrant of attorney was void under section 1 of our "Act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments." 1 Gen. St. p. 172. But in the case of *Hendrickson v. Fries*, 45 N. J. Law, 555, the Court of Errors and Appeals held that, since under our Constitution the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law, it follows that this act has no effect with respect to any object that is not expressed in the title, and must therefore be construed to be a mere regulation of the practice in our own courts. It was therefore held that the act in question did not prohibit the making in this state of a valid power of attorney for use in other states, although it may be embodied in a bill or other instrument for the payment of money, but only prohibited the use of such a power of attorney in the entry of a judgment in the courts of this state.

The position of the present defendant is certainly not strengthened by the fact that the power of attorney here in question does not appear to have been made in New Jersey. It will be presumed to be valid until the contrary appears.

The plaintiff is entitled to judgment on the demurrer.

McLEAN v. ERIE R. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.

1. Where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff in doubt, the case is for the jury.

2. In referring to photographs, the judge said to the jury: "I have admitted these photographs in evidence. They are put before you. You ought to look at them with a good deal of caution. I suppose all of you know that a photograph of natural scenery is more or less misleading as to distance, on account of what the artist would call perspective or want of perspective. Do not be misled by the photographs in an estimate of distance. In that respect, it is fair to say that they are unavoidably misleading. It is the nature of photography." This was not an erroneous statement, but one within the legitimate right of comment by a trial judge.

3. It is for the jury to say whether the testimony of a witness, having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle or ringing of a bell, notwithstanding he listened, shall or shall not be

¶ 1. See *Negligence*, vol. 37, Cent. Dig. §§ 286, 296.

given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear.

(Syllabus by the Court.)

Error to circuit court, Essex county.

Action by Lauchlin McLean against the Erie Railroad Company. Judgment for plaintiff and defendant brings error. Affirmed.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

O. & R. W. Parker, for plaintiff in error.
Samuel Kallsch, for defendant in error.

FORT, J. This was an action for damages alleged to have resulted from an injury caused by the train of the defendant company running into a wagon of the plaintiff, in which the plaintiff was, at the crossing of the said company at or near Soho, in Essex county.

There was a motion to nonsuit, and also a motion to direct a verdict for the defendant, both of which motions were refused by the learned trial judge. A careful examination of the testimony leads to the conclusion that there was no error in either of these refusals. There was proof in the case in corroboration of the testimony of the plaintiff by two witnesses—one, Eugene Verhagen, called by the plaintiff, and the other, Edward Arlington, called by the defendant—that the plaintiff had stopped his wagon within 25 feet of the crossing. Mr. Verhagen testifies that he was on foot passing in the same direction along the highway as the plaintiff; that, as he drew near the track, the plaintiff's wagon was standing within about 25 feet of the track, and that he passed by him as he stood there, and crossed the track for several hundred feet before he heard the sound of what undoubtedly was the accident. Mr. Arlington testifies that he was passing along the highway on a bicycle; that he was going down toward the railroad crossing; that the wagon was just ahead of him, in what he describes as "semidarkness." He says he heard the rumble of the train, and was intent on finding out whether this wagon would cross before the train got to the crossing or not, and then says: "Just as I thought it was past the crossing, the train flashed on the crossing and the crash came." On cross-examination, he was asked whether the wagon stopped, and said he could not say, and, being asked why he could not say, gave as his reason, "On account of the darkness." But his statement, which was quite detailed and accurate, is entirely consistent with the theory of the plaintiff that the wagon had stopped before he came up, or was actually standing at the time he first saw it. If the statement of Mr. Verhagen is to be accepted, it is quite apparent that at the time he crossed the track, when the plaintiff's wagon was at a standstill, the train of the defendant company was not within sight.

Both Verhagen and Arlington testify, as distinctly and specifically as human testimony can be given to a negative fact, upon the question of whether the statutory signals were given. Both of these witnesses affirm that they did not hear the bell ring or the whistle blow, and it seems impossible to believe that Arlington would not have heard them, in view of the fact that he states that he was familiar with the train, knew it was coming, was looking for and expecting it, and heard the rumble, but did not hear any bell or whistle, and of the further fact that he was undoubtedly listening for the warning to the plaintiff, who was about to pass over the track in a position which, he thought, was one of danger, and against which, he states, he was endeavoring to get near enough him to warn him. The question of negligence in the company and contributory negligence in the plaintiff were clearly jury questions, under the evidence in the case, and were rightly left to the jury by the trial judge.

Another assignment of error was as to the court's statement in the matter of photographs which had been introduced in evidence by the defendant. On that subject, the court said: "I am asked to mention the subject of the photographs to you. I have admitted these photographs in evidence, and they are put before you. You ought to look at them with a good deal of caution. I suppose all of you know that a photograph of natural scenery is more or less misleading as to distance, on account of what the artist would call perspective or want of perspective. You can hardly judge accurately of distance from a mere inspection of the photographs. So far as concerns the trees and shrubbery that were there at the time, you must remember that the photographs were taken on the 14th of January, 1901, about three weeks, or a little more than three weeks, after this accident." Then follows a statement by the judge as to the allegations in the proof of the change in trees, underbrush, etc.; and then he concludes as follows: "That is a question for you to judge, under the testimony in this case; but do not be misled by the photographs in an estimate of distance. In that respect it is fair to say that they are unavoidably misleading. It is the nature of photography." This statement of the court is not only legitimate comment on the evidence, but is a statement of that which is common observation and knowledge. There is much that is misleading in photographs in the matter of distance, in what the learned trial judge well calls "perspective" or "want of perspective." It depends almost entirely upon the viewpoint from which a photograph is taken, as to the effect that is given to the surroundings at the point shown thereon. We see no reason for reversal in these statements.

Another alleged error was on account of the refusal of the trial judge to charge the

following request: "That affirmative evidence of the ringing of the bell and blowing of the whistle is generally entitled to more weight than evidence that it was not noticed or heard." We are unable to see upon what principle a judge is justified in stating to a jury that one piece of evidence, which is legitimate, is not to be treated by the jury the same as other evidence in the cause. It is for the jury to say whether the testimony of a witness, having an equal opportunity to hear and whose hearing is equally good, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, notwithstanding he listened, shall or shall not be given equal credit with the testimony of a witness, similarly situated, who testifies that he did hear. There was no error in the refusal of the trial judge to charge the request excepted to.

The judgment of the circuit court is affirmed.

MACMILLAN CO. v. STEWART.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CORPORATION—PROOF OF EXISTENCE.

1. Prima facie proof of the existence of a corporation plaintiff is sufficient where the defendant fails by plea or otherwise to make the existence of the corporation an issue in the case.

2. A foreign corporation may bring suit in this state upon a contract made in a foreign state without complying with the provisions of the corporation act requiring a certificate to be filed in this state.

(Syllabus by the Court.)

Certiorari to district court.

Action by the MacMillan Company against Robert Stewart. Judgment for plaintiff, and defendant brings certiorari. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Louis O. Morten, for prosecutor. Llewellyn F. Hobbs, for respondent.

GARRETSON, J. It appeared prima facie in the case that the plaintiff was a corporation. The defendant made a contract with it. He negotiated with it as to the discontinuance of a former suit upon the same contract, and agreed to pay the balance then due. He went to trial without notifying the defendant in any way by plea or otherwise that its corporate existence would be disputed. *Star Brick Co. v. Ridsdale*, 36 N. J. Law, 229. It further appeared that the plaintiff was a foreign corporation; that the contract sued on was made in New York, and was a single transaction with the defendant. The plaintiff was not bound in such case to comply with the provisions of the corporation act requiring it to file a certificate in this state, and was competent to

bring this action. *Faxon Co. v. Lovett*, 60 N. J. Law, 128, 36 Atl. 692.

The plaintiff offered in evidence its books of account, and proved them by its cashier, who testified that he knew all about them; and also produced the original contract or order, which the defendant admitted was signed by him. The plaintiff also proved that it had previously begun a suit upon the same contract, which had been withdrawn at the request of the defendant, he agreeing to pay the costs of that suit, as well as the balance due on the contract, and had made one payment after the suit was discontinued. The motion to nonsuit was properly denied. The defendant offered no evidence.

The judgment will be affirmed, with costs.

C. B. COLES & SONS CO. v. BLYTHE.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ATTACHMENT—ABSENT DEBTOR.

1. When it appears from the evidence that the defendant in a writ of attachment against an absent debtor has a dwelling house and usual place of abode within this state where a summons may be served, the writ of attachment will be quashed.

(Syllabus by the Court.)

Certiorari to circuit court, Atlantic county.

Action by C. B. Coles & Sons Company against Kirk Blythe. Application of Edwin Smith, a judgment creditor, to quash a writ of attachment. Application denied, and the judgment creditor brings certiorari. Award made absolute.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

U. G. Styron and John J. Crandall, for prosecutor. William D. Lippincott and George H. Pierce, for respondent.

GARRETSON, J. The respondent, on the 26th day of November, 1901, obtained a writ of attachment out of the circuit court of Atlantic county against Kirk Blythe, upon an affidavit alleging that he was not at that time a resident of this state. By virtue of this writ the sheriff, on the 29th day of November, 1901, attached money in the hands of Nicholas W. Young due to Blythe. The writ was returnable on the 18th of December, 1901, and was actually returned December 16, 1901. On the 5th day of March, 1902, judgment upon bond and warrant of attorney was entered in the Supreme Court by Edwin Smith against Kirk Blythe. An execution issued on that judgment March 8, 1902, which was returned unsatisfied March 17, 1902. A petition was presented to a justice of the Supreme Court, dated April 8, 1902, and on the 10th day of March, 1902, the justice made an order requiring Blythe to appear and make discovery concerning his property, and on the 1st day of May, 1902, the justice ap-

¶ 2 See Corporations, vol. 12, Cent. Dig. § 2544.

pointed a receiver of the property of Blythe. On the same day Smith presented an application to the judge of the circuit court of the county of Atlantic to quash the writ of attachment issued at the suit of the respondent against Kirk Blythe, and dismiss the same. A rule to show cause was granted. Evidence was taken upon this rule, and after consideration the judge denied the application and discharged the rule. The legality of that judicial action is challenged by this writ.

The court will not reverse the action of the circuit judge upon a question of fact when there is evidence upon which the finding of the court could be made. *Stout v. Leonard*, 87 N. J. Law, 492; *McAdam v. Block*, 63 N. J. Law, 508, 44 Atl. 208; *Miller v. Servis* (N. J. Sup.) 52 Atl. 374.

When it appeared from the testimony that the debtor had a residence in this state, and also a residence elsewhere, he was liable to be sued by attachment, if at the time he did not dwell in this state, and did not dwell or have his usual place of abode here. If he could not, when the writ was issued, have been personally served, and his dwelling house and usual place of abode was not in this state, then attachment would lie. *Stout v. Leonard*, supra; *Mygatt v. Coe*, 63 N. J. Law, 510, 44 Atl. 198; *Evans v. Perrine*, 35 N. J. Law, 221. A residence or place of abode in this state of a temporary or permanent character, at which a summons might lawfully be served, is the condition on which process of attachment cannot be issued. *Baldwin v. Flagg*, 43 N. J. Law, 495; *Conover v. Beckett*, 38 N. J. Eq. 389.

It appears that Blythe in November, 1894, went to live in Atlantic City, and that in 1901 he was living at 208 North Virginia avenue, that he had been a voter in Atlantic City for four years, but did not vote there at the election held in November, 1901. That he lived at this house with his wife and two children, aged respectively 9 months, and 3 years and 4 months.

It is admitted that Blythe, with his wife and younger child, left Atlantic City in the latter part of September or the early part of October, 1901, and went to Camden, the husband having work in Philadelphia; that they remained in Camden about two weeks, and then went to Philadelphia and boarded there, Blythe until about January, 1902, and Mrs. Blythe leaving there a few weeks before Christmas, and returning again to Atlantic City. When they went to Camden they left the older child with Mr. Blythe's parents, and a Mr. and Mrs. Hoffman—the uncle and aunt of Mrs. Blythe—went to live in their house. The house remained open, with the Blythes' furniture there, and Mr. and Mrs. Hoffman living there. The evidence shows that both Mr. and Mrs. Blythe returned to that house at different times during the period they were boarding in Philadelphia, and remained over night or

longer. The frequency of the stays by Blythe and his wife in this house is disputed.

The respondent claims that the Hoffmans rented the house from Blythe for a definite period, but the only evidence of this is from various witnesses that Mrs. Blythe so stated to them. This, of course, was not legal evidence to prove the fact, and could not bind Mr. Blythe. On the other hand, the Blythes and the Hoffmans both testify that they went to the house to be company for Mrs. Blythe during her husband's absence; that Mr. Blythe continued to pay the rent monthly, as he always had done, although on one or two occasions Mrs. Hoffman carried the money for the rent to the agent, but it was furnished to her by Blythe; that Mrs. Blythe was only visiting her husband when she was away, but that her residence, and also his, continued at the house in Atlantic City, and the evidence is uncontradicted that at the time the attachment was issued Mrs. Blythe was at the house in Atlantic City. We do not think, therefore, that there was evidence to show that Blythe had obtained any other dwelling house or usual place of abode than the one in Atlantic City, and that that was his dwelling house and usual place of abode, and that summons might have been served upon him there.

The rule to show cause should be made absolute, with costs.

STATE ex rel. O'HARA v. NATIONAL BISCUIT CO. et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CORPORATIONS—RIGHTS OF STOCKHOLDERS—EXAMINATION OF BOOKS—MANDAMUS.

1. The right to examine the stock and transfer books of corporations is, by the thirty-third section of the general corporation act of this state (P. L. 1898, p. 409), accorded to stockholders in their capacity as such; hence, in the enforcement of such right by mandamus, it must appear that the right which the relator seeks to exercise is germane to his status as a stockholder.

2. A statutory provision, originally enacted under the title of "An act to prevent fraudulent elections in incorporated companies and to facilitate proceedings against them," will have the limitation imposed by such title impressed upon it, notwithstanding its re-enactment in subsequent revisions of the law under the title of "An act concerning corporations," and hence, notwithstanding the generality of its language, does not extend the right of the stockholder to examine corporate books beyond that accorded to him at common law, or entitle him to the remedy by mandamus, save as a discretionary writ.

(Syllabus by the Court.)

Application by the state, on the relation of Joseph W. O'Hara, for writ of mandamus to the National Biscuit Company and James B. Vredenburg, registered agent. Writ denied.

Rule to show cause why a mandamus should not issue to compel the defendant cor-

poration and its registered agent in this state to permit the relator to examine its stock and transfer books during ordinary business hours.

The testimony established the following facts: The relator was, on October 11, 1892, the registered owner of five shares of the common stock of the defendant corporation. On that day, during ordinary business hours, he applied to James B. Vredenburg, Esq., the registered agent of the said corporation, to be allowed to examine the stock and transfer books of the said company, stating that he (the relator) represented a claim against a certain man by virtue of legal proceedings in the state of Ohio, and that his object in seeking to examine the said books was to find out whether this man owned or had recently transferred shares of stock of the said corporation. The relator's right to examine the said books for this purpose having been denied, this rule to show cause was allowed on October 13, and filed on October 16, 1902, and on October 17, 1902, a certain amended certificate of incorporation of said company was filed in the office of the Secretary of State.

Argued November term 1902, before GARRISON and GARRETSON, JJ.

John S. Parker, for relator. Albert O. Wall, for defendants.

GARRISON, J. This application involves the question whether the qualified right of a stockholder to inspect the books of his corporation, as that right existed at common law, has, with respect to stock and transfer books, been transformed into an unqualified right by force of the thirty-third section of the corporation act of this state (P. L. 1898, p. 409). At common law such restrictions as were imposed upon this right, whether as to mode of procedure or matter of substance, were judicial regulations incident to the exercise of a discretionary power over a topic not covered by specific legislation. It is not perceived that the enactment of such legislation infringes upon any prerogative recognized under our judicial system. If the legislature has conferred upon all stockholders an absolute right to inspect certain corporate books for all purposes, the duty of the court is to enforce such right by its writ of mandamus. The rule of the common law with respect to the right of stockholders to obtain by mandamus an inspection of corporate books is correctly stated in the opinion delivered in this court in the case of *Bruning v. Hoboken Printing & Publishing Co.*, 50 Atl. 906. The relator does not deny the discretionary nature of the writ at common law, or that this discretionary character still obtains in this state, save as it has been altered by the legislature. His contention is that, with respect to the examination of stock and transfer books, the legislature has conferred upon stockholders an absolute right that abrogates the judicial discretion nor-

mally incident to the writ in question. The statutory provision upon which this claim is rested is the first clause of section 33 of "An act concerning corporations" (Revision of 1896, as amended by P. L. 1898, p. 409), which is in these words: "Every corporation shall keep at its principal and registered office in this state the transfer books in which the transfer of stock shall be registered, and the stock books, which shall contain the name and address of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder."

I do not find in this language a legislative grant broad enough to cover the plaintiff's contention, or discover in it any purpose to dispense with the judicial discretion incident to the enforcement of its provisions. The right to inspect the books that contain the names, addresses, and quantum of interest of holders of shares in a corporation is given to "stockholders"; a term that not only defines the class upon which the right is conferred, but also indicates the capacity in which the right is to be enjoyed, namely, that it must be with respect to the relator's interests as a stockholder, or be germane to his status as such. If this is the correct interpretation of this language, it affords no support for the relator's contention that it confers upon him a right superior to and in excess of that obtainable under the settled practice of the discretionary proceeding that he has invoked. If, however, instead of interpreting the language of the legislative grant, we pass to its construction, a like effect must be given to it, so far as this relator is concerned.

The provision in question first appeared as a statute on December 8, 1825, under the title of "An act to prevent fraudulent elections by incorporated companies and to facilitate proceedings against them." *Harrison*, p. 112. Under this title it was continued in the Revised Statutes of 1846. *Rev. St.* p. 139. In the Revision of 1874 it was transferred to and re-enacted as section 36 of "An act concerning corporations." *Revision*, p. 163. In 1896 it was again re-enacted in the Revision of that year as section 33 of "An act concerning corporations," omitting the words "for thirty days prior to any election of directors," and without further modification was continued in the amended act of 1898, P. L. 1898, p. 409.

The effect to be given to this course of legislation is definitively settled by the decision rendered in the Court of Errors and Appeals in the case of *Hendrickson v. Fries*, 45 N. J. Law, 555. The statutory provision under review in that case was: "Every warrant of attorney for confessing judgment which shall be included in the body of any bond, bill or other instrument for the payment of money shall be void and of no effect; and such bond, bill or other instrument shall have the same

force, and no other, as if the said warrant of attorney had not been incorporated therein." Revision, p. 81, § 1.

The contention of the plaintiff in error in that case was that this statute, standing in unqualified terms as part of a general act, laid down a general rule with respect to its subject-matter. In disposing of this contention adversely, Mr. Justice Depue, delivering the opinion of the court, said:

"The statutory provision in question" was passed in 1799 as section 13 of an act entitled 'An act to regulate the practice of courts of law.' Rev. Laws, p. 415. It was continued in the practice act in the Revision of 1846. Rev. St. p. 931. In the Revision of 1874 it was transferred to and re-enacted as section 1 of 'An act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments.' Revision, p. 81. Under the provision of our Constitution, the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law. It can have no effect with respect to any object that is not expressed in the title. Applying this canon of construction, I think it is clear that this statute must be construed to be a mere regulation of the practice in our own courts."

Inasmuch as the limitation to the "practice in our own courts" is derived entirely from the title under which this statute was originally passed, and is not referable to the title under which it was re-enacted, the doctrine of the decided case is that, where a statute is originally passed under a title that limits its provisions, the re-enactment of such provisions in subsequent revisions of the laws under a title that has no such limiting effect will not remove the limitation imposed by the original title.

In fine, the rule established by *Hendrickson v. Fries* is that a legislative enactment, limited in its operation by force of the title under which it was originally passed, will continue to be impressed with such limitation, notwithstanding its re-enactment in subsequent revisions of the law under a title that imports no such limitation. Applying this canon of construction, which is binding upon this court, to the section of the revised corporation act under review, we must hold that the limitation imposed upon it by the title under which it was originally passed followed it through its subsequent transferences and re-enactments, so that, under the title of "An act concerning corporations," it is still to be construed as if it stood under the title of "An act to prevent frauds in the elections of incorporated companies and to facilitate proceedings against them." Thus construed, it does not extend the rights of stockholders beyond those customarily accorded to them at common law, and affords no ground for the claim that the discretionary nature of the proceeding now invoked has been abrogated or in any wise disturbed.

The result is that, whether we resort to interpretation or to construction, the relator has not shown himself to be entitled to the writ for which he asks.

If the relator so desires, the finding of facts prefaced to this opinion may be treated as the defendant's return to an alternative writ of mandamus to which the relator has demurred, in which case error would be assignable upon a judgment overruling such demurrer. For this purpose an application to the court is necessary. *Hoos v. O'Donnell*, 60 N. J. Law, 35, 37 Atl. 72, 447.

FELT v. STEIGLER.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ACTION FOR MONEY LOANED—INSTRUCTIONS.

1. An action being brought to recover the sum of \$1,500, payable in 15 monthly installments of \$100 each, and there being evidence from which the jury might find that the 15 months had not expired prior to the commencement of the suit, and that, as to \$100, it was not due when the suit was brought:

Held erroneous to charge the jury that the matter was of such small consequence that they might disregard it, even if they believed that the 15 months had not expired, and that, as to \$100, it was not due when the suit was brought.

(Syllabus by the Court.)

Error to circuit court, Essex county.

Action by Henry Felt against Charles Steigler. Judgment for plaintiff, and defendant brings error. Reversed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Johnson & German and Robert H. McCarter, for plaintiff in error. Francis Child, for defendant in error.

PITNEY, J. This action was brought by a building contractor to recover a balance claimed to be due upon a written contract, and also certain moneys claimed for extra work. Plaintiff had a verdict and judgment below.

The defendant contended, among other things, that the suit was prematurely brought, and that the plaintiff was not entitled to recover the full amount claimed. The contract provided that the consideration for the construction of the building in question should be \$3,000, \$1,500 to be paid in monthly payments of \$100 per month during a period of 15 months. The plaintiff claimed that the work was completed on or before July 28, 1900, but there was evidence to be submitted to the jury, and which the trial judge did submit to them, from which they might find that the final work was not done until some time in August. The suit was commenced October 30, 1901. Therefore, if the jury should find that the last work was done in August, it would follow that the final installment of \$100 had not fallen due

at the time of the commencement of the suit. In this state of the proofs, the trial judge in his charge to the jury, after referring to the evidence pro and con upon the question whether the building was completed in July, or not until some time in August, proceeded to charge the jury as follows: "The matter is of such small consequence that I instruct you that you may disregard it in the present suit, even if you believe that the 15 months had not expired, and that, as to \$100, it was not due when the suit was brought. At any rate, 15 months has now expired, and I think that no harm will be done by looking at the case in that way." To this portion of the charge an exception was taken and duly sealed.

It was, we think, erroneous for the trial judge to charge the jury that they might include the final \$100 in their verdict, although it was not due when the suit was brought. The action was commenced by summons, and no claim that matured after the suit was commenced could properly be included in the verdict. The rule laid down in *Devlan v. Wells*, 65 N. J. Law, 213, 47 Atl. 467, is only applicable where suit is commenced by attachment.

The judgment should be reversed, and a venire de novo awarded.

ARIMEX CONSOL. COPPER CO. v. STATE BOARD OF ASSESSORS et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CORPORATIONS—RETURN FOR TAXATION—CONCLUSIVENESS—REDUCTION OF TAX.

1. The return made by a corporation to the State Board of Assessors, for taxation under the corporation tax act (3 Gen. St. p. 3335), is not conclusive against the corporation.

2. If by mistake the return states the corporate stock issued and outstanding to be more than it really is, the corporation may show the truth and have the tax reduced, even though it has paid the excessive tax.

3. In view of the act of June 10, 1895 (P. L. p. 788), the court cannot order the state officers to restore the excessive tax.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Arimex Consolidated Copper Company, against the State Board of Assessors and J. Willard Morgan, Comptroller, to review an assessment for taxes. Tax reduced.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

William P. McMichael, Jr., for prosecutor. The Attorney General, for defendants.

DIXON, J. In the year 1900 the State Board of Assessors assessed the franchise tax of the prosecutor, under the corporation tax act of April 18, 1884 (3 Gen. St. p. 3335), at \$4,000, being the proper percentage on \$5,000,000 of stock which an agent of the company reported as issued and outstanding.

The company paid the tax. Afterwards the officers of the company learned at what figure the agent had reported the outstanding capital, and, as in truth the outstanding capital was only \$2,500,000, a writ of certiorari was obtained to reduce the tax to \$2,500, the legal sum.

While the corporation tax act requires each corporation to furnish to the Board an annual return of such information as the Board may desire to carry out the law, it does not make that return the legal basis of the tax. The legal basis of the tax is the capital stock issued and outstanding. *People's Investment Co. v. Assessors*, 66 N. J. Law, 175, 48 Atl. 579. The return therefore should not be deemed conclusive when the tax is brought into court by a direct proceeding to test its legality. Hence we must conclude that \$1,500 of the tax is illegal.

But the Attorney General contends that, as the company paid the tax voluntarily, it is not entitled to have the assessment reduced to the legal amount. In view of the rigorous and speedy means authorized by the statute for enforcing the tax, it may be doubted whether the payment can be deemed voluntary; but if it be, still it resulted from a mistake of fact by the agent making the return, a mistake which the company might indeed have discovered by an arithmetical calculation before payment, but which it did not discover until months after payment. Such a payment would not bar a suit for reclamation against another payee than the sovereign, and it does not lessen the moral obligation of the sovereign to see that justice is done. The tax should be reduced to \$2,500.

The prosecutor urges that we should make an order for the restoration of the surplus paid. In *Singer Sewing Machine Company v. Assessors*, 54 N. J. Law, 90, 22 Atl. 1085, we held that under the statute then in force we had legislative authority for doing so, but that authority was withdrawn by the act of June 10, 1895 (P. L. p. 788).

Let judgment be entered reducing the tax to \$2,500. No costs are allowed.

STATE v. KENILWORTH.

(Supreme Court of New Jersey. Feb. 24, 1903.)

DISORDERLY PERSONS—PRACTICE OF PALMISTRY.

1. The act concerning disorderly persons (P. L. 1898, p. 942) is valid in so far as it declares that persons who use palmistry shall be adjudged disorderly, and punished.

(Syllabus by the Court.)

Zoa Kenilworth was convicted of violation of a statute, and brings certiorari. Affirmed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

H. Wootton, for the State. R. H. Ingersoll, for defendant.

DIXON, J. The prosecutor was convicted before the recorder of Atlantic City, and fined for "pretending to use and using palmistry" in violation of section 1 of the act concerning disorderly persons (P. L. 1898, p. 942). The language of the enactment so far as now pertinent is, "all persons who shall use or pretend to use or have skill in physiognomy, palmistry or like crafty science . . . shall be deemed and adjudged to be disorderly persons." This provision has been part of our statutory law since June 10, 1799 (Paterson's Laws, p. 410).

One reason urged by the prosecutor of this certiorari for quashing his conviction is that the enactment is unconstitutional, but with this concession, that if palmistry is found to be a crafty science then the objection will not hold. Undoubtedly, within the intent of this statute, palmistry is a crafty science, that is, one by which the simple-minded are apt to be deceived. So much is plainly indicated by the collocation of words "palmistry or like crafty science." It was so used by the prosecutor when, from the lines on the palm of the complaining witness, he foretold the age at which the witness would marry and the duration of his life. If ever there shall be discovered any rational evidence that palmistry is a real science, its use for honest purposes will pass beyond the range of this statute; but in the present case the use of palmistry was plainly within the prohibition. We find no reason for denying the validity of the act.

The only other objection to the conviction is that the act (section 36) authorizes a conviction only on the oath or affirmation of one or more "credible" witnesses, while the record of conviction shows that it was based on the testimony of a "credible" witness. The use of the word "credible" to signify "worthy of belief" is said by lexicographers to be obsolete; and antiquity cannot be invoked to justify its use here in that sense, for it was introduced by our act of 1888 (P. L. 1888, p. 249). Nevertheless, we think such is its significance in this statute, and by a "credible witness" is meant one whose testimony is worthy of credit, credence, belief; that is, in more modern phrase, a credible witness.

The conviction should be affirmed, with costs.

CUNNINGHAM v. STANFORD.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ESTATES—DEBTS—WHEN BARRED.

1. Under Orphans' Court Act, § 70 (P. L. 1898, p. 741), providing that any creditor of a decedent who shall neglect to bring in his claim within the time limited by the orphans' court shall, by its decree, be forever barred

of his action against the executor or administrator, such a creditor is barred though the executor has personal property of the estate in his possession; section 75 providing that "nothing herein contained shall prevent or bar any person from bringing any action against an executor or administrator for or in respect to the personal estate of his testator or intestate" having no application to a suit to collect a claim.

Action by Annie F. Cunningham against Helen K. Stanford, executrix. Submitted on demurrer to replication. Demurrer sustained.

Argued at November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Albert C. Wall, for plaintiff. R. Wayne Parker and Cortlandt Parker, for defendant.

GUMMERE, C. J. This action is brought to recover upon a certain promissory note indorsed by the defendant's testator. To the declaration filed in the cause the defendant pleaded, among other things, the making by the orphans' court of a decree barring all creditors, who had not presented their claims to the executrix within the time limited by the decree, from having an action against her on account of such claims, and alleging that the plaintiff was barred by that decree. To this plea the plaintiff replied that there was personal property and estate of the defendant's testator in her hands to the value of \$15,000, and that the said plaintiff brings her action for and in respect to the same; and that, in accordance with the statute in such case made and provided, said plaintiff ought not, by reason of anything in said plea alleged, to be barred and prevented from maintaining her action against the said defendant.

The replication contains no answer to the plea. It apparently is intended to be based on section 75 of the orphans' court act (P. L. 1898, p. 741), which reads as follows: "Nothing herein contained shall prevent or bar any person from bringing and maintaining any action against an executor or administrator, for or in respect of the personal estate of his testator, or intestate, or for or in respect of any waste or misapplication thereof by said executor or administrator." It is not necessary, in disposing of this demurrer, to stop to explain the conditions under which the provisions of this section may be invoked against an executor or administrator. It is enough to say that they do not operate to limit in any way the effect given by section 70 of the act to a decree barring creditors. To give it the construction contended for by the plaintiff would be to make the decree to bar creditors a nullity, whenever the executor or administrator of the deceased had assets in his hands with which to pay creditors, and leave it in force only when the personal representative of the deceased was absolutely without assets.

That a decree to bar creditors will be enforced against creditors, notwithstanding that

the executor has personal assets of his testator in his hands, has been frequently decided by this court. *Ryder v. Wilson's Ex'rs*, 41 N. J. Law, 12; *Young v. Young*, 45 N. J. Law, 197; *O'Neill v. Freeman*, Id. 208; *Cunningham v. Stanford* (N. J. Sup.) 52 Atl. 374.

The defendant is entitled to judgment on the demurrer.

**PATERSON & P. GAS & ELECTRIC CO.
v. STATE BOARD OF ASSESS-
ORS et al.**

(Supreme Court of New Jersey. Feb. 24, 1903.)

CORPORATIONS—FRANCHISE TAX—AMOUNT.

1. The Paterson & Passaic Gas & Electric Company was formed March 1, 1899, by the consolidation and merger of eight corporations, some of whom possessed and exercised municipal franchises within the definition laid down in State Board of Assessors v. Plainfield Water Company, 67 N. J. Law, 357, 52 Atl. 230, and since its formation the consolidated company has constantly exercised those franchises. *Held*, that the company is subject to taxation under section 4 of the act of March 23, 1900 (P. L. p. 502), for the taxation of franchises.

2. The tax to be levied on the corporation under that section is 2 per cent. of its gross annual receipts from all its business, not merely 2 per cent. of its receipts from the exercise of municipal franchises.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Paterson & Passaic Gas & Electric Company, against the State Board of Assessors and others, to review an assessment. Tax affirmed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

R. V. Lindabury and Hobart Tuttle, for prosecutor. Michael Dunn, for defendants.

DIXON, J. The Paterson & Passaic Gas & Electric Company, was formed on March 1, 1899, by the consolidation and merging of the Paterson Gaslight Company, the People's Gaslight Company of the City of Paterson, the Passaic Gaslight Company, the Edison Electric Illuminating Company of Paterson, the Passaic & Bergen Gas Company, the Lodi Light, Heat & Power Company, the Passaic Electric Light, Heat & Power Company, and the Passaic Lighting Company. Under the corporation act of 1896, in pursuance of which the merger and consolidation took place, the several corporations became a new single corporation, with a new name, new capital stock, and new directors, and was (speaking generally) endowed with all the rights and powers, and charged with all the duties and limitations, of the constituent companies. Under the act of March 23, 1900, for the taxation of franchises (P. L. p. 502), this company, on April 23, 1901, made return to the State Board of Assessors that its gross receipts from its business in the state of New Jersey for the year ending December 31, 1900,

amounted to \$572,007.40, whereupon that board assessed the tax against the company at \$11,440.15, and apportioned the same to the various taxing districts in which the property of the company was located. The present writ of certiorari is prosecuted to reduce that tax.

The ground of the application for reduction is that three of the constituent companies, namely, the Paterson Gaslight Company, the People's Gaslight Company, and the Passaic Gaslight Company, never exercised any "municipal franchises" within the definition of that phrase given in State Board of Assessors v. Plainfield Water Company, 67 N. J. Law, 357, 52 Atl. 230. The prosecutor contends that as, by the terms of the act of 1900, it cannot "apply to any corporation which has not hitherto or may not hereafter exercise any municipal franchise" (section 8), therefore it cannot apply to the prosecutor, so as to impose a tax upon the receipts derived from the business formerly carried on by those companies. This contention plainly ignores the language of the statute. Construing together the first, fourth, and eighth sections of the act, it will be manifest that the corporations which are to make return to the state board are thus described: "Corporations [other than municipal corporations or corporations taxable under the act of April 10, 1884] which have acquired, or may hereafter acquire, authority or permission from the state or from any taxing district thereof, and have or may hereafter have the right to use and occupy, and occupying, the street or highways, roads, lanes or public places in the state," excluding, however, from such class of corporations, "any corporation which has not hitherto or may not hereafter exercise any municipal franchise." The prosecutor concedes that it is not taxable under the act of April 10, 1884; that it acquired from the state, through the charters of the three constituent companies last named, and from certain taxing districts of the state, through the five other constituent companies, authority and permission to use and occupy certain streets and highways in several municipalities of the state; that it is using those streets and highways; and that the franchises passing to it from those five companies, and which it is constantly exercising, were municipal franchises within the case cited—that is, franchises that could not be exercised without first obtaining the consent of the municipalities within whose limits they were to be exercised. It thus appears that the present corporation is within the general scope of sections 1 and 4 of the act, and is not within the special exception of section 8; in other words, that it is a corporation required to make return to the state board. What that return is to set forth is declared by the act in unmistakable terms, "the gross receipts of its business in the state of New Jersey for the preceding year," and then "an annual franchise tax of two per centum upon

the annual gross receipts as aforesaid" is to be assessed upon the corporation in lieu of all other franchise taxes. There is here no suggestion that the tax is to be limited to such receipts as are derived from the exercise of municipal franchises.

The tax is affirmed, with costs.

SLAYTOR-JENNINGS CO. v. SPECIALTY PAPER BOX CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

FOREIGN CORPORATIONS—RIGHT OF ACTION—SET-OFF.

1. A foreign corporation may maintain suits in this state on contracts made outside of New Jersey since the passage of the act concerning corporations (Revision of 1896), without complying with the provisions of the ninety-seventh section of that act.

2. Unliquidated damages cannot be set off in suits in the district courts.

(Syllabus by the Court.)

Appeal from Second district court of Newark.

Action by Slaytor-Jennings Company against the Specialty Paper Box Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Leon Abbett, for appellant. Gallagher & Kirkpatrick, for appellee.

GARRETSON, J. This is an appeal by the defendant from the judgment of the Second District court of Newark under the provisions of an act of the Legislature of April 3, 1902 (P. L. p. 565). The grounds of the appeal are (1) that the plaintiff, being a foreign corporation, could not maintain the action; (2) that the defendant should have been allowed to set off a claim for unliquidated damages against the plaintiff's demand.

Order for the goods, the price of which is the subject of the suit, was given by the defendant to a selling agent or broker for the plaintiff and several other firms or corporations. The order was placed with the agent at the defendant's office in Newark, and the agent did not at that time disclose for whom he was acting. Subsequently the order was mailed by the agent to the plaintiff at its office in the city of Boston for its acceptance, and was accepted by the plaintiff. The contract was executed in Massachusetts; hence no corporate act was shown to be done in New Jersey. In Faxon Co. v. Lovett Co., 60 N. J. Law, 123, 36 Atl. 692, this court construed the ninety-seventh section of the act concerning corporations (Revision of 1896) to permit foreign corporations without complying with its provisions to maintain suits in this state on contracts made outside of the state since the passage

of the act. The contract in this case was not made under the order obtained by the agent until it was accepted in Massachusetts. D. & H. Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538; 13 A. & E. Ency. of Law (2d Ed.) 869, 870.

The second ground of appeal is that the judge of the district court overruled a set-off or counterclaim of the defendant against the plaintiff for unliquidated damages. It is a general rule that unliquidated damages cannot be set off. *Edwards v. Davis*, 6 N. J. Law, 394; *Smock v. Warford*, 4 N. J. Law, 306; *Parker v. Hartt*, 32 N. J. Eq. 225, 230. The language of the sixtieth section of the district court act (P. L. 1898, p. 574), "If the defendant have any account or demand against the plaintiff he shall be permitted to discount or set off the same against the account debt or demand of such plaintiff," establishes no different rule. This only means a claim having the characteristics denoted by the word "set-off," one of which is its liquidated character. The act concerning set-off (3 Gen. St. p. 3109, § 1) is expressly limited to liquidated damages.

Judgment will be entered for the plaintiff, with costs.

SCHAMBERGER v. SOMERSET CHEMICAL CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

SERVANT—INJURY—NEGLIGENCE—BURDEN OF PROOF.

1. The burden is on the servant to establish negligence on the part of the master causing the injury.

Action by Mary Chamberger, administratrix of Jacob Chamberger, deceased, against the Somerset Chemical Company. On rule to show cause. Rule made absolute.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

Lewis A. Allen and Michael Dunn, for plaintiff. Colle & Duffield, for defendant.

PER CURIAM. The plaintiff's intestate was killed while repairing a belt. The plaintiff alleges that by reason of a defect in a pulley the clothes of the decedent were caught, and he was drawn into the machinery and killed. There was but little evidence to show how the accident happened. The burden is on the plaintiff to establish negligence of the defendant which led to the injury. The deceased was engaged in an employment in which there was obvious danger, requiring much care on his part to avoid injury. We think there is a want of evidence to show negligence on the part of the defendant, and that from the few facts that appear in the testimony it is more rea-

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2544.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 395.

sonable to conclude that the deceased failed to take proper care for his own safety.

The rule to show cause should be made absolute.

**BAILEY v. PENNSYLVANIA R. CO.
NAYLOR v. SAMEL.**

(Supreme Court of New Jersey. Feb. 24, 1903.)

ACTION ON CONTRACT—DEFENSES—ATTACHMENT.

1. It is no defense to an action upon contract that the debt sued for has been attached in the hands of the defendant in a foreign jurisdiction by a creditor of the plaintiff. Quære, whether, in such case, the suit should not be stayed, or the execution be controlled?

(Syllabus by the Court.)

Appeal from Trenton district court.

Actions by Andrew M. Bailey and by Joseph Naylor against the Pennsylvania Railroad Company. Judgments for each plaintiff, and defendant appeals. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Charles E. Gummere, for appellant. Harry C. Valentine, for appellees.

GARRISON, J. These appeals present a single question, namely, whether it is any defense to an action upon contract that the debt sued for has been attached by a creditor of the plaintiff in the hands of the defendant. The two cases differ only in that the attachment in the case of Bailey had gone to judgment, while in the case of Naylor judgment had not been rendered. In neither case had the sum garnished been paid over by the defendant. The attachments were instituted in the state of West Virginia, and levied upon wages earned in New Jersey by residents of the latter state. Neither these circumstances nor the validity of the attachment proceedings are of any consequence upon the question that is presented by these appeals, in view of the fact that the matter set up by the defendant does not meet the charge against it. It could not be pleaded in bar, for it neither denies the contract nor shows performance. It could not be pleaded in abatement, because it does not tend to end the suit, but at most only to retard its progress. Even where the earlier and the later suit are between the same parties, and of the same date, they must be of the same jurisdiction, in order to invoke successfully the rule here contended for by the defendant. The pendency of such prior suit in a foreign jurisdiction may furnish ground for staying the suit here, but not for its abatement. *Kerr v. Willetts*, 48 N. J. Law, 78, 2 Atl. 782.

Whether the pendency of an attachment suit of different plaintiffs should lead to the same practice is a question that is not now presented. All that is presented upon these appeals is the legal propriety of the action

of the district court in overruling the said defense and giving judgment for the plaintiffs. This action we affirm, and order that like judgments be entered pursuant to the statute under which these appeals are taken. P. L. 1902, p. 565.

It may be that upon a proper application execution should be stayed, but upon this point no opinion is expressed.

DRAKE v. CITY OF ELIZABETH et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CITY COUNCIL—JUDICIAL DUTIES—DISQUALIFICATION.

1. A determination by city council in a specific case, based upon the finding of that body in a matter in which a discretionary judgment was reposed in it, is so far judicial in character as to be voidable if any one of the quasi judges who participated was at the time disqualified by private interests at variance with the impartial performance of his public duty.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of J. Madison Drake, Jr., against the city of Elizabeth and the Times Publishing Company, to review a resolution of the city council. Resolution set aside.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

J. F. Brown, for prosecutor. C. Addison Swift, for city of Elizabeth. James C. Connolly, for Times Pub. Co.

GARRISON, J. This certiorari brings up a resolution of the city council of the city of Elizabeth by which a contract for city printing was awarded to the Times Publishing Company. The resolution in question was made pursuant to an advertisement for bids, of which the following is a copy:

"Proposals for Printing.

"City Hall, Elizabeth, N. J.

"May 24, 1902.

"The city council at its last meeting directed the committee on printing to advertise for bids from the various newspapers in this city for the printing of the minutes, official notices, ordinances, advertising, and other proceedings relating to municipal affairs for the term of one year, the same to be awarded to the lowest bidder, which newspaper shall be designated the official newspaper of the city of Elizabeth. Sealed proposals for the above must be presented at the next meeting of the city council, to be held on June 2, 1902, at 8:30 o'clock p. m.

"Daniel P. McGovern,

"B. J. Higgins,

"Committee on Printing."

By the resolution under review the proposed contract was awarded to the defend-

¶ 1. See *Municipal Corporations*, vol. 28, Cent. Dig. § 657.

ant publishing company. A determination of this nature, confined to a specific case, and based upon the finding of a body in which a discretionary judgment is reposed, is so far judicial in character as to be voidable if any one of such quasi judges who participated was at the time disqualified by reason of private interests at variance with the impartial performance of his public duty. *Traction Co. v. Board of Public Works*, 56 N. J. Law. 431, 29 Atl. 163.

In the case cited the vote of the disqualified member was not necessary to the result; but Mr. Justice Reed, in his opinion, said: "The fact that there were a sufficient number of votes apart from his vote to pass the ordinance is no answer to the objection taken upon the point. The infection of the concurrence of the interested person spreads so that the action of the whole body is voidable."

This salutary doctrine, re-enforced by the charter of the city of Elizabeth, which makes it unlawful for any member of city council to be directly or indirectly interested in any contract with the city, renders it unnecessary to inquire in the present case whether the number of councilmen disqualified by holding stock in the Times Publishing Company was one or more, or whether the required vote was three-fourths or a bare majority, or whether councilmen who had transferred their stock to their wives were thereby exculpated from having any indirect interest in the private corporation with which, in competition with others, they were called upon to act. It is established that at least one councilman who had not transferred his stock participated in the transaction throughout. That "infection," to adopt the language of the opinion above cited, is a sufficient ground for voiding the action of the entire body. The resolution awarding the contract in question is set aside with costs.

ATLANTIC CITY v. FREISINGER.

(Supreme Court of New Jersey. Feb. 24, 1903.)

AUCTIONEERS—LICENSE.

1. Under the Atlantic City ordinance for licensing auctioneers, etc., passed July 14, 1902, no license fee becomes due and payable until June 1, 1903.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Victor Freisinger, against Atlantic City, to review an ordinance. Conviction set aside.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

G. A. Bourgeois, for prosecutor. H. Wootton, for defendant.

DIXON, J. An ordinance of Atlantic City, passed July 14, 1902, made it unlawful for

any person to conduct a store where goods are sold at auction, unless a certain license fee had been paid, and further provided that the license fee should be due and payable on the 1st day of June in each year. On August 21, 1902, proceedings were instituted against the present prosecutor for conducting such a store without having paid the license fee, and thereupon he was convicted. By the very terms of the ordinance a license fee does not become due and payable until June 1, 1903, and therefore this conviction must be set aside, with costs.

BENNETT v. CITY OF ORANGE.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ELECTION OFFICERS—COMPENSATION—DIMINUTION OF DUTIES.

1. The passage of the act to consolidate the local or charter elections with the general election in the cities of this state, known as the "Meeker Act" (P. L. 1901, p. 41), does not operate to alter or abolish the compensation allowed by statute to the election officers for duties connected with the local or charter elections.

2. The compensation of a public officer belongs to him not by force of any contract, but because the law attaches it to the office, and it is not affected by a diminution of the duties of the office, the office itself remaining.

(Syllabus by the Court.)

Appeal from district court, Orange county.

Action by Frank E. Bennett against the city of Orange. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Thomas A. Davis, for appellant. William A. Lord, for appellee.

HENDRICKSON, J. The plaintiff was an election officer of the city of Orange, and he brought suit in the Orange district court, in his own behalf and as assignee of the claims of other election officers in that city, to recover the compensation claimed to be due them for services rendered at the election for city and county officers on November 5, 1901. The claim of each of the officers referred to was for services at such election, as follows: One day's registry, \$3; election day, \$7; aggregating in all the sum of \$240—for which judgment was given, besides costs. From this judgment the city has appealed to the court. It is agreed upon both sides that the only question at issue is whether since the consolidation of the municipal or charter elections in cities with the general or state election, under the act approved Feb. 28, 1901, known as the "Meeker Act" (P. L. 1901, p. 41), the officers can collect fees for services rendered in this dual capacity for both elections. These officers had already received from the county collector

¶ 2. See *Officers*, vol. 37, Cent. Dig. § 132.

of Essex county \$25 each for services rendered as members of the board of election and registry for their respective election districts. The contention is that this payment is in full for all their services connected with that election, and that they are not entitled to what the appellant terms "double compensation," and that the judgment should be reversed. We find, however, that the Meeker act does not touch the question of compensation, but that a supplement to the general election law of 1898, approved March 22, 1901, regulates that subject-matter. P. L. 1901, p. 258. After fixing the compensation of members of the boards in cities having a population exceeding 30,000, the supplement enacts that in all other cities, etc., the compensation of each member for all such services, in connection with any local or charter election, shall be for each registry day \$3, and for the election day, including the counting of the votes and the delivery of the returns and the ballot box, \$7, and for all such services in connection with the general election, or any special election held in and for the whole county, "such compensation shall be * * * twenty-five dollars in districts where the number of registered voters is more than three hundred." The city of Orange is within this class. We think that the words of this supplement clearly give to the election officers the compensation provided for their services in connection with each election. This view is strengthened by the fact that this supplement was passed after the enactment of the Meeker act. It must be observed also that the city election is still held, only the time of holding it is changed by the Meeker act to the time of holding the general election.

It is further urged that they should not be paid the compensation for services in holding the city election, because there is no additional service performed by them in connection therewith except in the counting and canvassing of the vote. But it must be remembered that the officer's right to compensation does not grow out of a contract between him and the municipality by which it is payable. The compensation belongs to him not by force of any contract, but because the law attaches it to the office. *Throop on Public Officers*, 443; *Hoboken v. Gear*, 27 N. J. Law, 265. And where a salary thus attaches to an office the right to it is not affected by a diminution of the duties of the office, the office itself remaining. *Marquis v. City of Santa Ana*, 103 Cal. 661, 37 Pac. 650. It is further urged that the payment by the county collector is a satisfaction for all services performed at the election, and that the act so declares. But the words here referred to plainly apply only to the sum certain fixed by the statute for services at the general election, and not to the compensation allowed in connection with the charter election.

The result we have reached is in accord

with the views expressed by this court in *Bellis v. Freeholders of Atlantic County*, 51 Atl. 781. The point, however, was not directly involved in that case. The judgment below is affirmed, with costs.

WHITTINGHAM et al. v. HOPKINS et al.
(Supreme Court of New Jersey. Feb. 24, 1903.)

HIGHWAYS—ESTABLISHMENT.

1. A slight variation in laying out a public road, due to the erection of houses by the prosecutors upon the line described in the application for the road, will not lead to the nullification of the proceedings of the surveyors.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Martha Whittingham and another, against Richard Hopkins and others, to review proceedings in laying out a public road. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Chauncey G. Parker and S. M. Rollinson, for prosecutors. Blake & Howe, for defendants.

GARRISON, J. The return to this writ of certiorari brings up the proceedings of surveyors in laying out a public road. It is objected that the notices of application for the appointment of surveyors and of their acting were not set up as required by law, in that two of them were posted at railroad stations; the claim being that railroads are private property, and hence are not public places. This claim is sound neither in its premises nor its conclusion, if reference be had to the sense in which the word "public" is used in these proceedings. Where notoriety is the object to be attained, the most public places are those that afford the most publicity, without regard to the title of the owner of the property. See, also, *State v. Schanck*, 9 N. J. Law, 107.

2. The objection that the return was not properly signed is not supported. See the case above cited.

3. The misdating of the return is shown to be a mere clerical error.

4. The prosecutor Walton C. Whittingham had actual notice, was on the ground with the surveyors, and objected to the road.

5. The variation of 90 feet in the terminal point of the road as laid is explained in the return of the surveyors to be due to the act of the prosecutor Walton C. Whittingham, acting either for himself or as agent for his mother, the other prosecutor, in building three houses on the line of the road as set forth in the application. If this had been the sole ground upon which the application for this writ had been rested, and the facts had been disclosed, it would have been within the sound discretion of the justice of the Supreme Court to whom the application was

made to have withheld his allocatur. The same discretion is now open to this court in dealing with this reason. *State v. Woodward*, 9 N. J. Law, 21.

The prosecutors, in point of fact, created the condition that led to the variation of which they now complain. The variation is not material, and affects no rights that were not involved in the application for the writ. The prosecutors were not misled into acquiescence, for they did not acquiesce, but objected, and their objections have been heard. We think that the change of course necessitated by their conduct cannot be successfully urged as a reason for nullifying the return of the surveyors.

The action taken in the court below on these proceedings is affirmed.

LONGA v. STANLEY HOD ELEVATOR CO. et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

INJURY TO EMPLOYE—LIABILITY—NEGLIGENCE—FELLOW SERVANT.

1. A servant of Whan, while in a safe position, and free from danger, in doing his master's work, at the request of the engineer of the elevator company, which was engaged in an independent employment, over which Whan had no control, attempted to loosen the elevator, which had stuck fast, and while so doing was killed.

Held: (1) That Whan is not liable, as the accident did not happen while decedent was engaged in serving him.

(2) That the elevator company is not liable. If the engineer had authority to employ the decedent, they were fellow servants.

If he had no such authority, the decedent was a mere volunteer.

The danger was also obvious.

(Syllabus by the Court.)

Error to circuit court, Hudson county.

Action by Julia Longa against the Stanley Hod Elevator Company and Alexander Whan. Judgment for defendants, and plaintiff brings error. Affirmed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

James F. Minurn, for plaintiff in error. Wallis, Edwards & Bumsted, for defendants in error.

VAN SYCKEL, J. This is a suit by the administratrix of an employé of the defendant Whan against both Whan and the Stanley Hod Elevator Company to recover damages under the death act. The servant was killed by the falling of the hod elevator. Whan was engaged in erecting a five-story brick storehouse. Whan employed the elevator company at \$10.50 per day to raise up the hods from the ground below to a platform provided by Whan on which the decedent's duty was to stand, and take the hods out of the elevator when they were brought up. The elevator company exer-

cised an independent employment, and furnished its own engineer, over whom Whan exercised no control. The decedent, as the servant of Whan, was not employed to run, or to assist in running or controlling, the elevator. The engagement of the elevator company required it to deliver the hods at the level of the platform, on which the decedent was placed, which it is not denied was a secure position for doing his master's work. During the day on which the accident occurred, the elevator stuck fast at the third story, where decedent stood. The engineer of the elevator company called to Whan's servant to assist in getting the elevator free, and while he was so engaged the elevator fell, and killed him. The deceased assisted in striking the elevator with joists, then jumped on it with four or five other men, which caused it to fall suddenly. The decedent was not in that respect acting as the servant of Whan, and Whan is no more liable for the injury than if the servant, without his authority or consent, had gone across the street to another building, and been there killed by the negligence of some other contractor. Whan furnished the decedent a safe place for his work, and while he was engaged in doing his master's work he was in no peril.

The question remains whether the other defendant is liable in damages. If the engineer of the elevator company had authority to employ the decedent to assist him in loosing the elevator, then he was a fellow servant of the engineer, and the plaintiff cannot recover. If the engineer had no such authority from his employer, then the decedent was a mere volunteer, and the company is without liability.

It is also to be observed that the decedent was guilty of want of care for his own safety in placing himself in a position of obvious danger in the elevator. A nonsuit was properly directed by the trial court as to both defendants.

The judgment below should be affirmed.

MALBERTI v. UNITED ELECTRIC CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

PLEADING—DEMURRER—STRIKING DECLARATION.

1. Mere imperfection or lack of form in pleading are not good grounds for demurrer.

2. A declaration will be stricken out, on notice under section 132 of the practice act (2 Gen. St. p. 2555), as being so defective or so framed as to prejudice, embarrass, or delay a fair trial of the action, although a demurrer would not be sustained against it.

(Syllabus by the Court.)

Action by Felice Malberti against the United Electric Company of New Jersey. Demurrer to declaration overruled. Mere imperfections or lack of form in the pleading are not good grounds for demurrer.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

McEwan & McEwan, for plaintiff. Bedle, Edwards & Lawrence, for defendant.

FORT, J. This is a demurrer to a declaration. The declaration contains two counts. Both the counts are inartistically drawn. They can truly be styled imperfect, and lacking in form. It is probable that, if the demurrer were not a general one, but was to the second count only, it would have been sustained. But mere imperfection or lack of form in pleading are not now good grounds for demurrer. 2 Gen. St. p. 2557, § 139. It is quite difficult to grasp the pleader's method of statement, or his ground of liability on the part of the defendant company, but the court, after much reflection, is unable to say that the first count in the declaration does not allege a duty to the plaintiff, as one of the public, which the defendant has failed to perform, and which failure has resulted in injury to the plaintiff through no fault of his own. It is quite evident that this declaration would be stricken out upon notice under section 132 of the practice act (2 Gen. St. p. 2555), as being so defective or so framed as to prejudice, embarrass, or delay a fair trial of the action. This is the better practice, as was suggested in *Minnuci v. Philadelphia & Reading R. R. Co.* (N. J. Sup.) 53 Atl. 229.

The demurrer in this case is overruled, with costs, but without prejudice to the right of the defendant to move to strike out the declaration.

CURTIS v. STOUT.

(Supreme Court of New Jersey. Feb. 24, 1903.)

JUDGMENTS—DOCKETING.

1. The act of April 4, 1892, concerning the docketing of judgments rendered in the courts for the trial of small causes (2 Gen. St. p. 1898), authorizes the docketing of such judgments without an affidavit of belief that the debtor is not possessed of goods and chattels to satisfy the amount due.

(Syllabus by the Court.)

Certiorari to court of common pleas, Monmouth county.

Action by Henry A. Curtis against Wesley B. Stout. Judgment for plaintiff, and defendant brings certiorari. Affirmed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

Parker & Pearce, for plaintiff. Wesley B. Stout, pro se.

DIXON, J. This writ brings up a docketed judgment entered in the office of the clerk of the Monmouth pleas on September 25, 1899, and the execution thereon issued. The docketing is attacked because there was not filed an affidavit of belief that the debtor

was not possessed of goods and chattels sufficient to satisfy the amount due, as required by section 72 of the justice's court act (Gen. St. p. 1879). The question for decision is whether this requirement was dispensed with by the later act of April 4, 1892 (2 Gen. St. p. 1898). This question was noticed, but not decided, in *Barr v. Fleming*, 61 N. J. Law, 431, 39 Atl. 915, Id., 62 N. J. Law, 449, 45 Atl. 1090, and in *Brink v. Blazer*, 62 N. J. Law, 175, 40 Atl. 623. In *Grimshaw v. Carroll*, 62 N. J. Law, 730, 42 Atl. 733, a question closely related was presented to the Court of Errors, and that court decided that in docketing judgments of the district court the affidavit referred to was still essential, the fourth and fifth sections of the district court act of March 27, 1882 (1 Gen. St. p. 1260), not having abrogated that provision of the seventy-seventh section of the district court act of March 9, 1877 (1 Gen. St. p. 1228). In reaching this conclusion, however, the Court of Errors laid chief stress upon the declaration in the act of March 27, 1882, respecting the precise force and effect of its provisions, by which it clearly expressed a purpose to substitute those provisions for only two of the preliminaries required by the prior law, but left the third preliminary, the affidavit as to the debtor's property, unrepealed. The act of April 4, 1892, does not contain so narrow a definition of its scope, but, on the contrary, by its opening declaration as to what only shall be necessary in docketing justices' courts' judgments, evinces an intent to make compliance with its provisions sufficient in all cases to which its terms are applicable. Under this view of the force of that law, the affidavit referred to is not required. This renders it unnecessary to consider whether the supplement of March 22, 1901 (P. L. p. 365), validated previous docketings which were then void.

The docketed judgment, and also the execution, are affirmed, with costs.

LOEWENTHAL v. WAGNER.

(Supreme Court of New Jersey. Feb. 24, 1903.)

BAIL—DISCHARGE.

1. Under the peculiar circumstances of this case, the bail to the sheriff should be discharged, and money deposited with the sheriff as additional security should be returned to the bail, without formal surrender of the defendant.

(Syllabus by the Court.)

Action by Annie Loewenthal against Emil Wagner. Rule for discharge of bail made absolute.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

James F. Minturn, for defendant. Weller & Lichtenstein, for plaintiff.

DIXON, J. Since the decision in this cause appearing in 52 Atl. 298, the sheriff has been permitted to amend his return on the capias.

so that it now reads: "I took the body of the defendant named in this writ and released him on bail. The name of the bail is Joseph Stein. As additional security to the bail bond, I required said Stein to deposit with me the sum of one thousand dollars."

On the petition of the bail, Joseph Stein, a rule has been allowed requiring the plaintiff and the sheriff to show cause why the bail should not be allowed to surrender the defendant, or should not be discharged, and have the deposit of \$1,000 returned to him, without physical surrender of the defendant.

The material circumstances are: That in July, 1901, within 30 days after the defendant was returned in custody, the plaintiff filed her declaration, to which no plea has been filed; that when the sheriff made return that the defendant was in custody the defendant had been actually released on the security set out in the return as now amended; that in September, 1901, the defendant was again arrested on a capias issued at the suit of the same plaintiff for a different cause of action, and was detained in custody under that writ until February 27, 1902, when he was sent to the state prison for a term of three years upon a conviction for attempting to break jail, and is still in prison.

These circumstances show that the plaintiff lost nothing by the failure of the defendant and the bail below to put in and perfect special bail. Her declaration having been regularly filed according to the return then appearing upon the capias (Practice Act, § 103), she could have entered judgment against the defendant at the expiration of 60 days after the return. Before the time came for entering such judgment the defendant was in the actual custody of the sheriff at her own suit, and a *ca. sa.* upon such a judgment, lodged with the sheriff, would have afforded her all the redress to which she was legally entitled. The consequences of her failure to exercise her rights in the suit cannot be charged on the defendant or his bail, and the fact that the defendant cannot now be taken in execution is due to no fault of the bail.

We think the case warrants the exercise of the equitable power of the court for the relief of bail, and that a formal surrender through habeas corpus should not be required.

The rule for the discharge of the bail and the return of the deposit should be made absolute, but without costs.

GITTINGS v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. Oct. 31, 1902.)

APPEAL—REMAND FOR FURTHER PROCEEDINGS.

1. Where a bill for relief against an alteration in an assessment does not allege that no notice

of the purpose of the appeal tax court of Baltimore City to change or alter an assessment had been given, as required by Laws 1900, p. 603, c. 347, but the taxpayer alleges, on appeal, that he can show such want of notice, the cause will, under Code Pub. Gen. Laws, art. 5, § 36, be remanded for proceedings.

On motion for reargument. Former decree of affirmance rescinded, and cause remanded without affirmance or reversal, under Code Pub. Gen. Laws, art. 5, § 36.

For former opinion, see 52 Atl. 937.

PEARCE, J. A motion has been filed in this cause for reargument, or, failing in this, that the decree passed herein may be modified, and that, in lieu of the affirmance of the decree passed by the court below, the cause may be remanded, under section 86, art. 5, of the Code of Public General Laws, to the end that the appellant may have leave to amend his bill of complaint by averring therein that the appeal tax court of Baltimore City did not give him any notice of its purpose to change or alter his assessment upon "Ashburton" for the year 1901, under the provisions of section 164a of the charter of Baltimore City. Laws 1900, p. 603, c. 347.

We have carefully considered this motion and the brief filed in support thereof, and we remain of the opinion that the bill cannot properly be regarded as denying that the required notice of the purpose of the appeal tax court to increase this assessment was given to the appellant, and in the present state of the record we should be compelled to adhere to the decree of affirmance heretofore passed. We stated in the opinion heretofore filed in this case that, if the failure to give such notice had been alleged in the bill, the demurrer must have been overruled, and the injunction granted. It is now alleged in the brief filed in support of the motion for modification of the decree that no such notice was in fact given, and that proof thereof can be made. If this be true, we think it equitable that an opportunity should be afforded to establish the fact; since, under an amended bill averring this fact, and sustained by proper proof, the appellant would be entitled to relief. *Paine v. France*, 26 Md. 46; *Johnson and Wife v. Robertson*, 31 Md. 491.

We shall, therefore, as authorized by section 36 of article 5 of the Code of Public General Laws, rescind the decree of affirmance heretofore passed, and shall, without affirming or reversing the decree of the court below, order the cause to be remanded, to the end that the bill may be amended as indicated, and that such further proceedings may be had, and such testimony be taken, as shall be necessary for determining the cause upon its merits in accordance with this opinion. As this course is due to appellant's failure to make the averment, now to be allowed by amendment, it is only proper he should bear the costs up to this stage of the cause.

Decree of affirmance heretofore passed rescinded, and cause remanded, under section 36 of article 5 of Code, without affirming or reversing the decree of circuit court No. 2 of Baltimore City, for further proceedings in conformity with this opinion; appellant to pay the costs above and below.

TOMPKINS et al. v. SPERRY, JONES & CO. et al.

(Court of Appeals of Maryland. Feb. 11, 1903.)

CORPORATIONS—SUBSCRIPTIONS—PAYMENT IN PROPERTY—PROMOTERS—CHARACTER OF ACTS—LIABILITIES—ACCOUNTING IN FIDUCIARY CAPACITY.

1. Where, pending the organization of a corporation to consolidate several breweries, the promoter entered into an agreement with one brewer for the purchase of his brewery on behalf of the corporation, and the contract was not to be binding unless certain enumerated brewers and individuals become part of the consolidated company, and because of the failure of such brewers and individuals to join the consolidation the agreement was never carried into effect, the fact that thereafter such promoter purchased the brewery individually, under no agreement that it was to be assigned to the corporation, or any statement that it was made for its account or on its behalf, does not create a fiduciary relation between the corporation and such promoter, so as to render such promoter liable for a breach of faith in connection with such purchase.

2. Where promoters of a consolidated corporation purchased the properties to be consolidated in their own names, with a view to capitalizing their combined value by turning them into the company for payment of their stock and bonds, and there was nothing in the contracts of purchase showing that such purchases were made in a fiduciary capacity, there was nothing in the facts to render such promoters liable to the consolidated corporation in such fiduciary capacity.

3. Where, at the time defendants were promoting a corporation to consolidate several breweries in a certain city, they purchased such breweries, and thereafter turned them over to the corporation in payment for its stock and bonds, they were not liable to subsequent stockholders of the consolidated corporation in a fiduciary capacity, when in fact, at the time, they owned or controlled all of the stock then issued by such consolidated corporation; and that some of the shares did not stand in their names, but in the names of their employes or agents, was immaterial as affecting the real ownership of the property.

4. Where promoters of a corporation, organized for the purpose of consolidating the breweries of a city, owned all of its stock prior to the consummation of the purchase of the breweries, their act in subscribing for the remainder of the stock, authorized to be issued by an amendment to the corporation's articles, and paying for such subscription by a transfer to the company of the brewing properties previously purchased by them, was not invalid.

5. Where all the stockholders of a corporation were present or represented at a meeting, any defect in the prior notice of the meeting was waived.

6. Defendants organized a corporation for the purpose of consolidating all the breweries in the city of Baltimore, on a basis of \$20 capital stock for each barrel of output. Prior to the execution of the contract with the owners of the breweries, defendants owned all the stock

in the corporation, and thereafter purchased several of the breweries, which they turned over to the corporation, in consideration of the corporation's issuance to them of stock and bonds largely in excess of the amount authorized by the basis originally contemplated. *Held*, that defendants, in purchasing such brewery plants and selling them to the corporation, were not acting in a fiduciary capacity; and hence a receiver of the corporation was not entitled to maintain a bill to compel them to account for such stock and bonds.

Appeal from Circuit Court No. 2 of Baltimore City; J. Upshur Dennis, Judge.

Bill by John A. Tompkins and others, as receivers of the Maryland Brewing Company, against Sperry, Jones & Co. and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John Prentiss Poe and Williams, Thomas & Williams, for appellants. D. K. Este Fisher, Bernard Carter, Gans & Haman, Fielder C. Slingluff, and T. Wallis Blackstone, for appellees.

SCHMUCKER, J. This is an appeal from a decree of circuit court No 2 of Baltimore City, sustaining the appellees' demurrer to, and dismissing a bill filed by, the appellants, as receivers of the Maryland Brewing Company of Baltimore City, hereinafter called the "Company." The purpose of the suit is to procure an account of certain bonds and the proceeds thereof, which the bill alleges the appellees Sperry & Jones, while occupying a fiduciary relation to the company and being in control of its corporate organization, caused to be overissued by it to themselves, and which they and their coappellees, who acted with full knowledge of the facts, sold and disposed of for their own use and advantage. The allegations of the bill in large part relate to the stock of the company, which is charged to have been overissued at the same time and in the same manner as the bonds, but there is no prayer in the bill for an account of the stock or its proceeds, although there is a prayer for general relief.

The bill of complaint alleges that the company was incorporated under the general laws of this state by articles of incorporation filed on February 7, 1898, and amended on December 22, 1898, with a capital of 32,250 shares of preferred and 32,250 shares of common stock, and that it subsequently authorized an issue of \$7,500,000 of bonds; that the incorporators and directors named in the certificate of incorporation, and also the stockholders who participated in the organization of the company, consisted of the appellees Sperry & Jones, and persons who were under their control, and were in fact their agents, and were not independent subscribers, and by that means the said two appellees remained in absolute control of the company from its organization down to and including February 28, 1899; that, pending the or-

ganization of the company and prior to the last-named date, Sperry & Jones, who were bankers and brokers by profession, contracted for and on its behalf with each one of certain named brewers and brewing companies of Baltimore, including George Brehm and Joseph Strauss, to the end that they should sell and transfer their brewing establishment to the company, to be paid for by it partly in cash and partly in its bonds and stock at a valuation to be determined by their respective barrelage, or output of barrels of beer, for the preceding year; that the total capitalization of the company, which was expected to absorb all of the breweries in Baltimore having an estimated output of 700,000 barrels per annum, was fixed in the contracts at \$14,000,000, being \$20 of capital for each barrel of output, it being further understood that, if the entire brewing interests of Baltimore were not brought into the company, its capitalization should be reduced at the rate of \$20 per barrel of output of such breweries as failed to come in, such reduction of capitalization to be pro rata in bonds and stock; that it was further provided in the contracts that the several properties should be transferred free of debt to the company, but the latter would buy for cash the stock of malt and hops on hand at the several component breweries as of March 1, 1899, and, further, that out of the proceeds of the bonds and stock to be issued by the company a cash working capital of \$500,000 should be provided, and that the balance of the stock and bonds so to be issued should go to Sperry & Jones as compensation for their services, they to pay all of the expenses attending the promotion of the enterprise. Copies of the alleged contracts between Sperry & Jones and George Brehm and Joseph Strauss were filed as Exhibits A and B with the bill, which alleged that all of the contracts with the other brewers were similar in terms to the two of which the copies were filed, and that the other contracts were in the possession of Sperry & Jones. It was further alleged that all of those contracts were made by Sperry & Jones for and on behalf of the company, and provided on their faces that they were to be assigned to and filed with it. The bill, then, after having directly charged that Sperry & Jones in making the contracts with the brewers were acting for and on behalf of the company, proceeds to aver that Sperry & Jones, through the said board of directors, "did compel the said Maryland Brewing Company on February 28, 1899, to assume the obligations of the various contracts with various brewers hereinbefore referred to." The bill then further alleges that the various breweries which were, in fact, transferred to the company, without averring that they were so transferred by virtue of said contracts, represented an output for the preceding year of only 543,000 barrels, against which the terms of the contracts would have permitted an issue

of only \$5,320,000 of bonds, and a corresponding amount of stock by the company, but that the appellees Sperry & Jones, having control as aforesaid of the company, caused it to issue to them against the said properties \$7,500,000 of bonds, and \$2,750,000 of preferred and \$2,750,000 of common stock; that this issue of bonds and stock was authorized at a meeting of the company held on February 15, 1899, by the presentation to a stockholders' meeting, and the acceptance by the stockholders in such meeting assembled of a written offer from Sperry & Jones to subscribe for, and take the above-mentioned amounts of, bonds and stock of the company, and to pay for \$500,000 of the bonds in cash, and to pay for the remainder of bonds and stock so to be subscribed for by a transfer and conveyance to the company of certain specified brewery properties, at the valuations therein set forth. A copy of the minutes of said stockholders' meeting, showing that all of the stockholders were present in person or by proxy, and containing in full the said proposition of Sperry & Jones, is filed with the bill as Exhibit C. The bill then charges that this stockholders' meeting had no legal right to receive or accept said proposition, because it does not appear that prior notice had been given of the meeting and its purpose, as is required by law in such cases.

The bill further charges that the two trust companies, which were made codefendants with Sperry & Jones, and which appear in this court as appellees, with full knowledge of the matters hereinbefore mentioned, entered into an agreement with Sperry & Jones to furnish them the sum of \$3,300,000 to consummate the promotion of the company, for which they received \$4,000,000 of the bonds and a large amount of the stock of the company, and that they became jointly interested with Sperry & Jones in such promotion and in the transactions connected therewith, and that they subsequently sold said bonds for the sum of \$4,240,000, but did not account to the company or its receivers therefor, and that Sperry & Jones failed to account for such of the bonds as were retained by them. The bill then charges that this alleged overissue and sale and disposal of the bonds and stock of the company, procured by Sperry & Jones with the aid and connivance of the two trust companies, was a fraud upon the company and its original stockholders and its creditors. The bill further avers that subsequently the company was compelled to default upon its bonds, and was, upon a bill filed for that purpose, put in the hands of receivers under sections 264 and 264a of article 23 of the Code, and that, after a sale of substantially all of its property and effects and the application of the proceeds to the payment of its debts, there still remains over \$4,000,000 due to its bondholders, and that the institution of the present suit was authorized by an order of court passed in the receivership case. The prayer

of the bill is for an account from the defendants of the proceeds of the bonds of the company unlawfully obtained and sold by them or appropriated to their own use, and for general relief. The appellees Sperry & Jones and the Citizens' Trust & Deposit Company demurred to the bill, and the issue thus made was tried; and the decree appealed from, which sustained the demurrers and dismissed the bill, was entered before the time of the other appellee to respond to the bill had expired.

Notwithstanding the positive averment already referred to in the bill, that, on February 28, 1899, Sperry & Jones compelled the company to assume the obligations of the contracts with the various brewers, the theory of the bill is that Sperry & Jones acted for and on behalf of the corporation in making the contracts with the brewers, and for that reason stood in a fiduciary relation to it, and could have no undisclosed interest in the property covered by the contracts nor make any secret profit out of their execution. It is charged that they violated their fiduciary obligation by procuring the company to issue to them a larger amount of stocks and bonds than are called for by the contracts. The case against the two trust companies, who are also made defendants to the bill, rests upon the allegation that they, with full knowledge of the relation of Sperry & Jones to the company and of the terms of the contracts under which the breweries were to be acquired by it, not only aided and abetted their codefendants in securing their alleged secret profits, but also shared in the profits. The allegation of the bill is that all of the contracts with the brewers were similar in their terms to the Brehm and Strauss contracts. Copies of these contracts are filed with and made part of the bill, and they constitute the avowed foundation upon which it rests in averring what relation Sperry & Jones occupied to the company in making them, and what were the terms and conditions upon which, and the extent to which the company was to issue its bonds and stock in payment for the breweries. It therefore becomes of fundamental importance to ascertain what are the character and scope of these contracts, in order to determine whether they, when construed in the light of the other allegations of the bill, and taken together with them, present such a case of breach by Sperry & Jones of a fiduciary relation to the company as would constitute a sufficient cause of action to maintain the present bill.

If we now turn to the Brehm and Strauss contracts, it becomes apparent at the first inspection of them that they are dissimilar in character, and proceed upon theories which are inconsistent if not conflicting with each other. It cannot be accurately asserted that all of the other contracts with the brewers were similar in their terms to these two, for these are not similar to each other. The

Brehm contract recites that Brehm is the owner of a brewing establishment in Baltimore City, and believes that it would be to his advantage to have his business consolidated with other breweries, so as to effect certain economies, and to produce an annual output of not less than 560,000 barrels of beer, and that he desires to secure the assistance of Sperry & Jones in effecting such a combination, and that they are willing to make an effort to accomplish the desired result. Sperry & Jones then agree "to give their best efforts to procure" the desired combination upon the terms briefly outlined in the earlier part of this opinion, and Brehm agrees to sell and transfer his brewery to the consolidated corporation when formed, at the fixed price of \$1,050,000, to be paid \$450,000 in cash, \$100,000 in bonds, \$250,000 in preferred, and \$250,000 in common, stock of the company. But it is provided by the terms of this agreement that certain breweries therein named and specified must be embraced within the proposed combination, and that the annual output of the combined establishments should not be less than 560,000 barrels of beer; and it is expressly declared that the agreement "is not to be binding upon said George Brehm unless the above enumerated breweries, companies, and individuals become part of the said consolidation."

Now, the bill nowhere alleges that all of the breweries named in the agreement did come into the consolidation, or that the annual output of those that came in amounted to 560,000 barrels. On the contrary, it avers that such output was only 543,000 barrels, and it appears from Exhibit C, filed with the bill, that the breweries specified in the Brehm contract did not all come into the company. So it is apparent upon the face of the bill and exhibits that the so-called Brehm contract, by its own terms, never became a binding obligation, or fixed the terms upon which Sperry & Jones were bound to effect the organization of the company, or on which Brehm was bound to convey his brewery to it when organized, or upon which a proposed consolidation of breweries was to be made. Nor does it appear that any attempt was ever made to put this contract into execution. By reference to Exhibit C, it appears that Brehm's brewery went into the company, not at the price of \$1,050,000, fixed by this contract, of which \$450,000 were required to be paid in cash, but that it went in at the price of \$925,000, of which no part was paid in cash, but \$400,000 was paid in the bonds and the residue in the stock of the company. Moreover, the brewery was not acquired by the company from Brehm or the price paid by it to him, but it was acquired from Sperry, Jones & Co. in payment for stock and bonds issued to them. Not only, therefore, does it appear from the exhibits that the Brehm contract by its own provisions never became binding and operative,

but also that his brewery was not acquired by the company from him or under the terms of that contract.

If we turn now to an examination of the contract between Strauss and Sperry & Jones, we find that it was one for the out and out sale by the former to the latter of the brewery therein mentioned, at the price of \$1,100,000, of which \$890,000 was to be in the preferred and common stock of the company, and the balance in cash or bonds of the company, as Strauss might prefer. This contract contains no provision whatever, such as is found in the Brehm contract, stipulating that it is to be assigned to the company, or any statement that it was made for its account or on its behalf. The contract does provide that the property to which it relates is to be paid for by Sperry & Jones in bonds and stock of the company, which are to be issued by it only to the extent of \$20 per barrel of the total output for the preceding year of such breweries as shall be acquired by it, exclusive of cash or working capital; but as there is nothing in the contract giving rights under it to any other persons than the contracting parties, no right of action would have accrued to the company or to its receiver from a breach of that provision, if such breach ever, in fact, occurred.

There is an allegation in the bill that the various breweries were put into the company under the management of Sperry & Jones at much higher prices than those fixed on them in the contracts with the various brewers; but, when we turn to the only contracts produced by the plaintiffs, we find that Sperry & Jones turned in the Brehm brewery to the company at a distinctly less price than that mentioned in the contract on which the bill rests its allegations, and that the brewery mentioned in the Strauss contract was turned into the company at precisely the same price as that for which the contract filed with bill shows that he agreed to sell it to Sperry & Jones. The exhibits filed with the bill not only fail to afford reasonable ground for making this allegation, but directly contradict it.

Turning now to Exhibit C, we find that, when the breweries in question were finally acquired by the company, they were taken by it, not from the several brewers who had formerly owned them, but from Sperry & Jones, who must in the meantime have acquired them. It is entirely consistent with the exhibits on which the allegations of the bill rest that these gentlemen should have purchased the properties on their own account, with a view to capitalize their combined value by turning them into the company in payment for its bonds and stock. The Brehm contract, which was, on its face, made for the benefit of the company, was a purely conditional one, which was to become operative and take effect only upon the happening of events which the bill alleges nev-

er occurred. No inoperative contract like that could create a fiduciary obligation to the company on the part of Sperry & Jones. The Strauss contract is not only consistent with, but it, in its terms, contemplates that Sperry & Jones are to acquire on their own account, and not in a fiduciary capacity, the property to which it relates. The bill itself alleges that Sperry & Jones were the real owners of all of the company's stock issued prior to the meeting of February 15, 1899. There was nothing unlawful, in that condition of affairs, in the fact that some of the shares stood in the names of their employes or agents. *Pott & Co. v. Schmucker*, Trustee, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415. Nor was there anything unlawful in their subscribing for the remainder of the stock, and paying for it by a transfer to the company of the brewing properties at any fair price agreed upon, if they owned or controlled and could procure the conveyance of those properties, and complied with the provisions of the law in such cases. The company could also validly purchase property suitable for the purposes for which it was incorporated, and issue its bonds or other obligations in payment therefor. The presence of all the stockholders at the meeting of February 15, 1899, overcame any supposed difficulty from want or prior notice of the meeting, even though the statute prescribed the notice. *Cook on Corporations*, vol. 2, § 599; *Clark & Marshall on Corporations*, vol. 3, p. 1968; and cases cited by those two authors.

The transfer to a corporation, by a subscriber to its stock, of property under such an arrangement as was followed in this case, if the property were valued at a grossly exaggerated price, might, it is true, not constitute payment in full of the stock, so as to protect him from liability to its creditors in a suit brought by them under the provisions of section 64, art. 23, Code. *Basshor v. Dresel*, 34 Md. 511, 512. But this is not a suit of that character. There could have been, under the conditions of the meeting of February 15th, no concealment of the true situation from any of the real stockholders, for they were the same persons as the vendors of the property to the company. It was simply a changing by Sperry & Jones of the form of property owned by them, or under their control for that purpose, from individual estate to corporate securities. The public were not invited to subscribe to any stock. It was perfectly well known by the parties to the transaction that the full \$7,500,000 of bonds were also being issued for the property. The bill itself alleges that "there were issued by the Maryland Brewing Company against the properties therein set forth \$7,500,000 in first mortgage 6 per cent. gold bonds."

When Sperry & Jones afterwards sold or disposed of the bonds and stocks to the brewers or to the public, either directly or

through the agency of their codefendants, they were bound to exhibit the same candor and practice the same good faith toward the persons with whom they dealt that all vendors are, and if they failed to do so they were liable to their vendees in proper proceedings, seasonably instituted, for damages, or for a rescission of the sales, as we held in the case of *Brehm v. Sperry, Jones & Co.*, 92 Md. 378, 48 Atl. 368; but that issue is not presented in this case brought by the receiver.

The proposition that no fraud is involved in the transmutation of property, suitable to the purposes of a corporation, into the form of corporate securities, in the manner adopted by Sperry & Jones in the present instance, has been recently decided, after a full examination and discussion of the subject, by the House of Lords, in *Salomon v. Salomon*. App. Cases 1897, p. 22, and was also adopted in *Re Ambrose Lake Tin & Copper Min. Co.*, L. R. 14 Chy. Div. 390. Mr. Morawetz in section 290 of volume 1 of his work on Corporations takes the same view, saying: "The vendor of the property in truth took back what he gave. He placed the property in the corporate name, and at the same time practically became the corporation by becoming its sole stockholder. Evidently no one was injured by that transaction. If subsequent transferees were deceived by the false representation that the amount of shares had in fact been paid into the treasury of the company, their claims should have been for the damages, caused to themselves individually through the false representation, and not for an infringement of the collective or corporate rights of the shareholders."

There is no real conflict between these authorities and those relied on by the appellants. In *Gluckstein v. Barnes*, L. R. App. 1900, p. 240, and *Erlanger v. New Sombbrero Phosphate Co.*, L. R. 3 App. Cases, 1218, the promoters had a secret profit in the land which the corporation was formed to take over, and they issued a prospectus, which did not disclose that fact, and thereby induced other persons to subscribe to the stock. The same thing is true of the case of the *Yale Gas Stove Co. v. Wilcox* (Conn.) 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159, with the aggravation that the promoter, who had a secret profit in the property turned in to the company, induced persons to put their money into the enterprise by the false representation that they would stand upon exactly the same basis that he did. In *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, Hooper's executors sold a lot of ground to Hammond, a promoter, to be paid for in part by second mortgage bonds of a corporation to be formed to take over the land. It was agreed, as part of the terms of sale, that certain things should be done by the corporation tending to give value to the land. The corporation, when formed, put a first mortgage on the land, under circumstances which this

court held to constitute a fraudulent breach of the agreement with the vendors of the land who had taken \$100,000 of the second mortgage bonds in part payment for it. Under these circumstances, when the corporation defaulted in the interest on its bonds and foreclosure proceedings had been instituted, the court, upon the petition and cross-bill of the defrauded vendors, finding that the holders of the first mortgage bonds were not bona fide holders, gave the second mortgage bonds, held by the vendors of the land, priority over the first mortgage bonds in the distribution of the proceeds of the foreclosure.

The true test of the responsibility of parties occupying positions such as Sperry & Jones did, in putting the brewing properties into the company in this case, is whether other persons than themselves hold stock in the company, and are not made aware of the true state of facts, or are induced to come into it by concealment or misrepresentation of the facts, or have furnished all or part of the capital embarked in the enterprise, and are misled or kept in the dark as to the actual transaction. In other words, the ground of their liability is the concealment or misrepresentation by those whose duty it is, by virtue of their relation to the other persons interested in the transaction, to make a full disclosure. It is a misuse of terms in the present case to say that Sperry & Jones stood in a fiduciary relation to the company at the time they made the contracts with the brewers, or when they turned the property into the company in payment for its stock and bonds. They, at that time, held all of its stock, and were the sole owners of the company. They were, in equity, the company itself. *Swift v. Smith, Dixon & Co.*, 64 Md. 428, 5 Atl. 534, 57 Am. Rep. 336. There was no invitation to others to subscribe for the stock.

The relations of Sperry & Jones to each of the brewers were, it is alleged in the bill, fixed by a separate contract. Assuming that these contracts called for the delivery by them to the respective brewers of bonds and stock of the company capitalized upon a certain basis, and that they delivered securities issued upon a different basis of capitalization, that might afford to each individual brewer a right of action against Sperry & Jones for such damage as he suffered under the terms of his particular contract, but these various contract rights of the different brewers cannot be asserted collectively in this suit by the receiver: When Sperry & Jones offered any of the bonds or stock issued to them by the company for barter or sale to other persons, and thus, as it were, invited them to become interested in the enterprise, they were bound, as we have already said, to practice no concealments toward those persons, and to give them all desired information as to their own relations to the company. But this, like their duty to the contracting brewers, was an obligation to each person with whom they so dealt, and the rights of

their several vendees, in case of a breach of the obligation, are several and according to the nature of the particular transaction, and cannot be collectively asserted in this suit. In fact, the bill does not allege that any of the present bond or stock holders were the original holders of those securities, or that they received them from the defendants or from either of them. Such an allegation has, in several cases, been held to be necessary to enable a receiver to maintain a suit of this character, even when it is free from the other objections existing in the present case. *Dimpfel v. O. & M. R. Co.*, 110 U. S. 209, 210, 3 Sup. Ct. 573, 23 L. Ed. 121; *Robinson v. W. V. Loan Co. (C. C.)* 90 Fed. 770-772.

We do not think that the bill states a good cause of equitable action in the receiver against Sperry & Jones, and still less does it do so against the other appellees, and we will affirm the decree appealed from.

Decree affirmed, with costs.

PENNSYLVANIA CO. v. OHIO RIVER JUNCTION R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

APPEAL—REVIEW—RAILROAD—RIGHT OF WAY—INJUNCTION.

1. Findings of fact in a suit in equity will not be disturbed unless clearly wrong.
2. A railroad company located a branch line on land to which it had title in part by condemnation proceedings and in part by deed, and was in actual or constructive possession of all the land for railroad purposes. *Held*, that it could sue to restrain a railroad company subsequently chartered seeking to oust it by force from the land, although such company set up a title under a deed from the same person from whom plaintiff claimed.

Appeal from Court of Common Pleas, Beaver County.

Bill by the Pennsylvania Company, lessee of the Pittsburgh, Youngstown & Ashtabula Railroad Company and the Pittsburgh, Ft. Wayne & Chicago Railway Company, against the Ohio River Junction Railroad Company. Decree for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of the court below:

"The plaintiff complains that the Pittsburgh, Youngstown & Ashtabula Company had caused to be surveyed, staked out, and located a branch railroad from its road in the borough of New Brighton to a point near Remington, in Economy township, Beaver county, Pennsylvania, which said line had been duly adopted by the proper officers of said company; that since the location and adoption of said line it has become the owner of a certain tract of land over which said line extends (giving the boundaries), and that the defendant company, on March 21, 1901, entered upon and began to lay tracks over the said land purchased without having filed any bond, or attempted to agree with the owners

for the payment of damages sustained, and so forth; and alleges that, if the defendant is permitted to take and occupy said lands as hereinbefore set forth, the plaintiff will be irreparably damaged, and will have no adequate remedy at law, and asks that the preliminary injunction be made perpetual to restrain the defendant from interfering with said lands in any manner whatever.

"To these allegations the defendant answers, admitting the fact of entry, but averring that the defendant was the owner in fee simple of all the land upon which it so entered and began to lay its track, and the appropriation of the land by the defendant company for railroad purposes; and further alleging that it was under no obligation whatsoever to file any bond, or to attempt to agree with any person for the payment of damages.

"Findings of Fact.

"(1) The plaintiff company is a corporation chartered and organized under a special act of assembly approved April 7, 1870 (P. L. 1025), entitled 'An act incorporating the Pennsylvania Company,' and is the lessee of and operates the Pittsburgh, Youngstown & Ashtabula Railroad and the Pittsburgh, Ft. Wayne & Chicago Railway.

"(2) The Pittsburgh, Youngstown & Ashtabula Railroad is a railroad formed by a consolidation and merger of the Ashtabula, Niles & Youngstown Railroad and the Lawrence & Pittsburgh Railroad, the Lawrence & Pittsburgh Railroad Company having been formed by the consolidation and merger of the New Brighton & New Castle Railroad Company and the Lawrence Railroad Company, the articles of consolidation in both cases being duly filed at Harrisburg. The said New Brighton & New Castle Railroad Company was chartered on March 24, 1881, under the act of April 14, 1868, and the supplements thereto, and authorized to construct, operate, and maintain a railroad between New Brighton, in Beaver county, Pennsylvania, and New Castle, in Lawrence county, Pennsylvania.

"(3) The Pittsburgh, Youngstown & Ashtabula Railroad Company, with its franchises, etc., was leased by articles of agreement dated December 12, 1887, to the Pennsylvania Company, and has been operated since that time by the Pennsylvania Company.

"(4) The defendant company is a corporation of the state of Pennsylvania, organized and existing under the provisions of the act of April 4, 1868, and the several supplements thereto.

"(5) On August 8, 1898, a survey was made under the direction of the chief engineer of the Pennsylvania Company, who was also chief engineer of the Pittsburgh, Youngstown & Ashtabula Railroad Company, and a location staked for an extension or branch line on the line of the said Pittsburgh, Youngstown & Ashtabula Railroad on the easterly

shore of the Beaver river, and running thence in a general southerly direction following the course of the Beaver river through the towns of New Brighton, Bolesville, Rochester, and Freedom to a point in the main track of the Pittsburgh, Ft. Wayne & Chicago Railway just east of Remington station.

"(6) On the same day this extension was authorized by the board of directors of said Pittsburg, Youngstown & Ashtabula Railway Company, and a map and plan of the said location having been submitted to the board of directors of the said Pittsburg, Youngstown & Ashtabula Railroad Company, the said plan was duly approved and adopted by said board of directors, and at the same meeting the said board directed the proper officers of the company to take such measures for acquiring rights of way over land embraced in said route as might be proper and necessary.

"(7) Article first of the lease aforesaid 'demised to said Pennsylvania Company all the railroad of said lease, branch road, sidings, etc., now owned or that may be hereafter acquired by the said party of the first part at and between the said above-mentioned termini of said railroad, or as pertaining thereto, and all extensions of the same now or hereafter to be constructed; also the corporate rights and franchises of the party of the first part that may be requisite and necessary for the use, operation, and management of the said railroad and property.'

"(8) The located and surveyed extension of the Pittsburg, Youngstown & Ashtabula Railroad ran through lands in Rochester township owned at that time by John E. Herrold, Anna Magee, Matilda Tischler, Ida M. Potts, James P. Leaf, Helen Leaf Miller, Joseph Anderson, Sarah J. McDonald, and others.

"(9) The defendant company was chartered on January 18, 1898, for the construction of a railroad from a point in the borough of Rochester, in said county of Beaver, to a point in the township of New Sewickley, in said county; and afterwards, on September 16, 1900, the defendant company was authorized by letters patent to extend its line from its northern terminus in the borough of Rochester to the village of Wampum, in the county of Lawrence, and from its eastern terminus in the township of New Sewickley to the town of Butler, in the county of Butler, with a branch from its main line in the township of Economy to the borough of Sewickley, in the county of Allegheny.

"(10) On October 29, 1900, the defendant company adopted a branch line for its railway, known as the 'Block House Run Branch' thereof, which said line extends through the township of Rochester, in said county. The said branch line prior to the adoption thereof was duly surveyed and staked out upon the ground by the engineers of the defendant company by authority of its board of directors.

"(11) On December 18, 1900, the defendant company, through its agent, George I. Park,

procured from John E. Herrold a contract for the sale of a certain tract of land situate in the township of Rochester, aforesaid, for the price or sum of \$3,500, \$25 thereof being paid at the execution of the contract, and the balance, \$3,475, to be paid within thirty days after the date of the contract, or when a good deed for the premises could be delivered; which said contract was taken in the name of the said George I. Park, in trust for the defendant company.

"(12) On December 19, 1900, the engineer of the defendant company recommended to the board of directors thereof the acquisition of the lands described in the plaintiff's bill for the purpose of establishing thereon a yard for the defendant company; and thereupon the engineer of the defendant company, in accordance with the instructions given him by the said board of directors, surveyed and staked out a location for a yard for the defendant company, and returned the same to the board of directors of the defendant company on February 6, 1901, and the same was then and there adopted as the location of its yards by the said board of directors.

"(13) On February 23, 1901, J. D. Strock, acting for the Pittsburg, Youngstown & Ashtabula Railroad Company, bought the land owned by John E. Herrold, over which the branch line of said defendant company was located by an article of agreement; and in pursuance of this contract a deed was made by said John E. Herrold and wife to William Jackson for said land, the said deed being dated March 8, 1901, and entered for record the same day; the said William Jackson holding this land merely as trustee for the Pittsburg, Youngstown & Ashtabula Railroad Company, which paid the consideration money thereof.

"(14) In the same manner, on March 15, 1901, the said Pittsburg, Youngstown & Ashtabula Railroad Company acquired the land of John J. Hoffman in said township; on March 8, 1901, the land of James P. Leaf; on March 2, 1901, the land of Ida May Potts; on March 10, 1901, the land of Matilda Tischler; on March 9, 1901, the land of Joseph Anderson; on March 2, 1901, the land of W. J. Davidson; on March 5, 1901, the land of Anna Magee; and on March 4, 1901, the land of Sarah Jackson McDonald.

"(15) On March 14, 1901, the defendant company tendered to John E. Herrold the balance of purchase money due under its contract to purchase for the land which had been deeded by the said John E. Herrold to the Pittsburg, Youngstown & Ashtabula Railroad Company by deed of March 8, 1901, and the said defendant company on March 21, 1901, entered upon said land, and began the construction of one of its yard tracks thereon.

"(16) On the same day the employees of the Pennsylvania Company tore up and removed said track, and threw the materials of which the same was composed into the Big Beaver

creek, and the defendant company thereupon secured other materials, and replaced the said track, where the same yet remains.

"(17) The yard track in course of construction by the defendant company is more than 100 feet east of the location of the Pittsburgh, Youngstown & Ashtabula Railroad.

"(18) By the purchase of the lands in findings 12 and 13 the Pittsburgh, Youngstown & Ashtabula Railroad Company became the owners of all the lands in said township bounded as follows: 'North by lands of the Beaver Valley Traction Company, east by the public road leading from Rochester to New Brighton, south by lands of S. Barnes & Company, Limited, and west by the Big Beaver river,' with the exception of one strip extending east and west, which is owned by Mrs. A. W. Miller.

"(19) That the location of the extension of the Pittsburgh, Youngstown & Ashtabula Railroad over this line was prior to any location thereon by the Ohio River Junction Railroad Company of its yards and shops.

"(20) On March 21, 1901, the Ohio River Junction Railroad Company entered upon the land as aforesaid acquired by the Pittsburgh, Youngstown & Ashtabula Railroad Company from John E. Herrold, and began to dig up the same, and lay tracks thereon, in accordance with an alleged plan for yards and shops, which covered the whole of the land acquired from John E. Herrold, Joseph Anderson, and others, and the located line of the Pittsburgh, Youngstown & Ashtabula Railroad, without having filed any bond or making any agreement with the owners of said land.

"(21) On March 28, 1901, the defendant company presented to the law side of this court bonds to the owners from whom the Pittsburgh, Youngstown & Ashtabula Railroad Company purchased, upon which said yard and its branch line were located, except the tract of J. E. Herrold and Mrs. A. W. Miller, to secure the damages sustained by reason of said appropriations, which said bonds were objected to by the plaintiff company, and have not yet been approved, pending this suit.

"Conclusions of Law.

"(1) Upon the merger of railroads a new corporation is formed, having all the rights, privileges, and franchises theretofore vested in either of them. Act May 16, 1861 (P. L. 702).

"(2) The New Brighton & New Castle Railroad Company had the right to make such extensions and branches as it might deem necessary to increase its business and accommodate the travel of the public; and, this company having been merged in the Pittsburgh, Youngstown & Ashtabula Railroad Company, the latter would, therefore, be vested with the same right.

"(3) The location of the extension by the Pittsburgh, Youngstown & Ashtabula Railroad Company on August 8, 1898, was a valid

location for a railroad over the land in question. See Pittsburgh, etc., Railway Co. v. Pittsburgh, etc., Railroad Co., 150 Pa. 331 (1893) 28 Atl. 155.

"(4) The Pittsburgh, Youngstown & Ashtabula Railroad Company having a prior location, and having acquired title to the land, is entitled to exclusive possession thereof; and the said Ohio River Junction Railroad Company had no right to interfere with any of this land by laying tracks thereon, or in any other manner, until it had filed bonds, and properly taken so much of said land as is not absolutely necessary to the operation of the branch line of the said Pittsburgh, Youngstown & Ashtabula Railroad Company.

"(5) The Ohio River Junction Railroad Company should not be permitted to take any of the said lands until the same have been properly condemned.

"(6) The Ohio River Junction Railroad Company should not be permitted to take any part of said lands needed by the said Pittsburgh, Youngstown & Ashtabula Railroad Company for the construction and operation of said line.

"(7) The preliminary injunction heretofore issued should be made perpetual.

"(8) The costs of this proceeding should be paid by the defendant company.

"Now, October 1, 1901, the preliminary injunction heretofore granted is made perpetual, and counsel for plaintiff are directed to draw a decree in conformity with this opinion."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES- TREZAT, and POTTER, JJ.

Richard S. Holt, George Wilson, and A. M. Neeper, for appellant. John M. Buchanan and Arthur E. Barnett, for appellee.

DEAN, J. The Pittsburgh, Youngstown & Ashtabula Railroad was incorporated under the general railroad act of 1868. It runs from New Brighton, Beaver county, to Ashtabula Harbor, on Lake Erie, a distance of 106 miles. It is located for the greater part on the east bank of the Beaver river. At New Brighton it connects with the Pittsburgh, Ft. Wayne & Chicago Railway. Both roads are leased and operated by the Pennsylvania Company, this appellee. On August 8, 1898, the Pittsburgh, Youngstown & Ashtabula road adopted a survey of a branch line along the east bank of the Beaver river for about nine miles from New Brighton to Conway yards, where its freight cars are classified for shipment. After the location of this branch, the Pittsburgh, Youngstown & Ashtabula road acquired, by purchase, land necessary for the extension along the bank of the river. One tract—the Helen Miller—it did not purchase, but so much of it as was necessary for its right of way was appropriated in condemnation proceedings, and a proper bond filed, conditioned for the payment of damages.

The Ohio River Junction Railroad Company, this appellant, on September 28, 1900, took out its charter under the general railroad act of 1868, and in October of the same year made a location of its line on part of the same land theretofore claimed to have been appropriated by appellee for its branch line from New Brighton to Ashtabula; and, further, appellant, in connection with the land taken for its right of way, also sought to occupy land adjoining for yards and railroad shops, and on March 21, 1901, began the construction of yards and shops. Thereupon appellee removed its tracks, and filed this bill for an injunction restraining it from entry upon any of the lands theretofore appropriated by it. Appellee claimed to be in possession by grant in fee of a greater part of the land, and of that which it did not own in fee by the lawful exercise of the power of eminent domain. Appellant claims possession of two of the tracts through which appellee's line is located—the one, J. E. Herrold, by a conveyance in fee from the owner; the other, Helen F. Miller, by survey, location, and filing of bond under the statute. The appellee claims the Herrold tract by conveyance in fee simple, the Miller by lawful appropriation. The same parts of both of these tracts would be occupied by the rival lines, as apparent from the testimony and maps before us.

The learned judge of the court below, after full hearing, found the facts, applied his conclusions of law, and decreed a perpetual injunction against appellant. From that decree comes this appeal, with 22 assignments of error—7 to the findings of fact and 15 to the conclusions of law.

Under our well-established rule that the findings of fact by the court below will not be disturbed unless manifestly erroneous, we could not, even if doubtful of their correctness, set any one of them aside. But a careful examination of the testimony raises no doubt in our minds as to their being sustained by the weight of the evidence. So these seven assignments of error to findings of fact are overruled.

Coming, then, to the alleged errors in the court's conclusions of law, we are of opinion that the fourth conclusion necessarily follows from the nineteenth and twentieth findings of facts, following: "(19) The location of the extension of the Pittsburgh, Youngstown & Ashtabula Railroad over this line was prior to any location thereon by the Ohio River Junction Railroad Company of its yards and shops. (20) On March 21, 1901, the Ohio River Junction Railroad Company entered upon the land as aforesaid acquired by the Pittsburgh, Youngstown & Ashtabula Railroad Company from John E. Herrold, and began to dig up the same, and lay tracks thereon in accordance with an alleged plan for yards and shops which covered the whole of the land acquired from John E. Herrold, Joseph Anderson, and oth-

ers, and the located line of the Pittsburgh, Youngstown & Ashtabula Railroad, without having filed any bond or making an agreement with the owners of said land." Then follows the fourth conclusion of law, which amply vindicates the decree, unless, as we shall presently notice, a court of equity had no jurisdiction to make it. The conclusion is this: "(4) The Pittsburgh, Youngstown & Ashtabula Railroad Company, having a prior location, and having acquired title to the land, is entitled to the exclusive possession thereof, and the said Ohio River Junction Railroad Company had no right to interfere with any of this land by laying tracks thereon, or in any other manner, until it had filed bonds, and properly taken so much of said land as is not absolutely necessary to the operation of the branch line of the said Pittsburgh, Youngstown & Ashtabula Railroad Company." It is argued by appellant's counsel that, without regard to the findings of fact, the bill should have been dismissed for want of jurisdiction, on the ground that it is an ejectment bill involving the title to land, which can only be tried on the law side of the court. If the point made be applicable to the facts, it would undoubtedly rule the case in favor of appellant. "Trial by jury shall remain as heretofore, and the right thereof remain inviolate;" and we have often decided that equity cannot try a question of title to real estate according to the course of proceeding in chancery. It is said in *North Penna. Coal Co. v. Snowden*, 42 Pa. 488, 82 Am. Dec. 530: "The Legislature cannot confer upon the Supreme Court and the courts of common pleas the power of trying according to the course of chancery any question which has always been triable according to the course of law by a jury." To the same effect are *Norris's Appeal*, 64 Pa. 275, *Grubb's Appeal*, 90 Pa. 228, *Washburn's Appeal*, 105 Pa. 480, and *Duncan v. Hollidaysburg, etc., Iron Works*, 186 Pa. 478, 20 Atl. 647, and many other cases. But it is just as firmly established that, where equity has jurisdiction of the subject-matter, it will decide every incidental question that is necessarily involved. As a fact, the court found that appellee had made its location in 1898, and had gone into possession, or was at least constructively in possession then, for railroad purposes; that appellant's location was not adopted until October, 1900; and that it impliedly sought by force to oust appellee from the land of which it had been in possession for railroad purposes for two years. We think it cannot be doubted that equity would have jurisdiction to prevent forcible interference with the operation of a large carrying corporation; an interference which, from its very nature, would be continuous; and the jurisdiction would be sustained on the single ground that the damage would be irreparable and there was no adequate remedy at law.

In view of the finding as to prior location

and constructive possession, how could the bill in equity, in any legal aspect of the question, be what is commonly known as an ejectment bill? Ejectment is a possessory action. Appellee, under a prior location, was in possession. Appellant wanted possession. Appellee could not, either by bill in equity or in a common-law court, bring ejectment against itself. As a justification of its prior possession, appellee chose to aver its right under what it alleged was a valid title. Appellant, in its answer, denied the right, and set up its own alleged legal title to the land; but the question of title was a mere incident of the subject of equitable jurisdiction. It was wholly unnecessary for appellee, to sustain its prayer for equitable relief, to aver title by a common-law conveyance of the land which was a part of its roadbed. In determining whether an injunction should be awarded, incidentally a question of title arose, and for equitable purposes it was perhaps proper for the court to pass on the title. As to how far such decision would be conclusive of the title it is not necessary to decide in this case. That can be settled in an action at law; but it would be conclusive so far as it tended to move or to stay the hand of the chancellor. An injunction is of grace, and not of right. It is the conscience of the chancellor which is to be aroused or quieted; and he, to enlighten his conscience as to whether he should put forth his hand or withhold it, will look into those facts which aggravate or mitigate the alleged wrongdoing. The court below, having found that the acts of the defendant necessarily interrupted appellee's large transportation for the public; that it had a prior location, and was in peaceable possession—might have stopped just there, and awarded the injunction to await the event of an action at law by appellant on its alleged legal title. It chose, however, to go further, and find that Herrold, whose land is claimed by both appellant and appellee, had conveyed it by deed to appellee, duly recorded March 8, 1901; that he had conveyed the same land to appellant by deed duly recorded six days later; and that appellee was in possession under its prior deed. Further, that as to the Miller tract appellant was in possession under a lawful appropriation of a right of way within its power of eminent domain. Even if the learned judge of the court below was of opinion that an incidental inquiry into the title was proper to inform his conscience, his authority to make such inquiry is undoubted. Justice Sharswood, in *Wilhem's Appeal*, 79 Pa. 120, 141, speaks thus: "Nor is there any doubt that, though a question of title may be necessarily involved, it is within the jurisdiction [of equity], for, where there is jurisdiction of the subject-matter, that carries with it jurisdiction to decide every incidental question that is necessarily involved."

But, as before intimated, we decline to

pass on the question of title to the Herrold tract on this appeal, because it is not necessary to a decision of the question before us. Leaving that entirely out of view, the decree is sustained on the other findings of fact to which we have adverted. Of course, if the question to be decided depended on in whom is the legal title to the Herrold and Miller tracts, then the power to award an injunction would depend on that decision; but the right to equitable interference turns on answers to these questions: Is appellee a heavy transportation company? Had it a prior location on the land, and was it in possession thereof, conducting a large business, both in its own interests and for the advantage and convenience of the general public? Would the attempt of appellant to assert by force its assumed, but disputed, legal right, result in a possible disturbance of the peace, and sudden disruption of business of a common carrier, as well as cause great inconvenience and loss to the public? On the answers to these questions depended the jurisdiction of equity. The chancellor answered them all in the affirmative, and put forth his strong hand to restrain appellant. He was warranted in so doing without regard to the incidental question, in whom was the legal title to the land?

The decree is affirmed.

ROSE et al. v. BEAVER COUNTY et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

POOR DISTRICTS—CONSTITUTIONAL LAW—TITLE OF ACT—LOCAL LAW.

1. Act June 4, 1879 (P. L. 78), creating poor districts, and authorizing purchase of lands and erection of buildings to furnish relief and give employment to the destitute in the commonwealth, is not unconstitutional, as being a local or special act, as it relates to every county within the commonwealth, though it excepts cities from its operation.

2. Act June 4, 1879 (P. L. 78), entitled "An act to create poor districts and to authorize the purchase of lands and erection of buildings to furnish relief and give employment to the poor and paupers in this commonwealth," sufficiently expresses the subject of the act in the title; there being nothing in the bill which does not relate to the general subject.

Appeal from superior court.

Bill by Jacob A. Rose and others against Beaver county and others. From a decree of the court of common pleas for defendants, affirmed by the superior court, plaintiffs appeal. Dismissed.

The opinion of the superior court was as follows:

"In pursuance of the provisions of the act of assembly of March 29, 1851 (P. L. 260), the commissioners named therein purchased a tract of land, upon which buildings for the accommodation of the poor of Beaver county were subsequently erected, title to which was taken in the name of 'the directors of the poor and of the house of employment for the

county of Beaver.' The fourth section of the said act provided 'that the said directors, as soon as may be after their election and organization as aforesaid, shall make an estimate of the probable expense of purchasing the lands and buildings, or erecting the necessary building or buildings, and furnishing the same and maintaining the poor in said county for one year, whereupon the county commissioners of the said county shall, and they are hereby authorized and required to increase the county tax by one-fourth part of the sum necessary for the purpose aforesaid; and shall procure on loan, on the taxes herein directed to be levied, the remaining three-fourths thereof, to be paid in installments, with interest, out of the county taxes: provided, always, that if such loan cannot be made, the whole amount of the sum necessary for the purpose aforesaid, or such part thereof as may be deemed proper, shall immediately be added to the county tax, to be paid by the county treasurer to the directors aforesaid, on orders drawn in their favor by the county commissioners, as the same may be found necessary.' By the second section of an act of assembly approved April 3, 1852 (P. L. 280), it was provided 'that the time specified in the first section of the act of the 29th of March, 1851, authorizing the erection of a house for the employment and support of the poor in the county of Beaver, for the commissioners therein named to carry out the provisions of the said act, in making a purchase of real estate for the purposes therein mentioned, shall be extended to the 1st day of January, A. D. 1853, and that the said commissioners are hereby required to meet and organize on or before the first Monday of July next and proceed to make such purchase as is required in said act and make report to the county commissioners in writing signed by a majority of them, on or before the first Monday in October next. Said report shall set forth a full description of said property as to quantity, price and terms of payment.' By the third section of the same act it was provided 'that the said county commissioners are hereby authorized and required to make provision for the payment of said property, as required in the fourth section of the act to which this is a supplement.' This latter act is not repealed in terms by the act of May 15, 1901 (P. L. 193).

"The poor of the county of Beaver were maintained under the provisions of the act of 1851 and its supplements, until the first Monday of January, 1902, when, by virtue of the act of May 15, 1901 (P. L. 193), supra, repealing the said act of March 29, 1851, and all other special acts relating to the poor of Beaver county, except the act of 1852, supra, the provisions of the said act ceased to apply. It will be observed that, although the title to the real estate purchased under the act of 1851 vested in the directors of the poor provided for in the said act, the money necessary to purchase land and erect buildings

and maintain the poor was raised by an additional general tax levied upon the whole county by the county commissioners. The property, therefore, belonged to the county at large as fully, to all intents and purposes, as if the title thereto had been made to the county in its corporate capacity. In view of the prospective operation of the repealing act, the plaintiffs, citizens and taxpayers of the county of Beaver, filed a bill in equity, in which the county of Beaver and the county commissioners of said county were named as defendants, and in which, after setting forth the essential facts hereinbefore recited, they prayed (1) that by an injunction, preliminary until hearing and perpetual thereafter, the said defendants be restrained from entering into and taking possession of said poorhouse and the tract of land upon which it is located; (2) that by injunction, preliminary until hearing and perpetual thereafter, the said defendants be restrained from levying, assessing, or collecting any tax or sum of money upon or from the taxable inhabitants and property, or either, of said county of Beaver, and from making any appropriation or expending any of the public funds of said county for the maintenance, relief, support, and employment of the poor of said county of Beaver at said poorhouse or elsewhere. Other prayers asked for an injunction restraining the defendants from employing a superintendent and other employés for the poorhouse, making contracts for the maintenance or employment of the poor, and the issuing of warrants, bonds, orders, obligations, or other evidences of indebtedness relating to the maintenance, care, and support of the poor of Beaver county, etc.

"The plaintiffs contend that, by virtue of the repeal of the special acts relating to the care of the poor of Beaver county, their care and maintenance was relegated to the several poor districts of the county, under and in pursuance of the act of June 13, 1836 (P. L. 539). The defendants, on the other hand, contend that the provisions of the act of June 4, 1879 (P. L. 78), entitled 'An act to create poor districts and to authorize purchase of lands and erection of buildings to furnish relief and give employment to the destitute poor and paupers of this commonwealth,' apply. Under section 11 of the latter act it is made the duty of the county commissioners 'from time to time to receive, maintain, provide for and employ all paupers, poor and indigent persons within their district entitled to relief and having a settlement therein. The duties heretofore performed by overseers of poor within such districts shall be done and performed by said commissioners, with the same rights and subject to the same penalties.' The provisions of this act, under which the county of Beaver is a single poor district, undoubtedly give the commissioners authority to do and perform all the several acts in reference to the maintenance and employment of the poor, from the performance of which the

plaintiffs' bill asks to have them enjoined and restrained; and this seems to be conceded by the plaintiffs, unless, as they claim, the said act is unconstitutional. The unconstitutionality of the act of June 4, 1879 (P. L. 78), is therefore the question which, under various phases, constitutes the real bone of contention in the case.

"It is assailed by the plaintiffs on three several grounds: First. That the title is defective. Second. That it is local and special (a) in that it requires, under the third and fourth sections thereof a vote of the qualified electors of each county to determine whether or not it shall have a poorhouse; (b) in that it provides in section 20 that 'when any county embraces within its limits an incorporated city, such city and the territory embraced within it shall not be included in such poor district, and such city shall not be in anyway affected by this law, but all the other parts of such county shall in such cases compose the poor district of that county.' The question of the constitutionality of the act does not seem to have been argued in the court below, the court remarking in its opinion: 'The court has not had the benefit of the argument of counsel in passing upon this question, and, when the bill was presented, the act of 1879 was not considered by either side.' The objection to the title seems to have been raised in the mind of the plaintiffs still later, as is shown by the fact that the argument in relation thereto is contained in an insert in the argument. The question, however, is of such importance that we waive all technicalities and consider the question as if it had been properly argued in the court below and duly presented here.

"1. As to the title. In *Com. v. Lloyd*, 2 Pa. Super. Ct. 6, the subject of the sufficiency of the title of an act of assembly was very fully considered, and all our cases to that date carefully analyzed, and, as a result, it was there stated that 'It is not necessary that the title of an act should be a complete index of its contents. If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary.' The title of this bill is general, but it is comprehensive. It does not descend to details; but no one interested in the general subject of the formation of poor districts, the purchase of lands, and the erection of buildings and the furnishing of relief and giving employment to the destitute poor, would not have such general notice as would lead him to make inquiry into the body of the bill. There is nothing in the bill which does not relate to the general subject outlined in the title. The opinion of Mr. Justice Mitchell in *Sugar Notch Borough*, 192 Pa. 340, 43 Atl. 985, applies in many respects to all the questions raised in this case. It is there said: 'It must not be lost sight of that the attitude of courts is not one of hostility to acts whose constitutionality is attacked. On the contrary, all the presumptions are in their favor, and

courts are not to be astute in finding or sustaining objections. The evil at which the constitution was aimed is thus stated with great clearness by the present chief justice in *Road in Phoenixville*, 109 Pa. 44: "The design and scope of this constitutional amendment, adopted in 1864, are readily understood when we consider the mischief which it was intended to remedy. Prior to that date the vicious practice had obtained of incorporating in one bill a variety of distinct and independent subjects of legislation. The real purpose of the bill was often, and sometimes intentionally, disguised by a misleading title, or covered by the all-comprehensive phrase, 'and for other purposes,' with which the title of many omnibus bills concluded. Members of legislature, as well as the general public, were thus misled or kept in ignorance as to the true character of proposed legislation. This being the evil intended to be remedied, the constitutional requirement as to the title is not to be strained to apply to cases not really within its reasonable intent.'" See also *Com. v. Gilligan*, 195 Pa. 504, 46 Atl. 124.

"2. The objection to the bill that it is not general in its application is not well founded. It relates to every county within the commonwealth. It is true that it excepts cities from its operation; but if the legislature has power to legislate for the government of cities, and provide affirmative legislation for their peculiar needs, and not only so, but to legislate for the several classes of cities, how much more should it have power to except cities in general from the operation of laws which are not applicable to their peculiar needs? Nor is the objection a valid one that because the city of Philadelphia and the county of Philadelphia are co-extensive, and the law excepts cities from its operation, it is therefore local. If for any reason the boundaries of the city of Philadelphia should be reduced, so as not to be identical with the boundaries of the county, or if the boundaries of the county were enlarged, so as to extend beyond the present limits of the city, the law would apply to it, as well as to other counties.

"3. There is no similarity between this act and that of June 23, 1885 (P. L. 142), relating to the repeal of section 1 of the fence law of 1700 (1 Smith's Laws, p. 13). The law itself in that case was not to become effective within the limits of any county unless so determined by a vote of the people, and, inasmuch, as the vote might be in favor of the repeal in one county and against it in another, the operation of the law would become local, and it was so held in *Frost v. Cherry*, 122 Pa. 417, 15 Atl. 782; but in this case it is not the question of the operation of the law which is left to a vote of the people, but simply the question of the purchase of real estate under its provisions, the law remaining in force within the county, whether the vote be for or against the purchase of such

real estate. The county of Beaver having already purchased property and erected buildings necessary for the care and maintenance of their poor, no vote of the people in regard to the purchase thereof was necessary. The property belonged to the county, notwithstanding the fact that the title is in 'the directors of the poor and of the house of employment for the county of Beaver,' instead of 'Beaver county poor district,' as provided in the act of 1879. The property was purchased by the levy of a general tax, and each individual citizen is as much interested in the property in the one case as in the other. The machinery of the law for the maintenance of the poor is practically the same under the act of 1879 as under that of 1851. In the one case the directors furnished the estimates upon which the county commissioners levied the tax. In the other the machinery for carrying out the provisions of the law is entirely within the hands of the county commissioners, and is thereby simplified, and the expenses of administration presumably reduced. We attach no importance to the fact that the act of April 3, 1852 (P. L. 280), is not repealed in terms by the act of 1901. It was simply a prop to the act of 1851, in order to continue the time within which the provisions of that act could be carried into effect. When the building fell, the prop has no significance.

"The act of 1879 has been twice under consideration in the Supreme Court, first, in *Jenks Tp. v. Sheffield Tp.*, 135 Pa. 400, 19 Atl. 1004; and, second, in *Straub v. Pittsburgh*, 138 Pa. 356, 22 Atl. 93. It has been in operation for more than 20 years. These facts should count in its favor; for it was said in *Sugar Notch Borough*, 192 Pa. 349, 43 Atl. 985: 'It is rather late now to question it. While these circumstances are not conclusive in its favor, yet they are a strong argument that it is not so plainly repugnant to the constitution as it must be to require a court to overturn an act of the legislature.' Viewing this case from every point of view, we can see nothing objectionable in the decree of the court dismissing the plaintiffs' bill. It is therefore affirmed, and the appeal dismissed, at the costs of the appellants."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES-
TREZAT, and POTTER, JJ.

Richard S. Holt, D. A. Nelson, Roger Cope, and D. M. Twiford, for appellants. J. F. Reed and Edwin S. Weyand, for appellees.

PER CURIAM. We have reviewed the disposition made by the common pleas of Beaver and the superior court of the several questions raised by the appellants, and affirm the decree appealed from on the opinion of the superior court (20 Pa. Super. Ct. 110), where Judge Beaver clearly demonstrates the constitutionality of the act of June 4, 1879 (P. L. 78), and "which," he properly

says, "under various phases, constitutes the real bone of contention in the case."

Appeal dismissed at appellants' costs.

BURTON v. FOREST OIL CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

GAS LEASE—CONSTRUCTION—ASSIGNMENT—ROYALTIES.

1. A lessee of a gas lease, under which he was to pay a certain royalty, assigned an undivided one-half interest therein to a corporation, to hold subject to the royalty contained in the lease, and thereafter assigned the other one-half interest to a second company. The first corporation operated the land under an agreement to account to the second company for one-half of the proceeds, the latter company to pay one-half of the expenses. *Held*, that the first company was liable for the whole of the royalty.

2. A lease granted the right to drill for oil and gas, with a provision for a certain rental if gas was obtained, and without any distinction as to whether the gas was derived from gas or oil wells. *Held*, that the evidence was inadmissible to show that the word "gas" as used in the lease in trade usage meant gas derived from a gas well, and not gas from an oil well.

Appeal from Court of Common Pleas, Butler County.

Action by B. P. Burton against the Forest Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ferdinand Reiber, a witness, was asked this question: "Q. Now, Mr. Reiber, I want to ask you this question: In an oil and gas lease, where this term is used, 'If gas is found in sufficient quantities to utilize,' whether in the trade that means gas derived from an oil well that cannot be marketed and that is dangerous to use, or it means gas obtained from a gas well which can be connected with the pipe line and run to market? (Objected to until the purpose is shown.) Mr. Campbell: The purpose of this offer is to show the definition of the word 'gas,' as used in contracts of this kind in the business. Mr. Bowser: I object to this offer, for the reason that the contract between the plaintiff and the defendant is defined by explicit words, intelligently and without any ambiguity, and to attempt by custom to overrule, or an alleged custom to overrule, a contract between the parties, would not be admissible evidence. The question is further objected to because the tendency and purpose is to construe a contract different from what it is written between the parties themselves. Furthermore it is objected to because it is asking the understanding of the witness as to the construction of an instrument which is a question of law, and is for the court, and in no event would the testimony be admissible. The Court: Objection sustained, and bill sealed for the defendant. Q. In the oil and gas trade or business, state whether or not the expression 'gas obtained in sufficient quantities to utilize' has a well defined meaning, and if so what it is? Mr. Bowser: This ques-

tion is objected to and the testimony, for the reason that here is a written contract by which the parties have come together, plaintiff and defendant, and becomes a question now, and it is the main question before this jury, whether or not this gas was used and sold for other purposes than operating this lease, and if the defendant has already used it and sold it he has decided himself that it is in sufficient quantities to use, and he would be estopped from now setting up a defense to the payment of it when he so decided to use it. The Court: I think that would be going a little too far. We will sustain the objection, and seal a bill for defendant." The court charged in part as follows: "The defendant company was only the owner of the undivided one-half; the Chartiers Oil Company the owner of the other undivided one-half. If this were a case of ordinary rent or rental, where no oil or gas was taken from the land, and the defendant was sued, the plaintiff could only recover for the one-half, or if this was an action brought to recover for oil or gas not marketed, as is claimed sometimes where they find gas in paying quantities, and should be marketed, and no gas was taken away, then we would say to you that the defendant would only be liable for the one-half of the rental; but the question here is different. The defendant company here, if it took the gas, took it all, or at least took all that was taken, and when they took any beyond what was necessary to run the boiler and engine on the Burton lease, they would then become liable at the rate of \$500 a year. We think the rule would be different where the defendant company got the product. The fact that the defendant company took the gas, if you find that it did take it, then, we think, it having taken the gas, would be liable for the whole amount of rental, for whatever time it took the gas, and that is for you to determine from the testimony."

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

T. C. Campbell, R. W. Cummins, and W. D. Brandon, for appellant. S. F. Bowser and A. L. Bowser, for appellee.

MESTREZAT, J. B. P. Burton, the plaintiff and appellant, by an agreement dated April 3, 1889, leased to W. S. Guffey and Emmet Queen his farm of 36 acres in Butler county for the purpose of drilling and operating for petroleum, oil, or gas for the term of 10 years, or thereafter while oil or gas was produced in paying quantities or the rental was paid. The agreement required one-eighth of the oil produced on the premises to be delivered to the lessor, and then provides as follows: "It is further agreed that if gas is obtained in sufficient quantities to utilize, the consideration in full of the party of the first part shall be five hundred

dollars (\$500) per annum for each and every well drilled on the premises herein described, as long as the same is utilized, payable at T. Mellon's Bank, Pittsburg, Pennsylvania." In August, 1889, Guffey and Queen assigned the lease to J. M. Guffey, who, by an assignment dated November 15, 1890, assigned to the Forest Oil Company, the defendant and appellant here, an individual one-half interest therein, "to have and to hold the said interest in the above-described lease, leasehold and premises, subject to all royalties, rents and covenants of the lessee therein contained to be rendered, paid and performed on and after November 8, 1890." By another assignment, dated February 1, 1890, the other undivided one-half interest in the lease was vested in the Chartiers Oil Company. A well was drilled on the demised premises in the fall of 1889, producing large quantities of oil and gas. The Chartiers Oil Company had the management and control of the lease until January, 1893, when the Forest Oil Company, the defendant, took possession of the premises and operated the well for oil and gas until 1898. The jury found that the well produced gas in sufficient quantities to utilize, and that the appellant company did utilize it while it had possession of the premises. This action is assumpsit and was brought by the plaintiff to recover the gas rental of \$500 per annum, alleged to be due from the appellant company during the time it had the management and control of the leased premises. The case was submitted to the jury, and a verdict was returned for the plaintiff, upon which judgment was entered. The defendant company has appealed.

There are two questions raised by the assignments: (1) Is the plaintiff entitled to recover the whole gas rental from the defendant? and (2), did the court err in refusing to permit the defendant to show the trade meaning of the word "gas" in leases of this character?

We are unable to see how the defendant company can relieve itself from liability for the claim of the plaintiff. The assignee of the lease is liable for the rental of the premises by reason of the privity of estate existing between him and the lessor. The same is true of any subsequent assignee of the lease. Here the defendant company denies its liability for the one-half of the rental, because, as it claims, the undivided one-half interest in the lease was assigned to the Chartiers Oil Company by the assignee of the lessees. We are not called upon to determine the right of the lessor to recover against the Chartiers Oil Company for any part or all of the gas rental due the plaintiff. It may be that he could recover the whole rental in a joint action against the two companies, or the one-half of the rental from each company in an action against them severally. But, under the facts in this case, why is not the Forest Oil Company liable for the whole rental? The jury has found that it was in

exclusive possession of the demised premises, and that it received and utilized the entire gas product. The possession and beneficial enjoyment of the premises for gas purposes by the defendant company were as complete and exclusive as the lessees were entitled to under the terms of the lease. The defendant enjoyed all the benefits conferred by the covenants of the lessor. It took possession and operated the gas well under the assignment from the lessee's assignee, "subject to all royalties, rents and covenants of the lessee therein contained, to be rendered, paid and performed on and after November 8, 1890." It therefore held and operated the well under the covenant in the lease to pay the entire gas rental, which, by reason of the privity of contract, the lessor, could have collected from the lessees.

If, as claimed by the appellant, the Chartiers Oil Company received from it the one-half of the proceeds of the gas produced, to which the latter was entitled under the assignment of the undivided one-half interest of the lease, then it can enforce contribution against the Chartiers Company for its share of the rental. In fact, the evidence tends to show that contribution was made by the Chartiers Company as the rental became due. An officer of the appellant company testified that his company rendered statements to the Chartiers Oil Company for one-half of the amount expended in running the business, and that the bills were paid. But if the appellant company has not received from the Chartiers Oil Company the one-half of the rental for the premises, it can be no hardship, under the circumstances disclosed here, to require it to compel contribution, otherwise to bear the loss against which it had the means in its hands to protect itself. From the testimony it is evident that the appellant took charge of the premises and well, and utilized the gas, under an agreement by which it was to pay the Chartiers Oil Company for the one-half of the gas produced, and the latter was to be responsible for one-half of the expense in producing it. The plaintiff was not presumed to, nor did he, have knowledge of the existence of any arrangement between the parties by which the well was operated. He saw the appellant company in exclusive possession of the premises, taking and utilizing the gas. This was the extent of his knowledge as to the party operating under the lease. Under its assignment, the appellant had, as against the appellee, the right to the possession of the premises for the purpose of operating for gas. The plaintiff could not interfere with or control the appellant in the exercise of this right. As the company, therefore, had, by virtue of its assignment, the beneficial enjoyment of the premises as fully as the lessees could have had under the lease, the obligation is upon it to perform their covenants to pay the gas rental to the plaintiff.

The learned trial judge was right in excluding the testimony offered for the purpose of showing the trade meaning of the word "gas" used in the lease between the plaintiff and Guffey and Queen. The purpose was to show that in the oil and gas business the word "gas," as used in such contracts, means gas derived from a gas well, and not from an oil well. The lease granted the right to drill and operate for "petroleum oil or gas," and provides that, if gas is obtained in sufficient quantities to utilize, the consideration therefor should be \$500 per annum for each well drilled on the premises. The meaning of the word is neither ambiguous nor uncertain, but is well understood. Nor does the connection in which it is used give it a meaning requiring parol evidence to explain it. The offer was in effect not to explain, but to contradict, the explicit provisions of the contract, by showing that the lessees were to pay for the gas only on condition that it was produced or derived from a gas well. This would have been in direct opposition to the agreement, and in conflict with its terms. The lease, as we have seen, granted the right to drill for oil and gas, but the consideration to be paid for the gas did not depend on whether it was derived from an oil well or a gas well, but whether the gas was "obtained in sufficient quantities to utilize." Parol evidence is not admissible for the purpose of making a new and different agreement for the parties, and hence the evidence, the rejection of which is complained of by the appellant, was properly excluded.

The assignments of error are overruled, and the judgment is affirmed.

ALLEGHENY NAT. BANK v. REIGHARD.
(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EASEMENT—CONSTRUCTION.

1. The owners of adjoining lots constructed their buildings so as to have a common stairway and area, but there was no evidence as to the terms under which they were to be used. *Held*, that the inference is that the right was confined to the common area as it was established at the time, and that one of the parties therefore could not make such changes in the stairway as to interfere with the light from the windows opening into the area, or cut new holes in his neighbor's walls to support new landings, and subject the common area to a new and additional use of persons going to upper stories, erected by him on his own building.

Appeal from court of common pleas, Allegheny county.

Action by Allegheny National Bank against D. P. Reighard. Decree for plaintiff, and defendant appeals. Affirmed.

Shafer, J., found the facts to be substantially as follows: In 1858, the plaintiff was the owner of a lot of ground fronting 25 feet on Fifth avenue, in the city of Pittsburgh. At the same time the defendant's

predecessors in title were the owners of a lot fronting about 23 feet on Fifth avenue, adjoining the lot of plaintiff on the west. The plaintiff built its banking house on its lot, and the defendant's predecessor in title built on his lot a business house; these two buildings being each of a height of four stories, and provided with an iron front, alike on the two buildings. In the construction of these buildings a space $4\frac{1}{2}$ feet in front on Fifth avenue, and 15 feet in depth, was left out of the walls of each building, one on the westerly side of the bank's lot, and the other on the easterly side of the lot, now belonging to the defendant. In this space a staircase was built to the top of the building. A doorway, 6 feet wide, opened into this space from Fifth avenue, and the stairs started up from the side next to the bank building at a distance of about 6 feet from the doorway, and the flight of stairs went up from side to side of the space with continuous landings at the level of the stories. The front of this space was covered by the common iron front of the building, and contained windows, which were but slightly interfered with by the stairs. There were openings from the third and fourth stories into the bank's building, and on each of the stories above the ground into the building now of the defendant. The stairs have been used continuously by both parties. No contract of the parties, written or oral, in regard to this staircase, was given in evidence, but it is alleged in the bill, and admitted by defendant, that the plaintiff paid one-half the cost of the construction of the stairs in 1858. In the summer of 1900 the defendant's building was seriously injured by fire, and the rear part of it destroyed, but no part of the staircase, or the walls, or doors adjoining it, was affected. Some time after the fire the defendant drew up plans for the alteration of his building, including the putting in of an elevator and a change in the number of stories, by making three stories out of a third and fourth, and adding what would be a sixth story, and by changing the front, and submitted these plans, or some of them, to the plaintiff, and requested the plaintiff to agree to them. The bank, after considering the matter, declined to agree to the changes. Negotiations were then had between the counsel of the respective parties, and while these were pending the defendant proceeded with his plan, tore down the staircase, rebuilt it in part, and put a wall 10 feet high on top of the walls inclosing the 9 by 15 foot space heretofore described, and extended the staircase up into it, to connect with his new sixth story. This work was done without the knowledge of the plaintiff, it being all inside the building, and done with the rest of the work of rebuilding the burnt portions of defendant's house, the upper stories of the bank building either being unoccupied or the tenants not objecting. The plaintiff bank filed the bill herein, and applied for a preliminary

injunction, which was granted, restraining the defendant from further interfering with the stairs, except to protect them with banisters, and from taking down and changing the front, and from further proceeding with the work.

The changes actually made by the defendant, up to the time of filing the bill, were: He raised the first platform two or three feet above its former level, for the purpose of giving headroom to reach his elevator from the front door, and to do so was obliged to bring the foot of the stairs two feet nearer to the door than it was before. In raising this platform he made new cuts into the wall of the bank building in which to place the supports, and similar changes were made in the various platforms of the stories above the first, the same being broken into two parts, so as to reach the changed position of the doors in his building, and the headway over the stairs in one or two places was reduced to as low as seven feet. The stairs, as so altered by him, were much less conformable to the windows in the front than they were before, and the light to the staircase is materially interfered with. This the defendant claims will be practically remedied if he is allowed to change the front according to his design. The platforms of the stairs still conform to the stories of the plaintiff's building. He put a 13-inch brick wall on the top of the walls, inclosing the sides and back of the space on his own building and on that of the bank, and extended the staircase up into this space to connect with his sixth story. The defendant has also put an elevator into the building, wholly upon his own ground, immediately in the rear of the $4\frac{1}{2}$ feet of his own ground, which is inclosed for the purpose of a staircase, and has cut a door through the rear wall of the 9 by 15 foot space to give access to his elevator from that space, under the platform raised for that purpose. All the other doors of the elevator are into defendant's building on the west side of the elevator shaft, and not into the stairway. Persons using the elevator instead of the stairs to reach the upper stories of defendant's building enter through the door, the middle of which is on the outer line of the two properties, and proceed thence to the left to the elevator, the stairway starting up on the right. There is no place in which the plaintiff could put an elevator opening to his building in the space used for the stairway except by removing the stairway. The further changes which defendant proposes to make are to take out the whole front of the nine feet on Fifth avenue, and replace it with a brick wall, in conformity with the new front which he proposes to put on his own building, putting in new windows to correspond in height and appearance with the windows in his altered front, and which will then not conform with the windows in the bank building. Of this the plaintiff complains that it will cause the whole of the nine-

foot space to appear to be a part of defendant's building, and that the change is unnecessary.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. H. White, S. W. Childs, and John Reed Scott, for appellant. C. C. Dickey, George Shiras, 3d, and W. K. Shiras, for appellee.

MITCHELL, J. It is not material for the purposes of this case whether the appellant's right in plaintiff's building be called an irrevocable license or an easement, for it must rest on the principles and be decided on the footing of an easement by prescription. That the joint erection and occupation of the stairway and the area in which it is located were by agreement is known here just as it is implied in a prescription, but, in the absence of any evidence, either written or oral, as to the terms of the agreement, the court can only determine what it was by what was done without dispute by the parties on the land at the time and subsequently. That is the test of the nature and extent of an easement by prescription, and it must be the test here. The inference from the evidence is, not that each party gave the other an unlimited right to use the common area for such purposes and in such manner as he might desire, or even for general use for a stairway, but that the right was definitely confined to the common area as it was established by the parties at the time and as it continued to be jointly used.

The alterations in the stairway and building made by defendant are admitted. Some of them—such as the building of the wall an additional story in height on plaintiff's side of the area, and the alteration of the front wall over the area—were corrected before the decree, and are now out of the case. But there still remain the removal of the stairway farther front at the ground floor, the reduction of the headway at points in the stairs and landings, the consequent interference with the light from the front windows, the cutting of new holes in plaintiff's wall to support the new landings, and the opening of a door to the elevator on the ground floor of the area, which, though in defendant's own building, subjects the common area to the new and additional use of persons going to the new upper stories erected by defendant. All these, and perhaps some others, less manifest, are new or more extensive burdens on the area and stairway than have been used heretofore. That the changes inflict little or no damage on plaintiff is not material. Even a conceded benefit by an improvement cannot be imposed without consent, for plaintiff's right is to have the status quo maintained, independently of any actual present injury by the change. The legal injury which plaintiff is entitled to prevent is the permanent change in the conditions agreed upon as shown by the past user.

Decree affirmed, with costs.

HOON v. BEAVER VALLEY TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

STREET RAILROADS—CHILD ON TRACK—DAMAGES.

1. Plaintiff sued an electric railway company to recover for the death of a boy six years old. The evidence showed that the car which injured the boy was running near a schoolhouse, when children were on the street, at a rate of 25 miles an hour, without notice, by gong or otherwise. *Held*, that a verdict for plaintiff was sustained by the evidence.

2. A verdict of \$1,518 for the death of a boy six years old is not excessive.

Appeal from court of common pleas, Beaver county.

Action by W. S. Hoon against the Beaver Valley Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented this point: "While on account of the tender age of Gilbert Hoon at the time of the accident, he being only 6½ years of age, contributory negligence cannot be attributed to him, yet if you find under the evidence that at the time of the accident he unexpectedly and without warning ran from the pavement, or from the cross street, against or in front of the moving car of the defendant, and was killed, such fact is not evidence of negligence on the part of the street railway company, so as to render it liable in this action; and if you so find, your verdict must be for the defendant. Answer. Refused." The court charged in part as follows: "The measure of damages for the death of a minor child occasioned by negligence is the money value of the child's services until it attains its majority, reduced by the cost of maintenance and education." Verdict and judgment for plaintiff for \$1,518.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. P. Marshall and John M. Buchanan, for appellant. Richard S. Holt and J. H. Cunningham, for appellee.

FELL, J. The case could not properly have been withdrawn from the jury. The plaintiff's son was not of an age to be charged with negligence. There was testimony that the car by which he was injured was running at a rate of 25 miles an hour through a populous part of the borough, near a schoolhouse, at an hour when school children were on the street, and that no notice, by gong or otherwise, was given of its approach to the crossing where the accident happened.

The point for charge, the refusal of which is the subject of the second assignment of error, could not have been affirmed. It leaves out of view altogether the negligence in run-

ning the car too rapidly under the circumstances, and it ends with a direction to find for the defendant, an ending so often fatal to points otherwise good. The question intended to be raised by this point was fully covered by the general charge, in which it was said by the learned trial judge: "While negligence cannot be imputed to a child of the age of Gilbert Hoon, nevertheless it may be assumed that a child old enough to be allowed to run at large has discretion enough to avoid ordinary dangers; and that persons who have business on the streets may reasonably conclude that they are not to provide against possible danger that may result to such a child from its own willful trespasses; so that where a child unexpectedly and without warning runs from the pavement against a moving traction car, or in front of a moving traction car, such fact is not evidence of such negligence on the part of the street railway company as to render them liable."

The objection that there was not sufficient evidence of the value of the child's services or the cost of maintenance on which to base the amount of the verdict is not without force, but it cannot be sustained. The age, physical and mental condition of the child, and the circumstances in life of its parents, were shown. Ordinarily this is all that can be shown. It furnishes a very unsatisfactory basis for the computation of pecuniary damage, as the chances of life and death, of health and sickness, and of the earnings of the child going to the parents, are necessarily involved in it. A verdict in such cases is always more or less conjectural, but the common experiences of life furnish some basis for a reasonable estimate. All that a trial judge can do is to state clearly the true ground of recovery, limiting it to the probable pecuniary loss, and pointing out the elements to be considered, and to permit no excessive verdict to stand. The instruction upon the subject in this case was full, clear, and accurate, and was accompanied by a caution to the jury not to render a verdict for an unreasonable amount. The judgment is affirmed.

REES et al. v. JOSEPH WALTON & CO.
(Supreme Court of Pennsylvania. Jan. 5,
1903.)

COLLISION—EVIDENCE—NONSUIT.

1. Evidence, in an action for injuries to a steamer by collision with another steamer, showed that the plaintiff's steamer was running at a low rate of speed, and was actually backing at the time she was struck by defendant's steamer. *Held* error to enter a nonsuit on the ground that plaintiff's steamer was guilty of contributory negligence in running at too high a rate of speed in a fog.

Appeal from Court of Common Pleas, Allegheny County.

Action by Thomas M. Rees and Frances

K. Hulings against Joseph Walton & Co., incorporated, to recover damages for injuries to a steamer by collision. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. W. Acheson, Jr., Thomas Patterson, and James R. Sterrett, for appellants. John S. Wendt, D. T. Watson, Johns McCleave, and John M. Freeman, for appellee.

DEAN, J. The plaintiffs owned the steamer John K. Fisher, the defendant the Coal City. Both navigated the Monongahela river on the night of January 6, 1899. The Fisher had been towing on the river, but on the day named her tow had been tied up and her work ended. She then steamed down stream, intending to round the point into the Allegheny river and proceed to her landing on the north side. In her course down the Monongahela she took the Pittsburg side. The Coal City was coming up the Ohio, bound for her landing, which was on the south side of the Monongahela, when, as she was rounding the point, she struck the Fisher amidships and seriously damaged her. The plaintiffs alleged the collision was caused by the negligence of the Coal City. In that, although out of her course, she sounded no signals and ran on at full speed; displayed no lights on her smokestack as the law required. On the other hand, plaintiffs averred that the Fisher acted with proper care under the circumstances; it being a very foggy night she ran very slowly; when the Coal City came within sight she reversed her engines and was actually backing away when the collision occurred; that she displayed the statutory light and sounded fog signals; that, as she approached the Point, she sounded a whistle, which could be heard far down the Ohio river below the approaching Coal City.

After the evidence was all in the learned judge of the court below, being of opinion that it showed contributory negligence on the part of the Fisher, directed a nonsuit, which he afterwards, on motion, refused to take off, and we have this appeal by plaintiffs. In his opinion refusing to take off the nonsuit, he bases the charge of contributory negligence on one fact, that under the circumstances the Fisher was steaming at too great speed. He says: "Taking plaintiffs' own account of the character of the weather the fact, as testified to by the master and pilot, that he could see not over 300 feet, and that frequently the smoke and fog were so thick that he could not see even that distance, which is fully borne out by the fact that he did not see the lights on defendant's boat at all until the collision took place, it seems plain that a speed of nine miles an hour was an immoderate speed. As we understand the cases which have been presented to us, they hold that in fog or thick weather it is negligence for a boat to proceed at such speed

as to make it impossible to stop its headway and bring it to a standstill within the distance at which another vessel could be seen; and the testimony fully disclosed that at the speed of nine miles an hour, or anything approaching it, it would have been impossible to stop the boat within seeing distance of another boat at the place of collision." It will be seen from this that the court undertook to decide from the evidence that plaintiffs' boat, under the circumstances, was moving at an immoderate speed at the time of the collision, and was therefore guilty of contributory negligence, and the learned judge was right in so deciding if the evidence clearly disclosed such negligence. But appellant argues that the evidence does not so show. Captain E. J. Hulings testifies: That he has followed steamboating for 17 years, and is a pilot; that on the day of the collision he started with the Fisher to go around to her landing on the Allegheny at the foot of Fifth street; that it was a bad night, very foggy; that he sounded fog signals and kept to the Pittsburg side of the river; that he ran under slow bells, which is as slow as a boat can go under steam, and is the slowest a boat can go, unless stopped and allowed to float, and that speed continued until the collision; that at the time he had out the regular signal lights; that above the Point he sounded signals for it, a kind of signal which would be recognized by river men; that when he saw the Coal City approaching, he stopped his boat and rang to back her, and, while backing, the Coal City struck the Fisher. He further states that on a slow bell a boat runs five or six miles an hour; that he could not have entirely stopped his boat and backed her after seeing the other boat. Dalley, the engineer, testified the boat was running at a slow bell, and was actually backing at the moment of collision. There was other testimony to the same effect.

To our minds, the evidence does not show clearly what the speed of the Fisher was per hour just before the collision. It does seem to show, at least inferentially, that it was going very slowly because of the dangerous navigation that night. From the testimony of boatmen of knowledge and experience, it would seem that a boat running in a fog under the most careful navigation cannot go so slowly as to lose what is called steerage-way without becoming unmanageable.

It seems to us, while it may be a fact that the rate of speed of the Fisher was negligent, nevertheless, that is an inference from the evidence that a jury might not have drawn, or might reasonably have drawn a different one. Therefore, as is said in *Bucklin v. Davidson*, 155 Pa. 362, 26 Atl. 643, "the plaintiff is entitled to the benefit of every fact and inference of fact which might have been found by the jury or drawn by them from the testimony before them."

The judgment is reversed, and a procedendo awarded.

In re DAVIDSON'S ESTATE (No. 1).

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

ADVANCEMENT TO HEIRS—INTEREST.

1. A widow, having a right under the will to use all the income of the estate, used only a portion thereof, and allowed the executor to pay out large sums of money to certain of the legatees, and did not require him to keep all the funds invested. There was evidence that such payments were not intended as gifts, but were made with the intent that they should be accounted for to the estate. *Held*, that they bore interest from the date of payment until the distribution of the estate.

Appeal from orphans' court, Beaver county.

In the matter of the estate of Daniel R. Davidson. From a decree dismissing exceptions to the auditor's report, Charles Davidson appeals. *Affirmed*.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, POTTER, and MESTREZAT, JJ.

J. F. Reed, for appellant. John M. Buchanan and Winfield S. Moore, for appellees.

POTTER, J. Daniel R. Davidson died on March 18, 1884. By his last will and testament he gave to his wife, Mary Clark Davidson, a life estate in the real estate and the income and interest of the personal estate, at will or absolutely. At her death the entire estate was to be equally divided among the children of the testator. The widow had the right to use all of the income, if she saw fit to do so; but, if she did not take it all, whatever was left would necessarily remain as a part of the estate of her husband, which at her death was to be divided equally among the children. As a matter of fact she did not use nearly all of the income, and large sums were left in the hands of the executor as part of the corpus of the estate. The appellant, Charles Davidson, is the executor, and as such has been in charge of the estate since his father's death in 1884. Instead of keeping all the funds of the estate employed in outside investments until the period of final distribution should arrive, the executor paid from time to time large sums of money to himself and to certain of his brothers as legatees; the amount thus paid to himself being largely in excess of that paid to any of the others. In making these payments the executor secured the consent of the widow. But, as pointed out by the auditor in his report, the fact that she approved or authorized these payments to be made by the executor of her husband's will, as executor, he to take receipts therefor as such, and to account for and claim credit for them as executor, and the further stipulation upon her part that these sums should be charged against the children in the final settlement of the estate, make it clear that she did not in any way treat these payments as gifts from her separate estate. Undoubtedly, if she had

chosen to do so, she might have reduced all the income to her own possession, and then distributed it to her sons as gifts from herself; but in her testimony she distinctly repudiates the idea that anything paid out by the executor to her sons was a gift from her, and she distinctly asserts that it was all to be repaid, or to be accounted for to the estate, and, whatever the amount of the estate, it was, under the terms of the will, to be equally divided among the children.

There is no room for the distinction suggested in the argument for the appellant—between appropriating the whole of the income, and merely directing its use, during the lifetime of the widow. Appellant admits that she did not take for herself all the income, and the auditor and the court below have found nothing in the evidence to justify the conclusion that the widow did, or intended to direct or authorize the use of any portion of the income by the executor and certain other children of the testator for their own personal benefit, and to the disadvantage of the other legatees. The only conclusion, therefore, that can be drawn from the actual facts of the transaction, is that the payments were made by the executor, out of the funds belonging to the estate, to certain of the legatees at a time prior to the period of distribution. As the auditor well says, if these sums had been otherwise invested, the interest thereon would have augmented the estate to the mutual benefit of all the legatees. He therefore very properly reaches the conclusion of law that, "in the equalization of the shares to be distributed to the legatees, said sums should bear interest."

This conclusion, and the computation of interest made in pursuance thereof, and the schedule of distribution which properly followed, were confirmed by the court below. The result thus reached is just and equitable, and carries out the intention of the testator that, after the death of his wife, each of his children should take equally from his estate. The decree of the court below dismissing the exceptions to the auditor's report is affirmed. The account shows a large balance, which presumably has remained invested or drawing interest; and therefore, to the amount ascertained to be in the hands of the executor for distribution, should be added interest during the pendency of this appeal, which is hereby dismissed at the cost of the appellant.

In re DAVIDSON'S ESTATE (No. 2).

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EXECUTORS—COMMISSIONS.

1. Where an executor received a commission on moneys of the estate in a prior account, he was not thereafter entitled to commissions on an enhanced value of stocks and other investments made by him with such money.

Appeal from orphans' court, Beaver county.

54 A.—18

In the matter of the distribution of the estate of Daniel R. Davidson, deceased. From an order dismissing exceptions to the auditor's report, Charles Davidson appeals. Affirmed.

The auditor found, among others, the following facts:

"(1) Letters testamentary upon the estate of Daniel R. Davidson, deceased, were issued to Charles Davidson, a son, and one of the legatees, on April 2, 1884. (2) On June 9, 1894, an inventory and appraisal was filed in the office of the register of wills of the county, amounting to \$245,136.82. In this inventory were included 398 shares of the Pittsburg National Bank of Commerce, at \$131 per share, \$52,138; 75 shares of the Commercial National Bank, at \$106 per share, \$7,950; 104 shares of the Southwest Pennsylvania Railway stock, at \$70 per share, \$7,280. (3) In 1894, the executor filed a first partial account, in which he charged himself with 'all and singular the goods and chattels, rights, and credits of said decedent, as shown by the inventory and appraisal filed June 9, 1894,' amounting to \$245,136.82. (4) In this first partial account the total assets of the estate are stated to be \$551,041.53, and the executor claims a credit for services and expenses of \$25,390.52, or 5 per cent. of \$507,310. (5) The executor filed a second partial account, in which he charges himself with \$32,878.33, the balance shown by the first partial account. The assets of the estate in this account, including the balance aforesaid, amount to \$105,888.98. (6) In this account the executor claims credit for expenses \$385.53; for cash paid W. A. McCool, \$50,000; and for services as executor, \$5,294.44. This charge for services is 5 per cent. of \$105,888.98. (7) The credit claimed for \$50,000 paid W. A. McCool was for the purchase price paid for 500 shares of the Union Drawn Steel Company, in March, 1893, at \$100 per share. At this time the attention of the executor was called to the stock as being a desirable investment by his brother, James J. Davidson, and J. F. Reed, Esq., and after an investigation his mother, Margaret Clark Davidson, joined with the others in asking that the investment be made. These shares were therefore bought with money belonging to the estate. (10) In 1901 the executor filed a third partial account, in which the total assets are \$298,659, and claimed for services and expenses the sum of \$14,627.95. This is 5 per cent. of \$292,559, the total assets less \$6,100. (11) In 1902 the executor filed his final account, showing assets of the estate amounting to \$194,185.66½. In this account he charges himself with 'all and singular the reversion or remainder due of the personal estate, and all the profits, income, and advantage, remaining of the estate of decedent after the death of his wife, as per the inventory of appraisers,' amounting to \$166,511.33½. (12) The appraisal above mentioned was made shortly before the filing of the account, by

appraisers appointed for that purpose, in order to comply with a provision in the last will of Daniel R. Davidson. (13) This inventory includes the 398 shares of the Pittsburgh National Bank of Commerce, 75 shares of the Commercial National Bank, and 104 shares of the Southwest Pennsylvania Railway stock, mentioned in finding of fact No. 2; also 75 shares of the Commercial National Bank, bought by the executor from his mother, Margaret C. Davidson, in 1896, with money belonging to the estate; 171 shares of the Southwest Pennsylvania Railway stock purchased by the executor with money belonging to the estate, and 227 shares obtained by stock dividends; also 500 shares of the Union Drawn Steel Company, purchased with money belonging to the estate and mentioned in finding of fact No. 7, and 133 shares obtained by stock dividends. (14) In the final account the executor charges for services \$4,000. (15) The executor had no official connections with the Commercial National Bank, the Pittsburgh National Bank of Commerce, or the Southwest Pennsylvania Railway. He became a director of the Union Drawn Steel Company in the fall of 1895, and in January, 1897, became president. As an official of the company he had no regular time for being at the works; comes and goes at his convenience, sometimes once a week and sometimes once a month; and is paid for his time and expenses by the company. He resides in Connellsville, Pa. The plant and business office of the company is in Beaver Falls, Pa. (16) The active management of the Union Drawn Steel Company is looked after by others. (17) The executor was occupied, when attending to the business of the estate, principally in receiving and paying out money. These moneys were received by him for awhile at Pittsburgh, but for some years later they were sent to him in the forms of dividends by checks at his home in Connellsville."

From these facts, found from the evidence, the auditor draws the following conclusions of fact:

"(1) That, prior to settling his final account, the executor has charged and received commissions on 398 shares of the Pittsburgh National Bank of Commerce, appraised at \$52,138; 75 shares of the Commercial National Bank, \$7,950; and 104 shares of the Southwest Pennsylvania Railway stock, at \$7,280—amounting to \$67,568. These stocks are included in the item \$196,511.33 in this account. (2) The 500 shares of the Union Drawn Steel Company's stock, included in the item \$166,511.33 in the final account at \$50,000, are assets of the estate in another form, on which the executor has already received a commission. (3) The remaining shares of stock, making up this item \$166,511.33, are an increase in the assets of the estate due to the business management of the companies in which the stock is held, and not to the business sagacity or responsibility of the executor. (4) That the other items in the account (ex-

cept the sums received from Shaffer and Hough) are dividends accruing on the stock since the filing of the third partial account."

The auditor, in view of the foregoing findings of fact, makes the following conclusions of law:

"(1) That the executor is entitled to commissions upon \$5,060, the amounts received from Nelson Shaffer and Philip Hough, said commissions amounting to \$253. (2) On the other items embraced in this account he is not entitled to commissions."

Exceptions to auditor's report were dismissed by the court.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MES- TREZAT, and POTTER, JJ.

J. F. Reed, for appellant. John M. Buchanan and W. S. Moore, for appellee.

PER CURIAM. The auditor reported that there had been no litigation in the settlement of the estate, and that the main duty performed by the executor was the collection of the income from investments made by the decedent. For these services he has already received over \$45,000. Some of the largest items in the account on which commissions were claimed were the result of appreciation in the value of stocks and other investments made with money on which commissions had been charged and allowed in a prior account. These findings are practically undisputed, and they fully sustain the conclusion of the auditor that the accountant has received ample compensation.

The decree is affirmed.

HUNTER v. APOLLO OIL & GAS CO., Limited.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

OIL LEASE—CONSTRUCTION—REDUCTION OF RENTAL.

1. An oil lease provided for payment for each well from which gas was transported or used of \$500 per year. One well was drilled, and produced small quantities of gas. Thereafter the lessor agreed in writing that the rental of the well should be reduced from \$500 to \$100, and a new well should be commenced within three months, and thereafter indorsed on the original agreement that, in consideration of commencing another well within three months, the well rental "on this lease" was reduced from \$500 to \$100 per year. The lessor and two others present at the signing of the papers testified that it was the understanding that the reduction applied only to the first well. Held to warrant a finding that the reduction did not apply to other wells that might be drilled under the first lease.

Appeal from court of common pleas, Allegheny county.

Action by R. O. Hunter against the Apollo Oil & Gas Company, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

The opinion of the Supreme Court states the case. A witness testified as to tenders

made to the lessor on a basis of \$100 rental for a second well. The court ordered this testimony to be stricken out. Defendant presented this point: "The court is requested to charge that the oral testimony on behalf of the plaintiff is not sufficient to overcome the terms of the written agreement sued upon in this case, and the plaintiff is only entitled to recover upon the two wells drilled and operated by the defendant company at the rate of \$100 per annum per well, or at the rate of \$200 per annum for both wells. Answer: Refused." The court charged in part as follows: "There is the evidence on the part of the plaintiff that what was said was the definite understanding at the time this paper was signed and previous to its signing. Another witness corroborates that statement of his. Those two witnesses are sufficient, then, to carry the case to the jury."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. M. Lindsay and A. M. Neeper, for appellant. J. M. Hunter, J. A. Beatty, and J. Q. Cochran, for appellee.

MESTREZAT, J. R. O. Hunter, the appellee in this case, by an agreement in writing dated December 9, 1895, granted to the Apollo Oil & Gas Company, Limited, the appellant, all the oil and gas in and under 22 acres of land in Armstrong county "for the term of five years, or as much longer as oil and gas is found in paying quantities." The agreement contained, *inter alia*, the following provision: "(3) If gas is found upon said premises, the second party agrees to pay to the first party five hundred (\$500) dollars per annum, payable quarterly on demand, for each and every well from which gas is transported or used off the premises, for whatever time the same is so transported or used." The appellant company began to drill a well on the premises shortly after the execution of the agreement, and completed it about the 1st of March, 1896. It produced gas, but not in large quantities. Some time after the appellant had completed the first well, known as "Well No. 1," on the appellee's premises, and prior to March 20, 1896, at the request of Henry A. Bowers, the appellant's agent, Mr. Hunter signed the following memorandum of agreement: "The well rental on my farm shall be reduced from five hundred (\$500) dollars to one hundred (\$100) dollars, and a new well to be commenced within three months from this date, March 20, 1896. R. O. Hunter. [Seal.] Witness: H. Vandersaal." Subsequently, Mr. Hunter signed the following writing, indorsed on the original agreement: "In consideration of commencing another well within three months, I hereby reduce the well rental on this lease from five hundred (\$500) dollars to one hundred (\$100) dollars per year. Witness my hand and seal this 20th day of March, A. D. 1896. R. O. Hunter. [Seal.] Witness: R. D. Wilson." When the first quar-

terly rental became due after the second well, or well No. 2, had been completed, it was tendered to the appellee on the basis of \$100 per year for each well, as provided in the modified agreement. Mr. Hunter refused the tender, alleging that the reduction of the rental applied only to the first well, and did not reduce the rental of the second or any subsequent well, for which, as he claimed, a rental of \$500 per year was to be paid, as provided in the original agreement. The appellant refusing to pay the rental of the two wells in accordance with the claim of the appellee, the latter brought this suit to recover the rental of \$100 per year for the first well, and \$500 per year for the second well, which was completed on or about June 9, 1896.

The appellant company claims that the writing indorsed on the written agreement correctly evidences the contract of the parties as to the reduction of the rentals, and that it applies to all gas wells that might be drilled on the premises. On the other hand, the appellee contends that the agreement between the parties prior to and about the time he signed the writing of March 20, 1896, reducing the rentals, was that the reduction applied only to the first well, or well No. 1, and not to any other or subsequent wells that might be drilled on his land; that the writing, as signed by him, does not contain the contract of the parties as agreed to and understood by them, and that it was executed under a mutual mistake of both parties. The learned trial judge submitted the case to the jury, holding that there was sufficient evidence to warrant its submission on the question whether the writing embodied the contract of the parties as to the reduction of the rentals, or whether the agreement to reduce the rentals applied only to the first well drilled on the appellee's premises. The judge instructed the jury as to their duty in passing on the question for their consideration, as follows: "When you get to that question, you are not to decide it merely upon the weight of the evidence, but you have got to consider that the evidence must be clear, precise, and specific. It must be sufficient to enable any reasonable and unprejudiced man to come to the conclusion, beyond a reasonable doubt, that the position taken by the plaintiff in this case is sustained by the testimony, in order to set aside the written contract." The jury found in favor of the plaintiff, the appellee here, and the defendant company has appealed.

The controlling question in the case is whether there was sufficient evidence of the alleged mistake to submit to the jury to reform the written contract. The trial judge held that the testimony of the plaintiff as to the agreement of the parties concerning the reduction of the rentals was corroborated by another witness, and that the testimony of the two witnesses was sufficient to send the case to the jury. The appellant's counsel

alleges that the appellee himself was the only witness who testified that the reduction of the rentals was confined to the first well, and therefore the case should have been withdrawn from the jury. There were but three witnesses in the case, and they were all called by the plaintiff. The plaintiff testified in his own behalf that Mr. Bowers, the appellant's agent who procured from the appellee the lease and subsequent papers, approached him in reference to the reduction of the rental on the first well, and that he consented to it; that he and Bowers went to the appellant's office in Apollo, and he there instructed Mr. Wilson, an employé of the West Penn Gas Company, how to write the paper for the reduction of the rental in the presence of Bowers, who assented to its terms, and said "that it was only the one well that he asked me to reduce, and that was all that alluded to"; that Bowers never asked the witness to reduce the rental on but one well, and that it was in reference to that well the parties were dealing when the writing was signed by the appellee; that Bowers never asked him to reduce the rental on the farm or lease; that, after the indorsement was written on the lease, Bowers read it to the witness, and explained to him "that it was the reduction of the one well, all that he asked me to reduce; that was all, just the one well"; and that he then signed it; that for 10 or 12 years his eyes have been very bad and hearing defective. R. D. Wilson, who wrote both papers at the office of the West Penn Gas Company, testified that Hunter and Powers came to the office, and he wrote the indorsement on the agreement as dictated by Bowers; that while he was writing Hunter and Bowers said they were reducing the rental of No. 1 well, and Hunter said in the presence of Bowers that the reduction applied only to one well, and not to the lease, and did not affect the lease; that immediately before the signing of the agreement Hunter said, "Mind, that only applies to that one well," to which Bowers replied, "That is all right." Mr. Bowers testified, *inter alia*, as follows: "I went to Mr. Hunter. I was told by the company to see Mr. Hunter, and have it reduced—this well. I went to Mr. Hunter, and told him that if he would reduce the price of the well that they would drill two or three more wells on his farm, and he talked about it several times before he reduced it. Q. Your negotiations, then, were with reference to well No. 1? A. That was the only well that was on the place at the time."

The testimony was ample, not only to justify its submission to the jury, but to warrant the jury in finding, as they did, that the understanding and agreement prior to and at the time of the indorsement on the original agreement was that the reduction of the rental applied only to well No. 1, and did not include other wells that might be drilled under the lease. That such was the agree-

ment of the parties is established by testimony that is clear, precise, and indubitable, and fully up to the standard required in such cases. No other construction can be placed on the language used by the contracting parties prior to and at the time the paper was signed by Hunter. Presumably the rental of \$500 per year provided in the agreement of December 9, 1896, was a fair compensation for the gas privileges on the lessor's land, and it is not apparent, nor has any sufficient reason been suggested, why Hunter, without consideration, should reduce the rental of the premises to one-fifth the original sum agreed to be paid. The first well was producing gas in small quantities at the time the reduction in the rental was made, and Hunter may have considered it judicious to make a reduction on it as an inducement to appellant to operate the well and drill other wells on the premises. But it is unreasonable to suppose that on subsequent wells, producing gas in paying quantities, he intended to remit four-fifths of the rentals which both parties had agreed was a proper consideration for the lease. The position of the appellant as to the agreement for the reduction is not supported by reason nor the facts disclosed in the testimony.

We think it equally clear from all the testimony in the case that it was the intention of the parties that the reduction of the rental made by the memorandum first signed by Hunter should be limited to well No. 1. There is nothing in the evidence that would lead to a different conclusion.

Having properly submitted the case, and the jury having found that the agreement reducing the rental was limited to well No. 1. the court committed no error in striking out the testimony offered by the appellant to show the tender of the rentals as they became due. As they were made on the basis of \$100 per year for each of the two wells as provided in the written contract of March 20, 1896, they were insufficient as a tender, and hence, striking out the testimony relating thereto, did the appellant no harm.

The assignments of error are overruled, and the judgment is affirmed.

KINTER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RAILROAD CROSSING—ACCIDENT—CONTRIBUTORY NEGLIGENCE.

1. Where a person driving a wagon approached a railroad crossing and grade, and stopped at a point where he could not see the track far enough to observe an approaching train, but, if he had got down from his wagon, and walked about five feet, he could have seen the train, he was guilty of contributory negligence in not doing so as a matter of law.

2. Where a driver is about to cross a railroad track, and he cannot see down the track, he should stop, look, and listen, and, if necessary, get out of his wagon and lead his horses.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by Maggie W. Kinter against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph A. Langfitt, H. W. McIntosh, and S. J. Telford, for appellant. M. W. Acheson, Jr., Thomas Patterson, and James R. Sterrett, for appellee.

BROWN, J. The deceased was killed at a most dangerous railroad crossing in the borough of Wilkinsburg. The train that struck him was coming from the east. He approached the crossing on South avenue, and to his left—the direction from which the train was coming—the street makes an acute angle with the railroad, on which there were five tracks. In this angle there was a plumbing shop, which obstructed the view of the railroad. It was 8 feet and 10 inches from the first rail. The through passenger train which collided with the deceased was rapidly approaching on the first track. When about 350 feet from South avenue, it crossed over on a switch to the middle, or third, track, on which it ran into the team. In the direction from which the train came there was a straight stretch of over half a mile from the crossing, but there was no point nearer than five feet from the first rail where there could be a view of it. Kinter was driving a two-horse wagon loaded with coal. He was sitting about in the middle of it, and a man named Musser, who was to put the coal away, was on the rear end. There was no view of the tracks to their left as they approached them. When the heads of the horses were at the first rail of the track nearest to him, Kinter stopped them. From their positions on the wagon, with the plumbing house alongside of them and cutting off the view to the left, neither man could see the coming train, and their view of the track on which it was rapidly coming was for but 240 feet. They could not even see Wilkinsburg station, barely a square away; but there was a point beyond the house, five feet from the track, from which the deceased could have seen the danger. Neither he nor the man with him went forward to look from this, the only, point from which they could see what was coming upon them; and, in an unguarded moment, the driver started his team, and drove on to his death. As soon as he passed the plumbing house, Musser jumped, and his life was saved; but it was too late for Kinter to escape from the deadly peril. With these facts developed, the court below entered a judgment of nonsuit on the ground of the contributory negligence of the deceased.

Negligence is the absence of care under the

circumstances. The more imminent the danger, the greater should be the care exercised in the presence of it. The rule upon one about to cross the tracks of a railroad is that he must stop, look, and listen. Some crossings are much more dangerous than others, and many of them in towns, with views on either side obstructed by buildings, are, as in the present case, notoriously so. Railroad companies may be regardless of their duty in protecting the public from the constant danger that besets them at such crossings, but the man who drives over them is not, on that account, relieved from the duty of exercising care himself. On the contrary, the very highest degree of it is wisely required of him; and there could be no better illustration than that given by the present case of the wisdom of the rule that if one approaches a railroad in a vehicle, and cannot, from his seat in it, have a view of the tracks, he must get down from it, and walk to where he can. The observance of this rule by Kinter would manifestly have saved his life. Our enforcement of it may save many others; departure from it would send many victims into these death traps.

The duty of Kinter was to stop and look and listen at a place where he could have a view of the tracks which would enable him to see the approaching train. *Central R. R. Co. of N. J. v. Feller*, 84 Pa. 226; *Ely v. Pittsburgh, etc., Railway Co.*, 158 Pa. 233, 27 Atl. 970. He did not stop at such a point, and, concededly, not having been able to see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. "Where there is a doubt as to the proper place to stop, look, and listen, as a general rule such question will be referred to the jury. But where there is no such doubt—where the deceased stopped at a point where he could not see—it is for the court to determine whether it was a proper place." *Urias v. Penna. R. R. Co.*, 152 Pa. 326, 25 Atl. 566. When it must have been manifest to the deceased, as he approached the tracks, that he could not have a view to his left, he might have protected himself by exercising ordinary prudence. Instead of driving his horses on until their feet nearly touched the first rail of the tracks, and then stopping, and trying to look from his seat in the wagon, where he could not see the danger that was almost upon him, he ought, as a prudent man, to have stopped further back, got down from his wagon, walked forward beyond the obstruction, and looked. That this was his duty is clear from the standpoint of prudence and proper care, and that we have so repeatedly declared is not uncertain. His failure to observe this duty cost him his life, and has left his widow and children without remedy for the serious consequences which may have resulted from the defendant's negligence.

In *Pennsylvania Railroad Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753, where, as here,

there was an obstruction to the view of the railroad, we held that, if one driving and about to cross a track cannot have a view of it by looking out from his vehicle, it is his duty to get out, if necessary, and lead his horse and wagon. This principle has been uniformly recognized in later cases. It was reaffirmed the same year in *Pennsylvania Railroad Co. v. Ackerman*, 74 Pa. 265, by the same member of this court that had announced it. In *Ellis v. Lake Shore, etc., Railroad Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914, attention is called to the rule "that it is the duty of a traveler, when about to cross a railroad, if he cannot see the track, to stop, look, and listen, and, if necessary, to get out and lead his horse;" and in *Lehigh Valley Railroad Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238, we held: "It was the duty of the plaintiff before crossing to stop, look, and listen for the approach of trains. It was his duty to do so immediately before crossing, and, as the learned court instructed the jury, 'if he could not see up and down the track from any point upon the road before reaching the rails, it was his duty to go upon the track itself, and look and listen, before attempting to drive his team across.'" The case before us calls for the application of this rule, and it must be enforced. That Kinter passed safely over the first track, and was struck on the third, can make no difference in the application of the rule; for, if he had observed it, he would have seen not only the train coming towards him on the first track, but the switches as well, leading to the other tracks, over which the train in its regular course might go, and, as a matter of fact, did.

Judgment affirmed.

ELLIOTT v. ALLEGHENY COUNTY LIGHT CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

NEGLIGENCE—REMOTE AND PROXIMATE CAUSE.

1. In an action by a painter to recover for injuries received, where the evidence shows that he fell from a ladder and clutched at a live electric wire, and was shocked thereby, he is not entitled to recover from the electric light company, which left the wire uninsulated, the fall from the ladder being the proximate cause of the injury.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Elliott against Allegheny County Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The court charged as follows: "The proximate cause of the plaintiff's injuries was his fall from the ladder, and not his grasping the wire in the line of his fall. The negligence of the defendant, if any, was intervening, but not a proximate cause of the accident. For this reason we direct a verdict for the defendant."

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

Rody P. Marshall and Thomas M. Marshall, for appellant. Samuel McClay, J. H. Reed, Edwin W. Smith, George E. Shaw, and J. H. Beal, for appellee.

POTTER, J. The appellant, while engaged as a painter, fell from, or with, a ladder that slipped from its proper position while he was using it. In the effort to save himself he reached out, while in the act of falling, and clutched at an electric light wire, which was supported from brackets at the side of the building. It is claimed that this wire was not properly insulated, and for that reason the appellant was shocked and burned, and was, possibly, thereby prevented from mitigating the force of his fall.

At the close of the testimony, the trial judge gave binding instructions in favor of the defendant, upon the ground that the proximate cause of the plaintiff's injuries was his fall from the ladder, and not his grasping the wire in the line of the fall. This view was manifestly correct. It is undisputed that the defendant was in no wise responsible for the slipping of the ladder, which was the originating cause of the plaintiff's fall. It would be speculative in the extreme to attempt to differentiate between the extent of the injury which he did receive, and that which he would probably have received, if he had not come in contact with the electric light wire in the course of his fall. It is quite possible that the wire helped to break the fall, and thus lessen the extent of the injury. But even if the presence of the wire, in the condition in which it was, made the consequences of the fall more serious, yet it did not bring about the accident, nor was it in any sense the efficient responsible cause of the injury.

It was the duty of the learned trial judge, upon the admitted facts of this case, to determine the question of proximate cause, and he was right in refusing to submit it to the jury.

The judgment is affirmed.

WILLOCK v. DILWORTH et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

DECEIT—EVIDENCE—SUBSCRIPTION TO CORPORATE STOCK.

1. In an action by a subscriber to the stock of a proposed corporation for deceit of defendant in procuring the subscription, plaintiff could not allege as a ground for recovery that, though he was informed that a portion of the capital stock was to be used to pay for patents, it was concealed from him that the patentee had agreed to assign to the other subscribers a certain portion of the stock which was to be issued to him in payment, where there is no evidence that such agreement was made before plaintiff's subscription.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by S. M. Willock against Lawrence Dilworth and others. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Curtis M. Willock, J. S. Ferguson, and E. G. Ferguson, for appellant. W. B. Rodgers, for appellees.

BROWN, J. This is an action for deceit, and the facts can be very briefly stated. Willock, the plaintiff below, alleges that he subscribed, at the solicitation of Ache, one of the defendants, for 10 shares of the capital stock of a proposed corporation, to be known as the American Food & Oil Company. Nothing appears to have been said to him upon the subject by any of the other defendants. Ache represented to him that the capital stock of the company would be \$60,000, of which a patentee, named Weatherly, was to get \$29,000 for his patents, to be used by the company as the basis of its business. It was subsequently organized with a capital of \$60,000, composed of 600 shares of the par value of \$100 each, of which, it seems to be conceded, 290 were issued to Weatherly. The complaint of the appellant is that a fraud was perpetrated upon him by the defendants, for which they must answer to him for his loss on the 10 shares of stock he originally subscribed for, and for a loss on 80 more subsequently purchased by him from Weatherly, the alleged fraud being an agreement entered into on June 16, 1896, between the six defendants and Weatherly, by the terms of which the latter agreed to transfer to each of them 35 shares of the stock issued to him, the consideration being \$1 and the use of their names as incorporators, and the subscription by each of them for 5 shares of the capital stock. Appellant's allegation is that at the time he subscribed for his stock the representation was made to him by Ache that the company was to pay Weatherly \$29,000 in its stock for his patents, but that no mention was made of the agreement by which 210 shares of the stock were to be transferred by Weatherly to the appellees. The deception of which he complains is not of an actual misrepresentation by Ache, but a concealment of the agreement, and a failure to disclose what he regards as its fraudulent terms. In this respect the case materially differs from *Clarke v. Dickson*, 6 C. B. (N. S.) 453, upon which the appellant seems to chiefly rely. There the charge against the defendant was that he willfully made, or had been a party to the making by others, of false and fraudulent representations, and not that he merely concealed something which it was convenient that the plaintiff should know: If the agreement of Weatherly to so transfer 210 shares of the stock to the six defendants even was of the fraudulent character at-

tributed to it by the appellant, his first difficulty is that he did not prove it had been entered into before he subscribed for his stock. He avers in his statement, and his learned counsel argue, that it had been; but he failed to prove this material fact in his case. The gravamen of his charge against the defendant is fraud. There was no presumption in favor of it, or of any fact essential to sustain it, and the burden was upon the plaintiff to prove that the compact of which he complains was made before he subscribed for his stock. If made afterwards, it cannot be pretended that it was a fraud upon him or any one else. It was proper and lawful that for the patents, regarded by the company as valuable, the owner of them should receive paid-up stock, for they were property within the letter and spirit of section 7, art. 16, of the Constitution, and, when so issued to him, he could do as he pleased with it.

The agreement was executed on June 16, 1896. The plaintiff did not prove when he subscribed for his stock. All that he said was that he thought it was in June, 1896, and added that possibly the paper could be produced showing the date; but he produced no paper bearing his subscription, though the presumption is he could have done so. A fair inference from the testimony is that he subscribed before June 16, 1896. His testimony as to the time he talked to Ache is that it was in the latter months of 1895 or in the early months of 1896. He says that Ache told him Weatherly "wanted or demanded \$29,000 of the paid-up capital on organization." He says, "I hesitated at that point in regard to taking the stock, saying to Mr. Ache pointedly that it was getting very close to the danger line to give a practical man \$29,000 worth of paid-up stock of a concern that was capitalized at only \$60,000." Ache replied, "Well, we regard it as a good venture, and Mr. Weatherly will not organize on any other terms, and, if we don't accept his offer, others will." Appellant then subscribed for the stock. From the history of the case in his paper book—presumed to have been prepared by counsel in the light of the testimony as they understood it—it seems that the negotiations between him and Ache took place and that the stock was subscribed for in March or April, 1896. But whatever the inference may be as to the date of the subscription, we are concerned only with what was actually proved in the case, or, rather, the absence of proof that the compact or agreement between Weatherly and the appellees, of which the appellant complains, existed at the time he subscribed for his stock. Without proof that it did then exist, there is nothing of which he can complain; for subsequently Weatherly, with stock properly issued to him, could do what he pleased with it, without subjecting to the charge of fraud either himself or the persons to whom he may have given it, or to whom

he may have sold it for what he may have regarded as a valuable consideration.

But without regard to the date of the subscription of the appellant for the 10 shares of stock, was the agreement of June 16, 1896, unlawful, and can it be regarded as the means of perpetrating any fraud upon the appellant? As already stated, it was proper and lawful for the company to agree to transfer 290 shares of the capital stock to Weatherly. After he received it—on the very day he received it—he could do as he pleased with it. He saw fit, in the exercise of his best judgment, to transfer 210 shares to the defendants, in consideration of their identifying themselves with the company organized for the very purpose of putting into practical use the patents and processes owned and controlled by him. He doubtless felt that without such identification and the active co-operation of the defendants, no matter how much stock might be issued to him, there would be no value or profit in it for him. He may have regarded, and apparently did so regard, such identification and co-operation as imparting a value to the 80 shares he retained equal to the 210 shares given in exchange for them. At any rate, it was for him, and him alone, to put whatever value he chose upon the whole or any portion of the stock so lawfully issued to him, and in doing so no one was or could have been injured. The plaintiff admits he knew the stock was to be so issued to Weatherly, and for the remaining \$31,000 it is to be assumed he knew treasury stock would be issued for cash, or the equivalent. It is not pretended that any misrepresentation was made as to the actual cash to be invested in the enterprise, or that anything improper was done with what the appellant knew was to be the cash capital, upon which alone the company would have to depend for its operations; and it does not lie in his mouth to complain of the disposition Weatherly saw fit to make of the stock issued to him.

As to the 80 shares purchased by the appellant from Weatherly, nothing more need be said than that it was an ordinary, everyday business transaction, on which, according to his own admission, he hoped to profit, but was disappointed. The judgment of non-suit could not have been properly withheld, and ought not to have been taken off.

Judgment affirmed.

GILES v. JONES & LAUGHLINS, Limited.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO SERVANT—ASSUMPTION OF RISK.

1. Plaintiff had been in defendant's employ as a carpenter for about a month, and was sent to work at a sheave block near the top of a blast furnace, and stood on a narrow platform near the top of the stack. Explosions were thrown from the top of the stack at irregular intervals, sometimes 24 to 36 hours apart, and

sometimes several times a day. The stack was furnished with fire doors, usually kept closed, but which opened on an explosion, giving vent to the burning gas. Plaintiff was burned in such an explosion. The evidence was conflicting as to any warning given him. Held, that the question of the assumption of the risk was for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by James H. Giles against Jones & Laughlins, Limited. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff, a carpenter, was injured by a burst of burning gas from a blast furnace, while at work near the top of a stack of the furnace. Defendant presented these points: "(1) That under all the evidence in the case the verdict must be for the defendant. Answer: Refused. (2) That while it appears that the place in which the plaintiff was at work at the time of the accident was dangerous, the uncontradicted evidence is that it was an obvious apparent danger, and the plaintiff, being of full age and of ordinary intelligence, must be held to have known of such danger, and in going to work there to have assumed the risk of injury, and therefore cannot recover in this action. The verdict must, therefore, be for the defendant. Answer: Refused. The place was clearly a dangerous place to work. If plaintiff had actual knowledge of the nature and character of the danger, either by being informed of it, or, as a man of ordinary intelligence, knew or should have known and anticipated the fact that an explosion such as occurred would probably happen, and that he might be hurt by it, he is, under the law, not entitled to recover in this suit. But this is matter of fact for the jury to determine under the evidence bearing upon that question and not a matter of law for the court." Verdict and judgment for plaintiff for \$4,493. Defendant appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William S. Dalzell and John D. McKennan, for appellant. W. H. McGary and Thomas L. Kerin, for appellee.

MITCHELL, J. This case involves but a single question—was the risk of injury such as plaintiff received so far patent and manifest that plaintiff must be held as a matter of law to have assumed it as a risk of the employment? Plaintiff was sent to work in a dangerous place, on a narrow platform near the top of the stack, at considerable height from the ground. It is conceded that this involved certain dangers, such as a misstep and fall, and the jury were clearly instructed that these were incident to the situation, and the plaintiff could not recover for any injury resulting from them. But there were other dangers specially incident to the furnace stack. These were a "slip" and a "gas puff." The former was caused by part

of the materials with which the furnace was charged adhering to the sides, called a "hang," until the molten mass below it had settled down, and then making a "slip" or fall, so as to produce an explosion, by which gas, ore, limestone, and other materials in the furnace were blown out of the openings at the top. A "gas puff" was caused by an accumulation of gas near the top of the stack, mixing with the air, taking fire, and exploding. The two kinds of explosion differed mainly in that a slip threw out quantities of materials from the stack, while a puff was merely a flame from the lighted gas. To lessen, as far as practicable, the damage from such explosions, the stack was furnished near the top with "fire doors" that hung upon hinges at the top, and were usually kept closed by their own weight, but opened on an explosion and gave vent to the burning gas.

Plaintiff was at work in the line of his trade as a carpenter, at a sheave block near the top of the stack, when an explosion occurred, whether from a "slip" or a "puff" was not clear, and he was burned by the flames of the escaping gas. There was some conflict of testimony whether he had been warned to look out for such danger, and this, of course, went to the jury. But defendants contended then, as now, that the danger was so manifest that any man in the proper exercise of his senses must have known of it. This, as already said, was the pinch of the case.

The testimony in regard to these explosions was that they occurred at frequent, but irregular, intervals, sometimes 24 to 36 hours apart, and again several times a day. They could be heard and seen for a considerable distance. There being a number of blast furnaces close together in that neighborhood, appellants argue that the explosions were so frequent as necessarily to compel notice of them. Plaintiff had been in employment at that place about a month, but testified that his work was inside the carpenter shop, except on two days, and that he had no knowledge of the danger from the explosions. There was nothing in the ordinary course of his trade as a carpenter to charge him with such knowledge, or even to put him upon inquiry. If he had come that day for the first time from a different place, where there were no furnaces in operation, it is plain that he could not be deemed to have knowingly assumed such risk. He had been there a month, and while it is difficult to see how he could have failed to notice and be informed about the explosions, yet, on the other hand, it may be that a burst of flame, apparently from the top of a high stack, did not convey to an ordinary observer from the ground the idea of danger to a workman on a platform several feet below the top. Taking the case on the whole evidence, it was for the jury, and was properly submitted to them.

Judgment affirmed.

JUERGEN v. ALLEGHENY COUNTY.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

LANDLORD AND TENANT—UNLAWFUL EVICTION.

1. A tenant was evicted by the sheriff in proceedings under Act March 21, 1772 (1 Smith's Laws, p. 370), authorizing the recovery of possession of property after a finding by a justice and 12 freeholders that the term had been fully ended. *Held*, that the tenant could not thereafter maintain an action for damages for unlawful eviction.

Appeal from Court of Common Pleas, Allegheny County.

Action by Henry S. Juergen against Allegheny county. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. S. Ferguson, John F. Cox, and E. G. Ferguson, for appellant. A. C. Johnson and George P. Murray, for appellee.

BROWN, J. On March 30, 1891, the county of Allegheny leased a property in the city of Pittsburg to H. W. Juergen and George B. Smith. The latter, sometime during the term, assigned his interest to his co-lessee. The clause in the lease involved in this controversy is: "The said party of the first part do hereby lease and let unto the said parties of the second part from the first day of April, A. D. 1891, for and during the term of five years, and the privilege of re-leasing at an increased annual rental, for the annual rent of \$3,000." The contention of the appellant is that there ought to have been inserted in the foregoing clause, after the word "re-leasing," a stipulation that the renewal of the lease should be at a rental of \$3,500 per year for ten years, and at a rental of \$4,000 for five years thereafter, and that, by accident or mistake, the intention and agreement of the parties were not so expressed in the lease. On December 31, 1895, the county of Allegheny notified the appellant to vacate the premises on April 1, 1896, on the ground that the term would then end. This notice was disregarded. On April 2, 1896, proceedings were instituted, under the provisions of the act of March 21, 1772, 1 Smith's Laws, p. 370, to recover possession of the property, and, after a finding by the justices and the 12 freeholders, summoned in pursuance of the act, that the term had fully ended, the appellant was evicted by the sheriff of the county.

This is an action of trespass by the lessee against the lessor for alleged unlawful eviction from the leased premises. It is not an action for damages resulting from an alleged breach of a contract or agreement by the county of Allegheny to re-lease the premises to the lessor after the expiration of the period of five years. After notice had been served upon him to vacate them on April 1,

1896, he made demand on the commissioners of the county that the lease be renewed in accordance with the terms which he alleged were omitted from the agreement of March 30, 1891. This was refused, and the eviction followed. The ground of the lessee's complaint, as set forth in the statement of his cause of action, is that this eviction was unlawful; but his own proof is otherwise. He was ejected from the premises by the sheriff of the county in the execution of a warrant to dispossess him, issued on the judgment of the tribunal created by the act of 1772, that the term of his lease had fully ended. If the term for which he had leased had ended, the eviction by proceedings regularly conducted under the act of assembly could not be unlawful. On the contrary, it was for the court to declare it lawful, and, if so, no wrong was done by it to the lessee for which he can recover damages from his lessor. Whether the term had fully ended was for the determination of the justices and 12 freeholders. They found that it had ended, and in so doing they may or may not have considered the alleged breach by the county commissioners of their agreement to renew the lease for ten years and to extend the term for that period. But our concern is only with what they found, not with what they may have considered; and their finding simply was that the term had fully ended and had not been extended. It was their duty to pass upon this very question, and from their finding there was no appeal.

Two reasons were assigned in the court below in support of the motion for the judgment of nonsuit: First, that the plaintiff had failed to prove by the testimony that the agreement to extend the lease had been omitted from the contract of March 30, 1891, by fraud, accident or mistake; and, second, that he was barred by the finding of the justices and freeholders in the landlord and tenant proceedings. It is conceded that the judgment complained of was entered on the second ground. This was clearly right, on the authority of *De Coursey v. Guarantee Trust & Safe-Deposit Company*, 81 Pa. 217, where it was held that one of the questions which the act of 1772, by its express terms requires a jury of freeholders to determine is whether the term had expired. Speaking of that act, we there said: "In no form of summary proceedings known to the law is so much care exercised to guard the rights of the parties and secure a fair trial as under the act of 1772. The provision for a freehold qualification for the jurors was intended, at least, to secure a jury of more than the average grade. If such juries are not composed generally of as good material as they ought to be, it is no fault of the law, but of its officers charged with its execution. In such proceedings the tenant has a fair trial before a jury of his peers, and it is no hardship to him to allow the judgment of such a tribunal upon so simple a question as

whether his term is fully ended, to be enforced."

We need not consider the question whether the appellant had shown by the kind of proof required that the terms upon which he leased from the county commissioners had been omitted by accident or mistake from his written agreement with them.

Judgment affirmed.

POWELSON v. UNITED TRACTION CO.
(Supreme Court of Pennsylvania. Jan. 5, 1903.)

STREET RAILROADS—INJURIES TO PASSENGER.

1. The evidence for plaintiff showed that he attempted to board a summer car, and waved his hand when he saw it coming about 100 feet distant; that when it reached plaintiff it had almost stopped, and he stepped on the running board, and was about to go into the car, when the conductor rang the bell, and the car started, and threw him off. *Held*, that the negligence of defendant was for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Powelson against the United Traction Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Rody P. Marshall and John C. Haymaker, for appellant. William A. Challener, Clarence Burleigh, and James C. Gray, for appellee.

DEAN, J. The plaintiff is 58 years of age. On June 25, 1900, he boarded a summer car in Allegheny City. When he saw the car coming about 100 feet distant, he waved his hand to the motorman to stop, who at once put on the brakes, so that when it reached plaintiff it had almost stopped, and he stepped up on the running board, and was about to go into the body of the car, when the conductor rang the bell for the car to start. It was instantly started with a jerk, which threw the plaintiff off, ran over his leg, so crushing it that amputation followed. We do not find these to be the undisputed facts, but only that there was some evidence tending to establish them. The learned judge of the court below, being of opinion that there was no sufficient evidence of negligence on the part of defendant, and that there clearly was contributory negligence on the part of the plaintiff, peremptorily instructed the jury to find for the defendant. We now have this appeal by plaintiff, who alleged error in the instruction, arguing that the case was for the jury on both questions.

To step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover

damages. To this rule, as in all rules, there are some rare exceptions. As to steam cars—such as *Johnson v. West Chester, etc., R. R. Co.*, 70 Pa. 357, where plaintiff had a ticket, and, while incumbered with bundles and a coil of pipe, attempted to get on a car just beginning to move, although the motion was just perceptible, fell, and had his arm crushed under the wheels—this court, speaking by Agnew, J., says: "There cannot be an inexorable rule so unbending that no circumstances begotten by the railroad company can change it. Even when a train is distinctly under way, there are cases (and this was one) where it must be left to the jury to say whether the danger of going aboard was so apparent that it would be culpable negligence in the passenger." This was the case of a passenger getting on a moving train under peculiar circumstances. *Penna. R. R. Co. v. Peters*, 116 Pa. 200, 9 Atl. 317, is a case of a passenger getting off a moving train under peculiar circumstances; and so there are a very few other cases reported as exceptions to the general rule.

The exceptional cases as to electrical cars, on one ground and another, are perhaps more numerous on account of the entirely different use made of them. They carry passengers, it is true, but generally only for short distances. Instead of fixed stations at comparatively long distances, they stop at every street corner, and often, when signaled, between. They accommodate their traveling public only, because they stop often. To see that they stop at the proper place for passengers to get off and on, and then start at the right time, is the principal duty of the employees in charge of the car. It necessarily follows that accidents to passengers in getting on and off are more numerous than on steam cars; and, while the same rule is applicable to both steam and electric cars, the exceptional cases are more in number in the latter than in the former. But the case cited and relied on by appellant, *Walters v. Phila. Traction Co.*, 161 Pa. 36, 28 Atl. 941, is not an exception to the general rule. In that case this language of the court below was held not to be error: "If you should arrive at the conclusion that the car was in motion, and was not in that condition of motion which would induce any reasonable man to get on, then the plaintiff cannot recover. If, however, you should come to the conclusion that it had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced the plaintiff to think it was about to stop, then he had a right to get on, and, if the car started before he was safely seated in the car, and an injury resulted therefrom, then your verdict should be for the plaintiff." In this case plaintiff testified the car had actually stopped when he attempted to get on, and after he was safely on the platform the car started, as here, by a sudden jerk, and he was thrown off. There was evidence for the defendant that the car

was actually moving—that is, had not stopped—when he was thrown off. The charge must be taken in its application to the peculiar facts as averred in plaintiff's testimony. If the car had not come to a full stop, and plaintiff negligently got on, yet, when safely on, by the negligent jerk of the motorman he was thrown from the platform, it cannot be said that plaintiff's negligence contributed to the accident. It was not his negligence in getting on a moving car that brought about the result, for he, by good fortune, although not by the exercise of care, escaped any injury. But, being on safely, at once commenced the duty of defendant to carry him safely. In this, according to plaintiff's testimony, defendant failed. There was no relaxation of the rule, in the case cited, that to get on a moving car is negligence. The language quoted was affirmed in a per curiam opinion. It was not intended by this court to say that in that case, under the circumstances, it was not negligence in defendant to get on a moving car; but that, even if plaintiff got on a moving car, if it was moving, and then he was jerked off by the negligence of the motorman, the charge of the court did not harm defendant's case. None of the other cases cited by appellant are in point on the facts before us.

It is argued that slowing up on plaintiff's signal was an invitation to him to get on while in that condition of motion. This is a mistake. It at most was an invitation to get on when the car stopped, not sooner. But it still remains to say whether, on this evidence, there was a question for the jury. The plaintiff testifies: "When I put up my hand, the motorman saw me, and he turned the brake. * * * When I held up my hand, the car slowed up. When it got to me it was about stopping, and I got on the car, and just as I got on the car the conductor rang the bell. I was about to take my seat, as the car gave a jerk. And the conductor was on the board at the time. He tried to hold me on, and I fell over, and had my foot taken off. * * * Q. What do you mean by saying that you were going to take your seat? A. Why, step up on the other. You know the footboard is down below, and then you have to step to get on to the seat, and I was just about in the act of doing that when he rang the bell, and it started, and knocked me off. I had stepped on the footboard." The evidence of defendant tends to contradict this statement but the credibility of the witnesses was for the jury. If they had believed defendant's witnesses, then plaintiff had got on a moving car; but, if they also believed plaintiff, then his negligence was not followed by the penalty of injury. He had escaped that, and was safe. Being on, it was the duty of the company to exercise care in carrying him. If it negligently started up the car with a jerk, that negligence was not excused by his, and the company would be answerable. There was conflicting evidence as to his negligence

and that of the company. He says, "It was not my carelessness in getting on the car when moving that threw me off, but yours in suddenly starting up before I had reasonable time to be seated." We think the court erred in not leaving the truth of the matter to be determined by a jury.

The judgment is reversed, and a v. f. d. n. awarded.

STODDARD v. CAMBRIDGE MUT. FIRE INS. CO.

(Supreme Court of Vermont. Windham.
March 13, 1903.)

INSURANCE—ARBITRATION CLAUSE—WAIVER—DENIAL OF LIABILITY—JURISDICTION—RECORD ON APPEAL—PRESUMPTIONS.

1. Where, in an action against a foreign corporation, which has pleaded the general issue, the record does not contain a complete transcript, and does not show how the summons was served, or that defendant was not doing business in the state, and had not complied with V. S. 4165, 4166, by appointing the secretary of state its attorney to receive service of process, an exception to a refusal at the close of plaintiff's testimony to direct a verdict for defendant, on the ground that the evidence showed the court had no jurisdiction, cannot be sustained.

2. A motion for judgment non obstante veredicto is not granted in favor of a defendant.

3. Where an insurance policy provides that if the parties fail to agree as to the amount of the loss, the question should be submitted to arbitrators, and that such reference, unless waived, should be a condition precedent to a right to sue, a denial of liability by the insurer is a waiver of such reference.

4. In an action against an insurance company in which it denied liability it excepted to the submission of the case to the jury, on the ground that there had been no arbitration, as the policy required as a condition precedent to a right to sue, and claimed that there was nothing to show that it denied liability before suit, while plaintiff claimed there was evidence of such denial from the first. The record did not contain a full transcript. *Held*, that it must be presumed there was evidence of waiver of the arbitration clause, and that the question was submitted with proper instructions.

Exceptions from Windham County Court; Tyler, Judge.

Action by Clarence G. Stoddard against the Cambridge Mutual Fire Insurance Company. The plaintiff recovered judgment, and defendant brings exceptions. Affirmed.

Argued before MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Clarke C. Fitts, for plaintiff. Waterman & Martin and Gilbert A. A. Perry, for defendant.

STAFFORD, J. The defendant insured the plaintiff's buildings against loss by fire. The buildings were burned, and this action is to recover the insurance. The property was situated in Massachusetts, and there the plaintiff resided both when the contract was made and when the loss occurred. The defendant is a Massachusetts corporation, hav-

ing its place of business in that state. When this action was brought the plaintiff had become a resident of Vermont. The defendant appeared and pleaded the general issue, and the trial proceeded until the close of the plaintiff's testimony, when the defendant moved for a verdict, on the ground that the evidence showed that the court had no jurisdiction. The motion was overruled, and the defendant excepted, but proceeded with its defense, introducing, however, no evidence affecting the question of jurisdiction. There was a verdict for the plaintiff, after which and before judgment the defendant moved for judgment notwithstanding the verdict. This motion likewise was overruled, and the defendant excepted. We are now asked to sustain these exceptions. The claim is that the defendant was a foreign corporation, and was not shown to have been doing any business in this state, nor to have any place of business therein. Assuming, without deciding, that the defendant did not waive the first of these exceptions by proceeding with its defense and omitting to renew its motion, and also that its course did not amount to a waiver of the objection itself, it will be sufficient to observe that the whole testimony is referred to in the bill, whereas we have not been furnished with a complete transcript, and are therefore unable to say what did and what did not appear in these respects, beyond the facts already recited, which are not shown by the exceptions to be all the facts bearing upon the question. It is admitted that if the defendant was doing business in this state, and had complied with our statute requiring it to make the secretary of state its attorney to receive service of process, such service would give the court jurisdiction. V. S. 4165, 4166.

We have not been furnished with a copy of the return, and are not informed what the service was. Evidently there is nothing before us from which we can say that the court erred in assuming jurisdiction. The motion for a judgment non obstante veredicto was properly overruled, if for no other reason, because it is not granted in favor of a defendant—certainly not when the pleadings are as they were here. *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652; *Davis v. Streeter*, 75 Vt. —, 54 Atl. 185.

The policy provided that in case of loss thereunder and failure of the parties to agree as to the amount that question should be referred to arbitrators, whose award should be final, and that such reference, unless waived, should be a condition precedent to the right to sue. "The defendant contended that the plaintiff was not entitled to recover until the amount of damages had been fixed by arbitration, and on that ground excepted to the charge of the court in submitting the case to the jury." "There was never any arbitration, or any attempt on the part of the plaintiff to procure an arbitration, as

provided by the policy, but the defendant denied liability, and pleaded the general issue." The defendant now asserts that the denial of liability referred to was the denial in court, and that there was nothing to show denial of liability before suit, while the plaintiff claims there was evidence of such denial from the first. Here, again, the transcript not being furnished, the doubt must be solved against the defendant, who is the excepting party. So the question is, did the court err in submitting the case to the jury at all? It is admitted that in some circumstances denial of liability will amount to a waiver of the arbitration clause. Not having the whole case before us, we cannot say that the evidence did not tend to show such a waiver. If it did it was the duty of the court to submit the question, with proper instructions, which, the contrary not appearing, we must presume was done.

Judgment affirmed.

KENDALL v. FLANDERS.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1903.)

COMPETENCY OF EVIDENCE—TRIAL COURT'S DISCRETION—EXCEPTIONS.

1. Where the issue in an action is the value of certain land, and evidence of the amount paid for other land in the vicinity is offered, the determination of whether such sales were of a too remote time to have any bearing on the question in issue is in the discretion of the trial court.

2. Where neither the purpose for which certain excluded evidence was offered nor the ground of the objection to the ruling thereon appears in the record, the exception to the trial court's ruling will be overruled.

Transferred from Superior Court.

Assumpsit by J. N. Kendall against William O. Flanders. Verdict for plaintiff, and case transferred from the superior court on defendant's exceptions. Exceptions overruled.

The note sued on was secured by mortgage; and the question submitted to the jury was the value of the real estate acquired by the plaintiff by foreclosure in July, 1901, as bearing upon the question of the amount due upon the note.

The defendant offered to show by one Kiel the price paid at an auction sale in 1896 or 1897 for an adjoining tract of 10 acres, and that the land so purchased was not very different from a part of the mortgaged premises, and by one Dane the price at which various tracts situated within a mile or two of the mortgaged premises had been sold within a few years. He also offered to show that subsequent to the date of the note he made an agreement with the plaintiff, whereby the mortgaged premises were to be sold, and the plaintiff was to receive one-half of the proceeds of sale in excess of \$4,000, in lieu of interest. All this evidence was excluded, and the defendant excepted.

Henry A. Cutter, for plaintiff. Wason & Moran, for defendant.

REMICK, J. 1. The exclusion of the evidence of Kiel and Dane presents nothing but a question of remoteness. That the question of remoteness is left to the discretion of the judge who tries the case is too well settled in this state to need the citation of authority.

2. It does not appear for what purpose the subsequent agreement was offered, nor upon what ground its exclusion was objected to. If offered for the purpose of modifying the contract evidenced by the note in suit, to have been admissible it must have been supported by a consideration. The plaintiff asserts that it was wholly without consideration. This is not denied by the defendant. The fact does not appear either way in the record. If the agreement was offered to show an admission by the plaintiff as to the value of the premises, that he believed they would sell for so much more than \$4,000, that he was willing to obligate himself to accept one-half of what they would sell for in excess of that sum, in lieu of the interest to which he was entitled upon the note in suit, then it was competent and admissible, unless in the judgment of the superior court it was too remote, which may have been the case. There is nothing in the record to show the contrary. The purpose for which the agreement was offered and the ground of the defendant's objection to its exclusion not appearing, the exception must be overruled. The party excepting "must show clearly and affirmatively from the record itself facts constituting error in the proceeding below." 2 Enc. Pl. & Pr. 424, 425.

Exceptions overruled. All concurred.

THOMAS v. HARRINGTON et al.

(Supreme Court of New Hampshire. Grafton. Feb. 3, 1902.)

NEGLIGENCE—INDEPENDENT CONTRACTOR—EXCAVATION IN STREET.

1. Owners of a house, who contract with one to put in the water pipe from the road, six feet under ground, are, even if he is an independent contractor, liable for injury to one who, on a dark night, drives into the unguarded and unlighted trench, the excavation constituting a nuisance, and the danger arising directly from the work which they required to be done.

Transferred from Superior Court.

Action by Mary C. Thomas against James J. Harrington and another. At the close of the plaintiff's evidence the court ordered a verdict for the defendants, and the plaintiff excepted. Transferred from superior court. Exceptions sustained.

The plaintiff's evidence tended to show that the defendants contracted in writing with one McFadden to construct two dwelling houses

¶ 1. See Master and Servant, vol. 34, Cent. Dig. §§ 1259, 1263.

for the defendants in the village of Littleton, and as a part of the contract the former was "to put in the water pipe from the main road, six feet under ground." McFadden proceeded to execute the contract in accordance with its terms, and, while working thereunder, by the instrumentality of servants employed by him, with whom the defendants had nothing to do, and over whom they had no control, he dug a ditch in the street, from the water pipe therein to the sidewalk in front of the defendants' premises, 12 feet long, $5\frac{1}{2}$ feet deep, and 2 feet wide, for the purpose of laying a water pipe from the water main to the defendants' dwellings. McFadden, or his servants employed on the work, negligently left the trench unguarded and unlighted in the evening, although the evening was a dark one, and the electric lights for a part of the time were unlighted; and the plaintiff, while riding along the street, in the exercise of ordinary care, was thrown from her carriage and injured, in consequence of her horse falling into the ditch.

Everett C. Howe and Scott Sloane, for plaintiff. Batchellor & Mitchell and Smith & Smith, for defendants.

WALKER, J. It is not necessary to decide whether McFadden was an independent contractor in the work of putting in the water pipe, or merely an agent of the defendants; for in either case the evidence was legally competent to support a verdict in favor of the plaintiff. From the written contract it appears that the defendants employed McFadden to build two houses upon their premises. One of the specifications of the contract was "to put in the water pipe from the main road, six feet under ground." The evident purpose of this provision was to secure a connection with the water main, which would require the digging of a ditch into the public highway. That the parties had in mind the excavation of a ditch in the highway is not open to doubt upon a reasonable construction of the contract. It was a necessary and anticipated part of the work which the defendants employed McFadden to do. Such an excavation in a street is a nuisance, because it renders public travel dangerous, and makes extra precautions necessary for the protection of travelers. Hence it became the duty of the defendants, who authorized and caused the ditch to be dug, to protect the public from the danger occasioned thereby. They knew the work could not be done, in its reasonable and proper prosecution, without increasing the danger of public travel in the highway at that point. The danger arose directly from the work which they required to be done, and not from the negligent manner of its performance. In such a case one cannot avoid responsibility for the consequences naturally to be apprehended in the course of the performance of the work by employing another to do the

work as an independent contractor. Upon the modern authorities, the question of liability, under such circumstances, does not depend upon an inquiry whether the parties sustain the relation of master and servant, or whether the contract between them makes the employé an independent contractor. The employer cannot absolve himself from the duty which, under the law, he owes to another with reference to the performance of work which is dangerous in itself—as the digging of a ditch in the highway.

In *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572, the defendant was held not to be responsible for flowing the plaintiff's land, not merely because it had employed an independent contractor to float the logs down the river, but also because the injury was not the direct result of the work it employed the *Thurstons* to do. The court say (page 59, 58 N. H., 42 Am. Rep. 572): "The plaintiff's injury was not the natural result of the work contracted to be done. A reasonable use of the dams for proper purposes, and a reasonable use of the stream for the transportation of logs, were lawful, and the authority conferred by the defendants was to execute the contract by a proper and reasonable use of all its means and appliances." If it had appeared in that case that the work which the contractors agreed to do would necessarily produce the damage the plaintiff suffered, it is believed the opposite result would have been reached, as was the case in *McDonell v. Boom Co.*, 71 Mich. 61, 38 N. W. 681. It was held in that case that where a boom company, having full control and management of a stream and the dams thereon, contracts for driving logs therein, the reasonable performance of which contract obliges the contractor to so run and manage the logs and water as to damage riparian owners, such damage is legally attributable to the company, and may be recovered of it. This doctrine is recognized in *Knowlton v. Holt*, 67 N. H. 155, 30 Atl. 346, and in *Manchester v. Warren*, 67 N. H. 482, 32 Atl. 763. See, also, *Pittsfield, etc., Co. v. Shoe Co.*, 71 N. H. 522, 53 Atl. 807. In *Bower v. Peate*, 1 Q. B. Div. 321, 326, Lord Cockburn says: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." To the same effect

are *Hardaker v. Council* [1896] 1 Q. B. 885; *Penny v. Council* [1898] 2 Q. B. 212, 217; *Holliday v. Telephone Co.* [1899] 2 Q. B. 392; *Gray v. Pullen*, 5 B. & S. 970. The American courts generally take the same view of the law. In *Robbins v. Chicago*, 4 Wall. 657, 678, 18 L. Ed. 427, it is said that an employer is liable "where the work to be done necessarily constituted an obstruction or defect in the street or highway, which rendered it dangerous as a way for travel and transportation unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim * * * of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor. * * * Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." See, also, *Water Co. v. Ware*, 16 Wall. 566, 576, 21 L. Ed. 485; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Woodman v. Railroad*, 149 Mass. 333, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 522, 28 Atl. 32; *Deming v. Railway*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521; *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Circleville v. Neuding*, 41 Ohio St. 465; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; *Covington, etc., Co. v. Steinbrock*, 61 Ohio St. 215, 224, 55 N. E. 618, 76 Am. St. Rep. 375; *Metheny v. Wolffs*, 2 Duv. 187; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094; *Spence v. Schultz*, 108 Cal. 206, 37 Pac. 220. In *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12, the defendant, as one of a committee representing the town of Keene, employed Nourse as an independent contractor to clear a piece of woodland belonging to the town; and it was held that he was not liable for damages caused by a fire which was set by Nourse to burn the brush on the lot, and which escaped, through the latter's negligence, onto the plaintiff's adjoining woodlot. The questions whether the work Nourse was employed to do was essentially dangerous to the property of others, and whether, if it was, the defendant could escape liability therefor because of the contract, were not discussed by the court or raised by counsel. If it is assumed that the work done in a reasonable way, or in the way contemplated by the parties, would not constitute a menace to the property of others, and require extra precautions for protection, the decision is in accord with

the general rule that the employer is not liable for the negligence of an independent contractor, and it is probable the court adopted that view of the nature of the contract. In the case of *Black v. Finance Co.* [1894] A. C. 48, under a similar state of facts, the defendant was held liable.

As the case does not disclose that permission was obtained from the selectmen to dig up the street by either the defendants or McFadden (Pub. St. c. 82, §§ 1, 2), the effect of such permission upon the defendants' liability, if any, has not been considered. The result is that the order of the court directing a verdict for the defendants was error.

Exceptions sustained.

CHASE, J., was absent. The others concurred.

PACKARD v. METROPOLITAN INS. CO.

(Supreme Court of New Hampshire. Merrimack. Jan. 6, 1903.)

LIFE INSURANCE—"SOUND HEALTH"—SUFFICIENCY OF EVIDENCE.

1. The expression "sound health," used in a provision in a life insurance policy, means, generally, the absence of any vice in the constitution, and of any disease of a serious nature that has a direct tendency to shorten life, in contradistinction to a temporary ailment or indisposition.

2. An insurance policy sued on waived the fact that the insured's father had died of consumption, but provided that the company assumed no liability prior to its date, nor unless the insured was in sound health then, and omitted the usual warranty in the application. When the insured, a boy 10 years old, was examined, he was found in good health, but before the policy was delivered he was taken with an illness from which he died inside of 6 months. At the delivery of the policy the insured's mother did not know the nature of his disease, and he appeared to suffer only from a temporary ailment, the disease being undiscoverable except to a physician, and one not infrequent with children, and often outgrown. The attending physician's testimony was that the insured died of heart disease and consumption, which latter might have been inherited, and been the cause of the heart disease. Held, that the jury was warranted in finding that the insured was not in sound health at the date of the policy.

Transferred from Superior Court; Peaslee, Judge.

Assumpsit by one Packard against the Metropolitan Insurance Company. Verdict for defendant, and case transferred from the superior court on plaintiff's exceptions. Exceptions overruled.

The insured was the 10 year old son of the plaintiff. The application for the insurance was made by the plaintiff on September 5th, and the boy was examined by the defendant's physician the next day, and was reported by him to be in good health. Thereafter, and before the policy was delivered, the boy fell sick of a disease of the heart,

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 689.

from which he died on March 8, 1901. September 16th the plaintiff took him to a physician, who found that he had a disease of the heart, but did not inform the plaintiff of his discovery; and she had no knowledge that the boy had such disease. The disease was undiscoverable except upon examination by a physician, is not infrequent with children, and is frequently outgrown. At the date of the policy and the time of its delivery, there was nothing in the actions and appearance of the boy to indicate to ordinary observation that he had anything more than a temporary ailment. The boy's father died of consumption, and that fact was waived by the defendant in the policy. The attending physician testified that the boy died of heart disease and consumption, and that the consumption might have been an inheritance from the father, and the cause of the heart disease. The policy contained the following: "Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive, and in sound health." The application contained a like provision. The policy also contained the following: "This policy is issued upon an application which omits the warranty usually contained in applications, and contains the entire agreement between the company and the insured and the holder and the owner hereof."

Martin & Howe, for plaintiff. Brown, Jones & Warren, for defendant.

CHASE, J. The parties introduced into their contract a provision "that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive, and in sound health." That they had authority to limit the contract in this way cannot be doubted. *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729. The question to be considered arises upon this provision, not upon a representation or warranty made by the plaintiff in the application for insurance. There was no warranty in the application, and it does not appear that any representation was made therein concerning the health of the assured. The entire contract is contained in the policy. The question, then, is, what did the parties intend by this provision? It must be presumed that they intended what the words used by them ordinarily signify in common speech. This leaves little room for interpretation, since there is but slight ambiguity in the terms of the provision. No obligation was assumed by the defendant unless the insured was alive, and in sound health, on the day of the date of the policy. The defendant's promise was not absolute, but conditional. The existence of life and sound health in the insured was a condition precedent to the promise of insurance. But what was meant by the words "sound health"? Evidently, not perfect health. "We are all

born with the seeds of mortality in us." No definition can be given to these words that will apply in all cases. A mere temporary indisposition or ailment would not ordinarily be regarded as rendering the health unsound, within the meaning of these words when used in an insurance contract. Speaking generally, they mean the absence of any vice in the constitution, and of any disease of a serious nature that have a direct tendency to shorten life; the absence of a condition of health that is commonly regarded as disease, in contradistinction to a temporary ailment or indisposition. *Cushman v. Insurance Co.*, 70 N. Y. 72, 77; *Brown v. Insurance Co.*, 65 Mich. 306, 32 N. W. 610, 3 Am. St. Rep. 894; *Metropolitan Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908. Whether, in a given case, a person is of sound health, must, of course, depend upon the circumstances of the case. "It must obviously be very difficult to determine questions like these by any general rule. And it is the usual practice to leave these questions to the jury." 2 Par. Cont. (8th Ed.) *467; *Billings v. Insurance Co.*, 70 Vt. 477, 41 Atl. 516; *Dorey v. Insurance Co.*, 172 Mass. 234, 51 N. E. 974; *Cushman v. Insurance Co.*, 70 N. Y. 72, 77; *Grattan v. Insurance Co.*, 92 N. Y. 274, 44 Am. Rep. 372. The question of sound health resembles in this respect the question whether a ship has been "in collision" (*London Assurance v. Companhia*, 167 U. S. 140, 17 Sup. Ct. 785, 42 L. Ed. 113), or whether a person was of "temperate habits" (*Insurance Co. v. Foley*, 105 U. S. 350, 26 L. Ed. 1055), or whether premises were "vacant by the removal of the owner or occupant" (*Stone v. Insurance Co.*, 69 N. H. 438, 45 Atl. 235).

It must be inferred from the fact that a general verdict was rendered in favor of the defendant that it was found as a fact that the insured was not in sound health at the date of the policy. The facts specifically reported warrant this finding. After the boy was examined by the defendant's physician, and before the date of the policy, he "fell sick of a disease of the heart," from which he died within six months. Although the disease was one that was not infrequent among children, and is frequently outgrown, it could not reasonably be regarded as a temporary ailment, or as not of a serious nature. A person having such a disease would not be regarded as in sound health. The fact that the plaintiff was not aware of the nature of the disease, and that its nature was undiscoverable except by a physician, did not prevent it from rendering the boy's health unsound. Undoubtedly, the testimony of the mother and others that the boy appeared to be in good health would be competent evidence on the issue of soundness, but it would not be conclusive. The testimony of physicians concerning the condition of his health, discovered by their examinations of him, would also be competent. In *Dorey v. In-*

insurance Co., *supra*, several persons testified that the insured appeared to be in good health, and was working as usual at the date of the policy; but the testimony of physicians tended to prove that he had a disease of a serious nature, which was not apparent to common observation, and the question of the soundness of his health was submitted to the jury. See, also, *Billings v. Insurance Co.*, *supra*.

Presumably, the attending physician's testimony that the boy died of heart disease and consumption, and that the consumption might have been inherited from the father, and caused the heart disease, was considered and weighed by the court in connection with all other testimony in the case, and in view of the defendant's waiver of the fact that the boy's father died of consumption. If the boy was sick with consumption at the date of the policy, no one would say that he was in sound health. As the record is understood, the waiver related to the liability of the boy's having consumption in the future as an inheritance from his father, and not to the existence of the disease at the date of the policy. The defendant waived the possible defect in the boy's constitution arising from the existence of the disease in his father, but not the present, active existence of the disease in the boy himself. It is highly improbable that they would insure the life of a person actually sick with consumption, but they might take the risk of insuring a son whose father died of consumption, and in whom the disease had not appeared.

Exceptions overruled. All concurred.

MURRAY v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Hillsborough. Feb. 3, 1903.)

INJURY TO BRAKEMAN—RES GESTÆ—DECLARATION—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. Declaration of one within two minutes after he was run over by a car, and while he was lying between planks, with his legs nearly cut off, that it happened from his falling over the planks, is part of the *res gestæ*.

2. Whether a brakeman who was run over by cars, he having stumbled over a "jigger stand," consisting of two planks, for a hand car, close to the track, and within 10 feet of a switch which he was about to operate, knew or ought to have known of the stand, negligently placed there, so that he can be held to have assumed the risk, is a question for the jury, though he had been over the road 10 or 12 times within two months of the accident; men who had worked with him during that time testifying that they had not noticed it before, and it appearing that such stands are seldom placed near switches, and usually lead into car houses, which afford notice of their presence, while in this case there was no such house.

3. Whether a brakeman, who, stumbling over a jigger stand within 10 feet of a switch, was run over by the cars, exercised reasonable care in the performance of his work, is a question

for the jury, he, when last seen before the accident, having been getting down with his lantern over the side of the car nearly opposite the switch, for the purpose, evidently, of setting the switch, as was his duty, he having had extensive experience as a brakeman, a very brief time having elapsed from the time he alighted till he cried out, and it being competent to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that this would be a reasonably prudent way.

Exceptions from Superior Court; Young, Judge.

Action by Michael Murray, administrator, against the Boston & Maine Railroad. Verdict for plaintiff. Defendant excepts. Exception overruled.

Case, for negligently causing the death of Baker, the plaintiff's intestate. Trial by jury, and verdict for the plaintiff. At the close of the plaintiff's evidence, the defendant's motion for a nonsuit was denied, subject to exception. Transferred from the May term, 1902, of the superior court by Young, J. The plaintiff's evidence tended to prove the following facts: At the time of the accident, and for some time prior thereto, Baker was in the employ of the defendant as a freight brakeman. The crew to which he belonged had no regular run, but worked on extras on the lines of the defendant's road running out of Nashua. During the two months before the accident, they had been over the road from Nashua to Keene about a dozen times. The accident occurred in the yard at Greenfield, at about 2 o'clock in the morning, while the crew were engaged in making up their train. Baker was the "middle man," and it was his duty to throw a switch after certain loaded coal cars had been drawn from a side track upon the main track. While the cars were in motion, some one with a lantern was seen by one of the men on the car next to the rear one, and when nearly opposite the switch the lantern disappeared, going down by the side of the car, on the side of the track opposite the switch. On this side of the track there was a "jigger stand," about six feet from the switch, consisting of two planks placed at right angles with the track, and within two or three inches of it, and extending back some fifteen feet. Such appliances are used by the section men in running their cars from the track. There was no car house at this point, and the stand had not been used for two or three years. Just after the lantern disappeared, and as soon as the car passed the switch and stopped, Baker was heard to cry out and groan; and one of the witnesses at once ran to him, and found him lying between the planks, his back to the track, with both legs nearly severed from his body. Another witness, who reached the place in less than two minutes after he heard the outcry, asked Baker what the matter was, and he replied that he had lost his legs. The witness asked, "How did you do that?" and Baker replied, "I fell over these old

¶ 1. See Evidence, vol. 20, Cent. Dig. § 372.

planks." This testimony was admitted, subject to the defendant's exception. Baker died in a few hours thereafter. The broken pieces of his lantern were found near him between the planks, and there was blood on the rail at the end of the planks, and on one of the car wheels. Jigger stands are of frequent occurrence on the defendant's various roads on which Baker had worked, but in a great majority of cases they are opposite car houses, and not in the immediate vicinity of switches. One of the trainmen who worked with Baker testified that he had not noticed this jigger stand before the accident. It did not appear whether Baker had ever operated this switch, or whether he had ever got off his car at this point on the side where the stand was. The stand had been there from seven to ten years. It appeared that some years ago Baker went over the road as brakeman a large number of times, but had not worked there in recent years until about two months before the accident.

Doyle & Lucier, for plaintiff. Hamblett & Spring and Burns & Burns, for defendant.

WALKER, J. It is claimed that Baker's statement, made directly after the infliction of his injury, was not admissible. If the declaration was merely a narrative of a past event, the evidence of it would be inadmissible, upon the ground that ordinarily hearsay evidence is not received in proof of the truth of an assertion. The uniform practice of the courts in common-law jurisdictions has resulted in the establishment of this principle, as a necessary and useful rule in the investigation of questions of fact. But when the declaration of one not a sworn witness upon the trial is something more than mere narrative—when its probative force is derived in part, at least, from sources other than the credibility of the declarant—an opportunity is afforded for the argument that it does not fall within the strict rule against hearsay evidence, or that it constitutes an exception to the rule. It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be, for that reason, of such probative force as to be admissible as evidence upon a material issue. It may be so connected with other controverted facts as to be itself a fact or circumstance naturally growing out of, and in some sense attested by, them. The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestæ*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision. But the principle, whether expressed in an abbreviated Latin phrase

or otherwise, is an important one in any system of evidence whose object is the ascertainment of facts. Its development has been promoted, in modern times, by an effort to afford the triors of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible?

In cases of this character it is important to ascertain what, if any, relevancy the declaration has—in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible. In this case the burden was upon the plaintiff to establish, by a balance of the probabilities, that his intestate received his injury in consequence of the negligence of the defendant. This, in a broad general sense, was the issue tried; but it involved a material inquiry as to the manner in which the accident happened. If it is assumed that suffering the planks to be where it is admitted they were was a negligent act of the defendant, it was important for the plaintiff to show that they were the proximate or effective cause of the accident. If, in the exercise of due care, the deceased would not have received the injury complained of but for the existence of the planks at that particular place and time, the plaintiff would have sustained the burden assumed by him. On the other hand, if the cause of the accident was something other than the planks, as manifestly might have been the case, his failure in this respect might have been fatal. *Nashua Iron & Steel Co. v. Railroad*, 62 N. H. 159. The controversy was whether the planks caused the deceased to stumble and fall, and thus to suffer the injury inflicted upon him by the car wheel running over his legs. The plaintiff's evidence was that the deceased was found almost immediately after the accident lying between the planks, with his legs practically severed from his body; that the fragments of his broken lantern were on the ground near him; and that blood and bits of flesh were found upon the car wheel and near the planks. These are all physical facts which, as evidence, afford some information as to how the accident happened. They are relevant details or results of the main fact. In the strictest sense, they may not together constitute or fully evidence the fact in controversy; but in law they are said to be a part of it. The admission of evidence of this character is placed upon the ground that it discloses to the jury the facts and circumstances which attended the principal fact. In a not inappropriate sense, they are a part of the *res gestæ*, and exist as evidence of it. *Willis v. Quimby*, 31 N. H. 485; *Tucker v. Peaslee*, 36 N. H. 167, 181; *Wyman v. Perkins*, 39 N. H. 218; *Willey v. Portsmouth*, 64 N. H. 214, 219, 9 Atl. 220.

When, instead of attendant physical facts and circumstances, the evidence consists of a declaration, made by a person at the time of the event or transaction which is under investigation, its admission depends upon a similar principle. If its materiality or relevancy is conceded, the question whether it is a part of the *res gestæ* arises; that is, whether it occurred in such intimate connection with the event in issue as to constitute it in a reasonable and proper sense a part thereof. If it does, it is, in its probative bearing, superior to mere hearsay remarks, and may, for that reason, be admissible. "Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is a part of the transaction, and may be given in evidence in the same manner as any other fact." *Hadley v. Carter*, 8 N. H. 40, 43. "Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as a part of the *res gestæ*." *Sessions v. Little*, 9 N. H. 271, 276.

After approving the statement quoted above from *Hadley v. Carter*, the court, in *Wiggin v. Plumer*, 81 N. H. 251, 267, state the principle as follows: "When a fact is offered in evidence, the whole transaction, if it consists of many particulars, may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence, may neutralize it, or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury. * * * Contemporaneous, but otherwise unconnected conversation, is rejected, on the same ground as other unconnected facts. If the statement offered in evidence does not tend to elucidate or give character to the acts proved, it is to be rejected. If it is upon the same subject and relative to the act in proof, it should be received." See also, to the same effect, *Mahurin v. Bellows*, 14 N. H. 206, 212; *Tenney v. Evans*, 14 N. H. 343, 350, 40 Am. Dec. 194; *Morrill v. Foster*, 32 N. H. 358.

But while admitting that the foregoing statements of the law are substantially correct, the defendant insists that a declaration of the character received in this case, in order to be admissible, must have been strictly and literally contemporaneous with the fact it was intended to elucidate or explain. In other words, it is in effect conceded that if, while the car wheels were passing over Baker's legs, he had exclaimed, "I fell over these old planks," that statement would have been admissible as a part of the *res gestæ*; but it is claimed that, although made within two

minutes after the actual infliction of the injury, while he was lying between the planks, groaning on account of the pain, and while no substantial change had occurred in the attendant circumstances, it is not admissible, because the accident was then a past event, and the statement a mere narrative. But this technical refinement is not based upon a reasonable view of the principle involved. No satisfactory reason is assigned for the distinction suggested. If the statement of a party made while a serious injury is being inflicted upon him is regarded as an evidentiary fact throwing light upon the manner of the occurrence, why does not the same statement, made immediately after the principal event, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, constitute an equally admissible part of the proof? Why may it not be as much a part of the *res gestæ* as the fact that the declarant is found at the same time lying in a place and position indicating the manner of the accident? His position as well as his declaration may be to some extent subject to his volition. If the very short period of two minutes after a man's legs have been severed from his body in a railroad accident prevents his declaration then made from being deemed a part of the transaction, it is difficult to understand why his position, which may be as much subject to his intelligent control during that brief and trying interval of time as his power of verbal communication, should be regarded as a competent evidentiary fact explaining the manner of the accident. The fact is that both his declaration and his position may be, under the circumstances, credible and admissible evidence, for very similar reasons; and that to exclude the evidence in the one case, because it may be fabricated, would furnish a reason for its exclusion in the other. The possibility of its being unreliable would seem to relate to the weight, rather than to the admissibility of the evidence. That the doctrine of exact coincidence in such cases is not followed in this state is plainly indicated in *Caverno v. Jones*, 61 N. H. 623, 624, in which it was decided that, in trespass for assault and battery, threats to do the plaintiff bodily harm, made by the defendant so soon after the alleged assault as to constitute a part of the transaction, are competent. Nor do any of the decisions in this jurisdiction warrant the assumption that the defendant's theory has been adopted here. See cases above cited.

Cases in other states and in England, it must be admitted, are not in accord. Some adopt an unreasonably strict construction of the rule (*Reg. v. Bedingfield*, 14 Cox, C. C. 341; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Eastman v. Railroad*, 165 Mass. 342, 48 N. E. 115; *Louisville, etc., R. R. v. Pearson*, 97 Ala. 211, 215, 12 South. 176; *Cleveland, etc., R. R. v. Mara*, 28 Ohio St. 185); others admit statements only remotely

connected with the principal fact (*Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297); while others adopt what seems to be the more rational view, as stated in *Commonwealth v. Hackett*, 2 Allen, 136, 140, that statements are admissible when "it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact" (*Rawson v. Haigh*, 2 Bing. 99; *Rouch v. Railway Co.*, 1 Q. B. 51; *Reg. v. Lunny*, 6 Cox, C. C. 477; *Waldele v. Railroad*, 95 N. Y. 274, 47 Am. Rep. 41; *Martin v. Railroad*, 103 N. Y. 626, 9 N. E. 505; *Estell v. State*, 51 N. J. Law, 182, 17 Atl. 118; *Mayes v. State*, 64 Miss. 329, 1 South. 733, 60 Am. Rep. 58; *Pittsburg, etc., Ry. v. Wright*, 80 Ind. 182; *Wood v. State*, 92 Ind. 269; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Chicago, etc., Ry. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 141; *Lambert v. People*, 29 Mich. 71; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84; *Christianson v. Company*, 92 Wis. 649, 66 N. W. 699; *Fish v. Railway*, 96 Iowa, 702, 65 N. W. 995; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *State v. Rider*, 95 Mo. 474, 8 S. W. 723; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49. See, also, Professor Thayer's article on *Beddingfield's Case*, 14 Am. Law Rev. 817; *Id.*, 15 Am. Law Rev. 71).

The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration. When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character. It is as if it were a part of the act itself. This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail. If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity.

It is not contended that Baker's statement was not relevant, or that it did not tend to

show how the accident happened; that is, the proximate cause of it. It was not mere hearsay, depending alone for its truthfulness upon the credibility of an unsworn witness. It was directly connected in point of time with the main fact, and was made while Baker was in the place where the force of the collision presumably threw him, and in view of all the surrounding physical facts connected with his misfortune. It cannot be said, therefore, as a matter of law, that his remark did not derive credit from the occurrence with which it was so intimately connected, or that it was not in a reasonable sense a part thereof and admissible in evidence. Although in form it was a narrative, it could not be excluded for that reason alone, if in other respects it was competent. Nor does the fact that it was made in answer to the witness' question deprive it of its character as a part of the *res gestæ*. *Fish v. Railway*, 96 Iowa, 702, 707, 65 N. W. 995; *Crookham v. State*, 5 W. Va. 510. To exclude it "would be practically to say that no declaration or statement, however near to the principal fact, or however important and material as giving to it color and significance, could ever be admitted in proof." *Commonwealth v. Hackett*, 2 Allen, 140. How far the question of the admissibility of such testimony may be determined by the trial court as a matter of discretion, it is unnecessary in this case to decide; for the exception to its admission presents no error. In *Commonwealth v. McPike*, 3 Cush. 181, 184, 50 Am. Dec. 727, it is said that, "In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding justice"; while the contrary of that proposition seems to be maintained in *Lund v. Tyngsborough*, 9 Cush. 36, 41.

The defendant insists that the motion for a nonsuit should have been granted, because Baker must be held to have assumed the risk in consequence of which he was injured. This contention, in effect, concedes that the defendant was negligent in permitting a jigger stand to be where this one was, and that it was an operating cause of the accident; but it is claimed the plaintiff cannot recover, for the reason that the danger incurred was one of the incidents of his intestate's employment. If the latter did not know of the existence of the jigger stand near the switch which he was about to operate, or if, in the exercise of ordinary care in the performance of his duties, he was not chargeable with such knowledge, he cannot be held responsible for consequences resulting from his failure to take such precautions for his safety as a knowledge of the danger would have suggested to a man of ordinary prudence. Otherwise he is precluded by the doctrine of the assumption of risk. "The plaintiff was bound to prove that the special danger causing the injury was not known to" Baker, "and in the exercise of ordinary care

by him would not have come to his knowledge." *Burnham v. Railroad*, 68 N. H. 567, 44 Atl. 750.

If the fact that the accident happened is not alone sufficient evidence of the injured party's want of knowledge of the existence of the defective appliance causing it, or of his exercise of due care (*Huntress v. Railroad*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443), the manner of its occurrence, when that is in part disclosed by the evidence, may warrant an inference in his favor upon these points. In this case the plaintiff's evidence (which, upon this motion, is to be taken as true) showed that it was Baker's duty to set the switch which was near the jigger stand. This stand consisted of two planks about 15 feet long, placed at right angles with the track. When nearly opposite this place, at about 2 o'clock in the morning, Baker, who was on a car, went down over the side of the car to set the switch. The night was a dark one. Very soon thereafter he made an outcry, the car wheels passed over his legs, and he at once said he stumbled over the planks. His position immediately after the accident, the blood on the rail between the planks, as one witness testified, the pieces of his broken lantern near him, corroborated and supported the statement that he stumbled over the planks. If he had known that there was a jigger stand at that place, he would have known that some care was necessary to avoid falling over it in the performance of his work. It is hardly conceivable that he would have knowingly encountered that danger—that is, knowing the obstruction was directly in his way, he would have stumbled over it. The act of stumbling usually implies the existence of an object in a traveler's way of which he was at the time unconscious. It is no answer to say that Baker must have known of this obstruction because he had been over the road as a brakeman 10 or 12 times within 2 months of the accident; for it appeared that men who worked with him during that time had not noticed it before the accident. It was not so conspicuous as necessarily to attract the attention of brakemen. It is at least apparent that fair-minded men might reasonably draw the inference from the evidence (*Hardy v. Railroad*, 68 N. H. 523, 536, 41 Atl. 179; *Whitcher v. Railroad*, 70 N. H. 242, 245, 46 Atl. 740) that Baker did not know that his approach to the switch lay over a jigger stand.

But it is urged that he ought to have known it. His experience for many years as a freight brakeman must have afforded him the information that such stands are of frequent occurrence on the line of a railroad, and that they are necessary appliances at certain points for the use of the sectionmen. But while it appeared from the cross-exam-

ination of the plaintiff's witnesses that these appliances are numerous on lines of road on which Baker had worked, it also appeared that they are seldom placed near a switch, and usually lead into car houses, which would afford some notice of their existence. Upon the evidence, it might be found that a brakeman ought to know that in the vicinity of a car house there would in all probability be a jigger stand, and that its existence near a switch and away from a car house was so unusual as to make it unreasonable to say that a brakeman ought to anticipate such an arrangement at every switching point. It was not unreasonable for the jury to infer from the evidence that men of ordinary prudence in Baker's position, and possessing his knowledge of the means employed in the business of railroading, would not anticipate the existence of a jigger stand at this particular point. If upon this subject fair-minded men might differ, the question should be submitted to the jury. It does not appear that Baker ought to have anticipated the peculiar obstruction which caused him to stumble.

The further contention is made that there is no evidence that Baker exercised reasonable care in the performance of his work at the time of the accident—a fact that the plaintiff was bound to prove by competent evidence. But it is not necessary that the evidence should be direct. The fact may be inferred from circumstances; and, in the absence of direct proof, the question is whether the circumstances legitimately warrant an inference of the fact. *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Burnham v. Railroad*, 69 N. H. 280, 282, 283, 45 Atl. 563. When Baker was last seen before the accident, he was getting down over the side of the car nearly opposite the switch, for the purpose, evidently, of setting the switch. He was attending to his duty. He had had extensive experience as a brakeman, and understood perfectly how to perform his work with reasonable safety under ordinary circumstances. The time that elapsed after his lantern disappeared over the side of the car until he cried out was very brief. What he was doing during that short space of time is not a mere matter of conjecture. It was competent for the jury to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that such a way would be a reasonably prudent one—not the opposite. The evidence was sufficient to warrant that finding, in the absence of any evidence tending to show that he was negligent. *Hutchins v. Macomber*, *supra*.

As there is no contention that the evidence did not warrant a finding of the defendant's negligence in permitting the jigger stand to be near the switch in question, no error is apparent in the trial, and the verdict must stand.

Exception overruled. All concurred.

**CARDIFF v. NEW JERSEY STATE
BOARD OF ARCHITECTS.**

(Supreme Court of New Jersey. Feb. 24, 1903.)

ARCHITECTS—RIGHT TO CERTIFICATE.

1. Under the act entitled "An act to regulate the practice of architecture," approved March 24, 1902 (P. L. 1902, p. 54), creating the State Board of Architects, and requiring persons about to engage in the practice of architecture to submit to examination and obtain a certificate from the State Board, it is provided that any person who shall, at the time of the passage of the act, be engaged in the practice of architecture in this state, and shall present to the State Board an affidavit to that effect, shall be entitled to receive such certificate upon the payment of the regular fee. The prosecutor presented his application in due form, accompanied by his affidavit showing that he was engaged in such practice in this state at the time of the passage of the act. He was afterwards examined before the Board upon the facts stated in the affidavit, and as a result the Board rejected the application. *Held*, on review, that the refusal of the certificate was not justified by the facts developed, and that the action of the Board should be reversed, and that a certificate should issue.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Joseph A. F. Cardiff, against the New Jersey State Board of Architects, to review its action in refusing prosecutor a certificate. Reversed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

John J. Mulvaney, for prosecutor. Corbin & Corbin, for defendant.

HENDRICKSON, J. The prosecutor of this writ seeks to set aside the action of the New Jersey State Board of Architects, refusing to grant his application for a certificate to practice the profession of architecture in the state of New Jersey.

The statute creating this Board, and requiring a certificate to practice such profession, is entitled "An act to regulate the practice of architecture," and was approved March 24, 1902. P. L. p. 54. Provision is made for the examination of applicants for certificates, to whom, if the examination is satisfactory, such certificate shall be granted upon the payment of fees amounting to \$20. It is also provided, in section 10 of the act, as follows: "Any person who shall at the time of the passage of this act be engaged in the practice of architecture in this state and who shall present to the State Board an affidavit to that effect or a certificate from a similarly constituted board of another state, and any person who is a member of the American Institute of Architects shall be entitled to receive such certificate upon the payment to the said board of a regular fee of five dollars." It is not disputed but that the prosecutor made his application under the provision here quoted, as one engaged in the practice of architecture in this state when the act was passed, in accordance with the

form adopted by the Board and with the proper affidavit annexed, as therein required. The application was sworn to on May 28, 1902. The applicant was required to name or describe by location two buildings of which the applicant was the architect, with the names and post office addresses of the owners thereof. This the prosecutor did. He gave his own present office and place of business as 288 Monmouth street in Jersey City. The applicant submitted himself to examination before the Board. This examination appears as a part of the return, preceded by the following statement: "Examination of architects applying for certificates by affidavit." The examination was conducted by the president of the Board. A careful inquiry was made as to the allegations of the affidavit, the applicant answering in detail every question fully, and stating in answer to questions that he had a sign out at his place of business a few months prior to the passage of the act, and at the time of its passage. Being further examined he gave in detail his connection as architect in the erection of a number of other buildings, some of which were built under his personal supervision as such. The buildings referred to in the application and in the examination were located in Jersey City, where this examination was conducted. It was also developed in his examination that his name had been in the directory as an architect for a number of years past, and he had used stationery with his name as architect upon it, and that in 1900 he had written five articles on building construction for architectural papers in New York. He had also worked in the office of an architect in the city of New York, and before that he was with the secretary of the Board before which he was being examined. The return further shows that at a meeting of the Board at their rooms in Jersey City on July 18, 1902, opinions of counsel of the Board were received and filed, and then this entry from the minutes appears: "Upon the advice of counsel the application of Jos. A. F. Cardiff was not granted, and the secretary was instructed to write and inform Mr. Cardiff of the action of the Board," etc. Annexed appears the letter of counsel advising the Board that the applicant appears to have been and to be employed by others, and to be classed as a learner or student in architecture, and recommending that Mr. Cardiff be not admitted without examination. There is no evidence to justify the conclusion that the applicant was a mere learner or student in architecture; but, on the contrary, we think the evidence shows, without dispute, that the prosecutor was engaged in the practice of architecture in this state on March 24, 1902, when the act was approved.

It has been urged that, inasmuch as the case shows that the prosecutor admitted, in reply to a question by the secretary, that on one occasion, when questioned in the secretary's office, where prosecutor was working,

as to whether he was serving as architect on one of the buildings mentioned in the affidavit, he had prevaricated, saying that he had only furnished a tracing for the persons engaged in the work, and was not connected with the job in any other way, the Board was justified, in the exercise of its discretion, in refusing to believe his sworn affidavit, and as a result in denying his application. But, as it already appears, the Board did not put its rejection of the application upon this ground. If it had, the facts being undisputed, there is nothing to warrant such a conclusion.

It has also been urged that this court cannot look into the facts without first ruling the Board to certify the facts and the ground of their action. Whether the proceedings under review emanate from a tribunal that is a special statutory one in the sense of the supplement to the certiorari act of 1895 (1 Gen. St. p. 870), giving the court the power to determine disputed questions of fact as well as of law, it is not necessary to determine. The question is raised by the defendant Board, which had certified the examination of the applicant as a part of its record. And if the examination is not legally here it may be disregarded altogether, and then the prosecutor's right to his certificate upon his application and affidavit is entirely clear.

Another objection raised is that certiorari is not the proper remedy; that mandamus alone will lie. But the act itself provides in the twelfth section that the person whose certificate is refused shall have the right to appeal by certiorari to this court, which is therein authorized and empowered to review and correct the action of the State Board, and the latter is directed to forthwith carry out the judgment of the court.

The result is that the action of the Board is reversed, and an order will be made directing the certificate to be issued to the prosecutor.

TEMPLE CO. v. PENN MUT. LIFE INS. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

TROVER—DEMAND—FIXTURES.

1. When goods are left by the owner in a building lawfully in possession of the defendant, who did not remove, or do any act except to permit them to remain in the building, the owner of the goods cannot maintain an action of trover without first making demand, and being met with a refusal by the defendant to deliver.

2. In determining whether the goods are fixtures and part of the real estate, the rule declared in *Feder v. Van Winkle*, 33 Atl. 399, 53 N. J. Eq. 370, 51 Am. St. Rep. 628, applies.

(Syllabus by the Court.)

Action by the Temple Company, to the use of Smith, against the Penn Mutual Life In-

surance Company. Verdict for plaintiff. On rule to show cause. Rule made absolute.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

H. A. Drake, for plaintiff. D. J. Pancoast, for defendant.

VAN SYCKEL, J. This is an action of trover to recover the value of what is alleged to be personal property in the Temple Theater. The defendant held a real estate mortgage on the theater, under the foreclosure of which it purchased the theater, and claims certain articles for which this action is brought as part of the real estate. The verdict was rendered for plaintiff for \$8,621.05. The plaintiff claims title under a subsequent mortgage, which was both a real estate and chattel mortgage. At the sheriff's sale under the mortgage to the defendant, the plaintiff gave notice that the property in question in this suit was personal property, and that it would not pass by the sale, but was subject only to the lien of the said second mortgage. There was no other notice served upon the defendant, nor demand made before this action of trover was instituted. The goods were left in the theater, which was lawfully in possession of the defendant, who did not remove the goods, or do any act except to permit them to remain where they were when mortgaged to the plaintiff, and when the sale was made under the chattel mortgage which is the basis of the alleged title.

The gist of the action of trover is wrongful conversion by the defendant, without proof of which the action will not lie. *Wykoff v. Stevenson*, 46 N. J. Law, 328; *Bigelow Co. v. Heintze*, 53 N. J. Law, 69, 21 Atl. 109. The defendant being lawfully in possession of the property, that possession could not become tortious until it had refused upon demand made to deliver them to plaintiff, in the absence of any evidence to show a removal of the goods by the defendant, or destruction of them. For this reason the plaintiff was not entitled to recover.

It is apparent, also, that the plaintiff recovered the value of some articles which were part of the real estate and passed to the defendant by the sale under its mortgage. In *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628, our court of last resort pronounced the rule which distinguishes between chattels which become part of the realty and those which retain the character of personalty to be as follows: "There must be actual annexation, with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel,

the inference that it is intended to be a temporary annexation." The building was erected and used as a theater, and whatever was incorporated with the building to fit it for use as a theater became part of the realty. As in the case of *Feder v. Van Winkle*, a number of the valuable chattels in this case, such as the range, the dynamos for lighting, the engines, the permanent seats, and other things were actually annexed to the freehold, fitted for and applied to the use to which the real estate was appropriated, all being necessary to the prosecution of a common purpose, and adapted to permanent use as part of the structure. A heater and range are fixtures, although but slightly attached to the building, if put in by the owner of the premises with the intention of making them such. *Erdman v. Moore*, 58 N. J. Law, 445, 33 Atl. 958. Applying this rule to the case, the verdict was against the weight of evidence.

The rule to show cause should be made absolute.

In re WILCOX.

(Prerogative Court of New Jersey. Jan. 27, 1903.)

WILLS—CONSTRUCTION—BENEFICIARIES—DISTRIBUTION.

1. A testator, by his will, devised and bequeathed to six of his children, by name, all the residue of his estate, expressly excluding one child, who had been previously provided for, and also provided that the portion of any child dying under 21 years of age should be divided among the survivors. A child was born to testator afterwards, and there was no provision in the will disinheriting an after-born child. The executors of the will paid to the guardian of one of the children his share of the residuum. The ward died while under age, and without issue. The guardian, having settled his account in the Orphans' Court, was directed by that court to pay the amount remaining in his hands to seven of testator's children, including among them the child excluded by the provisions of the residuary clause, and the after-born child. The appeal from the order of distribution did not question the jurisdiction of the Orphans' Court to make the order, but only claimed that it was erroneous in including in its terms the excluded child and the after-born child. *Held:*

(1) That the order cannot be supported on the ground that the distributees were the heirs at law and next of kin of the deceased infant, because, by the residuary clause, the interest of the infant, who died an infant and without issue, was thereby divested, and became vested in the survivors of the children therein named.

(2) That the order was erroneous in including the child who had been excluded by the residuary disposition, on the ground that she was not, on a proper construction of that clause, one of the survivors intended by testator.

(3) That the order was also erroneous in including the after-born child, on the ground that it must be presumed that she received her share of the testator's estate under the statute, before the executors distributed and paid over the shares of the other children.

(Syllabus by the Court.)

Appeal from Orphans' Court, Passaic County.

In the matter of the accounting of Albert

A. Wilcox, guardian of James Robertson, a minor, deceased. From an order of distribution, the guardian of the deceased minor, the executors, and certain other heirs appeal. Reversed.

The fifth item of the will of John Robertson, dated October 22, 1891, was expressed in these words: "Fifth. All the rest, residue and remainder of my estate, whether real or personal and wheresoever situate, I give, devise and bequeath in equal portions, share and share alike to my children Matilda Robertson, Annie Robertson, James Robertson, John Robertson, Clarence Robertson and Leonard Robertson (my daughter Mame Brickman, wife of Frederick Brickman, having been provided for during my lifetime, it is my will that she shall not have any further portion of my estate) to have and to hold to them, their heirs and assigns forever. the share or portion of any deceased child or children dying without issue under twenty one years of age to be divided equally among the survivors, and the issue of any deceased child or children to take his, her or their parents share whether said parent or parents shall have arrived at the age of twenty one years or not."

James G. Blauvelt, for appellants. Francis Scott, for respondents Matilda Miller and Annie Hawkins. Wood McKee, for respondents Mame Brickman and Sarah Robertson.

MAGIE, Ordinary. The appeal in this cause is from an order of distribution made on the 20th day of December, 1901, by the Orphans' Court of Passaic county. The order recited that the account of Albert A. Wilcox, as guardian of James Robertson, a minor, deceased, had been passed and allowed by that court, June 28, 1900, and it directed that the balance in the hands of the guardian, appearing by that account (after payment of costs and certain counsel fees), should be distributed in equal sums to the minor's half-sister Mame Brickman, his sisters Matilda Miller and Annie Hawkins, and his half brothers and sister Clarence Robertson, Leonard Robertson, John Robertson, and Sarah Robertson, one-seventh to each. The appellants are Wilcox, the guardian of the deceased minor, James Robertson; John Robertson, Clarence Robertson, and Leonard Robertson, three infants who appeared by said Wilcox as their guardian; and James A. Graham and Emmons Fullerton, who are surviving executors of John Robertson, deceased.

The appellants have not contested the jurisdiction of the Orphans' Court to make the order of distribution in question. They only claim that the order was erroneous in including among those entitled to distribution Mame Brickman and Sarah Robertson, who is also called Sarah J. Fullerton. The petition of appeal asserts that the fund in question should be divided between Matilda Mil-

ler, Annie Hawkins, Clarence Robertson, Leonard Robertson, and John Robertson, one-fifth to each. The order of distribution cannot be sustained on the theory upon which the Orphans' Court seems to have put it. The order declares that the parties to whom distribution is directed therein take the fund as heirs at law and next of kin of the intestate minor. Moneys in the hands of a guardian of a minor at his death do not pass to the heirs at law or next of kin, but to the representative of the minor. As the minor is incapable of making a valid testamentary disposition, the representative is necessarily an administrator. To him the guardian may safely pay the funds in his hands. After administration, what remains may then be distributed to those to whom the fund goes.

The order cannot be supported in its entirety unless the interest of James Robertson under the will was either not vested in him, or was, although originally vested, afterwards divested by the admitted fact that he died before he attained the age of 21 years, and without issue. That the provisions in the fifth item of the will, set forth in the prefatory statement, when properly construed, vested in James the share of the residue thereby disposed, will not support the order, if, by a consideration of the whole of those provisions, he was afterward divested of his interest upon the happening of the contingency specified. The consideration of the language of the fifth item of the will leads me to the conclusion that the share allotted thereby to James became vested in him upon the death of the testator; but I think it equally clear that the testator intended that upon the death of any of the children to whom a share was given by that item, occurring under the age of twenty-one years and without issue, the share would be otherwise disposed of. Upon the happening of the double contingency—death without issue and under 21 years of age—the share was thereby divested in favor of such other of the children named in that item as fell within the description of survivors. The case is within the well-settled doctrines of our own cases. *Nevison v. Taylor*, 8 N. J. Law, 43; *Van Houten's Ex'rs v. Pennington*, 8 N. J. Eq. 745; *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. 237.

Nor is there any ground for the contention that the limitation over was restricted by the contingency of death without issue under 21 years, before the death of the testator. At the execution of the will, James and other of the children were infants. He was making a testamentary disposition in contemplation of his death. It must have been within his contemplation that his infant children might not attain the age of 21 years before he died. The period fixed must therefore be the attaining of that age, whenever that might happen. *Van Houten v. Pennington*, ubi supra. This construction is strengthened and made conspicuously clear by the last clause of the

item in question. The construction of that clause, in all its possible applications, is not drawn in question; but it plainly evinces the intention of the testator that in the event of the death of any child under 21 years of age, leaving issue, such issue should become immediately vested with its parent's share, thus providing for the happening of one event of the double contingency previously dealt with. It results that, on the death of James, the share passed by the will of his father, and the question is to whom it passed.

The sole contest raised by the appellants is to the right of Mame Brickman and Sarah J. Fullerton to any portion of the share. The case discloses that Sarah J. Fullerton was a daughter of the testator, born to him after the execution of his will. At that time the testator had children. An examination of the will shows that it contains no provisions for the disinheriting of after-born children. If there was no settlement upon such after-born child, she became entitled to such portion of the parent's estate as she would have been entitled to if the parent had died intestate. 3 Gen. St. p. 3760, § 19. The contribution required from devisees and legatees to make up the interest of such after-born child does not disturb the provisions of the will in other respects. *Wilson v. Fritts*, 32 N. J. Eq. 59; *Van Wickie v. Van Wickie*, 59 N. J. Eq. 317, 44 Atl. 877. The case does not disclose how, or to what extent, Sarah J. Fullerton, the after-born child of John Robertson, has acquired the interest in her father's estate which devolved upon her under the act. But it is clear that she cannot enforce any claim upon the estate of the deceased infant, in the accounting by Wilcox as guardian. It must be presumed that the fund the executors paid to the guardian represented James' share of the estate of his father, after the after-born child had been provided for under the law. They could administer and pay over no more, for the will did not operate upon any of the estate of testator except what was left after satisfying the claims of the after-born child as heir at law and next of kin. The order was clearly erroneous in including Sarah J. Fullerton as entitled to one portion of the fund in question.

The further contention is that the order was erroneous in including Mame Brickman as entitled to a portion of the fund. On her part it is argued that, as she is named in the fifth item of John Robertson's will, although no share is thereby given to her, the word "survivor" used by testator to express those to whom a share, the title to which became divested by the contingent limitation, should go, includes her. But I cannot assent to this contention. The provision is designed to dispose of a share previously bequeathed and devised. It cannot be construed to relate to the property which testator states he had previously given to Mame Brickman. The provision that, under

a certain contingency, the share should go to issue, clearly shows that the testator's purpose was to provide for the shares that are given by that item. There is no language in the item capable of applying to the portion of testator's estate which had been previously given to Mame Brickman, and the testator could not, if he desired, impose any condition upon the portion thus previously given. It results that the survivors intended are those to whom the shares were thereby given, and the order was erroneous in including Mame Brickman as a distributee.

No attention has been paid to the question whether a guardian can properly pay the share thus limited over to the parties to whom it is limited, directly, or whether the fund should first go to the executors of the testator and be distributed by them. No objection to a distribution by the guardian was made below, or has been made here. The surviving executors of the testator join in this appeal, which seems to indicate that they acquiesce in such order as was made, except in the particulars objected to by them, and it has been deemed to justify the consideration I have given to the matter upon the merits.

For the reasons above given, the order must be reversed.

HEUBLEIN BROS. & CO. v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

CITIES—BOARD OF REGISTRATION—CONTRACTS FOR MEALS—VALIDITY.

1. The charter of New Haven, § 209 (13 Sp. Laws, p. 449), provides that the selectmen shall receive 50 cents an hour for time spent in the discharge of their duties, and that their necessary expenses and compensation shall be paid by the city. *Held*, that a contract by the selectmen, as the board of registration, with the keeper of a restaurant, for meals for the members of the board and its employes while it is in session, is not binding on the city; the duty imposed on the city by the statute being one toward the selectmen, and not toward a third party with whom they have incurred a debt as a part of their expenses.

Appeal from City Court of New Haven; James Bishop, Judge.

Action by Heublein Bros. and Co. against the city of New Haven to recover for meals furnished members of the board of registration on the order of the board. From a judgment for plaintiffs, defendant appeals. Reversed.

Leonard M. Daggett, for appellant. E. P. Arvine, for appellees.

TORRANCE, C. J. In the fall of 1900 the board of registration of New Haven held a ten-days session for the admission of electors. The board consisted of five selectmen and the town clerk. To assist in this work, the

board employed four clerks and the two registrars of voters of New Haven. During this time the plaintiffs, at the request of the board, and upon its order, furnished at their restaurant meals to the members of the board and to its clerks and the two registrars to the value of \$228.10. The plaintiffs presented their bill to the city, and, payment being refused, this suit upon the common counts was brought to recover the price or value of the meals so furnished. The court below rendered judgment against the city for the above amount, with interest, and the city appeals.

Quite a number of questions are presented by the appeal, but, in the view we have taken of the case, it will not be necessary to consider most of them.

In the discussion of this case, we shall assume, without deciding, that, if the members of the board of registration had paid the bill here sued upon, the amount so paid could have been recovered by them from the city, under the charter, as a part of their necessary expenses.

The plaintiffs' right to sue the city is based upon the provisions contained in section 209 of the city charter (13 Sp. Laws, p. 449). The claim is that under these provisions the city is made liable to third persons, in cases like the present, for the necessary expenses of the members of the board. We think this claim is untenable.

The town and city governments of New Haven were practically consolidated under an act approved June 2, 1897 (12 Sp. Laws, p. 1108). By section 12 of that act it was provided that the powers and duties of the five selectmen of the town of New Haven should, after a certain date, "be limited to those powers vested in and those duties imposed upon them by the Constitution and laws of the state in relation to the admission of persons to the privileges of electors in said town, and to the erasure from the registry list of the names of those who have forfeited the privileges of electors." It further provided as follows: "Each of said selectmen shall receive fifty cents per hour for the time actually spent in the discharge of said duties, and their necessary expenses, and their compensation and expenses shall be paid by the city." The provisions of this act, having been accepted by the electors, were incorporated in the city charter as revised in 1899, and the two provisions above quoted appear in section 209 of said revised charter (13 Sp. Laws, p. 449). It is under the language last above quoted that the plaintiffs' right to sue the city is based. We think it gives no such right. Section 209 is mainly concerned with the duties and compensation of the selectmen, and not at all with the board of registration, as a board. It provides that each selectman shall "receive" a certain fixed compensation and his "necessary expenses," and that both compensation and expenses shall be paid by the city, although the selectmen are

officers of the town. It clearly provides that the "compensation" to each selectman shall be paid to him by the city, and just as clearly, we think, does it provide that the "expenses" of each shall be paid by the city to him, and not to a third party. We think the word "expenses," as here used, means something due from the city to the selectman for money paid him, or debt incurred by him, necessarily in the performance of his duty. The duty imposed upon the city by the provision in question is a duty towards the selectmen alone, and not a duty towards a third party with whom they may have incurred a debt as part of their necessary expenses. This being so, there is no privity between the city and the plaintiffs with reference to the indebtedness sought to be recovered in this action. Neither the selectmen, nor the board of registration, nor any member of it, by dealing with the plaintiffs as set out upon the record, could bind the city to the plaintiffs for the payment of that indebtedness; nor does the city charter anywhere impose upon the city any duty towards the plaintiffs as to this indebtedness.

For these reasons, we think the record shows that the plaintiffs have no cause of action against the city. In this view of the case, it is unnecessary to consider the other errors assigned.

There is error. The judgment below is set aside, and the cause remanded, to be proceeded with according to law. The other Judges concurred.

HESSE v. MERIDEN, S. & C. TRAMWAY CO.

(Supreme Court of Errors of Connecticut.

March 4, 1903.)

STREET RAILROADS—NEGLIGENCE—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—ADMISSIBILITY—DAMAGES—STATUTORY ALLOWANCE.

1. In an action for wrongful death of one killed by being struck by a trolley pole while riding on the running board of an open car, defendant claiming that before deceased was struck he had ridden for some distance, and was chargeable with knowledge of the proximity of the pole that struck him, it was proper to show that the poles passed prior to the accident were placed at a safe distance.

2. A street car being crowded so that there were no seats, a passenger rode on the running board; and as the car, running at a speed of 15 miles an hour, went upon a curve, he was jolted so that his head was thrown outward, and was struck by a trolley pole, inflicting injuries from which he died. The pole leaned toward the outside of the curve. Its distance from the body of the car, at the level of the floor thereof, was 25 inches, and at the height of the head of deceased, as he stood on the running board, 21 inches; and the running board was 8½ inches wide, and the distance between its outside edge and the pole was 14½ inches. *Held*, that the facts justified a conclusion that defendant was negligent in permitting a passenger to ride on the board while running at such speed past the point in question, with the pole so situated.

3. A street car being so crowded that there

were no vacant seats, a passenger rode on the outside running board, and as the car went upon a curve his head was thrown back so that it struck a trolley pole dangerously near the track. *Held*, that no contributory negligence was shown.

4. In an action for wrongful death, defendant made a claim of law "that, on the facts proven, no judgment could be rendered against defendant for greater than nominal damages." *Held*, that the claim meant that there was not sufficient evidence bearing on the quantum of damages to warrant an award of the full statutory amount.

5. As a general rule, in an action for death there should be more evidence as to the quantum of damages than the mere fact that the injured party died at a certain age, to warrant an award of full statutory damages.

6. In an action for wrongful death, the evidence tended to show that deceased was a man of average size, and in good condition mentally and physically, and that he lived for some minutes after the accident, and suffered some pain; and a claim of law was that, on the facts, no judgment could be rendered for greater than nominal damages. *Held*, that it was not error to award the full statutory damages; it appearing that there was little or no contest as to the quantum of damages, and the attention of the court not having been called to the matter, save by a somewhat ambiguous claim of law.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by John Hesse, as administrator of the estate of Joseph J. Meyer, deceased, against the Meriden, Southington & Com-pounce Tramway Company. Judgment for plaintiff for substantial damages, and defendant appeals. Affirmed.

Marcus H. Holcomb, for appellant. Jacob P. Goodhart and Robert O. Stoddard, for ap-pellee.

TORRANCE, C. J. Joseph J. Meyer, the plaintiff's intestate, while riding upon the footboard of one of the trolley cars of the defendant, came in contact with a trolley pole, and was so injured thereby that he died within a short time thereafter. In the suit brought to recover damages for said injury, the defendant suffered a default, and the case was heard in damages. The trial court rendered judgment in favor of the plaintiff for \$5,000, and the defendant appealed.

The errors assigned relate to the action of the trial court (1) in refusing to amend the finding as requested; (2) in admitting certain evidence; (3) in holding that the defendant was guilty of negligence, and that the deceased was not guilty of contributory negligence; (4) in overruling certain claims of law; (5) in rendering judgment, upon the evidence in the case, for full damages. These claimed errors will be considered substantially in the order stated.

Upon a careful review of the evidence certified up, in connection with the defendant's claims to have the finding corrected, we are of opinion that the court did not err in refusing to do so. Most of the matters which the court below has refused to expunge from or add to the finding are matters about which there was some conflicting evidence, or are dependent upon the credit which the court

might give to a witness; and the few, if any, not of this nature, are immaterial, and would not affect the finding if added to or expunged therefrom. Consequently the finding as made must stand.

The only ruling upon evidence, of which the defendant complains, was correct. The defendant claimed that as Meyer, before he was struck, had ridden for some distance on the footboard next to the poles, he was chargeable with knowledge of the nearness to the track of the pole that struck him. To meet this claim, it was proper to show that the poles passed prior to the accident were placed at a safe distance from the track, and so would have led Meyer to believe, if he observed them at all, that all were so placed.

The court has found, in substance, the following facts: Meyer became a passenger on a trolley car of the defendant going from Stillman's Corners towards Meriden. From the time he boarded the car until he was thrown off, he rode upon the right-hand, or south, running board of the car, near the rear platform. The car, when he got on, was full; every seat and the rear platform being occupied. Passengers were riding on both running boards, and three or four others besides Meyer were riding on the south running board. The car was a double-truck open car, for summer traffic, new and in good condition. There was room for persons to stand between the seats, and for a few to sit on the car floor between the seats, with feet on the running board, but it did not appear that it was practicable to do so while Meyer was on the car. Meyer voluntarily took his position upon the running board, and made no request for a seat; nor did he make any attempt to find a seat inside the car, or between the seats, or upon the platforms. The conductor saw Meyer get on, but did not know that he was riding on the running board until he collected his fare. After doing so, the conductor passed around Meyer, and stood on the footboard, collecting fares from passengers on the rear platform. While so doing "he felt some portion of Meyer's arm or hand strike him, and Meyer was hurled from the car." The car was then going down grade, with power off, under control of the brake, at the rate of 15 miles an hour. It was stopped as soon as possible—within about 300 feet from the point where Meyer left the car. The conductor and others went back, and found Meyer lying on the ground, about 35 feet from the pole that struck him. He was alive, but unconscious, and died within a few minutes after he was found. The trolley pole that caused the accident is situated on the south side of the track, at the outside of a curve, and leans towards the track. Its distance from the track, and from a car standing on the track near it, leaving out small fractions of an inch, is as follows: From the inside gauge line of the south rail to the pole the distance is 3 feet 6 inches; from the body of the car,

at the level of the floor, to the pole, the distance is 25 inches, at the level of the seats it is 22 inches, while at the height of Meyer's head above the running board it is 21½ inches. The running board is 8½ inches wide, and, from the manner in which it is hung, the distance between its outside edge and the pole is 14½ inches. Nothing prevented the defendant from placing this pole at a greater distance from the track. A car travelling rapidly to the east, as was the one in question, when it strikes the curve aforesaid, "gives a jolt or lurch, and has a tendency to throw people upon the car outward." Just as the rear of the car, at the time in question, was passing this pole, the forward wheels struck the curve, "there was a jolt, and Meyer's head was thrown back and struck said pole, and he was hurled from the car in consequence." It did not appear that Meyer had any knowledge of the nearness of the pole to the track.

These are the controlling facts in the case, and from them the court drew the conclusion that "the defendant was negligent in permitting its passengers to ride upon said running board while running its car at such rate of speed along the track at the point in question, with the pole situated as aforesaid." The facts found amply justified this conclusion, whether it be regarded as one of fact or of law. Upon the facts found, the court ruled that the defendant "had failed to disprove that the intestate's injuries and death were caused by the negligence alleged in the complaint, or to prove that the plaintiff's intestate was guilty of contributory negligence, as alleged in the notice" filed before the hearing in damages. There is nothing in the record that shows or tends to show that the court erred in these rulings.

The defendant made some 10 claims of law in the court below, relating to the question of negligence on the part of the defendant, and contributory negligence on the part of Meyer. Most of these claims were based upon states of fact negatived by the finding, and were properly overruled; and, so far as any of said claims were not so based, there is nothing in the record to show that the court overruled them.

The defendant also made the following claim below: "That, upon the facts proven at said trial, no judgment can be rendered against the defendant for greater than nominal damages." This, standing alone, is perhaps somewhat ambiguous. It may mean that, upon the facts proven, the defendant was not guilty of negligence, or that Meyer was guilty of contributory negligence, and so the plaintiff was entitled to no more than nominal damages; or it may mean, as the defendant claims, that there was not sufficient evidence bearing upon the quantum of damages to warrant the court in awarding the full statutory amount. We are of opinion that this last is the meaning that

should be given to this claim. The finding upon this point is as follows: "Upon the trial the plaintiff, in opening his case, offered no evidence of damages, further than the fact, formally and expressly admitted by the defendant, that he (Meyer) was dead, and that his age was thirty-seven years; and there was no evidence as to damages, except such admission and the facts hereinbefore set forth." This part of the finding occurs near the end, so that "the facts hereinbefore set forth" include all the facts in relation to Meyer stated theretofore in the finding. We agree with the defendant that in cases of this kind there should be more evidence as to the quantum of damage than the mere fact that the injured party died, and at such an age. Such evidence, standing alone, would rarely, perhaps, warrant a court in awarding the full statutory amount of damages. But the court below had before it, bearing upon the quantum of damage, something more than the mere facts of the age and death of Meyer. There was evidence tending to show that Meyer was a man of average size, and in good condition physically and mentally; and there was evidence tending to show that he lived for some minutes after the accident, and that he suffered some pain. This being so, we cannot say that the court erred in awarding the full statutory amount of damages, especially in a case like the present, where, from the record, it appears that there was little or no contest upon this point as to the quantum of damages, and that the attention of the trial court was not called to this matter, save by the somewhat ambiguous claim of law hereinbefore stated.

There is no error. The other Judges concurred.

McQUEENEY v. NORCROSS BROS.

(Supreme Court of Errors of Connecticut.

March 4, 1903.)

APPEAL—COSTS—PREVAILING PARTY—EXPENSE OF PRINTING EVIDENCE.

1. Under Rules of Court, p. 100; § 62, providing that costs will be taxed, in the absence of special order, in favor of the prevailing party on appeal, an appellant who sustains the appeal on any grounds is the prevailing party, notwithstanding his failure to sustain it on all.

2. Gen. St. 1902, § 797, provides that the expense of printing evidence certified up "shall be paid and taxed" as provided in section 796, which is that such expense "shall be paid" by the party requesting the evidence to be certified, and "may be taxed," to an amount not exceeding \$50, in favor of the prevailing party. Rules of Court, § 62, provides that, when error is found, costs will be taxed, in the absence of a special order, in favor of the prevailing party. *Held* that, where appellant prevails, costs of printing the evidence will be taxed to the full extent allowed by law, unless there was no reasonable ground for printing the whole evidence.

On motion by appellee for a special order that no costs be taxed for expense of printing the evidence on reversal of judgment below. Motion denied.

For opinion reversing judgment below, see 53 Atl. 780.

PER CURIAM. The rules of court (page 100, § 62) provide that when "error" is found costs will be taxed, in the absence of special order to the contrary, in favor of the prevailing party. In this case the appellants were the prevailing party. It was enough to make them such that they prevailed on any of their reasons of appeal, notwithstanding their failure to sustain all of them.

Gen. St. 1902, § 797, provides that the expense of printing the evidence, when that is certified up, "shall be paid and taxed as provided in section 796." The latter section provides that such expense "shall be paid" by the party requesting that the evidence be so certified up, and "may be taxed," to an amount not exceeding \$50, in favor of the prevailing party. Construing these sections together, the words quoted from the former have the same meaning as if they were "shall be paid and may be taxed." Under our rules (section 62) the costs which, unless otherwise ordered, will be taxed in favor of the prevailing party, are costs to the full extent allowable by law. Such an order as is now asked for can only be proper when there was no reasonable ground for asking that the whole evidence be printed. In the case at bar we think there was reasonable ground, and therefore the motion is denied.

TOWN OF FAIRFIELD v. TOWN OF NEWTOWN.

(Supreme Court of Errors of Connecticut.

March 4, 1903.)

SUPPORT OF PAUPER—KNOWLEDGE OF RESIDENCE—PRESUMPTION—FAILURE TO GIVE NOTICE—EFFECT—QUESTION DECIDED BELOW—REVIEW.

1. Plaintiff town sued the town of E. for the support of a pauper. In such action, facts were found, which, by a proper application of the law, established the pauper's residence in defendant town. *Held*, that plaintiff is presumed to have known the law, and hence defendant is not liable for the pauper's support after plaintiff's knowledge of such facts; no notice having been served as required by Gen. St. 1902, § 2485.

2. Under Gen. St. 1902, § 2485, providing that, where the selectmen of a town have knowledge of the town where a pauper belongs, the latter shall not be liable for any expense for the time during which there was a neglect to give notice, the failure of a town to give notice of a pauper's condition after it knows to what town he belongs does not relieve such latter town of liability for support furnished prior to such knowledge.

3. Though, in an action against a town for the support of a pauper, the claim that defendant was liable for support furnished before plaintiff's neglect to give notice to defendant of such pauper's condition was not expressly made by plaintiff, as such question was necessarily decided in sustaining defendant's claim that there was no liability whatever, it will be considered on appeal.

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by the town of Fairfield against the town of Newtown to recover for supplies fur-

nished a pauper. Judgment for defendant, and plaintiff appeals. Reversed.

Elmore S. Banks, for appellant. Frank M. Canfield, for appellee.

HALL, J. The selectmen of the plaintiff town furnished support for one Stilson, a pauper over 14 years of age, belonging to the defendant town, from December 22, 1899, continuously until April 10, 1901, at an expense of \$3 a week. From information received from said Stilson, and from the selectmen of Newtown and others, the selectmen of Fairfield believed that Stilson belonged to the town of Easton; and in April, 1900, a suit was instituted by the plaintiff against the town of Easton, in which the plaintiff claimed that Stilson belonged to that town, and that it was liable for the support so furnished him by the plaintiff. The selectmen of Fairfield did not obtain knowledge of the facts necessary to determine the liability of the defendant until March 29, 1901, when the court to which said action was brought made a finding of all the facts bearing upon the question of the settlement of said Stilson in the town of Easton. Upon the facts thus found, the selectmen of Fairfield still believed that by law the town of Easton, and not the defendant, was liable for the support of Stilson, until they learned on the 1st of June, 1901, that this court, upon the reservation of said case against the town of Easton, had advised otherwise. 49 Atl. 200. On June 3, 1901, the selectmen of Fairfield gave due notice in writing to the town of Newtown of the condition of said Stilson, that he had been furnished support by the town of Fairfield, and that the town of Newtown was liable therefor, and thereafter brought the present action.

It is not claimed that prior to March 29, 1901, the plaintiff's selectmen had such knowledge of the town where Stilson belonged as made it their duty to give to the defendant notice as required by section 2485 of the General Statutes of 1902, to enable the plaintiff to recover of the defendant, under section 2487, the expense incurred for support furnished to Stilson before that date. On that day, however, they learned, from the finding of the court, that prior to July, 1895, the domicile and residence of Stilson had been in Newtown, and ascertained all the facts upon which it was claimed by the plaintiff, and also by the town of Newtown, that after that date he had gained a settlement in Easton. *Fairfield v. Easton*, 73 Conn. 735, 49 Atl. 200. They are conclusively presumed to have known the law, which, applied to such ascertained facts, showed that Stilson had not acquired a settlement in Easton, and that he therefore still belonged to the town of Newtown. *Stow v. Converse*, 3 Conn. 325-347, 8 Am. Dec. 189; *Bestor v. Hickey*, 71 Conn. 181, 188, 41 Atl. 555. It became their duty, therefore, to give notice to the defendant within five days after March 29th.

in order to enable them to hold the defendant liable for such support as they might thereafter furnish to Stilson. That they still believed that Stilson had gained a settlement in Easton, after learning the facts, furnished no excuse for their delay in giving notice to the defendant until that question had been decided by this court. They delayed giving such notice at their own risk. If, after a knowledge of the facts, there existed a doubt as to which of the two towns was liable for support so furnished, the safe course would have been to notify both.

But the failure of the plaintiff to give the required notice until June 3d did not relieve the defendant from liability for the support furnished Stilson before the plaintiff had knowledge that he belonged to Newtown. The statute imposed no duty upon the plaintiff's selectmen to give such notice before they became chargeable with such knowledge. Section 2476 provides that paupers shall be supported at the expense of the town where they belong; and section 2485, that the selectmen of every town in which a pauper belonging to another town is chargeable shall give notice of his condition to the town in which such pauper belongs, within five days after they shall know to what town he belongs, and that "when the selectmen have knowledge of the town where such pauper belongs such town shall not be liable for any expense, for the time during which there was a neglect to give such notice." Section 2487 provides that "every town incurring any necessary expense pursuant to § 2485 * * * for a pauper belonging to another town, may recover it from such town." As there was no neglect to give notice until the expiration of five days after March 29th, the defendant is only relieved from liability for the expense of the support of Stilson after that time.

The claim that the defendant was liable, under the statute, for support furnished before there was any neglect by the plaintiff to give the required notice, apparently was not expressly made by plaintiff's counsel in the argument in the trial court; but the question was necessarily decided by that court, in sustaining the claim of defendant's counsel that there was no liability upon the part of the defendant, and in rendering judgment in favor of the defendant. *Atwood v. Walton*, 57 Conn. 514-524, 18 Atl. 322. Upon the assumption that the plaintiff was chargeable with knowledge on the 29th of March that Stilson belonged to the defendant town, the plaintiff, in his reasons of appeal, only claims that the trial court should have rendered judgment in its favor for support furnished prior to that date. The trial court erred in not rendering such judgment.

There is error, and the case is remanded for the entry of a judgment for the plaintiff for the expense incurred in the support of Stilson from December 22, 1899, until March 29, 1901, at the rate of \$3 a week. The other Judges concurred.

NELSON v. BRANFORD LIGHTING & WATER CO.

(Supreme Court of Errors of Connecticut.
March 4, 1908.)**ELECTRICITY—CONTACT WITH WIRES—DEATH—
— NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—
— DAMAGES—BRIDGES—RIGHT TO USE
— DANGEROUS INSTRUMENTS — DEGREE OF
CARE REQUIRED—EVIDENCE—JUDICIAL NOTICE—
HARMLESS ERROR.**

1. Intestate, a boy of 16, was killed by an electric shock from a wire strung across a highway bridge by defendant. He was on one of the trusses of the bridge at the time, preparing to dive, and caught the wire to prevent himself from falling. Boys were in the habit of diving from and swimming around the bridge, which fact was known to the selectmen of the town and to defendant. Defendant's wires were not insulated, so as to prevent injury from personal contact, nor was there any notice posted that they were dangerous to handle, nor was it shown that the selectmen had ever approved of the construction of the wires. *Held*, a finding that defendant was negligent was justified by the evidence.

2. Intestate knew that a boy had received a shock from the wires the year before, and had reason to know that the current was likely to be turned on at the time he met his death, but it was not shown that he knew that there was danger in touching the wire. *Held*, that a finding that defendant had failed to show contributory negligence was justified.

3. A private corporation, which maintains for its own use electric wires over a public bridge, is bound to use a high degree of care to prevent injury to persons using the bridge, taking into consideration all the uses to which it is put.

4. A private corporation, which maintains for its own use uninsulated electric wires over a public bridge, cannot object that a person injured from coming in contact with such wires was not rightfully on the bridge.

5. A default in a tort action throws on the defendant the burden of proving on the hearing in damages that the person injured was guilty of contributory negligence.

6. An assessment of damages at \$5,000, in an action for wrongful death, where the evidence showed that deceased was a bright active boy, 16 years of age, who for nearly 3 years had been a general clerk in a grocery store, is not excessive, though this is by statute the extreme limit of recovery in such an action.

7. Judicial notice can be taken of the probability of expectation of life disclosed by the mortality tables.

8. In an action for wrongful death, resulting from contact with electric wires hung by defendant on a highway bridge, it was error to exclude testimony tending to show that the pole on which the wires were hung was put in a proper place in being bolted to the bridge, rather than out in the stream.

9. Under Gen. St. 1902, § 797, providing that the superior court on appeal shall consider the whole record (in which is included the evidence certified) in considering the findings and rulings of the trial court, where the record in an action for wrongful death resulting from contact with an electric wire strung by defendant on a highway bridge shows that the court improperly excluded evidence tending to show that the wire was strung in a proper place, but immediately afterwards permitted the witness to testify that on the day of the injury the line was in all respects properly constructed, the error was harmless.

10. In an action for wrongful death from contact with an electric wire strung along the truss of a bridge, evidence as to what the cost of elevat-

ing the wire above the truss of the bridge would have been was properly admitted.

11. In an action for wrongful death from contact with an electric wire strung over a bridge, testimony by an expert, who had inspected the line the year before, describing the line as it then stood, as a preliminary to showing by him that it was properly constructed as it then stood, was properly excluded.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action for wrongful death by Ludwig Nelson, as administrator of John A. Nelson, deceased, against the Branford Lighting & Water Company. From a judgment for plaintiff on hearing in damages to the court, defendant appeals. Affirmed.

Seymour C. Loomis and Earnest O. Simpson, for appellant. Charles S. Hamilton, for appellee.

BALDWIN, J. In 1887 the town of Branford built a highway bridge over the Branford river, with a draw. It was a truss bridge, with a railing on each side. On the westerly side of it, outside the railing, was a platform, with steps leading down to a small landing for boats, which was eight feet below the roadway. Ever since the construction of this bridge the boys and young men in the neighborhood had been, with the knowledge of the selectmen, in the custom of bathing from it in summer, and, while so doing, of running and exercising themselves upon and jumping and diving from all parts of the bridge and draw; the smaller boys confining themselves to the landing, platform, and floor, but the larger ones diving and jumping from the railings and trusses. In 1896 the defendant constructed a line of wires for electric lighting purposes along the highway, and bolted one of its poles to the piles of the bridge at each side of the draw. An iron pipe was attached to each pole, through which the wires were carried down to the bottom of the river and across the bottom. In the summer of 1900, in lieu of this arrangement of the wires, overhead wires were strung between these poles, which could be detached and removed whenever a vessel passed through the draw. These ran over 14 feet above the floor of the bridge, and that nearest the west edge of it was about 5 feet 5 inches above the peak of the truss and 17 inches west of its west face. The selectmen inspected the defendant's line in 1896, and approved it. They were not consulted as to the change of construction made in 1900, and it did not appear that they approved it. The use of the bridge for bathing purposes continued thereafter as before, with their knowledge and that of the defendant. The wires above the draw were insulated so as to protect them against the weather, but not so as to make personal contact with them safe. The current was turned on every day towards dark, and then they were dangerous to handle. No notice of such danger was given by the defendant, al-

though it knew that the bridge had so much iron upon it as to be a good conductor of electricity, and that the current was liable to diversion if one standing on the bridge should touch the wire overhead, particularly if he were wet at the time. In July, 1901, at about a quarter before 7 in the evening, the plaintiff's intestate, a boy of 16, who had been in the water, while bathing from the bridge, walked up the west truss, clothed only in bathing trunks, to the peak, which was over 17 feet above the river, and asked some boys below if they thought he would touch bottom if he dove from there. He then faced about to the west, and—whether voluntarily or instinctively to prevent a fall did not appear—caught hold of the nearest of the overhead wires, and was killed almost instantaneously by an electric shock. He knew that the wire was an electric light wire, and that a boy had received a shock a year before, while climbing the nearest of the poles for the purpose of diving, but it did not appear that he knew that the wires were dangerous to handle.

The superior court has found that the defendant failed to prove that it was not negligent in running the overhead wire as it did, with no greater precautions against danger to bathers, and failed also to prove that the boy was guilty of contributory negligence. There is nothing in the facts specially found inconsistent with these conclusions. The defendant was bound to a very high degree of care in the use for its own purposes of a highway bridge. *McAdam v. Central Ry. & E. Co.*, 67 Conn. 445, 447, 35 Atl. 341. In determining what precautions against danger to human life were reasonably necessary, it was bound to consider all the uses to which the bridge was customarily put. It is found that it was convenient to the defendant to have the wires no higher above the truss; but convenience in such a matter is a subordinate consideration. The bridge, as part of a public highway, was open to general public use. Under the law of this state the purposes of a highway are not regarded as wholly restricted to serving the right of passage. He who is standing on one as a mere sightseer, to gratify his curiosity, is rightfully there. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 36, 33 Atl. 533. The custom of boys to dive from the bridge was known to the defendant. The selectmen, who represented the town which owned it, had known of this practice for 14 years. So far as appears, they had expressed no disapproval. Silence for so long a time might naturally be taken as importing acquiescence. It was for them, and not for the defendant, to determine how the town property should be used. As far as the defendant is concerned, the plaintiff's intestate was rightfully on the truss, and the defendant owed him the duty of not unnecessarily exposing him to dangers to life which reasonable care on its part could avoid. It could have insu-

lated the wires more effectively. It could have strung them out of the reach of one standing on any part of the bridge. It could have carried them across the river, as it originally did, in a pipe laid on the bottom of the river. It could have put up a notice of danger. The trial court had the right to take into view what the company had not done as well as what it had done in determining whether it had fulfilled its burden, under the default, of disproving the charge of negligence.

The default also threw upon it the burden of proving its claim that the plaintiff's intestate was not himself in the exercise of due care. There were circumstances indicating that he was lacking in this. There was no proof of any justifying cause for his grasping the wire, and it was in proof that he grasped it at a time of day when he had reason to apprehend that the current might have been turned on. But, while he knew the purpose which the wire served, it was not shown that he knew that there was danger in touching it. It was encased in a preparation of cotton fibre and paint. Had the casing been rubber or gutta percha, the danger from contact with it would have been slight. A boy of his age is not necessarily chargeable with knowledge of the different modes of insulation and their comparative effect. That he had knowledge that the casing contained a wire, and that an electric light wire, did not, as matter of law or of logical necessity, show that he was not in the exercise of due care, under the circumstances of his situation. It was to be and was considered by the trial court, but it was not absolutely controlling.

The only proof on the point of damages was that the intestate was a bright, active, intelligent boy of 16, 5 feet 2 inches high, who for nearly 3 years had been a general clerk in a village grocery, and driver of the delivery wagon. This was not insufficient to uphold the award of \$5,000. It is true that, since this amount is, under our statute, the extreme limit of recovery in an action for a wrong resulting in the death of the injured party, the plaintiff thus receives all that could be given for the loss of the most valuable life. It is also true that the life of this lad cannot be considered as possessing any extraordinary value. He had, however, a long expectation of life. While his earnings for the next four or five years would belong to his father, he had reason to expect to be able to earn thereafter, for a considerable period, much more than the cost of his personal support. What damage resulted from the loss of his earning capacity it was for the superior court to measure, as best it could, and there is nothing in the case which can be said, as matter of law, to require a lower estimate. *Broughel v. Southern New Eng. Telephone Co.*, 73 Conn. 614, 620, 48 Atl. 753, 84 Am. St. Rep. 139. While no evidence was offered, from

tables of mortality or otherwise, of the boy's expectation of life, none in a trial to the court was needed, for judicial notice could be taken of the probability which such tables disclose. 17 Amer. & Eng. Ency. of Law, tit. "Judicial Notice," p. 900. It is to be presumed, in support of the judgment, that the court found that his net earnings annually after he would have come of age would have exceeded the amount of the interest which could probably during the same period be obtained on \$5,000; for otherwise the judgment would amount to an annuity, equivalent to such earnings, in perpetuity. It is also to be presumed that due allowance was made for the anticipation of these earnings by force of a judgment which was payable immediately. The evidence, which has been included in the record under the provisions of Gen. St. 1902, § 797, discloses no cause for correcting the finding, in any of the particulars requested by the appellant.

The superintendent of the defendant company, having been qualified as an expert, testified in chief that he constructed its line, and had the pole at the side of the draw nearest to the point where the boy was killed bolted to the piling of the bridge. He was then asked his reason for doing so, rather than for setting it out in the stream. Objection being made, the reason was claimed as tending to show that it was put in a proper place; but the court excluded the evidence. The duty which the defendant owed, in constructing its line, to regard the safety of those using the bridge for bathing purposes, required it to use reasonable care to select a proper location for this pole. The witness should, therefore, have been allowed to state the reason which governed its action in that respect. The record of the evidence, however, shows that immediately after this ruling of the court the witness was asked whether, on the day of the injury to the plaintiff's intestate, the entire line was in all respects properly constructed, and gave an affirmative answer. Under Gen. St. 1902, § 797, it is proper for us to examine the whole record in disposing of this assignment of error, and the question and answer thus admitted are found in the statement of the evidence, though not in the special finding of the court. In view of that answer, no substantial harm can have been done by the exclusion of the preceding question.

The same witness, having testified in chief that the cross-arm on the pole above described was 15 feet lower than that on the pole standing next in the line on the same side of the draw, and that this was done to lessen the strain on the former and the risk of the falling of the wires in a high wind, was asked on cross-examination as to what would have been the expense of putting in an intermediate pole to reduce the strain, and then elevating the wires across the draw, and replied that it would have cost about \$60.

The objection to this cross-examination was properly overruled. The defendant was not an insurer of the safety of those undertaking to walk up the truss. It was not bound to guard it at any cost. It was bound to guard it within reasonable limits, and in determining those limits the expense of adopting another mode of stringing the wires was a legitimate subject of consideration.

Another expert was introduced by the defendant, who had inspected the line over the bridge in 1902. The defendant claimed that it was then in the same condition as at the time of the accident, except as to one small section. As a preliminary to showing by him that it was properly constructed as it stood in 1901, he was asked to describe it as it was when he saw it, except as to the particular section which it was admitted had been changed. The court excluded this inquiry, and did not exceed the limits of its discretion in so doing. The evidence sought was remote in character; corroborative at best; and the same object could have been attained by a hypothetical question, based on the testimony of those witnesses who had described the arrangement of the line in 1901.

There is no error. The other Judges concurred.

BATES v. SPOONER et al.

(Supreme Court of Errors of Connecticut.
March 4, 1903.)

PERPETUITIES—WILLS—REMAINDERS—CONSTRUCTION OF WILL—VESTING OF ESTATE.

1. Where the question is whether, under a will, an estate has vested, so that there will not be a violation of the rule against perpetuities, the fact that the legal estate vested on the death of testator in his executors is immaterial, since the law seeks out the beneficial estate, and demands that it shall vest within the prescribed period.

2. The rule against perpetuities does not demand that the particular individuals in whom an estate must be vested shall be definitely ascertainable at testator's death, but it is enough if it is certain that they be definitely ascertainable within the period limited after that event.

3. Where a will directed that the property of the estate be held in trust for the support of testator's children, and the maintenance of "any family" which either of them might have, until such time as, by the terms of the will, there should be a division and distribution of the estate by the terms of the will, the provision as to the families of the children being naturally referable to the education of their children during minority, such trust could not endure beyond 21 years and 9 months after the death of the survivor of the children, and could not violate the rule against perpetuities.

4. Where a will directed that the property of the estate should be held in trust for such time as the trustees should deem most expedient in order to secure the best value for the property on a sale thereof, and that after such sale it should be divided, and a certain share given to the daughter and her heirs forever, the bequest and remainder to the daughter vested at the time of testator's decease.

5. A will directed that, on conversion of the real estate into personality by the trustees, it should be divided into certain parts, and that each part should be held in trust for a son, and

on the death of either of the sons his share to go to his children, if any, or their legal representatives, but that, on the death of either without children, one half should go absolutely to a sister, and the other half to become a part of the active trust in favor of the other brother. *Held*, that there was nothing violating the rule against perpetuities, since the remotest of the remainders must vest on the death of the survivor of the brothers.

6. Where a will provided that the residuary estate should be held in trust for children until such time as the trustees should determine it could be sold to the best advantage, and remainders were then created, on an issue as to when the remainders vested it was immaterial whether the bequests in remainder carved out of the residuary estate would only be ascertainable when the conversion was fully accomplished, since the vesting of an estate is not deferred by such contingencies.

7. Testator's will provided that his real estate should be held by trustees until such time as they should determine the estate could be sold to the best advantage, and then sold, and remainders to his children were created. A creditor of one of the remaindermen sued in equity to subject certain lands to his execution on the ground that the will was void under the rule against perpetuities, inasmuch as the conversion of the real estate might not be completed until more than 21 years. *Held* that, as to plaintiff, the question whether the conversion might not be completed until after the lives of the children and the lapse of more than 21 years thereafter was immaterial, as equity would regard the conversion as made.

8. If the possible postponement beyond the period of 21 years would invalidate the provisions as to remaindermen, inasmuch as their equitable title must vest within that period, it was not their estates, but the direction for a conversion, that would fail.

Case Reserved from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Action under Gen. St. 1902, § 4053, by Robert W. Bates, an execution creditor who had levied on certain real estate as that of defendant Charles W. Spooner, against him and others, to establish and ascertain his title. Reserved on a finding of the facts for the advice of the Supreme Court. Judgment advised for defendants.

Robert E. De Forest, for plaintiff. Goodwin Stoddard and William B. Boardman, for defendants Morris B. Beardsley and Frederick Hurd.

BALDWIN, J. The plaintiff claims title under a levy of execution against Charles W. Spooner on an undivided third interest in certain lands vested in him as an heir at law of Clapp Spooner, who died in 1899. The will of Clapp Spooner purports to dispose of the lands in question, but the plaintiff insists that this disposition is void, and so that an undivided interest in them descended as intestate estate to Charles W. Spooner.

The testator, by a residuary devise, gave these lands to his executors in trust, to hold and manage, paying from the income, or proceeds of sales, to each of his three children, who were his sole heirs at law, "such sums as they, my said trustees, may deem necessary for the maintenance and support of my said children and for the maintenance and

support and education of any family which either of them may have until such time as by the terms of this will there shall be a division of my estate." He directed his "executors and their successors in said trust" to sell and convey all his "real estate and convert the same into safe investments" as soon after his decease as it could "be done in the exercise of their best business judgment." He then proceeded as follows: "It is my especial request that after a sufficient sum shall have been obtained from my estate for a very comfortable support and maintenance of my daughter and sons, that the sales of the balance of my property be not pressed upon the market as it may take several years to dispose of the estate advantageously. Therefore I trust that great patience and care will be exercised by my executors in the management and disposition of the same. At such time as this shall have been fully accomplished and my real estate having been entirely sold, my estate shall be ready for division; if my estate shall then amount to the sum of \$300,000, three hundred thousand dollars, I direct my said executors to pay therefrom to my niece, Elizabeth K. Patterson, wife of Robert, of Middletown, Connecticut, if living; and if she be deceased at that time, to her heirs at law, to be divided among them as if the same were her intestate estate, the sum of five thousand dollars (\$5,000)." Should his estate then amount to \$450,000, legacies were left to Catherine Towne and Lillian Gay, after which came this provision: "When the above directions shall have been carried out and my indebtedness shall have been fully paid and my real estate sold and converted into approved securities then subject to the said conditional legacies to Elizabeth K. Patterson, Lillian Gay and Catherine Towne, I direct my said executors or their successors in said trust at that time to divide my entire estate, as it shall then exist, into twenty-four equal parts and their division into these parts, as well as their allotment of said parts among my children shall be final and binding upon all parties in interest. I then give and bequeath ten of these said parts to my daughter Lily T. Spooner, to her and her heirs absolutely and forever. I give and bequeath to my said executors, or their successors at that time, seven of said parts, in trust, nevertheless, for the following uses and purposes, to wit, to take, hold, invest and reinvest the same and pay over at such times and in such sums as they may deem that circumstances require such portions of the net income therefrom as they may think best to or for the maintenance and support of my son, Charles W. Spooner, during his natural life. Upon his decease, should he leave him surviving a child or children, this trust shall thereupon cease, and the principal of said trust fund, together with any accumulated interest thereon, I give to such child or children absolutely to be divided among them as if it were the

intestate estate of said Charles W. Spooner. Should my said son, Charles W., upon his decease leave no issue or the representatives of children deceased, and in such event, should my daughter, Lily T., and my son, Harry C., both be living, then I give one-half of principal and accumulated interest of said trust fund to said Lily T. absolutely; and the other one-half I direct said trustees to take, hold and manage in the same manner as is hereinafter in this will provided in the case of the trust created for the benefit of the said Harry C. But if, in the event of the death of my son Charles W., without issue or the representatives of children deceased, my daughter, Lily T. should not be living, then I give at such time the one-half of said trust fund and accumulated interest that said daughter would have received, if living to her heirs at law, to be divided among them as if it were her intestate estate; and if upon the decease of my said son, Charles W., without issue or the representatives of children deceased, my son, Harry C., should not be living, then I give at such time the one-half of said trust fund and accumulated interest of which said son would have received the income, if living, to his heirs at law to be divided among them as if it were his intestate estate." The remaining seven parts were disposed of in a precisely similar way, *mutatis mutandis*, in favor of his other son, or his next of kin. At the time of the testator's death, no child was married, and none of them have since married.*

The plaintiff claims that the will contravenes the common-law rule against perpetuities. That the legal estate vested, upon the death of the testator, in his executors, is, in respect to this point, immaterial. The law searches out the beneficial estate, and demands that this shall vest within a life or lives in being and 21 years (or, as the case may be, 21 years and the period of gestation) thereafter. It does not demand that the particular individuals in whom it must thus be vested shall be definitely ascertainable at the testator's death. It is enough if it is certain that they will be definitely ascertainable within the period limited after that event. The plaintiff contends that the will disregards this limitation, and does not contemplate the vesting of any beneficial interest in the corpus of the residuary estate until the executors divide it into shares and make an allotment of them. In support of this contention, he urges, first, that the trust interposed for the maintenance of the three children pending the sale of the real estate, and for the support and education of any family which either may have, may endure so long

as to postpone the vesting of the remainders beyond the period permitted, because, by its reference to their families, the will provides for the education of those yet unborn. The provision is naturally referable to education of their children during minority, and to be construed as thus limited. *St. John v. Dann*, 66 Conn. 410, 404, 34 Atl. 110. This trust, therefore, could under no circumstances endure beyond 21 years and 9 months after the death of the survivor of the testator's children.

It is next urged that all the real estate may not be sold within a life or lives in being at the testator's death and 21 years afterwards, and that until all has been sold the remaindermen cannot be ascertained. So far as the provision in remainder for Lily T. Spooner is concerned, 10 of the shares into which the estate is, when ready for distribution, to be divided by the executors or their successors in the trust, are "then" bequeathed to her absolutely. To this disposition the testator, in the final clause of his will, thus refers: "I wish to place on record my reason for giving to my daughter, Lily T., a somewhat larger portion of my estate than I have herein given to my sons, and that is, that she has given the best part of her life to my interests as well as those of her brothers. Should either of my children or their representatives take any action to prevent the probate of this will or the carrying out of any of its provisions, he shall forfeit all interest under this will and receive no part of my estate." Looking at the will as a whole, and to its paramount intent to provide for the testator's children, as the main object of his bounty, it is apparent that he meant the absolute bequest in remainder to his daughter to vest in right at the time of his decease. *Farnum v. Farnum*, 53 Conn. 278, 279, 281, 2 Atl. 325, 5 Atl. 682; *Newberry v. Hinman*, 49 Conn. 132; *Johnson v. Edmond*, 65 Conn. 492, 499, 33 Atl. 503. In respect to the contingent remainders expectant upon the termination of the life estates of the sons, his intent is equally apparent that none of them should become vested ones until the decease of one of the sons, nor all of them until the decease of both. Upon the first of these events, the seven shares in which the son so dying had had a life estate were to vest either (1) in his children, if any, him surviving absolutely; or (2) in his children, if any, him surviving, and those who may then be the legal representatives of any deceased child of his, per stirpes, absolutely; or (3) one-half absolutely to Lily T. Spooner or her heirs at law, and one-half on an active trust for the life and benefit of Harry C. Spooner, with remainder to his (Harry's) heirs at law, absolutely. Unless, then, the delay allowed for the conversion of the realty into personalty can avail to postpone the vesting of these remainders, the remotest of them must become vested on the death of the survivor of the two brothers. Should

*This fact did not appear upon the record, but, on inquiry by the court, was admitted by counsel on both sides, who agreed and requested that it should be taken into consideration, if deemed of any materiality in the disposition of the cause.

the first to die leave surviving descendants, they take, upon his death, an absolute title. Should he leave none, half of the seven shares goes absolutely to his sister, if she be then living, and, if she should not be then living, to those who upon her decease were her heirs at law; while the other half, subject to a beneficial life estate in his brother, goes absolutely to those who upon the latter's decease may be his heirs at law. It is immaterial that whether the bequests in remainder will cover the entire residuary estate or not can only be ascertained when the conversion is fully accomplished, because until then it will be uncertain both whether the net income will suffice for the support of the children and their families, and whether the conditional legacies are to be deducted. The vesting of an estate is not deferred by contingencies of such a nature, which affect only its amount or value. *Mallory v. Mallory*, 72 Conn. 494, 500, 45 Atl. 164.

It remains to consider whether the testator's intent is to be defeated on account of his directions as to the length of time during which the executors and their successors in the trust may retain the title to the residuary estate for the purposes of conversion. In applying the common-law rule against perpetuities to estates in remainder, the ordinary rule is they must vest within the period prescribed, not only so far as to be capable of alienation and the subject of succession by inheritance, but so absolutely as to make it certain that the remainderman will come into possession immediately upon the determination of the preceding estate. *Johnson v. Edmond*, 65 Conn. 492, 499, 33 Atl. 503. A possession, however, for another, is his possession. The executors were to hold their title, and to retain possession for a longer time than that customarily occupied in the settlement of an estate, for the sole benefit of the testator's children, and of those entitled in remainder. It is possible that all of his children may die before the conversion of the residuary estate into personalty has been completed, and so before any division into or allotment of shares has been made. But had they survived their father only a day, the will would still have made a valid disposition of the residuary estate. The estate of the daughter would have immediately succeeded to her interest, namely, to the 10 shares to be received whenever the executors should be ready to make the allotment; and the remainders and cross-remainders in the other shares would also have then become vested in right, the time of enjoyment only being deferred. *Cropley v. Cooper*, 19 Wall. 167, 176, 22 L. Ed. 109; *Johnes v. Beers*, 57 Conn. 295, 303, 18 Atl. 100, 14 Am. St. Rep. 101.

It is unnecessary to determine whether it can be regarded as possible that the conversion may not be completed till the lapse of more than 21 years. See *Belfield v. Booth*, 63 Conn. 290, 27 Atl. 585; *Brandenburg v.*

Thorndike, 139 Mass. 101, 102, 28 N. E. 575. If it be possible, the result, as respects the claim of the plaintiff, would be the same, and for two reasons: (1) The will makes an equitable conversion. Equity—and this is an equitable action—regards the conversion, for all purposes of succession, as if it were completely effected at the testator's decease. *Duffield v. Pike*, 71 Conn. 521, 526, 42 Atl. 641; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585; *Henderson v. Henderson*, 133 Pa. 399, 19 Atl. 424, 19 Am. St. Rep. 650. That the time for the division of the estate into shares for allotment was not to arrive until the conversion had been made in fact did not, therefore, defer the time or times when the right of any legatee to benefit by the allotment would otherwise become a vested one. (2) If the period allowed for conversion can be construed as possibly exceeding the lives of the children and 21 years thereafter, and if the possible postponement beyond that period of the vesting of possession in the remaindermen, consequent upon that construction of the will, would invalidate the provisions in their favor, then, inasmuch as their equitable title must vest within that period, it is not their estates, but the direction for a conversion, that would fail. *Gray, Restraints on the Alienation of Property*, 97.

The superior court is advised that the trust provisions in the will of Clapp Spooner do not contravene the rule of law against perpetuities. Costs will be taxed in this court in favor of the defendants. The other Judges concurred.

McFARLAND v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

STREET RAILROADS—USE OF TRACKS—EVIDENCE.

1. Though a street car company has a superior right to use its tracks, it does not forbid their use by the public so as to render a person placing himself or his horse and vehicle on the tracks for any legitimate use of the street a trespasser.

2. Plaintiff was unloading a piano from a wagon, and waited for two street cars to pass, and then backed his wagon against the curb with the horse standing on the tracks. He sent a man down the street to signal any car that might approach. One came, without giving any warning, at an unusual rate of speed; and although the motorman had an unobstructed view for three or four squares, and was given a notice to stop, he struck the horse and wagon, injuring plaintiff. *Held*, that a verdict for plaintiff would be sustained.

Appeal from Court of Common Pleas, Allegheny County; McClung, Judge.

Action by W. T. McFarland against the Consolidated Traction Company. Judgment for plaintiff. Defendant appeals. *Affirmed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James C. Gray and Clarence Burleigh, for appellant. L. K. Porter and S. G. Porter, for appellee.

MESTREZAT, J. This is an action to recover damages for personal injuries which the plaintiff alleges he sustained by reason of the negligence of the defendant company. On the evening of March 29, 1900, the plaintiff was engaged with a one-horse transfer wagon in removing a piano, weighing about 1,200 pounds, to the residence of Mrs. Eschallier, 157 Larimer avenue, East End, Pittsburg. He drove to the avenue, in the vicinity of the place he was to deliver the piano, and, having waited for two street cars to pass, he backed the wagon against the curb, its rear standing at right angles with and against the curb, with the horse standing diagonally across the street car track with its head in the direction of Everett street. With the assistance of three other men the plaintiff began to remove the piano from the wagon, and when it was "half way off" a car of the defendant company coming from the east on an ascending grade struck the horse and shaft and caused the wagon to move, throwing the piano on the plaintiff and severely injuring him. Larimer avenue is 25 feet between curbs, and there is an ascending grade from Everett street to the place of the collision, a distance of about 120 feet. There is a single car track on the avenue, 9 feet 10 inches from the curb, on which the defendant company runs its cars in a westerly direction.

On the trial of the cause in the court below the learned judge, in a charge clear and adequate, submitted the question of the defendant's and plaintiff's negligence to the jury. The verdict was in favor of the plaintiff, and from the judgment entered thereon the defendant has taken this appeal. The principal and important error assigned is that the court erred in not affirming the defendant's point "that under all the evidence the verdict should be for the defendant."

If the testimony of the plaintiff was worthy of credence, the jury was justified in finding that the defendant's motorman was guilty of negligence which occasioned the plaintiff's injuries. At the time of the accident it was light, and he had an unobstructed view of the horse and wagon for three or four squares. When the car was approaching the place of collision, and distant therefrom at least 110 feet, the motorman, who could, and presumably did, see the horse on the track, disregarded a notice to stop which he heard, although, according to his own testimony, he could have stopped his car within 30 feet. At the time of the accident the car was running at twice its usual or ordinary speed, and no warning of its approach was given. We agree with the learned trial judge that if these were the facts "there would be little difficulty in determining that this was the grossest kind of negligence." The verdict

of the jury has established the facts as presented by the plaintiff.

In their printed brief of argument the learned counsel for the defendant attempted to show that the plaintiff's witnesses were not credible, and that his testimony was unworthy of belief. We must remind them of what they well know, that their argument should have been, and doubtless was, presented in another forum, and that the verdict of the jury, whose province it was, has settled the question against their contention.

It is argued very strenuously that the plaintiff was clearly guilty of contributory negligence, and hence the learned trial judge should have directed a verdict for the defendant company. The determination of this question requires a brief reference to the material facts as found by the jury. After the plaintiff arrived in the avenue near the Eschallier residence, and before he began to discharge his load, he waited until two cars had passed and no other car was in sight. He looked and could see "as far as the eye would carry" in the direction in which a car must come, and in order to protect his horse and wagon from a possible collision he sent a man in that direction to signal any car that might approach. Having taken these precautions, and knowing that the motorman if running his car at the usual speed could see the horse and stop without danger of a collision, the plaintiff placed the rear of his wagon against and at right angles with the curb, the horse necessarily on the car track and standing diagonally across it. The piano, the object to be removed from the wagon, was heavy, and it was dangerous to undertake to remove it by lifting it over the side of the wagon while it was standing parallel with the curb. It was the universal custom, under these circumstances, to unload pianos from the rear of the wagon as it stood against the curb.

These facts did not warrant the court in declaring the plaintiff guilty of negligence and directing a verdict for the defendant company. On the contrary, they fully justified the jury in the conclusion that he had performed his duty and had exercised proper care under the circumstances. The size of the piano and safety in its removal required it to be unloaded from the rear end of the wagon. The position of the wagon necessarily placed the horse on the car tracks. The plaintiff, therefore, had the right to occupy the tracks while unloading the piano, provided he did so with no unnecessary delay, and with proper precautions to prevent a collision with an approaching car. That he exercised care while occupying the track is apparent from all the facts, especially from the fact that he had the motorman signaled to stop at a point sufficiently distant to stop the car in time to avoid the accident. Had the motorman heeded the signal thus given him, the collision would not have occurred. Nor was the plaintiff, under the circumstan-

ces, regardless of notice to stop, required to anticipate that a car might strike his horse, and hence to keep him clear of the track when discharging his load. It was yet light, and the motorman had a clear, unobstructed view of the horse and wagon for at least three or four squares. The plaintiff had a right to assume that the motorman would be on the lookout for objects in front of him, as it was his duty to do, and have his car under proper control so that he could stop it to prevent a collision with a person or an object properly in use of the track. Under these circumstances, the plaintiff was justified in using the car tracks temporarily without incurring the charge of negligence. A contrary view of the right of the plaintiff would make him a trespasser, and deny to the public a right which it indubitably possesses in common with a street railway company.

A street car company has not the exclusive right to the use of a street on which it operates its road, nor has it such right to its own tracks. The streets of the municipalities of the state are for the use of the traveling public, and the right of the street railway company to use them is in common with the public. The street railway company and the public are alike liable for the negligent use of the street; each must exercise its rights thereon with care and a due regard for the rights of the other. While, for reasons which are apparent, a street car company must have a superior right to use its tracks in the operation of its road, yet this does not forbid their use by the public, but only requires that in their use the right of the public, under certain circumstances, shall be subordinate to that of the railway company. By placing himself or his horse and vehicle on the tracks of a street railway for any legitimate use of the street, the traveler does not become a trespasser, and will not become such unless he unreasonably and unnecessarily obstructs the company in the use of the tracks. These principles are well settled and have been recognized in the decisions of this court, among them being the very recent case of *Fenner v. Wilkes-Barre, etc., Traction Company*, 202 Pa. 365, 51 Atl. 1034.

The assignments of error are overruled, and the judgment is affirmed.

SPRING et al. v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

DEDICATION—PUBLIC SQUARE—ACCEPTANCE.

1. Commissioners appointed by the court laid out lands adjacent to a city in streets and blocks, one of which was shown on the plan filed as a public square. The owner thereof agreed that it should be so used if the city would accept the square and properly care for it. For 30 years the city allowed it to remain in the owner's control, who paid taxes for a large amount, and at the end of that period requested the city to take the square and repay her for the taxes and street improvements,

which the city thereupon did, and reimbursed her for her expenditures. Thereafter she executed a deed to the city for the square, with the condition that within 10 years it should cause the square to be improved as a public square. This condition was not fulfilled. *Held*, in ejectment by the heirs of the owner, that the deed and conditions therein were of no effect, as the transaction was completed when the dedication was accepted by the city.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary O'H. Spring and others against the city of Pittsburg. Verdict for defendant, and plaintiffs appeal. Affirmed.

Edwin W. Smith, Charles S. Crawford, J. H. Reed, George E. Shaw, and J. H. Beal, for appellants. W. A. Blakely and T. D. Carnahan, for appellee.

POTTER, J. On June 9, 1873, Mrs. Elizabeth F. Denny presented a petition to the common council of the city of Pittsburg. In this petition she set forth that the commissioners, who were appointed by the court of quarter sessions of Allegheny county, under the act of assembly of June 16, 1836, to lay out and report a plan of the territory adjacent to the then city of Pittsburg, and known as the city district, did, in their plan and report made to the court, reserve out of her land a block of ground between Twenty-Ninth and Thirtieth streets, to be appropriated and used as a public square under the name of "Snyder Square." This plan and report were finally approved on October 19, 1843. Mrs. Denny further states in her petition that she was satisfied, and consented at the time, to the said appropriation as a free gift to her native city, for the use, benefit, and comfort of its inhabitants, but that this consent was given on the condition that the public square should be accepted by the city and appropriately cared for as such. But for a period of some 30 years the city had not assumed possession and control of said square, but had permitted it to remain in her possession and control. During that period she had paid to the city in taxes and for the cost of street improvements a sum aggregating \$14,693.45. She therefore desired the city to say definitely whether or not it would accept this gift of land proffered so long before, and assume the obligation of putting and keeping it in good shape and condition. This petition was referred to the committee on city property, who afterwards reported that at a conference with the agent of Mrs. Denny terms were agreed upon as contained in a preamble and resolution, whose adoption they recommended, and which was duly passed by both branches of city councils upon June 30, 1873. The preamble recites the facts as set forth in the petition of Mrs. Denny, and recognizes her desire that the city take possession of said square and appropriate it to the uses for which it was dedicated. It also refers to her desire to

be reimbursed for the payments made by her for taxes and street improvements during the period which had elapsed since the date of the original dedication. By the terms of the resolution, the city accepts and assumes possession of said Snyder Square for the uses and purposes for which it was laid out and dedicated, and the controller is directed to issue a certificate for a warrant in favor of Elizabeth F. Denny for the sum of \$14,693.45.

The effect of this transaction was to place the city and Mrs. Denny in the same position as though the ground had been accepted at the date of the original dedication, and had been held for public use during the intervening time. It was only upon this basis that she could rightfully ask to be reimbursed for the amount paid out by her for taxes and street improvements.

It might well be held that this was all in affirmance of the original intent to dedicate at the time of the confirmation of the city district plan. Certainly if there had been an acceptance at that time by the city, Mrs. Denny would have been precluded from afterwards asserting any right incompatible with the purpose of the dedication. Be that as it may, whether the petition to councils in 1873 be considered as a new dedication, or simply as an affirmance of the prior offer to dedicate, we think that the terms and conditions of the acceptance are such, and such only, as are set out in the resolution of the city councils. The dedication was completed when it was accepted upon behalf of the public by the city councils. No particular formality is required to constitute a dedication. Any act or declaration which clearly expresses an intent to dedicate will amount to a dedication if accepted by or on behalf of the public.

Nearly one year after this action by the city councils accepting the dedication and assuming possession of Snyder Square Mrs. Denny executed a deed to the city of Pittsburgh for the said square, containing a condition that within the period of 10 years the city should cause the said square to be inclosed and improved as a public square. The contention of the plaintiffs is that all the conditions of this deed are binding upon the city, and by reason of a breach of the conditions the land has reverted to them. This deed was delivered to the city controller by the agent of Mrs. Denny, when he received the money appropriated to her, under the terms of the resolution of city councils, in reimbursement of the payment of taxes and street improvements. Why the deed was given to the controller does not appear. It would seem that it ought to have gone to the city solicitor, as the duty of examination and approving the deed would require technical knowledge of conveyancing, and therefore it should have been performed by the law officer of the city. But, whether accepted by the controller or

by the city solicitor, the duty performed in receiving the deed would be purely ministerial and administrative. The power of city councils to accept the dedication of land for public purposes, and to fix the conditions of acceptance, was not delegated to the city controller. Mrs. Denny was bound to know this, for the rule is well established that individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity.

The trial judge held that the deed was of no effect in this case. As stated by him in the charge, the transaction, in his view, was completed when the dedication was accepted by councils. He further points out that neither in preamble nor resolution is there any mention of these conditions, or of any time at which they are to be performed, and that the controller would have no power to bind the city or to accept the deed with such conditions. Under this view, there was nothing left in the case to support the claim of the plaintiffs that the title had reverted to them. It does not follow, however, that the city has any right to disregard the purposes for which this land was dedicated to public use. If the authorities are derelict in the performance of their duty in this respect, there are appropriate remedies which may be followed. It is enough for the purposes of this case to say that the conclusion reached by the court below was right.

The specifications of error are overruled, and the judgment is now affirmed.

HERRON v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—LIVE WIRE—NOTICE TO CITY—CONTRIBUTORY NEGLIGENCE.

1. In an action to recover for injuries sustained by a boy from contact with a live telephone wire used in the police service of a city, and which had fallen and had become charged from a feed wire of the electric railway, the case is for the jury where the break was known to the police within an hour after it occurred, and it was also known that the wire was in close proximity to other wires carrying dangerous currents of electricity.

2. In an action for injuries received by contact with a live telephone wire used by the police department, evidence of the ordinance and of rules of the police department as to the inspection of wires owned by the city is admissible.

3. Where a father, after leaving his home to go to work, saw a telephone wire on the pavement, and avoided it, it is a question for the jury, in an action for injuries to his son, who passed the same place on his way to school shortly after, whether the father was guilty of contributory negligence in not warning the son of the danger of contact with it.

Appeal from Court of Common Pleas, Allegheny County; Brown, Judge.

Action by Vincent Herron and Hugh Herron against the city of Pittsburgh. Judgment

for plaintiffs, and defendant appeals. Affirmed.

Plaintiff was injured by coming in contact with a police call wire which had broken and fallen to the street. The call wire was of itself harmless, but after falling it became charged with a heavy current of electricity from a feed wire of an electric railway. It appeared that about 8 o'clock on the morning of the accident the father of the plaintiff on his way to work saw the wire and carefully avoided it. He did not return to his home, which was a short way off, to warn his son. The boy was injured in the afternoon on his return from school. There was evidence that the police officials knew of the break in the wire within an hour after it occurred. The court admitted, under objection and exception, an ordinance of the city and rules of the police department relating to the inspection and use of the city wires.

The court charged in part as follows:

"While the call wire was harmless in itself, yet by its proximate relations to highly or heavily charged wires about it, or in close proximity to it, it might, by contact with such wires, become a source of great danger. Against such danger the city was bound to guard by a high degree of care. This is the rule of care, clearly stated, by the Supreme Court in *Fitzgerald v. Edison Electric Illuminating Company*, 200 Pa. 540 [50 Atl. 161, 86 Am. St. Rep. 732]. Mr. Justice Mitchell, delivering the opinion, says: 'Wire charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to the ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however (in this case the city), which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them. The duty is not only to make the wire safe, but to keep it so by constant oversight and repair. The case, in this aspect, is analogous to an action against a municipal corporation for an injury from a defective highway. The plaintiff is not bound to show direct and express notice of the defect (to the city in this case), but may show that it has existed for such a period that it ought to have been known to the authorities (in this case the city of Pittsburgh).'

"This raises a question for the jury, viz., as to whether the city, by the exercise of proper care, under all circumstances, ought to have known of this highly dangerous condition upon the pavement. If it ought to have known; if there was such a reasonable time, or, rather, if such a reasonable time elapsed, within which the city, by the exer-

cise of proper care, under the circumstances, would have discovered, or ought to have discovered, its dangerous condition on the highway—then the city was guilty of want of care, and is responsible for the damages, at least to the little boy, and perhaps to the father; but that is further along.

"Not only was it the duty of the city to exercise a high degree of care in the situation, by ordinance (and entirely outside of the ordinance that same duty remained), but in the exercise of that care it had methods and means, and it was bound to secure the reasonable method and means by which the proper inspection could be made. It had inspectors, or it was within the power of the city to have inspectors, to make proper inspection at proper times, having due regard to the locality and situation. That is, if a dangerous condition might arise in a section of the town that was very slightly populated, where perhaps few passengers would go by during the day, a less degree of care, in a sense as to time perhaps, would be required there than in a populous center, where it might be that millmen or other persons in large numbers frequently passed (as in this case) a point of danger."

Defendant presented these points:

"(1) That under the pleadings and evidence in this case the verdict should be for the defendant. Answer. Refused. It is for the jury to say whether it is or not.

"Notice to a police or lineman employed by the city of Pittsburgh that a telephone wire is down upon the street of the city of Pittsburgh is not notice to the city. Answer. Refused, under the evidence and testimony in this case.

"Before the jury can find the defendant guilty of negligence, it must be satisfied by the weight of the evidence that its negligence was the proximate cause of the injury. Answer. Affirmed, and the proximate cause of the injury, as we instruct you, would be the failure of the city, after the lapse of a reasonable time, to remedy that which it was its duty to remedy in order to prevent injury to persons passing along the sidewalk."

Verdict and judgment for Vincent Herron for \$6,364, and for Hugh Herron for \$864.

W. A. Blakeley and Thomas D. Carnahan, for appellant. Joseph Howley and W. A. Hudson, for appellee.

MITCHELL, J. It is the duty of all parties using a highly dangerous agent to use care commensurate with the danger, in order to prevent injury to persons or property exposed to its influence. *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. Cities are not excepted from the rule, and the fact that the agent is used or supervised under the police power does not excuse negligence in such use. *Mooney v. Luzerne Borough*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811. The cases deciding that municipal corporations are not

liable for errors of judgment or discretion rest on entirely different principles.

The wire in this case was a police call wire, and broke as early as 8 o'clock in the morning. The fact of the break was known to the police officials presumably at or near that time, and according to the evidence certainly as early as 9 o'clock. The wire was very lightly charged, and not in itself dangerous, but it was a naked wire, and strung on poles in close proximity to other wires, some of which carried strong and dangerous currents of electricity. The fact of the break, therefore, was notice that it might become dangerous, and imposed the duty of examination. Whether that duty was properly met under all the circumstances, the lapse of time, the condition and population of the neighborhood, the urgency of the possible danger, etc., was a question for the jury.

The evidence as to the ordinance, police regulations, etc., though not important, was not incompetent. It merely tended to make more clear and definite the responsibility for due care which existed outside of them.

The father saw the wire on the pavement as he went to work in the morning, and knew that his son would shortly pass the same place on his way to school. He testified that he avoided stepping on the wire, though he did not know whether it was dangerous or not. This was the act of a prudent man. Whether he ought further to have returned to his house, which was close at hand, to warn his son, was not so clear a duty that the court could declare it as a matter of law. It was a question of reasonable prudence or contributory negligence which was properly left to the jury.

Judgment affirmed.

IN RE MORROW'S ESTATE. (No. 1.)
(Supreme Court of Pennsylvania. Jan. 5,
1903.)

WILL—EXECUTION—VALIDITY—ALTERATION.

1. All of the granting part of a will was on a page with a blank space of two lines at the foot of the page. On the reverse side was written the usual attestation clause, followed by the words, "Witness my hand and seal," and by the signature of the testator. *Held*, that it was fully executed.

2. Where an alteration was in the handwriting of the scrivener, and the testatrix subsequently republished the will by a codicil, and the subscribing witness testified that the alteration was made at the suggestion of the testatrix before execution, the will is valid.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Nancy A. Morrow. From a decree dismissing the appeal from the register of wills, Frank Lewis Bridge appeals. Affirmed.

The following is the opinion of the court below:

There are two questions involved in this appeal: (1) Whether the fact of the presence of

a blank space of two lines at the foot of the first page of the paper propounded renders it inoperative as a will; and (2) whether there has been sufficient proof of execution—especially in view of an erasure appearing on the face of the original will. The facts are these:

"The paper propounded consists of one sheet of foolscap, on the obverse and reverse sides of which are written a will dated 1894 and a codicil dated 1900. The will begins at the top of the obverse page, 'I, Mrs. Nancy A. Morrow, * * * do make this my last will and testament in the manner following, * * *' and continues in consecutive paragraphs to within two lines of the bottom, where there is a blank without signature; but at the top of the reverse page there is an attestation clause, which begins thus: 'Signed, sealed and declared by the above-named Nancy A. Morrow as her last will and testament; * * * and following this is the signature 'Nancy A. Morrow,' and 'Witnesses, America W. Wallace and I. N. Forney.' Miss Wallace testified that the will was, at the request of Mrs. Morrow, written by Mr. Forney, and each paragraph read to her as written, and again read as a whole, before it was signed, and that Mrs. Morrow signed in their presence; and that they signed as witnesses at her request, and in her presence, on the day of the will's date. Mr. Forney, the scrivener and other witness, is dead, but his signature was proved by ample testimony. There also appears in the face of the will an erasure, and the word 'Pennsylvania' written over it. Miss Wallace said the word 'Allegheny' was erased and 'Pennsylvania' written at the instance of Mrs. Morrow, before execution, so that the name of a legatee should read, 'The Reformed Episcopal Church of Pennsylvania,' and Prof. Farrar testified that the paper was in this condition when the codicil was signed. The evidence leaves no room for doubt, and the court accordingly finds, that the paper as now propounded was 'signed, sealed, and declared by the above-named Nancy A. Morrow, as her last will and testament.' The codicil follows on the same page testator's signature, and runs over on the next page. Its execution is admitted. Mrs. Morrow died December 21, 1900.

"The paper propounded here bears on its face in form and contents the evidence of its own integrity. It is written on the same leaf, and in such manner as would commonly be understood as consecutive. It begins with a declaration of purpose, which raises a presumption of intended compliance with statutory requirements in the making of wills, and therefore that dispositive and attestation clauses and signature at the end would follow. The testatrix declares that 'I, Mrs. Nancy A. Morrow, * * * do make this my last will and testament in the manner following,' and then in fact follow dispositive clauses on the same page. The absence of

attestation clause and signature at the foot of the page naturally leads to inquiry as to the completion of her purpose, and this is found on the reverse side of the leaf. The facts that an attestation clause and signature were written on the same leaf as the declaratory and dispositive portion of the will; that they were written at the top of the reverse page, and purport to have been 'signed, sealed, and declared by the above-named Nancy A. Morrow as her last will and testament,' leave no room for doubt that they had reference to, and were the completion of, the will begun on the obverse page of the leaf. 'The above-named Nancy A. Morrow' can only be that Nancy A. Morrow whose name appears in the beginning, and whose signature follows the attestation clause as testatrix. Identity of name implies identity of person. The attestation clause is in the position in which the majority of persons would expect to find it, and would be vain and useless without this antecedent. Who that writes or reads a letter does not involuntarily turn over leaf after leaf, seeking the continuation, until he comes to the signature? How many are there who, from force of habit, or prudence, or economy, or necessity, have written wills on both sides of a leaf of foolscap, and how many titles have passed, without a thought of invalidity? After all, it is the common understanding and practice which must determine questions of this kind. There have been hundreds of wills written in circumstances of necessity beyond professional aid, and in which the application of technical rules would produce hardships not to be endured.

"While leaving a blank at the foot of the first page was imprudent, in that it afforded an opportunity for fraudulent practice, it certainly would not of itself invalidate the will. 'The general principle,' said Mr. Justice Clark in *Baker's App.*, 107 Pa. 381, 52 Am. Rep. 478, 'has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the facts clearly require. In writing a will upon pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio. There is no law which blinds him in this respect. He may begin upon the fourth page and conclude upon the first, or he may commence on the first, continue upon the third, and conclude upon the second; but in whatever order of pages it may be written however, it is to be read * * * according to the internal sense, the coherence or adaptation of parts.' It was accordingly held in *Ginder v. Far-num*, 10 Pa. 98, that where a will is written on several sheets of paper fastened together with a string, proof by two witnesses of the signature of the testator at the end thereof is sufficient. So, in *Wikoff's App.*, 15 Pa. 281, 53 Am. Dec. 597, it was held that a will

written on distinct pieces of paper, in whose arrangement there was even some confusion, is good if they are connected by their internal sense. So, where the name of the legatee was written, not in the body of a codicil, but was indorsed on the envelope in which the codicil had been placed, the two together constitute a valid will. *Fosselman v. Elder*, 98 Pa. 159. So where, as here, the whole of the disposing portion of a will was written on the first page of a double sheet of foolscap, the second and third pages were blank, and the attestation clause with the signatures of the testator and witnesses were on the fourth page, it was held there was a good execution. In *re Goods of Fuller*, L. R. Probate (1892) 377. 'An instrument is signed at the end,' said Mr. Justice Leonard in *In re Gilman*, 38 Barbour, 364, 'when nothing intervenes between the instrument and the subscription. Who shall undertake judicially to say that the subscription shall be one-eighth of an inch, half an inch, two inches, or ten inches from the last line of the instrument? The distance from the last line has not been fixed by statute. The place named by the statute is the end.' The result of the authorities is summed up by Underhill on Wills, § 185, by the statement that the interposition of a blank space between the dispositive portion of the will and the testator's signature is never material. The test of integrity of the will is, to use Mr. Justice Clark's phrase, the 'internal sense'; and as has been shown, there is enough on the face of this will to stand the test.

"2. It was said in *Wikoff's App.*, *supra*, and repeated in *Linnard's App.*, 93 Pa. 313, 39 Am. Rep. 753, that interlineations made in testatrix's handwriting are presumed to have been made at or before the time which the will was prepared for the final act. Liberality of construction in this respect is shown in the extension of the presumption to interlineations in pencil in the later case of *Tomlinson's Est.*, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637, and there is just as much reason for its application where the whole body of the will is in the scrivener's handwriting. It was probably for this reason that the scrivener's testimony was admitted without question in *Baker's App.* This testatrix having herself trusted the scrivener to write her will, it would be strange, indeed, if those claiming under her could discredit her judgment, and shift the burden of proof on proponents by mere assumption. This presumption is strengthened, if not made conclusive, by the republication of the will long after the scrivener's death; for, being in the scrivener's handwriting, the will must have been in the condition which it now is, with the erasure and superscription appearing on its face, when the republication took place, and therefore with testatrix's knowledge and approbation. The presumption was further strengthened by the direct testimony of Professor Farrar that the will was in the same

condition when the codicil was made as it is now in respect of erasure and the superscription. It was urged in Linnard's App., supra, that as a matter of fact the alteration there was not made before the original paper was signed; but the court said that it did not follow from this that they were not made before the last or some of the preceding codicils were executed. 'Indeed, the fair inference from the paper itself,' said Mr. Justice Sterrett, 'would seem to be that they were made before the second codicil. As has already been observed, the clause stricken out of the first codicil, before it was completed, refers to the canceled legacy in the second item of the original will, so that it may be fairly inferred that this was done before the testatrix signed what now stands as the first codicil; and it is quite probable that the alterations in the original paper were all made at the same time. But, however that may be, the presumption is that she made them before she affixed her name to the last codicil. Her signature to that, having been duly proved, should, in the absence of evidence to the contrary, be regarded as her final act.' But, in addition to all this, the testimony of the surviving witness leaves no room for doubt that the erasure and superscription thereon were made at Mrs. Morrow's suggestion, before execution.

"3. The suggestion of defective proof of execution is also without merit. The surviving witness explained very fully and intelligently the circumstances attending the execution, and this, with a clear proof of the handwriting of the deceased witness, filled the statutory requirement. If more be required, it may be found in the admission of the execution of the codicil, which amounted to a republication of the original will.

"It follows: (1) That the blank space in question is immaterial in this contest; (2) that on presumption and direct proof the erasure was made before execution of the will; (3) that proof of execution was in compliance with the statutory requirement; and (4) that consequently the appeal from probate must be dismissed."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Morton Hunter, W. A. Hudson, and Joseph Howley, for appellant. Frank W. Smith, James S. Young, and William H. Dodds, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below.

WILLIAMS v. CLARK.

(Supreme Court of Pennsylvania. Jan. 15, 1903.)

INJURY TO SERVANT—QUESTION FOR JURY—ORDERS OF MASTER.

1. In an action by an employé for personal injuries it appeared that while tearing down a furnace he was injured by a plate falling upon

him; that just prior to the accident plaintiff suggested to his employer that the plate should be taken down before he picked the brick out of the furnace, but defendant told him that he was looking after the plates, and that they were all right. Defendant's attention was called to the danger by other persons. The work in which plaintiff was engaged had no connection with the fall of the plate. Held, that the question of plaintiff's contributory negligence and defendant's negligence was for the jury.

2. In an action by a servant for personal injuries, if the evidence shows that the master gave positive orders to go on with the work under perilous circumstances, to which the servant had called the master's attention, the latter may recover for injuries received if the work was not inevitably dangerous.

Appeal from Court of Common Pleas, Allegheny County.

Action by W. D. Williams, administrator of John Reese, deceased, against Frank Clark. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

C. C. Dickey, George Shiras, 3d, and W. K. Shiras, for appellant. F. C. McGirr, L. P. Stone, and John Marron, for appellee.

MESTREZAT, J. This case was here in 1900 (198 Pa. 312, 47 Atl. 994) on an appeal by the plaintiff from a judgment of nonsuit granted by the court below on the ground that the plaintiff's negligence contributed to his injuries. We then examined the testimony very carefully, and concluded that the plaintiff's alleged negligence was a question for the jury, and not for the court. The judgment was reversed, and a new venire awarded. The case has again been tried, and, resulting in a verdict and judgment for the plaintiff, the defendant has appealed. The appellant now contends that the court below "undertook itself to declare what constituted negligence on the part of the defendant," and withdrew that question from the jury. It is further claimed that the court committed error in the answers to appellant's requests for instruction.

An examination of the charge clearly refutes the allegation that the learned trial judge usurped the functions of the jury in determining the facts of the case, or in declaring what constituted negligence on the part of the defendant. After referring briefly to some of the undisputed facts, the court in the beginning of his charges said: "The question, in the first place, is whether or not the defendant is liable, under the testimony in the case, for that accident; and, if so, whether or not the plaintiff himself, by reason of his careless work, or undertaking work in a dangerous position, so manifestly dangerous as to be apparent to him, is precluded, notwithstanding there was negligence on the part of the defendant, by what we call 'contributory negligence,' from recovering in this case." Again, the court says:

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 782.

"With reference to the question of fact in the case, you will have to determine it as you are satisfied the weight of the testimony may be." The excerpts from the charge complained of in the assignments, read in connection with these and other similar expressions in the charge, show that the learned judge submitted to the jury the question of the defendant's negligence as well as the plaintiff's contributory negligence.

We think the defendant's negligence is apparent from the testimony, and that it must have been so regarded on the trial of the case. The principal question for the determination of the jury was the alleged negligence of the plaintiff. When the case was here on the former appeal, and the controlling question was the plaintiff's negligence, it was said: "We think the facts in this case bring it within the well-recognized rules laid down in the text-books and in our own decisions. The true rule in this as in all other cases is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous." The rule thus announced was adopted and followed by the court below on the trial now being reviewed. Under this view of the law the trial judge submitted to the jury to determine from the testimony the negligence of the plaintiff.

There was no error in the answers to defendant's points. Favorable answers would have withdrawn the case or the determination of some of the facts from the jury. We gave this case careful consideration when it was here before on substantially the same testimony on part of the plaintiff, and held, against the defendant's contention, that the plaintiff's negligence was for the jury. In this appeal we are asked practically to review and reconsider our former decision, and to hold that the court below erred in not allowing the defendant's first point that, "under all the evidence, the plaintiff is not entitled to recover." Notwithstanding the able argument of the appellant's counsel, we are not convinced of our error, nor of the necessity of a further discussion of the questions raised here and determined on the former appeal.

The first assignment alleges error in admitting in evidence on the present trial the

deposition of Dr. Brooks read on the former trial of the case. As this assignment is in plain violation of a rule of this court, we cannot consider it.

The assignments of error are overruled, and the judgment is affirmed.

In re PITTSBURG WAGON WORKS' ESTATE.

Appeal of KOUNTZ.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

JOINT-STOCK ASSOCIATION—PERSONALITY—EXECUTION.

1. An unincorporated joint-stock association was organized to buy real estate, the title to which was held in trust for the association. The interest of each member was to be determined by the number of shares which he held, which he could sell only by transferring on the books of the company. *Held*, that the real estate of the association was personal property, and the interest of a member could not be sold under an execution as real estate.

Appeal from Court of Common Pleas, Allegheny County.

In the matter of the Pittsburg Wagon Works' Estate. From a decree dismissing exceptions to auditor's report, W. J. Kountz appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

D. F. Patterson and J. Charles Dicken, for appellant. William A. Sipe, for appellee.

MESTREZAT, J. The very full, clear, and able report of the learned auditor, in which he considers all the questions involved in this controversy, relieves us of any extended discussion of the case. W. J. Kountz and some other stockholders of "the Pittsburg Wagon Works," a corporation engaged in the manufacture of wagons and agricultural implements, formed themselves into an association with a capital stock of \$30,000, for the purpose of purchasing a claim against the corporation amounting to \$37,500 in mortgage held by John R. McCune et al. On October 30, 1883, the association adopted by-laws, the first section of which provides that "this company shall be called the 'Pittsburg Wagon Works Association.' The capital stock shall consist of \$30,650, and shall be divided into 613 shares of the par value of \$50.00 each." The by-laws further provide that "the legal right to all property of this company shall be held by one person," and that the title shall be for the time being in his own proper name, with the addition thereto of "trustee of the Pittsburg Wagon Works Association," in trust for the use, benefit, and behoof of the company. A two-thirds vote of the shares of the stockholders is necessary to authorize the trustee to sell, assign, transfer, or encumber the property. Section 3 further pro-

vides as follows: "The stock shares and interest of and in this company shall be assignable and transferable by the holder thereof in person or by attorney only on the books of this company, which books the secretary shall cause to be kept, showing the names of stockholders and the respective amount of stock held by each—in the presence of the president or secretary—and upon such transfer the assignee of such share or shares, shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto."

The association purchased the mortgage against the real estate of the Pittsburgh Wagon Works, and by proceedings thereon sold the same at sheriff's sale in March, 1880, the association becoming the purchaser, and the title being taken in the name of the trustee. By virtue of an execution at No. 207, December term, 1883, issued on a judgment against W. J. Kountz, his interest in said real estate was sold on November 30, 1883, and Peninah W. Kountz, the appellant's testator, became the purchaser. It is claimed that the mortgaged premises were held by the association as real estate, and that W. J. Kountz's interest therein passed to Mrs. Kountz by virtue of the levy and sale on the execution. The appellant therefore contends that he is entitled to the interest of W. J. Kountz in the association, being 230 shares of the capital stock thereof, and to that extent to participate in the proceeds of this real estate sold by the trustee under the Price act.

The learned auditor and court below correctly held that the interest of W. J. Kountz was personality, and not real estate, and that the levy on the execution created no lien on the real estate held by the association, and that the sale by the sheriff vested no interest in the real estate in Mrs. Kountz. The association was formed for the purpose of purchasing the mortgage against the Pittsburgh Wagon Works. Having secured the mortgage, the association was compelled to enforce the payment of it by a sale and purchase of the real estate. The by-laws adopted October 30, 1883, fixed the character of the real estate held by the association. As we have seen, they require the title of the association's property to be in the name of the trustee, and not in the names of the individual members. The interest of any member is determined by the number of shares he holds in the capital stock of the company. He could only dispose of his interest by transferring on the books of the company, in the presence of the president or secretary, his shares of stock to the purchaser, who should "thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto." Such was the nature and character of the interest of W. J. Kountz in the Pittsburgh Wagon Works Association in

November, 1883, and it is clear that it was not subject to levy and sale as real estate.

The auditor and court below awarded the Spiking and Chadwick interests (65 shares) in the association to the appellant, but he complains in his first assignment that the auditor erred in finding "that it has not been shown by clear and satisfactory evidence that Mrs. Peninah W. Kountz had, at the time of the purchase from W. D. Spiking, or at the time of the purchase from Joseph Chadwick, * * * a separate estate out of which she made said purchases, or any of them." This finding becomes immaterial in view of the fact that we have this day quashed the appeal at No. 183, October term, 1902, which assailed the correctness of the auditor in holding that appellant was entitled to these interests in the association.

We have held that Mrs. Kountz took no title to W. J. Kountz's interest in the real estate of the association or in the association itself by virtue of the sheriff's sale, and it follows that she has no standing to contest the right to said interest in the association of John Phillips, trustee of the Manchester Savings Bank, to whom it was awarded by the auditor. She, having no right to the interest, is not in a position to question the disposition of it by the auditor, and hence the sixth assignment of error cannot be sustained.

Under the testimony in the case, we are not convinced that there was error in allowing the credits claimed by the accountant for commission and for professional services. The interest which has accrued on the fund for distribution should be distributed in proportion to the shares in the association held by the respective claimants.

The assignments are overruled, and the decree is affirmed.

ENRIGHT et al. v. PITTSBURG JUNCTION R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO CHILD—NEGLIGENCE OF PARENT—TRIAL—MISCONDUCT OF PARTIES—CONTRADICTORY STATEMENTS.

1. A father is not guilty of contributory negligence in allowing his son, 11 years old, to go on the street alone on Sunday, and to stroll along railroad tracks a block and a half from his home.

2. Where the evidence in an action against a railroad company for personal injuries showed that an agent of the railway had paid certain moneys to boys, who were the only witnesses of the accident, and that counsel for plaintiff was prevented from speaking to the boys in court by defendant's agent, and the agent testified that the money was given to the boys for car fares and luncheons, the court properly left it to the jury to determine whether the payments were legitimate, or made for the purpose of affecting the evidence of the boys.

¶ 1. See Negligence, vol. 27, Cent. Dig. §§ 152, 159, 160.

3. Where a boy's testimony as to an accident in which he received the personal injuries sued for was different from his statements in the hospital at a time when one leg had been amputated, and the other was badly lacerated, and his head was cut open, it was not error to instruct that, if he was suffering such pain at the time of the statements as not to know what he was talking about, such fact should be considered by the jury in determining the question of his credibility.

Appeal from Court of Common Pleas, Allegheny County; Evans, Judge.

Action by Patrick Enright and Joseph Enright against the Pittsburg Junction Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The plaintiff, a boy about 11 years old, was injured on the afternoon of Sunday, September 5, 1897, while on a moving freight car. The conflicting testimony as to the circumstances of the accident is stated in the charge as follows:

"The plaintiff, Joseph Enright, with two other boys, McCarthy and Reardon, on the day of this accident, boarded a train of the Baltimore & Ohio Railroad Company which was being transported across on the tracks of this defendant company, for the purpose of going over to Schenley Park; and, in getting off the train while it was in motion, this plaintiff was injured.

"The important question for you to determine, first, is the circumstances surrounding the injury—how he came to get off the train. If he got off the train of his own motion, then he is not entitled to recover. He alleges, however, that he did not intend to get off the train, but that a brakeman on the train flourished his brake stick and yelled at him to get off, and, through fear of the brakeman, he jumped off the train and was injured. Now, that will be the first question of fact which will present itself to you to determine; and it is for you to determine, under the evidence in this case, whether it was through fear of injury to him by the brakeman, or the railroad detective whom the brakeman had called, as he said, that caused the boy to jump off while the train was in motion, or whether he got off of his own accord. You have heard the testimony on that subject, and, so far as the direct evidence as to the fact is concerned, the boy's testimony is uncorroborated. He testifies to that state of facts himself, and he is not corroborated directly by any other witness. He is contradicted directly by the two boys that were on with him, who testify that they heard no brakeman, and saw no brakeman swing a stick. From the testimony of the plaintiff, it is hardly conceivable that this could have happened, and the other two boys not know it. If I understand his testimony correctly, the three were on the car when the brakeman commenced to holler. He says, 'He hollered at us.' I infer from that that he means that the three were on the car when the brakeman commenced hollering;

and if that be true, and he heard it when they were all sitting together, it is not conceivable that the others did not hear it or see it. Therefore there does not appear to be any way of reconciling the testimony of these three boys. Either this plaintiff is telling us what is not true, or the other two are telling what is not true. At least, that is the way it looks to the court; and it is for you to determine which of these two stories is the correct one, because, as I stated before, the plaintiff's case hinges on the fact of whether this brakeman called out to him, or not. It is for you to pass upon the credibility of these witnesses. The plaintiff Joseph Enright is an interested witness, of course, because upon his testimony will depend his recovery in this case. You pass upon the credibility of the other two witnesses, and, in doing so, you take into consideration the testimony which has been offered in evidence to affect their credibility. One of them—I think it is Reardon, the larger of the two boys—has been contradicted by three witnesses. Of course, those three witnesses are the plaintiff Joseph Enright and the father and mother of the plaintiff—in fact, both plaintiffs and the mother; all interested. They have contradicted him directly as to assertions which he made very soon after this accident—within, I suppose, two or three months after this accident happened—that the brakeman did frighten him off the car. You take that into consideration.

"Another matter has come into the case, which you have a right to consider, as affecting the credibility of these two boys, and that is the fact that an agent for the defendant company paid them money at different times pending the trial of this case. You have heard his explanation of that; and while ordinarily it is a highly improper matter to pay a witness money, it is not improper, under certain circumstances, if the services of the witness are wanted, to pay his ordinary expenses. To illustrate what I mean: The testimony of the agent of the defendant company was that the counsel of the defendant company wanted these two boys in his office to make an affidavit. They had a right, of course, to demand their expenses to and from the office, and it was legitimate for him to pay it. If that and similar purposes is all that this money was paid for, then that was a perfectly legitimate transaction. But that is for you to determine. You take the fact into consideration that these boys were paid money at different times pending the trial of this case; and, taking the evidence, you will determine whether it was a legitimate payment, or whether it was a payment for the purpose of influencing their testimony in this case. If it was for the latter, of course, it would affect their credibility. Of course, if you believe that they were telling the truth, then, no matter how improper the payment might have been, it should not affect the verdict in

this case. You only consider that to affect their credibility—as to whether that was paid for the purpose of influencing them, and did influence them, in their testimony here.

"The plaintiff Joseph Enright is further contradicted by the testimony of Robinson as to an interview that he had with him a few days after the accident, and by Mr. Howells, the superintendent of the West Penn Hospital. Now, it is alleged that at that time (a few days after the accident) the boy was suffering pain; and you take that into consideration, not, as suggested by counsel for plaintiffs, because it was an outrage—a hard-hearted act on the part of the agent—because it does not matter how hard-hearted the agent might have been. That cannot affect the truth. But you take into consideration the time following the accident—as to whether the boy was in mental condition, or not, to tell it at that time. If he was, then, no matter how hard-hearted it might have been on the part of the defendant's agent, if he was in condition to tell the truth, and knew what he was saying, then the evidence of Robinson goes to affect his credibility. If he was suffering such pain at that time as to not know what he was talking about, or as to affect his knowledge of the subject, then you take that into consideration, as to whether this interview does affect his credibility, or not, and to what extent. All these things you consider, gentlemen, in determining the question as to which of these two stories you believe, because as I have said—and I am still of that opinion—you have to find that either this plaintiff, Joseph Enright, is telling the truth, and that the other two boys are willfully telling a falsehood, or else that he is telling a falsehood, and the other boys are telling the truth.

"When you come to consider the case of this father, you have one other matter to consider besides the question as to whether this accident was occasioned by the employes of this defendant company, and that is as to whether the parents of this child were negligent in permitting him to run into places of danger such as testified to in this case. If you believe that they did not take proper care of him, and allowed him to run as he pleased, and get into places of danger, then the father cannot recover. To illustrate what I mean: If this boy had been of mature years, he could not recover in this case, because it would be contributory negligence on his part to get upon a train such as this was, even if the train was standing still, and much more so if the train was moving. In his own case, it is only because he was a boy that he is entitled to recover. Now, it is the duty of the parents to take proper care of their children, and use all reasonable diligence to see that they do not get into places of danger. This boy had been, I think he said, two hours and a half, playing down near the tracks of this railroad. If you think that that was proper care for a parent to ex-

ercise over a child of this age, then, if you believe the accident happened as narrated by the boy, the father would be entitled to recover. If you believe that this was not proper care to exercise by a parent over a child, then he would be guilty of contributory negligence, and would not be entitled to recover."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Johns McCleave, for appellant. J. S. Ferguson, E. G. Ferguson, Horace J. Miller, and T. T. Donehoo, for appellees.

BROWN, J. When this case was here before (198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 795), on appeal from the refusal to take off a compulsory nonsuit, we held, in reversing the court below, that under the facts proven the defendant company was negligent. On this appeal the right of Joseph Enright, the minor, to recover, is not questioned, if his testimony is to be believed; but we are asked to reverse the judgment in favor of the father on the ground of his contributory negligence, and to send the case back for another trial on the boy's claim for alleged errors in the charge of the trial judge.

The contributory negligence of the father, which appellant insists is a bar to his right to recover, is his carelessness in allowing his boy to be out on the street alone, and to stroll away from home, a square and a half, with young companions, down along the railroad tracks, where they jumped on a moving train, and the boy was hurt in getting off. He was 10 years and 6 or 8 months old on the day of the accident, which we judicially notice was Sunday. It was a day of rest, in the late summer or very early fall, when the temptation to be out of doors is great. With all ordinary business suspended, and the dangers incident to children on the street greatly diminished, the solicitude of the most anxious parents for the welfare of their little ones, longing to be out, would be naturally relaxed on the Sabbath, and what might be negligence by them on any other day of the week might not be on this. But without regard to the day, ought the court below to have declared the father guilty of contributory negligence, as a matter of law? The boy was not a little, prattling child, of so tender years that his very presence on the street, away from home, unattended by any one, was in itself evidence of the carelessness and neglect of his parents. He was nearly 11 years old—soon to reach the age of discretion. Many no older than he earn their own living, and help to support needy or helpless parents. In the healthful development of children, thousands of the age of this boy are daily seen on the streets of towns and cities, squares away from home and unattended, without a thought in the mind of the passer-by that their parents are negligent; and even if, as here, they do stroll or wander into places of danger, and are hurt in their search

for amusement, the law could not declare the parents careless without offending its own humanity. What was said under the facts in *Philadelphia & Reading Railroad Co. v. Long*, 75 Pa. 257, may be aptly repealed here: "The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." In his charge to the jury, the learned trial judge said: "Now, it is the duty of parents to take proper care of their children, and use all reasonable diligence to see that they do not get into places of danger;" and he submitted it to them to determine whether, under the facts in the case, the father had been negligent. To more than this the appellant was not entitled.

The second assignment relates to what the court said in its charge about money that had been paid by an agent of the defendant company to the two boys who were on the car with Enright. McCarthy—one of them—testified that the agent had called to see him and given him money three or four times, and that it had been given to him voluntarily, as he had not asked for it. The other boy—Reardon—said the agent had given him money two or three times. In explanation, the agent testified: "I gave them fifty or sixty cents, and may be seventy-five cents or a dollar (I forget the amounts), to come into town to see the attorney once, and attend the trial once, and to get them their dinners. Once they came in to make an affidavit to their two statements. I gave them money for their fare, and also gave them money for their dinners. I also paid their fare and paid for their dinners. This money was for that. They were poor, they said, and did not have anything. That is the reason the money was given." These two boys were subpoenaed by the plaintiff, as well as by the defendant, at the first trial. When they came into court they were in charge of Robinson, the agent who had paid them the money; and Reardon testified that, when the attorneys for the plaintiff tried to speak to them, they were ordered not to do so by the agent who had them in charge. Robinson admits this in his testimony. On the second trial, when counsel for the plaintiff attempted to speak to them in court, he was stopped by the railroad detective, and not allowed to have any communication with them. Counsel for the appellee admits that he commented on these matters in his address to the jury, and it was not improper for him to do so, for the jury could have fairly concluded that the payments were made for a purpose which was effected. In commenting upon this feature of the case, the court left it to them to determine wheth-

er the payments had been legitimately made, or for the purpose of influencing the testimony of the boys. The portion of the charge objected to is: "Another matter has come into the case, which you have a right to consider, as affecting the credibility of these two boys, and that is the fact that an agent for the defendant company paid them money at different times pending the trial of this case. You have heard his explanation of that; and, while ordinarily it is a highly improper matter to pay a witness money, it is not improper, under certain circumstances, if the services of the witness are wanted, to pay his ordinary expenses. To illustrate what I mean: The testimony of the agent of the defendant company was that the counsel of the defendant company wanted these two boys in his office to make an affidavit. They had a right, of course, to demand their expenses to and from the office, and it was legitimate for him to pay it. If that and similar purposes is all that this money was paid for, then that was a perfectly legitimate transaction. But that is for you to determine. You take the fact into consideration that these boys were paid money at different times pending the trial of this case; and, taking the evidence, you will determine whether it was a legitimate payment, or whether it was a payment for the purpose of influencing their testimony in this case. If it was for the latter, of course it would affect their credibility." In this there was no error.

The statement of the occurrence given by the injured boy, when in the hospital, to Robinson, the agent already referred to, differed very materially, according to that witness and Howell, the superintendent of the institution, from his testimony on the trial. When he was interviewed in the hospital, on the second day after the accident, as nearly as Robinson could fix the date, he was lying on a cot, covered up. One leg had been amputated, the other was badly lacerated, his head was cut open, and it is safe to assume he was in great suffering. Under these conditions, the representative of the company called upon this boy to learn from him his version of the accident. Older heads might not have been able to remember, and no just complaint can be made of that portion of the charge in which, after directing attention to the inconsistent statements alleged to have been made by the boy, the jury were told: "If he was suffering such pain at that time as to not know what he was talking about, or as to affect his knowledge of the subject, then you take that into consideration, as to whether this interview does affect his credibility, or not, and to what extent."

The assignments are dismissed and the judgments are affirmed.

EVANS v. LINCOLN CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RENT—REDUCTION—CONSIDERATION—COVENANTS OF LEASE.

1. Where a landlord claimed full rental under his lease in bankruptcy proceedings against his tenant, it could be shown that he had agreed to reduce the rent, and had accepted installments at the reduced rates, based on considerations advantageous to him.

2. A covenant to pay water rent is a covenant to pay to the party entitled to receive the same, and cannot be enforced by distress.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Action by William D. Evans, trustee in bankruptcy of Jesse Miller Lee, against the Lincoln Company. Judgment for plaintiff. Defendant appeals. Affirmed.

At the trial it appeared that the defendant was the former landlord of the bankrupt, and that it had bought from the receiver in bankruptcy the goods of the lessee. The leased premises had been used as a hotel. Defendant presented these points: "(1) That under the pleadings and evidence the verdict must be for the defendant. Answer. Refused. (2) That, taking the plaintiff's own case, the defendant is entitled to a credit on the purchase price of the furniture, etc., of the sum of \$1,470.13, with interest from January 1, 1899, to June 1, 1899; the further sum of \$1,800 for unpaid rent notes, and the rent for the months of January, February, March, April, May, June, July, and August of 1899, at \$2,083.33½ a month. Answer. Refused. (3) That the defendant is further entitled to a credit of \$2,999.99, water rent paid. Answer. Refused." Verdict and judgment for plaintiff for \$2,056.91.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. B. Adair and William M. Hall, Jr., for appellant. Edward B. Vaill and E. Y. Breck, for appellee.

FELL, J. The issue was to determine the amount of a landlord's preferred claim for rent against the proceeds of goods sold by the receiver in bankruptcy of the tenant. The defendant, the Lincoln Company, was the lessor, and purchased the goods from the trustee in bankruptcy under an agreement that it should be credited with the amount of its preferred claim for rent, and should be required to pay only the difference between it and the price of the goods. At the trial there were three questions raised touching the amount of rent due: (1) Whether an agreement to reduce the rent, made during the term, was binding on the lessor; (2) whether from the claim for rent there should be deducted the amount received from reletting by the landlord for the remainder of the term; (3) whether the amount of the water rent, payable under the lease by the

tenant, but not paid by him, should be included in the landlord's preferred claim.

The property leased was a large and entirely new hotel in Pittsburg. The rent reserved was \$31,000 for the first year, and this was to be increased yearly until it reached \$35,000. Soon after the lease went into operation, the tenant found he could not conduct the hotel successfully as a first-class hotel, and pay the rent. He so informed the directors of the defendant company, and asked that the rent be reduced. They requested permission to place their own bookkeeper in charge, that they might ascertain what business was being done, and be better able to act intelligently on his application. To this he assented. After a full investigation had been made, a meeting of the board was held, and a resolution passed reducing the rent to \$25,000 per annum for two years, "on condition of prompt payment of the rental and proper conduct of the hotel." The tenant testified that the resolution was not shown nor read to him, but that he was told that they had acted upon his application, and reduced the rent to \$25,000, and that they wanted him to "go ahead and run the hotel as a strictly first-class hotel, and keep it up." The jury found this was the only communication made to him, and that he was not informed of the condition as to prompt payment, and that he complied with the condition that was named. Under the new arrangement rent was paid until the latter half of the second year, when, after a distraint made, the tenant went into bankruptcy. The tenant was not required by the lease to conduct the hotel in any particular manner, but was at liberty to conduct it in a way most advantageous to himself. The owners were interested in having it conducted as a first-class hotel, for which purpose it was intended, and for which, because of its size, situation, and appointments, it was peculiarly adapted. It can scarcely be maintained that an agreement to continue and conduct a business in a manner that would best advance the pecuniary interest of the owner of the property, when the tenant was at liberty to consult his own interest, was without consideration. But be this as it may, the agreement was an executed one, as payments were made and received on the basis of a reduction of the rent for 20 months, and until the tenant went into bankruptcy.

Rent was claimed for a part of the unexpired term after the owner had come into possession and leased to another tenant. It was held that from the total claim for rent, which included rent for this period of time, there should be deducted rent received from the reletting. In this there was no error, as otherwise there would have been an allowance by way of set-off against the claim sued for of double rent for this period and of more than one year's rent.

The agreement for the payment of the water rent is in the following clause of the

lease: "The parties of the second part covenant and agree to pay the rent aforesaid at the days and times hitherto limited and appointed for the payment thereof, that they will not re-rent or sublet the premises, or any part thereof, except the barber shop, news stand, and cigar stand, or assign this lease without the written consent of the party of the first part, under penalty of two thousand dollars (\$2,000) per month during the whole of said term, to be added to the above stipulated rent, and to be paid on the first of each and every month; and that they will not use or occupy the premises for any purpose, business or use except as a hotel, nor for any business deemed extrahazardous on account of fire; and that they will at their own expense keep the vaults, outhouses, cellars, yards, and all of said premises clean according to the regulations of the board of health; and that they will pay for any gas used on said premises and all water taxes assessed thereon; that they will make all necessary repairs on said premises at their own proper cost and charges without abatement of said rent." This clause is preceded by the clauses fixing the amount of the rent and the times when it is payable, and is followed by a stipulation that, if any part of the rent is unpaid, the whole of the rent for the coming year shall become due, and may be distrained for, or the landlord, at its option, may terminate the lease. There is no stipulation that the water rent shall be considered as a part of the rent, and that failure to pay it shall make the goods liable to distress therefor.

Distress is a remedy that can be employed only for the recovery of what is properly rent and is reserved as such. It may be sustained where the sum originally stipulated for has been increased by agreement, as in *Brisben v. Wilson*, 60 Pa. 452, where the tenant agreed to pay the additional sum in consideration of the landlord's acceptance of the surrender of the lease; or where the lease provides for an increase if improvements are made to the property demised, as in *Detwiler v. Cox*, 75 Pa. 200; or where the lessee agrees to pay a fixed sum for gas furnished by the landlord, and used on the premises, as in *Fernwood Masonic Hall Assn. v. Jones*, 102 Pa. 307. In these cases the additional payments were to be made to the lessor as rent, and were certain in amount, or certain in the sense that they could be made certain. "Id certum est quod certum reddi potest." But covenants that relate to the use of the premises, but not to the payment to the lessor for the use, do not give the right to distress. In *Latimer v. Groetzinger*, 139 Pa. 207, 21 Atl. 22, it was held that a covenant not to engage in another business on the premises under penalty to be paid in the nature of rent in monthly installments was a mere personal covenant for the payment not of rent, but of a penalty, and that the incident of distress did not attach to it. *Fernwood Ma-*

sonic Hall Assn. v. Jones, supra, relied on by the appellant, is not an authority in his favor. In that case the gas to be paid for by the tenant was manufactured on the premises, and furnished by the lessor, and the payment was to be made to him. This appears in the report of the case, and more fully in the paper books. We do not decide that the rent might not be reserved in such a manner as to include the water rent, and give the right to distress for it. But in this case there was no such stipulation. Standing alone, a covenant to pay water rent is a covenant to pay to the party entitled—in this case the municipality—and it cannot be enforced by distress.

The judgment is affirmed.

HAYS et al. v. WILKINSBURG & E. P. ST. RY. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

STREET RAILROADS—CONTRACTS—ABANDONMENT—DAMAGES.

1. A street railroad company obtained a right of way, and covenanted to grade and pave the portion thereof not occupied as a roadway by its tracks. Thereafter it abandoned the location by reason of its failure to gain the municipal consent, and placed no tracks whatever upon the land. *Held*, that the owner was not entitled to recover from the railroad company the cost of the grading and paving, but only nominal damages.

Appeal from Court of Common Pleas, Allegheny County.

Action by Miriam Hays and others against the Wilkesburg & East Pittsburg Street Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Plaintiffs presented this point: "(2) That the measure of damages is the cost of grading, paving, curbing, and sewerage the street through the plaintiffs' land in the manner and to the extent set forth in the contract in evidence, with interest from July 15, 1900. Answer. Affirmed."

Defendant presented these points: "(1) Under the pleadings and the evidence, the plaintiffs are entitled only to recover nominal damages. Answer. Refused. (2) Under the pleadings and the evidence, in no event are the plaintiffs entitled to recover the cost of grading, paving, curbing and sewerage, for the reason that such cost does not constitute or furnish the measure of damages, if any, to which the plaintiffs are entitled. Answer. Refused."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. H. Beal, J. H. Reed, Edwin W. Smith, and George E. Shaw, for appellant. James G. Hays and C. C. Dickey, for appellees.

POTTER, J. The appellant in this case procured from the appellees an agreement for a right of way across their premises in

the borough of Swissvale. Under the contract the appellant was at liberty to enter upon the property, and grade the right of way, and make cuts and fills, lay down rails, erect poles, and string wires therefrom. It was empowered to do all things necessary to construct, maintain, and operate upon and through the said premises a system of double-track electric street railway. As part of the consideration for these privileges the appellant agreed to grade and pave and curb, for the use of the owners and occupants of the premises, a roadway on the said right of way, outside of and along its tracks. No question is raised as to the perfect good faith of the appellant in entering into this agreement; but, in order to carry out the contract, it was necessary to obtain the consent of the municipal authorities of the borough of Swissvale to lay tracks upon a street leading to a point opposite the property of appellees, and from which it was separated by adjoining private property. The borough councils refused consent. Appellant was thereby prevented from building its line of railway over appellees' premises, and was obliged to seek another route. The privileges for which it had bargained with appellees were then of no use, and it refused to accept the grant of the right of way, and has relinquished all claim thereto. The breach of contract, therefore, upon the part of appellant, consisted in its refusal to accept, or enter into possession of, the right of way for which it had contracted.

Such a breach is analogous to that of the vendee in a contract for the conveyance of land. In such case the damages which may be recovered are not the whole amount of the purchase money, as that would be to enforce specific performance. The damages should only equal the loss sustained by non-fulfillment of the contract. The loss of the bargain is the measure of damages. The trial court here, however, adopted as the measure the equivalent of the full amount of the purchase money, or the cost of grading, paving, curbing, and sewerage of the street through the plaintiffs' land. If the street railway company had accepted from the plaintiffs the grant of the right of way, and had entered thereon, laid its tracks, erected its poles, strung its wires, and constructed and operated its railway over plaintiffs' property, and had then refused to make payment of the compensation as stipulated in the contract, the measure of damages applied by the trial court would have been correct. But as it is, the appellees have given up nothing to the street railway company. They have their property left in their possession, practically undisturbed, and not burdened in any way by the easement which they agreed to create in favor of the appellant. The privileges for which the street railway company stipulated, and in return for which it agreed to do the paving, grad-

ing, and curbing, have not been exercised by it, nor does it claim any right to them.

In so far as any act of the appellant is concerned, the appellees remain in the uninterrupted enjoyment of their property; and yet, without giving up anything, or suffering the loss of anything, or being put to inconvenience or annoyance by the appellant, they have been permitted to recover all that they would have been entitled to receive if they had sustained all the injury and annoyance which, by the terms of the contract, and for the consideration therein expressed, they were to sustain. Having parted practically with nothing, they have lost nothing, and are entitled to recover nothing more than the actual loss. Clearly, they are not entitled to have their property intact, and at the same time recover the full amount of the compensation to which they would have been entitled had the street railway been built upon their premises.

The authorities cited to sustain the contention of the appellees are all cases in which the party who committed the breach did so after having received the benefits of the agreement. For instance, in *Taylor v. Northern Pacific Coast R. R. Co.*, 56 Cal. 317, the railroad company, in consideration of the conveyance to it of a right of way, agreed to build a wagon road, and fence both sides of the way. It accepted the grant and built its railroad thereon, and then refused to construct the wagon road and build the fence. Of course, in such a case, the measure of damages would properly be the cost of building the fence and constructing the wagon road, which it had promised to give as the price of the grant which had been accepted and used by it. But if the railroad company had not accepted the grant of the right of way, or constructed its railroad thereon, or made any use of it whatever; and if no title thereto had vested in it, and all claim thereto had been relinquished, then, obviously, the measure of damages would have been properly confined to the actual loss.

Or take another illustration advanced in the argument. If A. contracts to build a house for B., and then fails to keep his agreement, the measure of damages to which B. is entitled is certainly not the whole of the contract price, but only such an amount as will compensate him for the difference between the price he was to pay to A. and that which, by reason of the breach, he may be forced to pay someone else. If B. had paid the consideration in advance to A., then the measure of damages would be the value of the house for which he had paid. But in the case in hand the consideration which the appellant was to receive for doing the grading, paving, and curbing of the street was the right to burden the property of the appellees with a perpetual easement, and to subject it to the annoyance of the construc-

tion, maintenance, and continuous operation of a street railway. Owing to the breach, they did not suffer this loss or inconvenience, or incur any burden. Nor did the appellant take any benefit from the grant. Under these circumstances, the measure of damages can be nothing more than the actual loss sustained by the appellees, which, in so far as the evidence shows, was merely nominal.

The assignments of error are all sustained, and the judgment is reversed, and a venire facias de novo is awarded.

**LAIRD v. CITY OF PITTSBURG et al.
BAIRD v. SAME. STENGER
v. SAME.**

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EMINENT DOMAIN—PARK PURPOSES—PUBLIC USE.

1. Where a municipality has power to condemn land for park purposes, that its intent is to use the land in order to extend a free library and art building, standing on other land which is part of the public park, is not without a legitimate scope of park purposes, so as to render such proceeding invalid.

2. Where a city has condemned land for a park, with intent to use a part of it for a free library, the fact that its representation on a board of directors of the library is only one-half does not prevent the condemnation from being for a public purpose.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Laird against the city of Pittsburgh and others, and by Milton I. Baird and Joseph W. Stenger against the same defendants. From decrees dismissing the appeals, plaintiffs appeal. Affirmed.

The court found the following facts:

The city by ordinance set forth and ordained " * * * that the city of Pittsburgh deems it proper and expedient that it exercise the power of eminent domain, vested in said corporation, for the acquirement by it of the real estate hereinafter described, to be used for park purposes. Therefore, the director of the department of public works of the city of Pittsburgh is hereby authorized and directed to proceed in the name and on behalf of said city, to have taken, appropriated and condemned for park purposes, in the manner described by law, the real estate and property of James and Eliza Laird, situate in the 14th Ward of said city, bounded and described as follows, to wit: * * * And the said city does hereby elect and resolve to take, use and appropriate the said real estate and land for the purposes aforesaid, the damages not having been agreed upon between said city and said owner, and the said parties being unable to agree upon the same."

The land described in plaintiffs' bill adjoins a public park of the city, known as "Schenley Park," which contains 422 acres,

of which 188/100 are occupied by the Carnegie Free Library building, four acres by the Phipps Conservatory, 2 3/4 acres by music stands, athletic grounds, and race course.

For the purpose of enlarging Schenley Park, the city has proceeded, under its right of eminent domain, to purchase and acquire, by condemnation proceedings, the properties of plaintiffs and others; that the properties so purchased and acquired contain together about 150,000 square feet of land. The property of plaintiffs was acquired by condemnation proceedings, and not by purchase.

The Carnegie Free Library Building contains a free library, an art gallery, museum, and music hall, which building was completed in the fall of the year 1895, and dedicated to public use on November 10, 1895.

The Carnegie Free Library was founded through the donation of Andrew Carnegie, under an ordinance of the city, approved February 25, 1890, and its supplements, so that the funds for the erection of the building and the equipping of the library were furnished by the donor, while the city undertook to appropriate \$40,000 per annum to maintain the same; and whereby the location, erection, and management of that institution were intrusted to a board of directors composed of the mayor of the city, the presidents of select and common councils, the president of the central board of education, and a library committee of five persons appointed by the councils of the city, and nine other persons appointed originally by the donor, with the right and power in the nine persons so appointed to fill vacancies in their number and to elect their successors.

The library and reading rooms in the building are open to the public free of charge; free public musical entertainments are given at least twice a week in the music hall of the library building; the hall is frequently let for entertainments, for which a rental is charged, the amount of the rental depending upon the nature of the entertainment, the purpose for which given, and by whom given. The museum and art gallery, which occupy rooms in the building, are under the control of the Carnegie Institute, which is managed by a distinct board of trustees, though its occupancy of rooms in the Carnegie Library Building is with the permission and co-operation of the board of trustees of the Carnegie Free Library. The museum and art gallery are open throughout the year to the public, without charge.

The board of trustees of the Carnegie Free Library has the management of the library building, and also the expenditure and disbursement of all funds belonging and applicable thereto, including the \$40,000 annually appropriated by the defendant city to assist in defraying the expenses necessary in maintaining the same.

The trustees of the Carnegie Free Library desire to extend and enlarge the present library building at a cost of \$3,600,000, which

sum has been donated by Mr. Carnegie, and is now subject to the order of the trustees, to be used by them for that purpose.

It is the intention of the board of trustees of the Carnegie Free Library to ask permission of the councils of the city to use and occupy a further portion of Schenley Park, to erect thereon the proposed addition to its library building. That the land necessary for such extension includes, among other property, the lots taken from plaintiffs, and will require an area of about 96,000 square feet.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. S. Mehard, A. W. Duff, H. E. Carmack, and H. A. Miller, for appellants. James O. Gray and Thomas D. Carnahan, for appellees.

MITCHELL, J. These cases might well be affirmed on the technical ground, found by the court below, that the power of the city to acquire land by eminent domain for park purposes is undisputed, and the ordinance and proceedings for that purpose are regular. But the case having been argued and fully considered on the real ground of controversy, that the use proposed to be made of the land is not within the legitimate scope of park purposes, we proceed to determine the cases on the merits.

A public park, in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. Worcester calls it "a piece of ground inclosed for public recreation or amusement"; Webster, "a piece of ground, in or near a city or town, inclosed and kept for ornament and recreation"; the Century Dictionary, "a piece of ground, usually of considerable extent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as an opportunity for open-air recreation." No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The chief amusements of the great body of our ancestors in England were in the open air, and a park meant for them practically a small or private forest, left in condition for the home of wild animals of the chase. Blackstone defines a park as "an inclosed chase extending only over a man's own grounds. The word 'park,' indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park; for the king's grant, or, at least, immemorial prescription, is necessary to make it so; though now the differ-

ence between a real park and such inclosed grounds is in many respects not very material, only that it is unlawful at common law for any person to kill any beasts of the park or chase, except such as possess these franchises of forest, chase, or park." 2 Bl. Comm. 38.

With the change of manners and habits of the people came also a change in their associations with the use of words. The idea of a public park in or near a city as a place of resort of the people generally for recreation and amusement necessarily banished the idea of a home for wild beasts of the chase, even in a very modified state of nature. The trimming away of thickets and underbrush, the substitution of regular pathways, paved, and perhaps railed and artificially lighted, which would have been incongruous to our forefathers, now enter into the accepted idea of a park. The growth of sentiment for artistic adornment of public grounds and buildings is part of the history of our time and country. Public parks have come to be recognized as not only the natural place for walks and drives afoot, awheel, or with horse and carriage, for boating, skating, and other outdoor athletics, but also as the appropriate and most effective location for monuments and statues, either to historic heroes or to pure art, fountains, flower displays, botanical and zoölogical gardens, museums of nature and of art, galleries of painting and sculpture, music stands and music halls, and all other agencies of æsthetic enjoyment of eye and ear. The parks of cultivated Europe are filled with works of art, and the great cities of this country are following fast in the same direction. Schenley Park in Pittsburgh, with which this case is immediately concerned, already devotes a portion of its space, as found by the court below, to the Phipps Conservatory of flowers, to music stands, and to the Carnegie Free Library Building, as well as to athletic grounds and a race course. The Carnegie Free Library Building, as also found by the court below, contains a free library, an art gallery, museum, and music hall, all free to the public.

The power to take by eminent domain is expressed in the statutes to be "for the purpose of public parks." No further legislative definition is given, and it must be assumed that the words are used according to their general understanding. This, as already indicated, includes all the customary forms of the use of land as a public pleasure ground. The Free Library Building, as already said, contains an art gallery, museum, and music hall, besides a free library. The latter is as much devoted to the public recreation as the other parts. It affords a place of resort and entertainment for the public at large in rainy and inclement weather, and at all times for those who prefer quiet study to sight-seeing or more active amusement. It may be conceded, as argued by appel-

lants, that a library, in itself, is not an integral part of a park, and, were the taking here complained of a taking directly and solely for a library site, a different question would be presented. But a library occupying only a very small fraction of the park area, not interfering at all substantially with its open air and free space, does not differ in legal effect from the museums, picture galleries, music stands, and other incidental means of promoting the entertainment and pleasure of the people. Should the city, therefore, decide to devote the land now in controversy to the enlargement of the Free Library Building, it could not be fairly said to be a use outside of what is legitimately implied in the authority to take for a public park. We have not found or been furnished with any case on the exact point here raised, but the analogous principles applicable to the use of a public square in a town plot are discussed in *Com. ex rel. v. Connelville*, 201 Pa. 154, 50 Atl. 825, and cases there cited.

The further objection that the city cannot take this land because the Carnegie Free Library is not under the control of the city, and its property is distinct from that of a public park, is also untenable. The city takes and keeps the title and control of the land, though it commits the ordinary management—what may be called the “police administration”—to a board of direction in which it has by election and *ex officio* a representation of one-half. This is not a taking of the property for a private institution.

Decree affirmed, with costs.

BAKER et al. v. BAILEY et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RES JUDICATA—EQUITABLE EJECTMENT—MORTGAGE—REDEMPTION.

1. In equitable ejectment against the holders of a legal title, where plaintiffs based their claim on an agreement creating a trust for plaintiff, a prior judgment in ejectment by the holders of the legal title against the plaintiff, in which the defense was based upon the same alleged trust, is *res judicata*.

2. The mortgagees under a mortgage given to secure future advances, in which no time of repayment is set forth, may file a bill to redeem within such time as equity shall decree, or to permit a sale and liquidation thereunder.

3. Where holders of a mortgage given to secure future advances purchase the legal title at sheriff's sale under a paramount incumbrance, and the mortgagor does nothing for 14 years, he is without remedy.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by Millard F. Baker and others against Austin L. Bailey and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

At the trial a verdict was rendered for plaintiffs subject to questions of law reserved. Subsequently the court entered judgment for

defendants non obstante veredicto in the following opinion:

“This is an action of ejectment, in which it is admitted that the title to the land in dispute was in Peter Baker in 1875 (both parties claiming under him), subject to a mortgage given by one T. W. Briggs, a former owner, to Mrs. E. Y. Patterson, for \$9,000, and dated January 7, 1873. A *scire facias* was issued on this property at No. 543, September term, 1887, and on al. lev. fa. No. 207, June term, 1880, of this court, the property was sold by the sheriff to Mrs. Patterson for \$50. In June, 1880, Mrs. Patterson sold the property to Thomas Fawcett and Madison Bailey, but previous to this, and before the sheriff's sale on the *scire facias*, and purchase by Mrs. Patterson, Fawcett and Bailey, at the solicitation of Peter Baker, the then owner of the property, agreed verbally with him that they would advance the money to pay Mrs. Patterson the amount of her mortgage, and take a deed from her for the land, and hold the title for his benefit, and as security for the money thus advanced, until it could be sold, and, when Fawcett and Bailey were paid for all moneys advanced by them, the balance should belong to Baker. Under this arrangement, to which Mrs. Patterson agreed, the property was sold to her, as stated, and by her conveyed to Fawcett and Bailey, who paid some money and gave their mortgage on the property to her for the balance, which they subsequently paid. After this purchase by Mrs. Patterson, and when the transfer of the property to Fawcett and Bailey was in process of execution, Fawcett—Bailey being present, and apparently assenting thereto—stated that they were doing this entirely for the benefit of Baker, and, in pursuance of the agreement previously entered into by the several parties, signed and delivered (as the jury have found) a written memorandum, in substance and effect as follows, *viz.*: It recites the sale of this property by Mrs. Patterson to Fawcett and Bailey; that they were taking it in trust for Peter Baker; that same was for the benefit of Baker, and was held by them for him; and that upon a sale of it all moneys over and above what it cost them should go to him. Baker was allowed to remain in possession of the property after this until July 30, 1888, when he was turned out by the sheriff at the suit of Fawcett and Bailey. In the meantime Mrs. Patterson, at the instance of Fawcett, proceeded under their mortgage to her, and had judgment and execution thereon against them for \$5,876.62, and interest thereon from November 22, 1882, at No. 164, March term, 1883, and at the sheriff's sale on said execution W. M. Watson, Esq., attorney for Fawcett and Bailey, bought in the property for \$6,200, had deed made to him, and on June 7, 1883, conveyed one undivided half thereof to Fawcett for the consideration of \$1, and the other half to Bailey for a like consideration. Subsequently they had a ha-

here *facias* issued at No. 25, October term, 1886, and Baker was turned out of possession by the sheriff on the date above stated. While Baker was in possession he paid the taxes on the property, and also some \$2,200 of the principal debt due Mrs. Patterson on the mortgage of Fawcett and Bailey. The evidence shows in 1883 Baker procured a person willing to purchase the property, but Fawcett and Bailey refused to sell, alleging that \$14,000—the amount offered—was not enough by some \$6,000. The purpose of Bailey and Fawcett in getting Mrs. Patterson to proceed and bring suit upon the mortgage was to get rid of any trust that might exist under the arrangement between them and Baker. The evidence further shows that in 1899 the property in suit was bought, under an agreement with the American Land Company, from Madison Bailey's heirs and Austin L. Bailey, grantee of Thomas Fawcett, and deed was made therefor on January 18, 1900, for the consideration of some \$80,000 or \$85,000. At the time the agreement for the purchase was entered into, this suit had not been brought, and nothing appeared upon the abstract of title furnished the counsel for the company except the old ejectment at No. 619, January term, 1885, *Bailey and Fawcett v. Peter Baker*, the ancestor of plaintiffs, and proceedings thereunder by which Baker was dispossessed, and the property delivered to Bailey and Fawcett. After the agreement for the purchase of the property, but before the execution of the deed, counsel for the company was notified by Mr. Stone, counsel for the present plaintiffs (the heirs of Peter Baker), that they claimed title to the property. He made no mention of any writing exhibiting the trust, and referred the counsel for company to Mr. Baker's answer in the prior ejectment for information as to what Baker's claim was. An examination of this did not indicate that the agreement was in writing, and counsel therefore concluded it was merely in parol, and passed the title.

"The defense to this state of facts consists (after a denial that the said arrangement was in writing, which the jury found against the defendants in this case) of several propositions of law going to the foundation of plaintiffs' right to recover in this suit, viz.: (1) That in an ejectment between the same parties or their privies for the same land there was a verdict and judgment for plaintiffs (defendants in this action), which is a bar to this suit. (2) That this action, being an equitable ejectment, plaintiffs in this suit, under the uncontroverted evidence, are barred by laches. (3) That the uncontroverted evidence showing Fawcett and Bailey, under whom defendants claim title, acquired title through their attorney, Watson, at sheriff's sale upon a paramount incumbrance, and subsequently brought an action of ejectment against Baker, recovering title to the premises and issued a writ of *hab. fa.*, and recovered pos-

session thereof in July, 1886, said action was a repudiation of any trust in favor of Baker, and that any trust relation that might thereafter be claimed to exist, could only be a 'constructive trust,' and, the same never having been acknowledged in writing, was barred after the expiration of five years. (4) That, there being no evidence that the plaintiffs have ever tendered defendants the amount of money advanced by them, or have in court the same ready to be paid in case there is a verdict for plaintiffs, they are not entitled to recover, and the verdict should be for defendants."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. A. Woodward, L. P. Stone, and Frank O. McGirr, for appellants. Thomas Patterson, E. Z. Smith, James R. Sterrett and M. W. Acheson, Jr., for appellees.

MITCHELL, J. Appellants' claim in the present suit is upon an equitable title growing out of the agreement made concurrently with the conveyance by Mrs. Patterson to Bailey and Fawcett in June, 1880. By the conveyances and proceedings set out in appellants' abstract the legal title is admitted to be in appellees, and no other equity is asserted against it but that arising from the agreement.

Turning now to the ejectment by Bailey and Fawcett in 1885 against Peter Baker, it is clear, as held by the learned judge below, that the title involved there was the same as that involved here. That was an ejectment by the holders of the legal title under the conveyances down to and including that by Mrs. Patterson to the plaintiffs Bailey and Fawcett. The defense, after a general denial of "the validity and legality of the proceedings in Common Pleas of September term, 1877," etc. (resulting in the sheriff's sale to Mrs. Patterson), set up further that, "should it appear otherwise on trial, still the plaintiffs hold the title subject to the defendants' right to hold, occupy, and possess the premises as set forth in the sworn statement filed herewith." The sworn statement thus referred to and made part of the abstract of title set up an agreement that Bailey and Fawcett took and held the title for the benefit of the defendant Baker, and only to secure themselves the repayment of the money advanced to assist him. It was not stated expressly that the agreement was in writing, but, with this exception, the agreement does not differ in any material respect from that sued upon now, and there is no claim that there was ever more than one agreement between the parties upon the subject. That the defense was not developed fully, if at all, at that trial, does not affect the force of the judgment. It was indicated, and could have been made fully under the pleadings, and was, therefore, conclud-

ed. The issue between the parties was identical in the two actions—the validity of the same equity against the same legal title, and the verdict and judgment in the first were a final adjudication, and a bar to the present effort for further contest.

The judgment of the court below was also correct on the other ground. It is admitted that Bailey and Fawcett, under the agreement, took title as security for the repayment of money advanced by them for the assistance of Baker. They claimed that it was a mere parol mortgage, but Baker claimed, and the jury have now found, that the agreement was in writing. It was, therefore, a mortgage to secure advances, but with no time of repayment agreed. They were not bound to wait indefinitely, but could have filed a bill calling upon Baker to redeem within such time as equity should decree, or to permit a sale and liquidation. A decree in either form would have ended the trust. Instead of pursuing this course, however, they chose to proceed upon a subsequently acquired legal title. The agreement was made in June, 1880, at which date they gave their mortgage to Mrs. Patterson. In 1882, Mrs. Patterson sued out her mortgage, and title under the judicial sale came again to Bailey and Fawcett, who then brought ejectment, and recovered judgment, and were put in possession by the sheriff in July, 1885. This was not a mere recovery of possession as mortgagee or trustee for Baker, for under the agreement Baker was to remain in possession. It was a clear repudiation of any further trust under the agreement, and the assertion of title as purchasers at sheriff's sale under a paramount incumbrance. Baker and his successors, the appellants, made no countermove for 14 years. It was then too late. *Bruner v. Finley*, 187 Pa. 389, 41 Atl. 334.

Judgment affirmed.

COMMONWEALTH v. PITCAIRN.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INQUISITION IN LUNACY—TRAVERSE BY WIFE—QUESTIONS CONSIDERED.

1. In an inquisition in lunacy a wife, the validity of whose marriage is affected by the determination, is a person aggrieved within Acts May 8, 1874 (P. L. 122), authorizing such a person to traverse the finding.

2. On the trial of a traverse in lunacy by a wife in an inquisition against her husband, the question of the validity of the marriage cannot be submitted to the jury.

Appeal from Court of Common Pleas, Allegheny County.

Proceeding by the commonwealth, on the relation of Robert Pitcairn, in inquisition in lunacy of Albert Pitcairn, on the traverse of Mary Pitcairn. Verdict for defendant, and the relator appeals. Affirmed.

It appeared that by an inquisition in lunacy Albert Pitcairn was found to be a lunatic without lucid intervals for four years prior to that date. Mary Pitcairn, who was married to the alleged lunatic, traversed the inquisition. At the trial of the traverse, the court refused to submit to the jury the question of the validity of the marriage, but admitted in evidence the testimony of several witnesses as to circumstances which led up to the marriage.

The court charged in part as follows:

"The traverser in this case, who is his wife, denies that her husband was a lunatic previous to 1899 or 1900, and just here I will say that so far as this case is concerned the wife is an aggrieved party, and may properly become the traverser, which she is in this case."

"We think, as you have heard us say to counsel during the trial of the case, that these proceedings have nothing to do with the validity or invalidity of the marriage. I mean that they have nothing to do with it directly. Counsel at first asked us to submit to you the question of the validity of the marriage. That we declined to do, for reasons that we think sufficient. In our opinion, this is not a proper proceeding in which the validity of that marriage ought to be determined, and for that reason we refuse to submit that question to you, but we admitted evidence in regard to the marriage so that you, gentlemen, could determine to what extent the circumstances of the marriage bore upon the lunacy of Mr. Pitcairn. Those circumstances leading up to the marriage, and all the circumstances after the marriage, are evidence to be considered with all other evidence in enabling you, gentlemen, to determine whether or not Mr. Pitcairn is a lunatic, and when his lunacy began. That is why we admitted it.

"The verdict here fixing the date of the lunacy will indirectly bear upon the marriage, if that question should come before the court hereafter, in casting the burden of proof either one way or the other. If you should find that Mr. Pitcairn was a lunatic previous to 1897, and an issue should be framed to determine the validity of that marriage, the fact that you found that he was a lunatic previous to August, 1897, would cast the burden of proof upon Mrs. Pitcairn to show that he was competent at that time to enter into a contract of marriage; if subsequent to August, 1897, and the marriage should be attacked upon the grounds that he was insane at the time, the burden would be upon the person attacking. That is, as near as I can say now, the effect your finding in this case will have upon the validity of the marriage in the event of that being raised in some other proceeding. So that, outside of merely getting information from the circumstances leading up to the marriage, you, gentlemen, will not consider it in any other way in determining this case."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

F. C. McGirr, T. O. Pitcairn, and John Marron, for appellant. J. S. Ferguson, E. G. Ferguson, and Henry Meyer, for appellee.

FELL, J. A wife, the validity of whose marriage is affected by an inquisition in lunacy, is a person aggrieved within the meaning of the act of May 8, 1874 (P. L. 122), and has a standing to traverse the finding. Generally the right to traverse extends to persons related to the alleged lunatic by blood or marriage, and to strangers interested in his estate. Wolf's Case, 195 Pa. 438, 46 Atl. 72. In Davidson's Appeal, 170 Pa. 96, 32 Atl. 561, the right of a person claiming title under a deed executed by an alleged lunatic to traverse the finding that the lunacy antedated the deed was sustained. The traverser in the case now before us married the alleged lunatic after the date when, as found by the commissioners, he became insane without lucid intervals. The length of time his incapacity had existed was a necessary part of the finding, and as to the traverser a material part. While admitting that her husband was a lunatic at the time of the inquisition, she had the right to traverse this part of the finding. It affected most seriously, if in no other manner than as prima facie evidence, all of her relations to him, and her right to present support from his estate.

The main contention at the trial was whether the validity of her marriage should be submitted to the jury. The court refused to do this, but admitted testimony to show the circumstances that led to or were in any way connected with the marriage, and instructed the jury to give due weight to these in determining whether Albert Pitcairn was a lunatic, and, if so, when he became a lunatic. For this purpose the testimony was competent, and for this only. The validity of the marriage was not in issue, and could not be determined by a proceeding of this kind.

The judgment is affirmed.

WINDSOR GLASS CO. v. CARNEGIE CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

CORPORATIONS—EXTENT OF FRANCHISE—PRIVATE INQUIRY—BILL.

1. Act June 19, 1871 (P. L. 1360), gives the right of inquiry, at the suit of private parties, into the existence and extent of franchises conferred by corporate charters, when they are set up to support acts injurious to the parties to the suit. *Held*, that the inquiry in such actions was limited to the nature and extent of the franchises conferred, and did not extend to the validity of the charter itself.

2. Plaintiff filed a bill, under Act June 19, 1871 (P. L. 1360), to inquire into the extent of franchises conferred on defendant, which was

a railroad company regularly organized for the conveyance of passengers and freight. The bill alleged that the railroad actually built was merely a private road on the property of a manufacturing company, not furnishing passenger cars or stations or freight cars which the public had a right to use. *Held*, that the bill was not maintainable.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Windsor Glass Company against the Carnegie Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The court below found the facts to be as follows:

"The bill is by the owner of lands, part of which the Union Railroad Company claims the right to take for railroad purposes under its alleged right of eminent domain against that company and its officers and stockholders, for the purpose of having it adjudged that the railroad company is not a bona fide railroad corporation, and is not operating a public road, but only a private road for the use of its stockholders in their manufacturing business, and that it has, therefore, no right to take the land of the plaintiff, or operate a railroad over it.

"(1) On July 2, 1894, the Union Railroad Company, one of the defendants, was chartered, under the general railroad law of April 4, 1868, and its supplements, to build a railroad from the village of Brinton, in Braddock township, Allegheny county, across the Monongahela river, through the borough of Homestead to the westerly side thereof; the length of the road being designated as five miles.

"(2) All the stockholders named in the articles of association were employes of the Carnegie Steel Company, Limited, which company was the real and beneficial owner of all the capital stock of the railroad; any shares not held in its own name being held by individuals for the purpose of maintaining the organization. At and before the time of the chartering and construction of the Union Railroad Company, the Carnegie Steel Company, Limited, owned and operated very extensive furnaces and manufacturing plants on each side of the Monongahela river, and along the route of the Union Railroad Company, which establishments were connected, in part, at least, by railroad tracks, so that manufactured and raw material, and material in the process of manufacture, could be transferred from one part of the system to another.

"(3) The primary object of the promoters and stockholders of the Union Railroad Company (being, in effect, the Carnegie Steel Company, Limited) was to more perfectly connect these plants with each other, and with the various railroads passing through the Monongahela valley, on either side of the river.

"(4) Soon after the procuring of the charter, the road was built under it, and up to the

present time there has been expended in its construction about \$7,000,000; the construction including two bridges across the Monongahela river.

"(5) The route of the Union Railroad is through a densely populated district, containing over 30,000 inhabitants, and is through or in six or more separate towns or boroughs; and there is much freight and passenger traffic back and forth between these towns, and between them and other places outside.

"(6) The plaintiff is a corporation, organized under the laws of the state of Pennsylvania, for the manufacture of glass, and is the owner of a tract of land in the borough of Homestead, fronting 240 feet on the Monongahela river, and extending back 635 feet, more or less; and the route of the Union Railroad is over and across this land, within a very short distance of the terminus at the line of the borough of Homestead.

"(7) When the Union Railroad Company, in the construction of its road, proposed to take land of a width sufficient for two tracks, and over and across the plaintiff's land, a bond was filed in the court of common pleas by the railroad company for that purpose; and the parties came in communication about the damages, and as to a proposition of sale made by the plaintiff. The plaintiff took legal advice as to whether the defendants had or had not the right of eminent domain, although this fact does not appear to have been known to the railroad company at the time. The plaintiff objected to the amount of the bond filed, and it was agreed that they would take the company itself, without security, rather than have a bond filed which they deemed too small in amount. To express this agreement a letter, dated March 10, 1899, was written by the plaintiff to the railroad company, agreeing that the defendant company might withdraw the bond, and that the damages should be determined without the filing of a bond; the company to have the right to proceed in the meantime with the construction of the road, under its right of eminent domain. The two tracks were thereupon laid over the plaintiff's land, and the company has been since that time operated over it, and extensive additions and improvements have been made upon the road since that time.

"(8) The Union Railroad Company has not, and never had, any freight or passenger stations or depots; nor has it provided any place along the line of its road where passengers or freight may be received or discharged, excepting switches connecting with the property of the Carnegie Steel Company and a few others. It has no schedule or timetable of its trains, and no schedule of rates, and is constructed on such grades that it cannot be reached by the public at any of the thoroughfares which it crosses. It has no passenger cars, and does not engage in the conveyance of passengers. From be-

tween sixty-five and seventy per cent. of the business done upon the road and its branches and leased lines is with the Carnegie Steel Company, one of the defendants; nearly all of the remainder is the transfer of coal cars, wholly upon the north side of the Monongahela river, to the Pittsburg & Bessemer Railroad and other railways; and a few cars are delivered to one or more persons in Homestead, having switches into their works. Including the line leased by it from the Bessemer road (about seven miles), and the branches which have been already built, the company has about twenty-four miles of railroad in operation, and connects with the Pennsylvania Railroad, the Baltimore & Ohio, the Pittsburg & Lake Erie, the Pittsburg & Bessemer, and other railroads.

"(9) The defendant railroad company having declared its intention of appropriating a strip of the plaintiff's ground, alongside of that which it first appropriated, for the purpose of laying an additional track or tracks, this bill was filed to restrain their entry for that purpose."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Walter Lyon, Charles H. McKee, and H. Walton Mitchell, for appellant. J. H. Beal, J. H. Reed, Edwin W. Smith, and George H. Shaw, for appellees.

MITCHELL, J. The act of June 19, 1871 (P. L. 1360), gives courts the right of inquiry, at the instance of private parties, into the existence and extent of franchises conferred by corporate charters, when the latter are set up in support of acts injurious to the individual parties complaining. The language is: "In all proceedings * * * in which it is alleged that the private rights of individuals, or the rights or franchises of other corporations, are injured or invaded by any corporation claiming to have a right or franchise to do the act from which such injury results, it shall be the duty of the court * * * to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury * * * results; and if such right or franchise has not been conferred upon such corporation, such courts" shall enjoin or award damages, etc.

The act was intended to enlarge and make clear the rights of individuals to inquire into the charter franchises of corporations when asserted to their individual injury. In general, after a charter is once shown, the subject is only open to further inquiry at the direct suit of the commonwealth itself. This act enables the private suitor to demand that the charter right to do the thing complained of shall be shown. But it does not put him in the commonwealth's place, or clothe the court, at his instance, with the

commonwealth's general powers of inquiry. The inquiry is limited to the nature and extent of the franchises *prima facie* conferred by the charter, and does not extend to the validity of the charter itself. This is the plain limit of the language of the act, "and if such right or franchise has not been conferred," etc., and such has been its uniform construction.

In *Western Pa. R. Co.'s Appeal*, 104 Pa. 399, it was held that the inquiry must be confined to the charter, and the question of loss or forfeiture of franchises by laches can only be raised by the state. "But the appellant, by its counsel, insists that the act of 1871 warrants a much wider investigation into causes of forfeiture than those which may appear merely from the conditions and limitations of a charter. In other words, that the position of the commonwealth, as in a writ of quo warranto, may be assumed, and the mere nonuser of the franchise proved, in order to establish forfeiture of the defendant's right to act under its charter. But to this we cannot agree. * * * The act of 1871 contemplates nothing more than that it shall be made to appear from the charter that the corporation has the power to do the particular act in controversy, and which involves some right of the contestant."

The appellant's complaint in the present case is thus stated in its own abstract of its bill, wherein it avers "that said Union Railroad is not a bona fide corporation engaged in operating a railroad for public use in the conveyance of persons and property, but is a scheme or device of the defendants for the operation under the guise of a railroad charter of a private railroad or system of railroad tracks located upon the property of the defendants, and connecting the various plants and departments of the manufacturing system operated by defendants, and forming a part thereof, and used exclusively for the purposes of said manufacturing system; that defendants have no right or power under the said charter to construct, maintain, and operate a railroad of the character and in the manner herein described, and their occupancy and use of your orator's land as aforesaid is wrongful, unwarranted, and in violation of law." The inquiry under this bill, it is manifest, is not into the rights conferred by the charter, but into the conduct of the defendants under it. Defendants obtained a charter, it is said, for a general railroad; but all the corporators were stockholders in a manufacturing company, and acted in the interests of the latter, not in good faith to build and operate a railroad, but merely to make an addition to their manufacturing plant. Similar efforts to go behind the rights expressed in the charter have been before this court heretofore. *Rudolph v. Pa., Schuylkill Valley R. Co.*, 166 Pa. 430, 31 Atl. 131, was a very similar case. A railroad had constructed a short branch to a village where there was a large ironworks, and after the

construction the branch was used altogether for the carrying of freight to and from those works. No other stations were provided, and no passenger cars. An owner whose land was crossed by the branch filed a bill on the same grounds as the present bill—that the branch was not in good faith a branch road authorized by the statute, but a private road for private benefit. It was held that the charter showing the franchise to build a branch was conclusive; the court saying that, if there was bad faith, "the commonwealth would be the proper party to complain." In *Gaw v. Bristol, etc., R. Co.*, 196 Pa. 442, 46 Atl. 372, a similar question was determined in the same way, though the operating motive for the incorporation of the railroad was admitted to be the accomplishment of an object in which the corporators had been previously defeated; the distinguished counsel frankly arguing that "it is not an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do the thing desired." In *Oliver v. Thompson's Run Bridge Co.*, 197 Pa. 344, 47 Atl. 230, it was again held that, where a bridge was being constructed across a ravine in accordance with the charter of a bridge company for that purpose, it was not a good objection, under the act of 1871, that the building of the bridge may have been inspired by the desire of a passenger railway company to secure a means of passage over the ravine, which it could not obtain for itself, for lack of the right of eminent domain. These cases are conclusive that under the act of 1871 the inquiry is limited to the grant in the charter to do the thing complained of. If the power is there given, the authority of the court to interfere is at an end. The further questions of good faith in obtaining the charter or in acting under it can only be raised by the commonwealth. In the present case, as already said, the real substance of the complaint is not that defendants are doing something that the charter does not authorize, but that they are not doing something the charter enjoins, to wit, not furnishing passenger cars at all, and not furnishing stations or freight cars which the public can use as they have a right to use a public railroad. It is a conclusive reply that if the defendants should now provide stations, passenger and freight trains, time schedules, etc., there could be no question of the charter right to do so, and yet plaintiff's whole complaint would be swept away on the facts.

Much reliance is placed by appellant on *Edgewood Railroad Co.'s Appeal*, 79 Pa. 257, but the distinction is obvious. There the acts complained of were not omissions of any part of the charter duty, as is averred here, but were acts affirmatively shown not to be authorized by the charter. Such a case was directly within the act of 1871. *Mory v. Oley Valley Ry. Co.*, 199 Pa. 152, 48 Atl. 971, was another case of the same kind, and the

decision was put on the same ground. "The only possible conclusion," said our Brother Brown, "is that it [defendant] has undertaken to exercise a right expressly withheld from it by the statute creating it. * * * For a case like this the act of June 19, 1871 (P. L. 1360), was passed."

Decree affirmed at costs of appellant.

CLAYTON v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RELEASE—FRAUD IN PROCUREMENT.

1. Plaintiff sued a railroad company for personal injuries, and testified that a person came to her house, claiming to be a friend of the conductor of the street railroad company, and that he had come to see if the conductor could not be reinstated, and asked her if \$5 would cover her expenses up to that time; that he produced a paper which he represented to be a receipt for \$5, which she signed. The person presenting the receipt was in fact an agent of the company, and the paper was a release of all claims. The testimony of plaintiff was corroborated in part by a witness present at the interview. *Held*, that the question of the fraud of the railroad company in procuring the release was sufficient to take the case to the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by Jane Clayton against the Consolidated Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James C. Gray and Clarence Burleigh, for appellant. J. L. Ritchey and David S. McCann, for appellee.

MESTREZAT, J. This is an action of trespass to recover damages for personal injuries which Mrs. Jane Clayton, the plaintiff, alleges she sustained by the negligent conduct of the employees of the defendant company. On the evening of July 9, 1899, she boarded one of defendant's cars on Fifth avenue en route to her home, near the intersection of Fifth avenue and Dinwiddle street, in the city of Pittsburgh. When the car arrived at Dinwiddle street, it stopped, and, in attempting to alight, Mrs. Clayton was thrown or fell to the ground, and was injured. She claims that while she was in the act of leaving the car it was suddenly and violently started by the motorman, and she was thrown to the ground. This is the negligence complained of by the plaintiff, on which she bases her claim. The defendant company, on the other hand, alleges that the plaintiff attempted to leave the car after it had stopped at the crossing and was again in motion, and that her injuries were not caused by its negligence, but by her own carelessness in thus attempting to alight from the car at an improper time. The company sets up as another defense an alleged release signed by

the plaintiff about 10 days after the accident, by which she released and discharged the company from all claims and damages which she had or might have by reason of the injuries she sustained in falling or being thrown from the car. To this defense the plaintiff replied that the release was procured by fraud, and therefore was not binding upon her.

The learned trial judge submitted the issues of fact thus raised to the jury, who found a verdict in favor of the plaintiff. The defendant company appealed from the judgment entered against it. The appellant raises but a single question for consideration on this appeal, and that is whether there was sufficient evidence to be submitted to the jury on the question of fraud in procuring the release. The determination of this question requires an examination of the testimony.

The release was signed at the home of the plaintiff on July 19, 1899, at the instance and request of A. L. Bowden, the defendant's agent. Br. Bowden called on the plaintiff twice at her residence before he obtained the release. Mrs. Clayton testifies to what occurred on the two occasions, and, in substance, says: That at the first interview Bowden said that he was a friend of the conductor in charge of the car when she was injured and that he had come to see her in regard to reinstating him; that he intended seeing the company for that purpose, but desired to see her first, as he thought her influence necessary. That he was there only a short time, and, on leaving, said that, if he was successful with the company in the conductor's behalf, he would return and advise her of the fact. That the second interview was in her parlor in the presence of Miss Annie Rinehart, who boarded with her. That in this interview Bowden asked her about her expenses, and if \$5 would cover them, and she told him she thought it would at that time. That he then produced a receipt for \$5 for the expenses she had incurred, and requested her to sign it. That he read no paper to her. That on his second call she did not receive Bowden, but found him in the parlor, and supposes that Miss Rinehart admitted him. That Miss Rinehart was in the parlor, and was present during the entire interview. That the paper she signed was folded, and she saw no writing on it. That the expenses for which the \$5 were paid her were for such work as washing and ironing. That Bowden left no card with her on either occasion when he called.

Miss Rinehart testifies that at the second interview she admitted Bowden to the house, and was present and heard every word that was spoken between the parties; that Bowden began asking Mrs. Clayton about her condition, and she told him she was suffering, and did not know how badly she was injured; that he then asked her how much she had paid during the week for help, or anything of that kind, and she replied that she

did not know; that he asked Mrs. Clayton further about her expenses, and if \$5 would cover what she had paid, and she replied that it would; that he then said he would give her a check for \$5 for the expenses of the week; that Bowden wrote something, and passed a little slip of paper to Mrs. Clayton, and asked if she would sign a receipt for \$5 for her expenses for the week, and she signed the paper; that he said that it was for her expenses; that Bowden, pointing his finger at a blank line, asked her if she would "mind witnessing her receipt for this \$5," and that the witness did so; that Bowden did not read the paper to the witness or Mrs. Clayton, and that the latter did not have it in her hands to read; that it was in the form of about half a size of a foolscap sheet of paper; that the witness did not read the paper because she took Bowden's word that it was a receipt; that it was folded when she signed it; that Mrs. Clayton did not have or display Bowden's card during this interview.

The only witness in behalf of the defendant who testified in regard to the release was Mr. Bowden, and his testimony, in substance, is as follows: He called on Mrs. Clayton on July 14th and 19th. At the first interview, at which he remained an hour and a half, his errand was to see if she was injured, and, if so, to bring about a settlement. She said she did not then know the extent of her injuries, but, if she was injured, she would agree to settle, and requested him to call again. He told her he was the agent of the company, and gave her his card, showing the fact, which she displayed on his second visit. He denies that he told her he came to see her in the interest of the conductor, but admits that Mrs. Clayton expressed sympathy for the conductor. He called again, taking with him a release, and Mrs. Clayton admitted him to the house. He talked with her alone quite awhile, and, when he found she was but slightly injured, arranged terms of settlement. He then read the release to Mrs. Clayton and Miss Rinehart, whom Mrs. Clayton called to witness it. He denies that he represented the release to be a receipt for \$5 for expenses, and that he asked Mrs. Clayton to sign it as such.

We do not understand that the learned counsel for the appellant controvert the proposition that, if the release was procured by fraud, it would be void as to the plaintiff, and be no defense to this action. The only question, therefore, is as to the sufficiency of the evidence to establish the fact. We have stated above the substance of the testimony describing the circumstances under which the release was procured, and it is clearly within the rule requiring such testimony to be clear, precise, and indubitable. There can be no doubt, if the two witnesses are credible, that the defendant's agent misrepresented the true character of the release, and prevented its contents from being known to Mrs. Clayton or Miss Rinehart. It is equal-

ly clear, if the jury believed the plaintiff's witnesses, that Mrs. Clayton executed the release by reason of the fraudulent representations as to its contents made by the company's agent. The testimony of both witnesses is to that effect, and it is clear and positive. It flatly contradicts, as will be observed, the testimony of the company's agent as to the material facts of the fraudulent representations made by him at the second interview, when the release was signed. Miss Rinehart is wholly disinterested in the controversy, while the company's agent lacks corroboration by any other witness. We think the evidence of fraud was not only sufficient to submit to the jury, but that it fully warrants their conclusion that the release was procured by misrepresentation and fraud.

The learned counsel for the appellant rely upon *Penna. R. Co. v. Shay*, 82 Pa. 198, and *De Douglas v. Union Traction Co.*, 198 Pa. 430, 48 Atl. 262, as decisive of the question for determination here. In the *Shay* Case the trial judge said in his charge that "we fail to see any sufficient evidence to justify the jury in a conclusion of fraud to set aside the written evidence—the release in this case;" and this court (*Sharswood, J.*), in holding that to be true, said that "*Shay* [the plaintiff] did not even deny that he knew what he was signing; that it was a release of all his claim upon the company in consideration of a sum of money sufficient to pay the funeral expenses." In *De Douglas v. Union Traction Co.*, the plaintiff testified that she was requested to sign a receipt when she received the money; and she and her sister, who witnessed the paper, testified that the release was not read to her. It was held that "the evidence was not sufficient to support the plaintiff's claim." The facts of these cases clearly distinguish them from the case at bar. The mere fact that the release was not read to Mrs. Clayton, or that she did not read it, or signed it without knowing its contents, is not sufficient to invalidate it, or to convict the defendant of fraud in procuring it. As was said by Chief Justice Gibson in *Greenfield's Estate*, 14 Pa. 489, "if a party who can read will not read a deed put before him for execution, or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection either in equity or at law." Here the company's agent did not ask the plaintiff for a release for her injuries, nor was it discussed in the conversation between the parties. The plaintiff was not only ignorant of the contents of the paper, but the company's agent misrepresented its contents, and, without reading the paper to Mrs. Clayton, or giving her an opportunity to read it, assured her that it was a receipt for the sum which she and the agent had agreed upon as compensation for the expenses incurred by her since she was injured. In addition to this, when he presented the paper for

Mrs. Clayton's signature, he had folded it so that neither she nor the witness Miss Rinehart could see its contents. These and other acts on the part of the company's agent, disclosed by the testimony, clearly constitute fraud, and, having been established by the verdict of the jury, they relieve the plaintiff from the binding force of the instrument to which she attached her signature. The fraud perpetrated in procuring it vitiated the paper, and rendered it as inoperative and ineffective as though it had never been signed. *Clary v. Municipal Electric Light Co.*, 65 Hun, 621, 19 N. Y. Supp. 951; *Bliss v. N. Y. C. & H. R. R. Co.* (Mass.) 36 N. E. 65, 39 Am. St. Rep. 504; *C. R. I. & P. Ry. Co. v. Lewis*, 109 Ill. 120. In the case last cited it is said: "Conceding the fact to be well founded—as must be done—that the plaintiff was induced by the agents of defendant to sign the paper under the belief that it was a mere receipt for expenses, then that would be a fraud upon her, and the alleged release would constitute no bar to the present action."

The learned trial judge, in a very accurate charge, to which no exception has been taken, submitted the case to the jury, and they have found that the release was procured by the fraud of the defendant's agent. The evidence being sufficient to warrant its submission to the jury, the judgment entered on the verdict must be sustained. The assignment of error is overruled, and the judgment is affirmed.

PARK BROS. & CO., Limited, v. OIL CITY BOILER WORKS.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

CORPORATIONS—ACTIONS—VENUE—PROCESS—SERVICE—SETTING ASIDE.

1. Act July 9, 1901 (P. L. 614), regulating the service of process, does not affect the common-law rule as to suits against corporations, and under it no suit is authorized against a corporation except in a county where the corporate property is situated, or where it transacts a substantial part of its business.

2. Where service of process on a corporation is irregular, it may be set aside on rule, and it is not necessary to file a plea in abatement.

3. A return of service of process against a corporation should set out service at the office or place of business of the corporation in the county, and if it is not so served such facts should be set forth as would affirmatively show service within some of the methods prescribed by statute.

Appeal from Court of Common Pleas, Allegheny County.

Action by Park Bros. & Co., Limited, for use of the Park Steel Company, against the Oil City Boiler Works. From an order making absolute a rule to set aside service of summons, plaintiff appeals. Affirmed.

The defendant company is a manufacturing corporation of Pennsylvania, having its office in Oil City, Venango county, and hav-

ing no office or place of business in Allegheny county. The suit was brought in assumpsit to recover the price of steel sold to the defendants by the plaintiffs by a written contract, the place of execution and delivery of which did not appear, but which provided for the delivery of steel f. o. b. Pittsburg to the defendant company. The return was as follows:

"Served July 31, 1901, by delivering a true and attested copy of this writ to D. J. Geary, vice president of the Oil City Boiler Works, a corporation of Pennsylvania, and made known to him the contents thereof.

"So ans. Wm. C. McKinley, Sheriff."

D. J. Geary filed the following affidavit: "D. J. Geary, being duly sworn according to law, deposes and says that the Oil City Boiler Works is a corporation organized under and existing by virtue of the laws of the state of Pennsylvania; that it has no property, agent, or place of business in the county of Allegheny, and did not have on July 31, 1901, and for a long time prior thereto; that none of its officers or directors resided in the county of Allegheny; that it transacts no business in the county of Allegheny, and has not transacted any business in the county of Allegheny for many months prior to July 31, 1901, on July 31, 1901, or since; that on July 31, 1901, while deponent, the vice president of said corporation, was passing through said city of Pittsburg on his way to the city of New York, being only temporarily at said city, summons in said above-stated case was served upon him; that he is advised said service gave the court no jurisdiction."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John S. Wendt, D. T. Watson, and Johns McCleave, for appellant. A. Leo Well and Charles M. Thorp, for appellee.

MITCHELL, J. At common law a corporation could only be sued in the territorial jurisdiction where it had its legal domicile, and that was where it had its chief place of business. The general corporation act of this state requires the charter to set out "the place or places where its business is to be transacted," and this becomes the legal domicile of the corporation. Notwithstanding the learned and ingenious argument of the appellant, it is too firmly settled to admit of question that the common-law rule as to suits against corporations is still the general rule in Pennsylvania, and any exceptions to it must rest on clear statutory authority. The learned judge below found some conflict in the decisions of the courts of common pleas, and some uncertainty, perhaps, in those of this court. It is not worth while, however, to enter upon an extended review and comparison of the cases, since the subject was carefully considered and settled in *Bailey v. Williamsport*, etc., R. R. Co., 174 Pa. 114, 84 Atl. 556. In that case the legislation down

to that date was reviewed by our Brother Dean, and the result shown that no suit is authorized against a corporation except in a county where the corporate property is in whole or in part situated, or where it transacts a substantial part of its business. *Jensen v. Philadelphia, etc., St. Railway Co.*, 201 Pa. 603, 51 Atl. 311. Since those cases arose, however, there has been passed the act of July 9, 1901 (P. L. 614), and we have to consider its effect. It is entitled "An act relating to the service of certain process in actions at law, and the effect thereof, and providing who shall be made parties to certain writs." It provides somewhat elaborately for service of summons, attachment in execution, etc., first upon individuals, and, secondly, upon corporations, limited partnerships, etc., by the sheriff "in the county wherein it is issued, in any one of the following methods: (a) By handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk or other executive officer personally; or * * * (f) if the corporation * * * has no office or place of business in actual operation in the county where the cause of action arose, then service may be made in such county upon any member of its board of directors in any of the methods set forth" previously. These are the only portions of the act bearing upon the present inquiry, the others merely varying the allowable kinds of service under different circumstances. All of them relate solely to methods of service. No direct reference is made anywhere to the jurisdiction of the courts, nor is any such intent discoverable in the title. The only phrases from which such intent could be even remotely inferred are in the second section, above quoted, that the sheriff may serve the writ "in the county wherein it is issued," and the provision in clause "f" for service where the corporation has no office or place of business in actual operation "in the county where the cause of action arose." These are altogether insufficient to turn an act whose title and plain general purpose relate solely to methods of service into one making substantial changes in the jurisdiction of courts and the liability of corporations to be sued. The words, "county wherein it is issued," and "county where the cause of action arose," mean county wherein it was legally issued, and county where the location of property or business gave jurisdiction to the courts under existing law. If the quarter sessions issued a writ of summons in a civil action, it could hardly be contended that it was sustainable by this act, and yet the argument cannot stop short of that result if the language quoted was a grant of jurisdiction. The learned judge below was correct in holding that the act of 1901 was a regulation of service only.

It is further complained the court erred in setting aside the service on a rule, instead of putting the defendant to a plea in abatement. The latter is the ancient and more formal way, but it is not necessarily exclusive. The enlarged operation of rules is a somewhat peculiar and very admirable feature of Pennsylvania jurisprudence, growing largely out of the administration of equity through common-law forms. It was early held that remedy by rules had supplanted the ancient *audita querela* and writ of error *coram nobis*, and the constant tendency of modern practice has been to enlarge, rather than to restrict, their operation. No serious disadvantages have as yet been perceived, and the convenience is such that the legislature has in some cases—such as the acts of 1836 as to interpleaders in the district court of Philadelphia, of 1881, 1885, 1889, and 1893 as to ejectments, etc.—carried rules beyond their natural and legitimate province, and clothed them with the office of original process.

The practice of setting aside service on rule has the sanction of precedents sufficient to save it from being pronounced irregular in cases where it reaches the desired end without inconvenience or injustice to either party. See *Parke v. Commonwealth Ins. Co.*, 44 Pa. 422; *Hagerman v. Empire Slate Co.*, 97 Pa. 534; *Hawn v. Penna. Canal Co.*, 154 Pa. 455, 26 Atl. 544; *Fulton v. Commercial Travelers' Accident Assn.*, 172 Pa. 117, 33 Atl. 324; *Bailey v. Williamsport, etc., R. R. Co.*, 174 Pa. 114, 34 Atl. 556; *Platt v. Belsena Coal Mining Co.*, 191 Pa. 215, 43 Atl. 207; and *Jensen v. Phila. & S. Ry. Co.*, 201 Pa. 603, 51 Atl. 311.

While it is still the law that the sheriff's return is conclusive on the parties, and cannot be contradicted, yet modern practice is liberal in allowing inquiry into the actual facts where the return itself is not full or explicit. The return in the present case is exceedingly meager. It does not show that the service upon the vice president of the defendant corporation was made in Allegheny county, or even in the state of Pennsylvania. No doubt these facts will be presumed in favor of the sheriff's official action, but the facts are left open to inquiry. If it appeared that the service was in another state, it would unquestionably be bad, notwithstanding the return. A proper return should set out a service at the office or place of business of the corporation in the county, or, if not so served, then the facts should be affirmatively returned which will bring the service within some of the methods prescribed by statute. The court in the present case did not go into evidence contradicting the return, but only considered other facts consistent with the return, but showing details from which it clearly appeared that the service was bad.

Judgment affirmed.

SIEBERT v. STEINMEYER.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

ACTION AGAINST EXECUTOR—RES JUDICATA—ADMISSIONS.

1. In an action against an executor on a note given by decedent, brought by his son, the record of a prior suit in equity by the executor against the son, in which a decree was rendered compelling the son to surrender to the estate certain stock, was inadmissible as *res judicata*, where the note was not involved in the settlement connected with the equity suit in which the note was referred to.

2. Where a son sues his father's estate on a note, an item in an inventory filed by the son as executor for his father, specifying a claim against himself, is insufficient to sustain a plea of set-off, without other evidence.

Appeal from Court of Common Pleas, Allegheny County.

Action by P. W. Siebert against William Steinmeyer, executor. Judgment for plaintiff. Defendant appeals. Affirmed.

Counsel for defendant offered in evidence the record of the court of common pleas, which was a bill in equity filed by William Steinmeyer, executor of the last will and testament of Christian Siebert, deceased, versus P. W. Siebert, and the Ewalt Street Bridge Company, which was in the Supreme Court at the October term, 1898, in support of the proposition that the claim in relation to this note now sued on is *res adjudicata*. "Mr. Rodgers (addressing Mr. Ferguson): The note that is referred to in this proceeding is the same note as the note now offered, is it not? Mr. Ferguson: The plaintiff in this case was interrogated in that case, upon cross-examination, as to the note sued on in this case. Mr. Ferguson: I object, first, that the note sued on in this case was not involved in the pleadings in that case; that those proceedings are not, therefore, *res adjudicata*; and, generally, that the offer is incompetent and irrelevant. (Objection sustained, and bill sealed for defendant.)"

A witness for defendant was asked these questions: "Q. Do you know the paper I hand you, marked 'Exhibit No. 2'? A. Yes, sir. Q. What is it? A. This is the inventory and appraisal of the estate of Christian Siebert. Q. So far as regards the inventory, it is a statement of the items, and has a heading with the words, 'Christian Siebert, 18th Ward, City of Pittsburgh.' Do you know in whose handwriting all the entries I have referred to are? A. The handwriting of P. W. Siebert. Q. And this was filed by P. W. Siebert and yourself, I presume? A. Yes, sir. Mr. Rodgers: I offer Exhibit No. 2, the relevancy of which is in the way of a set-off. There is an item claimed against P. W. Siebert, with interest, amounting to \$8,300. I propose to use that as a set-off. (Objected to as incompetent for that purpose. Objection sustained, and bill sealed for defendant.)"

The court charged as follows: "Under the

evidence in this case, as we understand the law to be, the plaintiff is entitled to a verdict for the amount of his claim, with interest upon it, which will be computed. We therefore instruct you, as a matter of law, that, under all the facts in the case, the plaintiff is entitled to your verdict for the amount of this note, with proper interest."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James R. Sterrett, W. B. Rodgers, Thomas Patterson, and M. W. Acheson, Jr., for appellant. J. S. Ferguson and E. G. Ferguson, for appellee.

FELL, J. This action was against the executor of the will of Christian Siebert, on a promissory note made by the decedent, which became due after his death. The grounds of defense at the trial were *res adjudicata* and set-off. In support of the first ground the defendant offered in evidence the record of a proceeding in equity between the same parties in which the defendant in this action was the plaintiff, and obtained a decree that certain shares of stock of the Ewalt Street Bridge Company, standing in the name of P. W. Siebert, belonged to the estate of his father, Christian Siebert. In the answer filed in that proceeding, P. W. Siebert alleged that the stock had been transferred to him in part payment of an indebtedness due by his father. At the hearing he testified that there was due him in the settlement of an account with his father \$19,000, and that in payment of items of this account, amounting to \$6,500, he took 100 shares of the stock, and that a note for \$12,500 was given in payment of the balance. The court, among other conclusions of fact, found that the stock had not been transferred to P. W. Siebert by his father, and that his father did not then "owe him \$19,000, or, as far as appears, any sum whatsoever." See *Steinmeyer v. Siebert*, 190 Pa. 471, 42 Atl. 880, 70 Am. St. Rep. 641. The plea of *res adjudicata* is based on the second finding.

The note of \$12,500, mentioned in the testimony, is the note on which this action is founded. We do not see that its validity came into question in the equity proceedings. It was not referred to in the bill, which was filed after suit had been brought on it, nor in the answer, nor was it involved in the accounting prayed for, which was limited to the dividends received on the stock. The only mention of it was in connection with a settlement by which it was claimed that payment had been made for the stock. Of this settlement it was merely an incident, and related to a part of the transaction in which the stock was not involved. The finding that Christian Siebert did not owe \$19,000, "or, as far as appears," any sum whatever, settled nothing in relation to this note. The explanation offered as to the manner in which the stock had been

acquired was found to be unsatisfactory, but the inquiry was limited to the matter of the credit alleged to have been given. The finding by the court did not conclude the defendant in that proceeding as to matters not necessarily involved in it. The record was therefore not admissible in evidence.

The only evidence offered in support of the plea of set-off was an item of the inventory of the estate of Christian Siebert, as follows: "Claim against P. W. Siebert, and interest from October 8, 1892, \$8,360." The entire inventory, except the printed portion, was in the handwriting of the plaintiff, and was filed while he was one of the executors of his father's estate. It was offered as an admission of an indebtedness by him to the estate. Unsupported by testimony, it amounts to nothing more than an admission that the decedent claimed that the plaintiff owed him on some account the sum named. If disputed, it was proper to include it in the inventory, and thus bring it to the attention of the orphans' court and of parties interested; but, standing alone, it was not in itself an admission that would sustain an action or establish a set-off.

The question whether the burden was on the plaintiff to prove the consideration for the note, because of the confidential relation in which he stood to his father, does not appear to have been raised at the trial. The record in the equity proceedings was offered for the specific purpose of showing that there had been a prior adjudication of the matter in controversy, and no other ground for its admission can now be set up. There was nothing on the record in this action that showed that the plaintiff had been the executor of Christian Siebert, or that he was his son, and there was no evidence in the case that suggested the existence of a confidential business relation.

The judgment is affirmed.

In re PAYNE'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

DECEDENT'S ESTATE—CONTRACT—CARE OF MOTHER—EVIDENCE—LIMITATIONS.

1. Where a married daughter, living in her own home, agreed with her father to take care of her mother until the latter's death, on an express contract on the part of the father to pay for the services at a rate to be fixed by the mother's physician, and award to the daughter of a sum less than half what the mother's expenses would have been at a hospital will be sustained.

2. An objection that a part of a claim is barred by limitations cannot be first raised on appeal.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of James Payne, deceased. From the decree dismiss-

ing exceptions to adjudication, Harry H. Reed, executor, appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. B. Petty and J. R. McQuaide, for appellant. W. B. Rodgers, for appellee.

MITCHELL, J. Post mortem claims, especially by members of the decedent's family, are not favorably regarded. Frequently, if not generally, they are the product of greed for money, displayed after death of the party best qualified to contest them, and are not creditable to human nature. For this reason they are to be closely scrutinized. But in the present case the contract was clearly made out. The testator's wife requiring attention that he could not give her in his home, the testator was advised by her physician to put her in a hospital. Being reluctant to do that, the present claimant—a married daughter, living in her own separate home—agreed to take charge of her mother, and did so faithfully for more than four years, until the mother's death. There was an express contract to pay for these services at a rate to be fixed by the mother's physician. The judge below took the testimony of the physician and others on this point, and made an award of somewhat less than half what the expense would have been in a hospital. Every element of a valid and complete contract was proved, and we are unable to see that the court erred in any respect.

It is now objected that the services were rendered, in large part, more than six years before this claim was presented, and that a subsequent promise to pay did not sufficiently identify the debt to be valid. This point, however, was not made in the court below, which finds "that there is no effort to dispute the claim, * * * but the testimony goes entirely to the value of the services." As the court was not called upon to consider this point, and did not pass upon it, we dismiss it without further discussion.

Appeal dismissed, with costs.

SCHOMAKER v. SCHWEBEL.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

BENEFIT ASSOCIATIONS—BENEFICIARIES—CHANGE—BANKRUPTCY.

1. The by-laws of a beneficial association provided that the beneficiary named could be changed on compliance with certain formalities. A member designated his mother as beneficiary, and died without making any change in the certificate; and on his deathbed directed his mother to give the death benefits to his sisters; and the mother, on receipt of the check of the association after the death of the insured, indorsed it to his sisters. *Held*, that an assignee in bankruptcy of the mother, who was bankrupt at the time of the death of the son, could not compel the sisters to pay the money to him.

Appeal from Court of Common Pleas, Allegheny County.

* 2 See Appeal and Error, vol. 2, Cent. Dig. § 1104.

Bill by Fred W. Schomaker, trustee of Rosa Schwebel, bankrupt, against Anna Schwebel. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. A. Way and W. H. Lemon, for appellant. Lewis McMullen and C. O. Dickey, for appellee.

DEAN, J. William A. Schwebel was a member of the Catholic Benevolent Legion, a beneficial society, and held a benefit certificate in the society, payable at his death, in the amount of \$3,000, in which his mother, Rosa Schwebel, was named as beneficiary. The son died on January 26, 1900. The by-laws of the society provided as follows: "A member in good standing may at any time surrender his benefit certificate to the secretary of his council for change of beneficiary, and have a new one issued payable to such beneficiary or beneficiaries as he may direct, as provided in the foregoing section, upon the payment of a certificate fee of fifty cents. The right to receive the benefit will vest in the new beneficiary or beneficiaries named in this application so soon as indorsed over his signature on the benefit certificate, duly attested by two witnesses, one of whom must be a member of the legion." Two or three weeks before his death, he, then being in bed in his last sickness, directed his mother to give the proceeds of his certificate to his two sister, Anna and Mary Schwebel, to which the mother assented—this in the presence of witnesses. No change having been made on the books of the association in the name of the beneficiary, the association, 14 days after his death, sent a check for the \$3,000 to the mother, who, on receipt of same, immediately indorsed it over to the two sisters, as she had promised her son to do. They drew the money on the check, and have had possession of it since. A few hours before his death the son stated to a member of the association that he had made provision for his two sisters. Rosa Schwebel, the mother, at the time of the promise of her son to the sisters, was largely indebted and insolvent. An assignee in bankruptcy under the bankruptcy act has possession of her estate. The court below, on these facts, was of opinion that the mother, by the agreement with her son, was a mere trustee or depositary for the sisters, and, on a bill by appellant, the assignee in bankruptcy, against the sisters, dismissed the bill, and we have this appeal by him.

The beneficiary named in the certificate—the mother—was a mere volunteer. She had paid no dues, nor had any consideration passed from her to the son. Both he and she knew he had a right to change the beneficiary at any time, with or without her consent. The legal title to the benefit, however, remained in her so long as her name

remained on the face of the certificate; and the association could pay to her, without peril from adverse claims, as long as no formal change, such as described in the by-laws, had been made in the certificate or on the books. But as between the member and holder of the certificate the relation was an entirely different one. In law and in fact she was a beneficiary at will of the member. If he died without signifying his desire to make a change in the donee of his bounty, she took the benefit; but if, under the rules of the society, he had changed the name to that of another, the society must pay to that other. If she assented to a change without the formality required by the by-laws, she became a mere dry trustee for the new beneficiary. When she received the money she had but a single duty to perform; that is, to hand it over to the new beneficiary to whom she agreed it should be paid. The obligation on her to pay over to the sisters was both a legal and moral one—just as much so as if he on his deathbed had handed her \$3,000 in cash, and directed her to pay it to his sisters, and she had promised to do so. And this is, in substance, our decision in *R. Co. v. Wolf*, 52 Atl. 247—a case argued at Philadelphia last term, and not yet officially reported. If this were a claim on the society by the sisters for the money under the oral promise of the mother, the society would be protected by its by-laws in resisting the claim. It might insist on recognizing only the legal claim of the mother, whose name was on the face of the certificate. But the mother makes no claim. She has already paid to the sisters. A third party—the assignee in bankruptcy of the mother—demands that it be paid by the sisters to him; that is, the mother's creditors claim the money. To give this claim any foundation, there must have been a property right in the mother, of which she divested herself, in fraud of her creditors, by payment to the sisters. What property had she in the certificate, or the money payable on it? Any claim she might have made depended on two contingencies: First, that the son, in his lifetime, make no change in the beneficiary; and, second, his death. As long as the son lived, the mother could assert no claim. Before death occurred he had deprived her of all claim by making his sisters the beneficiaries, which he had a right to do, regardless of his mother's financial condition. The creditors, therefore, have no claim, because they have lost nothing. All the authorities cited by appellant, ruling that, to constitute a valid transfer of a certificate in a benefit association, the forms prescribed by the by-laws must be observed, have no application to these facts. This is not a contest of the society with the sisters as claimants, nor with the mother, the nominee in the certificate. The society paid to the mother, as it had a right to do; but she, under oral promise to the son, received the money as trustee for his

sisters, and has faithfully performed her trust. The creditors had no claim while the son was living. His death did not revoke the trust assumed by his mother, but only confirmed it.

The decree of the court below is affirmed.

FRIDAY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EMINENT DOMAIN—VALUE OF LAND—EXPERT EVIDENCE—CROSS-EXAMINATION.

1. In condemnation proceedings, a witness, in order to testify as to land values, should be familiar with the property in question, or uses to which it may be reasonably applied, and improvements and the general selling price of ground in the neighborhood.

2. The general selling price, as basis for determining value of land in condemnation proceedings, is to be fixed from a knowledge of the price at which lots are generally held for sale and at which they are sometimes sold in the course of ordinary business in the neighborhood.

3. Where a witness testifies as to the value of property to be condemned, he should be required to designate the properties in the vicinity with which he is acquainted, and set forth the source of his knowledge of their values.

4. Where an expert as to values of real estate has testified as to his qualifications, the opposing party should be allowed to cross-examine him before he is permitted to testify.

5. Where a witness as to value has given his opinion, and has also stated that he would give the price named for the property, an instruction leaving the impression upon the jury that the estimate of the witness was entitled to great weight because of his apparent willingness to purchase is error.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by Elizabeth F. Friday against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial the court admitted, under objection and exception, the opinions of various witnesses offered as experts as to values. The court charged in part as follows: "We have in this case, gentlemen—and we have no reason to believe that there was a man brought on the stand that did not tell you just exactly what he believed—on the one side we have it running from \$60,000 to \$75,000 and \$80,000, as the probable selling value of this property, what it would probably bring. On the other hand, we have it running from \$200,000 to \$275,000; probably a little more. One witness, when asked, said that he thought it was worth \$235,000; and there was one witness who said, I believe, that he would give \$250,000 for it, whether he had the money or not. But he said so, and the evidence is for you to consider; because if a man is able to pay for property at the price fixed, where he satisfies you that he is able and willing to pay that price, when the question of values comes up, it is some evidence as to what it would fairly bring,

because, if he would give it, it would fetch it. But that kind of testimony is to be looked at carefully, and should have very slight weight, because if we do not know ourselves what we would be able to do, it is not of much value. I might be willing to give \$100,000 for a piece of property very gladly if I had the money, but if I did not have it I might not be able to buy it. So I merely suggest it to you as indicating that, while it is not conclusive as to what the property is worth, and, while it may be considered, it is not to be considered absolutely as indicating to the jury what they ought to render a verdict for."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Patterson, James R. Sterrett, and M. W. Acheson, Jr., for appellant. Walter Lyon, Charles H. McKee, and H. Walton Mitchell, for appellee.

POTTER, J. This appeal is from a judgment entered upon the verdict of a jury fixing the market value of a certain property situated at the corner of Eleventh street and Liberty avenue, in the city of Pittsburg. The assignments of error challenge the competency of certain witnesses who testified on behalf of the plaintiff. It is contended that they did not show sufficient knowledge of the subject-matter of the inquiry to qualify them to give an opinion as to the value of the property in question.

The knowledge which is essential to qualify a witness to testify as to land values is clearly defined in Pittsburg, etc., Railway Company v. Vance, 115 Pa. 325, 8 Atl. 764, and reiterated in Michael v. Crescent Pipe Line Co., 159 Pa. 99, 28 Atl. 204. The requirements imply familiarity upon the part of the witness with the property in question, its area, and the uses to which it may reasonably be applied, and the extent and condition of its improvements. But this is not all. Another essential, by reason of the necessity for comparison, is a knowledge of the general selling price of ground in the neighborhood at the time. In fixing this, regard must be had also to the rule that the general selling price is not to be shown by evidence of particular sales of alleged similar lots, but is to be fixed in the mind of the witness from a knowledge of the price at which lots are generally held for sale, and at which they are sometimes actually sold, in the course of ordinary business in the neighborhood. While not easy to define with accuracy, yet there is such a thing as market value. And in an inquiry such as the present this is to be ascertained from the testimony of those who, by special knowledge, or opportunity for observation, are in possession of the data from which a proper estimate can be made.

Testimony for this purpose should not be

accepted against objection, upon the mere assertion of a witness that he knows the values. His averment should be tested by having him designate the properties in the vicinity with which he is acquainted, and set forth the source of his knowledge of their values. He should be able to give a satisfactory reason for his opinion, and show that it rests upon a substantial foundation, and is not a mere guess. The rule is clearly laid down in *Michael v. Pipe Line Co.*, *supra*, that in establishing the competency of witnesses called to give an opinion as to the market value of land it must affirmatively appear that they have the requisite personal knowledge of the subject-matter of the inquiry, and the source, extent, and character of that knowledge must be satisfactorily shown. These requirements were not met in the case of a number of the witness called upon the part of the plaintiff, and, if their competency be measured by this standard, they fall short. They were lacking in knowledge of the general market value of neighboring property, or, if they possessed that knowledge, the fact was not made to appear.

For instance, Mr. C. F. Klopfer testified that he thought he had a knowledge of the valuation of property in the neighborhood, but did not exhibit in any particular the extent, source, or character of his knowledge. Notwithstanding this, his attention was at once directed to the property which was taken, and his opinion as to its value was asked. Objection was made upon the part of the defendant on the ground that the witness had not shown any general knowledge of values, and leave was asked to cross-examine him as to his knowledge in this respect. This was refused, and the witness was allowed to express his opinion that the value of the property was about \$250,000. His reason for placing it at that figure was, as stated in the immediate connection, his willingness to give that amount for it himself. Upon cross-examination he admitted that this was his only reason, as he had not heard of any sales (except to the defendant), and he did not know the figures asked for property in the same square or in adjoining squares. Referring to his valuation again, he said, "It is merely my own idea what I would give for it as a speculator, and I think it is worth it." The only knowledge which the witness seemed to have of the value of property in the vicinity was of the price paid by this same defendant for some adjoining pieces; and this being only of particular sales, for a particular purpose, was not evidence of the general selling price of ground in the neighborhood.

Mr. N. L. Gleason, in fixing his valuation, was evidently influenced largely by what he termed the earning capacity of the property, arising from the fact that the building upon the lot was a licensed house for the sale of liquors. It did not appear that he knew of

the value of any property in the neighborhood, or of any sales which were made, except that of the adjoining property to this same defendant.

Mr. William Scott, when asked if he was familiar with the value of property in that vicinity, replied, "Well, only from what I heard of some sales." Objection was made to his competency, and counsel for defendant asked leave to cross-examine. This was refused by the trial judge, after the witness had simply asserted that he was familiar with the value of property in the neighborhood. After being allowed to express his opinion that the property was worth \$5,000 a front foot, the witness admitted upon cross-examination that the only sales that he had heard of in the neighborhood were of adjoining properties purchased by the defendant company; and that the highest of these sales was at the rate of \$3,600 a front foot, another being at \$2,500, and another at \$1,500 a front foot. And while, in the outset, he had given as the basis of his familiarity with values these sales of which he had heard, yet he eventually admitted that his estimate was not based upon these sales at all, but that he was getting away from them altogether.

James B. Lawler, after saying that he knew the values of property in the neighborhood of Eleventh street and Liberty avenue, estimated the value of the property in dispute as being \$225,000. Immediately afterwards, on cross-examination, he admitted that he had not bought or sold property in that neighborhood; that he knew of no sales outside of those made to the same defendant of adjoining pieces; and that he did not know the price at which people held their property in that neighborhood, on the squares between Tenth and Eleventh and Eleventh and Twelfth streets. Under these admissions it is difficult to see what there was left, within the knowledge of this witness, to be used as the basis of any intelligent comparison of values.

And so, without taking up in detail the testimony of other witnesses who were allowed to give their opinion in this case, the same criticism applies to them. They either had not sufficient actual personal knowledge of the value of the property in the neighborhood to use it intelligently as the basis upon which to estimate the value of the property in question, or, if they had such knowledge, it was not shown to the court. A striking difference appears between the estimates of some of these witnesses and those of others whose training and observation, seemingly, had fitted them to speak accurately as to market values. As against estimates of about \$235,000, the four experienced city assessors placed the market value of this property at from \$70,000 to \$80,000, the assessed valuation being much less. Further than this, in the case of certain of the witnesses the disqualification was not merely negative, but it was manifest that their estimates were based

upon the particular use to which the property was applied at the time, and that the value of the license to sell liquor upon the premises and the profits of the hotel business were controlling elements in the minds of these witnesses in estimating the value of the property.

The assignments of error must, therefore, be sustained in so far as they relate to the admission, as evidence, of the opinions of a number of witnesses whose competency had not, under the established rule, been clearly shown to the court.

There is also involved in this appeal the question of the right of defendant's counsel to cross-examine as to the qualifications of a witness before giving expression to an opinion as to land values. This point, too, was ruled in *Michael v. Pipe Line Co.*, supra, when Justice Sterrett, after pointing out that actual personal knowledge upon the part of the witness must affirmatively appear, and that its possession cannot be assumed, went on to say: "Hence the possession and sufficiency of such knowledge should be made to appear, and be passed upon by the court, before the witness should be allowed to express an opinion." The question of the competency of the witness is always for the court. But in deciding it should have the benefit of every reasonable aid, and nothing could be more effective than a cross-examination within proper limits. Aside from this, if the opposing counsel are not satisfied with the correctness of the statements of the witness as to his ability to give an opinion, they are justified in asking for an immediate opportunity to apply the test of cross-examination, and it should be allowed.

In charging the jury the trial judge referred to the fact that one witness, after giving his opinion as to value, had said that he would give that amount for the property. In commenting upon this statement the learned court very properly instructed the jury that such testimony was "to be looked at carefully, and should have very slight weight." But in further elaborating he inadvertently destroyed the effect of this instruction by adding that, while that evidence was "not conclusive as to what the property is worth," yet it was to be considered, but was "not to be considered absolutely as indicating to the jury what they ought to render a verdict for." This last suggestion could hardly have failed to restate in the minds of the jury the idea which they would be apt to take in the first instance—that the estimate of this witness was entitled to great weight by reason of his apparent willingness to back it up by taking the property himself at the figure named. Any such impression would be wrong, and its influence would be misleading, because the subject of inquiry before the jury was the market value of the property, and not what a particular witness, having in view a special purpose, might be willing to give for

it, if he had the money. The tenth assignment of error is, therefore, also sustained.

The judgment is reversed, and a venire facias de novo awarded.

LINN v. DUQUESNE BOROUGH.

(Supreme Court of Pennsylvania. Jan. 5, 1908.)

PERSONAL INJURIES—DAMAGES—MENTAL SUFFERING.

1. In a suit by a married woman to recover for personal injuries resulting in permanent damage to both of her hands, it is error to allow the jury to consider, in addition to the physical and mental suffering caused by the injury and permanent disability, the regret and humiliation that plaintiff would feel thereafter because of her inability to perform the services which she had formerly rendered to her husband.

Appeal from Court of Common Pleas, Allegheny County.

Action by Malinda Linn against Duquesne Borough. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial it appeared that the plaintiff was injured on October 14, 1900, by falling into an unguarded opening in a street. She fractured both wrists, and the accident resulted in permanent injury to her hands.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

J. S. Ferguson, E. G. Ferguson, and Fred W. Scott, for appellant. R. H. Jackson and J. R. McQuaide, for appellee.

FELL, J. The plaintiff, a married woman, fell into an unguarded opening in a street and fractured both wrists. The permanent injury caused by the fall was to her hands, the use of which was to some extent impaired. The instruction on the measure of damages allowed the jury to consider, in addition to the physical and mental suffering caused by the injury, and the permanent disability resulting from it, the humiliation and regret that the plaintiff might thereafter feel because of her inability to attend to her household duties, and to perform the services she had before performed for her husband. The latter part of the instruction is assigned as error.

Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury, or is the direct and natural result of a wanton and intentional wrong. Where a claim is for mental suffering that grows out of, or is connected with, a physical injury, however slight, there is some basis for determining its genuineness, and the extent to which it affects the claimant. But as the basis of an independent action, mental suffering presents no features by which a court

¶ 1. See *Damages*, vol. 15, Cent. Dig. § 255.

or jury can determine either its existence or its extent, and claims founded on it have generally been regarded as too uncertain and speculative for consideration. In *Ewing v. Pittsburg, etc., Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 686, 30 Am. St. Rep. 709, it was held that fear and nervous excitement and distress caused by a collision of cars on a railroad, producing mental and physical pain and suffering and permanent disability, but unaccompanied by any injury to the person, afforded no ground of action. In *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, recovery was denied for fright and anxiety caused by apprehension of personal injury. In *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, it was held that there could be no recovery for fright and mental suffering, nor for bodily injury resulting solely from mental distress. In the last-named case, on a review of the authorities on the subject, the exemption from liability is based, not on the ground that fright and anxiety do not constitute actual injury, or that mental and physical effects may not be directly traceable as a consequence of unintentional negligence, but on the ground that in practice it is impossible to administer any other rule without opening a wide door to unjust claims which cannot satisfactorily be met. Excepting cases in some jurisdictions where recoveries have been had for the failure to deliver telegrams announcing illness or death, or other matters of personal concern, but not of pecuniary importance, the instances are very few in which an independent action has been sustained for mental suffering alone. The decided trend of decision both in this country and in England is against the maintenance of such an action, or the allowance for mental suffering as an element of damages when distinct from physical injury.

The cases in which mental suffering has been considered as an element of damages are those in which the suffering was caused by the sense of peril at the time of the physical injury, or was incident to the physical pain, and formed a part of the actual injury. *Pennsylvania & Ohio Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549, and *Scott Township v. Montgomery*, 95 Pa. 444, are instances of such cases in this state. In *Chicago, Rock Island & Pacific Ry. Co. v. Caulfield*, 27 U. S. App. 358, 11 C. C. A. 552, 63 Fed. 396—an action by a boy for injuries—it was said that the instruction that the jury, in assessing damages, might consider his mental suffering because of his crippled condition, was erroneous. In *Bovee v. Danville*, 53 Vt. 183, and in *Augusta & Summerville R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 708, it was held that mental suffering because of disappointed hopes caused by the premature birth of a child as a result of an injury was not a subject of compensation. In *Chicago, Burlington &*

Quincy R. Co. v. Hines, 45 Ill. App. 299, the plaintiff's sorrow because of his crippled condition was rejected as an element of damage. In the opinion in this case it was said: "While in this state it is a well-settled rule of law that damages may be allowed in cases like this for the pain and anguish of mind caused by the personal injury, yet we are not aware of any case holding that anguish of mind, wholly sentimental, arising from a contemplation of a disfigurement of person, can be considered for the purpose of swelling such damages. The words 'pain and anguish of mind' are used in a popular sense to denote such as may arise from any cause, and are not necessarily restricted to that arising from personal injury. But the legal meaning of such words found in the reports of decided cases in this state, as will plainly appear from their reading, confines such meaning of the words to such pain and anguish of mind as occur necessarily and spontaneously from any injury of or shock to the nerves of sensation, or such pain and anguish as remain during the continuance of the original and exciting cause and arising therefrom. But where the injury only comes about by reflection or contemplation, then, in the legal sense, it is not caused by the injury, but arises from and is produced by a combination of causes other than the injury."

The first part of the instruction on the measure of damages allowed a recovery for permanent disability resulting from the injury, and for the mental suffering that was a natural incident of the physical pain, and inseparable from it. This was as far as the instruction should have gone. The objections to making mental suffering the sole ground of recovery apply with equal force to allowing it as an element of damages when it is not a part of the actual injury, but arises afterward from regret, disappointment, or anxiety. There are the same opportunities for establishing fanciful or fraudulent claims by testimony which it is impossible to contradict or impeach, and the injustice of holding a defendant responsible for the unforeseen consequences of mere neglect is as great in one case as the other. The distress of mind occasioned by regret and disappointment, and arising after the injury, was not an element of damage to be considered by the jury. The assignment relating to the instruction on this subject is sustained, and the judgment is reversed, with a venire facias de novo.

IN RE MORROW'S ESTATE. (No. 2.)

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILLS—CHARITABLE BEQUESTS—VALIDITY.

1. Testatrix executed a will, giving a legacy to a charitable institution, and divided the remainder of her estate among six charities,

share and share alike. Thereafter she executed a codicil, revoking the legacy to a charitable institution, and dividing the residue into seven portions; giving one to a stepson, and the remaining six portions among the charities mentioned in her original will. *Held*, that the gift to the charities was not rendered void by the fact that the codicil was executed within 30 days of decedent's death.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Nancy A. Morrow. From a decree dismissing exceptions to adjudication, Frank Lewis Bridge appeals. Affirmed.

The following is the substance of the opinion below:

"The first question involved in this matter is whether or not certain charitable bequests were rendered void because of a codicil made within thirty days before testatrix's death. The facts are these: By will dated July 25, 1894, Mrs. Morrow, after bequests of \$300 to the Uniondale Cemetery for the purpose of keeping her lot in good condition, and \$500 to the Allegheny Day Nursery, directed that the remainder of her estate should be divided among six specified charities, and two days before her death made the following codicil: 'Codicil made this 19th day of December, 1900, in which I revoke the bequest of five hundred dollars to the Allegheny Day Nursery, and desire and order by executors to add this to the remainder of my estate to be divided as above ordered. * * * And I further desire and order that the remainder of my estate may be divided into seven instead of six shares and that one share shall be given to my stepson Robert H. Morrow on condition that he use it properly and shall not oppose the distribution of my estate in accordance with the aforesaid and annexed codicil. I refer to the six shares mentioned in the 13th line of the aforesaid will which I wish to change to seven.'

"It is contended on behalf of the next of kin of testatrix that the effect of this codicil was to make (a) 'a new fund,' and (b) a new bequest within thirty days of her death, and therefore, by force of the act of 1855 (P. L. 328), avoid the charities.

"This case is not distinguishable in principle from Sloan's App., 168 Pa. 422, 32 Atl. 42, 47 Am. St. Rep. 889. The testator there made a gift to a charity, and fifteen months afterwards, within thirty days of his death, by codicil, modified it to the extent of life estates to two persons, and at their death the principal to this charity; and though the subject was introduced by a clause, 'I hereby annul and revoke the bequest' to the charity, and 'instead thereof I give and bequeath,' it was held that, notwithstanding the use of these words, the codicil did not revoke the gift. 'What the testator did, and all that he intended to do,' said the court, 'was to change the time of payment of the bequest so as to give the interest to the persons named in the codicil while they lived. This

is not a revocation. The fact that the testator called it by that name does not make it so. "Revoke" means recall, to take back, to repeal. "Annul" means to abrogate, to make void. The codicil did not recall nor make void the bequest in any particular, except as to the time of payment, and this it changed. * * * It really diminishes the value of the gift to the orphanage for the benefit of the annuitants, and so falls within the purview of the rule declared in Carl's App., 106 Pa. 635.' So here the only substantial change made by the codicil, so far as the charities were concerned, lies in diminution of their bequest. It is true, the residue was increased by the revocation of a special legacy, but the amount of this increase was far less than the loss which resulted to the charities from the division of the residuary estate 'into seven instead of six shares,' and is therefore not a factor in the matter. The real test in cases like the present is whether or not a charitable bequest is within the purpose of the act of 1855 to prevent undue religious influence in the making of wills. If the gift to charity is in fact made within thirty days of testator's death, undue influence is assumed, and the gift is declared 'void,' but otherwise is presumed valid. The original will of Mrs. Morrow was made so long before her death that there can, of course, be no question of any undue influence; and none could have been exercised within thirty days of her death, because she had long before that specified these charities as objects of her bounty, and, so far as appears, she had no intention of striking them out. The same charities continued until her death objects of her bounty and residuary legatees. The codicil, it is true, diminished the amount which she had originally expressed an intention they should have. 'Instead of' the whole, they were to receive only the six-sevenths of the residuary estate; but what remained passed, because it was given, by the original will only. There is a division of the residuary estate into seven instead of six in the codicil, and the only attempted disposition to Robt. H. Morrow implies that no other change was intended. It would have been vain and useless to revoke only to give again, and there was neither in fact nor law a revocation. Accordingly the expression "instead of" excludes the idea of revocation in its technical sense,' said the court in Sloan's App., supra, 'and is equivalent to a declaration that, in such particulars as a codicil differs from the bequest, it is to take the place of, or to be instead of, the bequest.' This is in accordance with the established rule not to disturb the dispositions of the original will more than is absolutely necessary for the purpose of giving effect to the codicil. Relchard's App., 116 Pa. 232, 9 Atl. 311. And it is clear that the only purpose of this codicil was to revoke a special legacy, and make Robt. H. Morrow one of the residuary legatees.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Morton Hunter, W. A. Hudson, and Joseph Howley, for appellant. Frank W. Smith, William H. Dodds, and James S. Young, for appellee.

PER CURIAM. The decree is affirmed on the part of the opinion of the court below relating to the question involved in this appeal.

UNITED STATES, to Use of NICOLA BROS. CO., v. HEGEMAN et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

PAYMENT BY NOTES — PRESUMPTION — CONTRACTS WITH UNITED STATES — BOND OF CONTRACTOR.

1. Where a creditor on a book account accepts notes to the amount of the account, there is no presumption that they were taken in payment of such account, but it will be presumed that they were accepted as collateral therefor.

2. Where a contractor had given a bond to the United States under Act Cong. Aug. 13, 1894, c. 280 [U. S. Comp. St. 1901, p. 2523], and it appeared that the material was charged on the books of the materialman against the contract, and that thereafter, without knowledge of the surety, the materialman took notes of the contractor to the amount of the book account, and extended the notes without knowledge of the surety, the question as to the liability of the surety, where the evidence was conflicting as to whether the notes were taken in payment or as collateral security, is for the jury.

3. In an action to recover on a contractor's bond given under Act Cong. Aug. 13, 1894, c. 280 [U. S. Comp. St. 1901, p. 2523], for timber furnished to the contractor, freight and demurrage on the timber may be recovered from the surety as part of the cost of the timber.

Appeal from Court of Common Pleas, Allegheny County.

Action by the United States, for the use of Nicola Bros. Company, against W. W. Hegeman and others. Judgment for plaintiff, and the surety company appeals. Affirmed.

Assumpsit on a contractor's bond given under Act Cong. Aug. 13, 1894, c. 280 [2 U. S. Comp. St. 1901, p. 2523].

The court charged, in part, as follows:

"If, however, the notes were simply taken as collateral security, were not taken in payment, but were taken as a means of raising money upon the part of both Hegeman & Co. and Nicola Bros., with the understanding that the book account was still to remain open, then the taking of the notes was not a payment of the book account; and, although the taking of the Hegeman & Rellley notes might be a payment of the Hegeman & Co. notes, that would not be a payment of the book account, and the surety company would still be liable. So that you see it is an important question of fact for you to determine as to what circumstances attended the tak-

ing of these notes, whether the notes were taken in payment, or were simply taken as collateral security. That will be the fact for you to determine. If you find that these notes were taken as payment, then to the extent of those notes (I think they represent \$2,300 of this claim), to the extent of that \$2,300, this claim has been paid, so far as the American Surety Company is concerned. If you find that the notes were taken simply as collateral security, or as a means of accommodation for the raising of money, then the payment of those notes by the receipt of the notes of Hegeman & Rellley would not be a payment of the book account, and the surety company would still be liable. You will consider, then, the question of payment, because it is practically the only question of fact in the case—as to whether these notes were taken in payment, or whether they were not; and, as you find that, that will determine the question of whether the plaintiff can recover for the \$2,300 or not."

The court refused the following points offered by defendant:

"That the plaintiff cannot recover in this action, on the ground that it appears from the evidence that the plaintiff extended the time of payment of any claim it ever had against Hegeman & Co. and thereby discharged the surety. Answer. Refused.

"That if the testimony of Mr. Nicola is true, that the original note given for the material furnished was taken up by a payment of part cash, and a new note was discounted and the proceeds applied to the payment of the balance of the old note, that the old note was thereby paid and the surety is discharged, or the time was extended without notice to the surety and the surety discharged. Answer. Refused.

"That the plaintiff cannot recover for the following item: 'July 24, 1899, demurrage, \$152.' Answer. Refused.

"That under all the evidence the jury should find for defendant, the American Surety Company. Answer. Refused."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. J. Rose and W. S. Thomas, for appellant. William M. Hall, Jr., and W. B. Adair, for appellee.

DEAN, J. September, 1899, Hegeman & Co., consisting of Hegeman and Russell, contracted with the United States to build a dam at Herr's Island on the Allegheny river, and the same month gave bond to the United States, with the American Surety Company as surety, having, among others, a covenant to pay all persons for material and labor supplied in the work. Nicola Bros. supplied the timber necessary to the carrying out of the contract; the custom of dealing between them and the contractors was for the latter to give their notes from time to time to Nicola Bros. for about the book account price of the timber payable at the date of the notes,

¶ 1. See *Payment*, vol. 39, Cent. Dig. §§ 189, 190.

which notes were indorsed by the payees, and discounts procured by indorsers; as they fell due they were paid in whole or in part; for whatever balance was unpaid, renewal notes of the same kind, were given by the contractors. Nicola Bros. kept a book account against the contractors, charging them up regularly as the timber was furnished. On August 11, 1899, the firm of Hegeman & Co. was dissolved by the retirement of Russell, and the introduction of a new member, Reilley, the firm name thereafter being Hegeman & Reilley. At the dissolution, there were three of the Nicola Bros.' notes outstanding, one for \$1,500, one for \$1,200, and one for \$800—an aggregate of \$3,500. These notes were given on the account of Nicola Bros. for timber furnished the contractors; the new firm assumed payment of them, and addressed a note to Nicola Bros., dated October 12, 1899, saying the new firm would become jointly liable for the notes if payment were extended until November 10th following. To this Nicola Bros. assented. The assent of the surety company to giving the notes or to their extension was not obtained. The notes were not paid. Nicola Bros. now bring this suit on the book account against the surety, claiming to recover on the covenant in the bond conditioned for the payment of all persons for material supplied. The contractors made no defense, but the surety set up a defense to the amount of the claim embraced in these three notes, alleging that not only was there an express agreement made by Nicola Bros. to extend the time of payment with Hegeman & Reilley, the new firm, but also that the mere acceptance of the notes, without the assent of the surety, operated in law as an extension, which released the surety. There was evidence on the part of plaintiffs that the notes were taken only as collateral to the book account for the benefit and accommodation of the contractors, and there was evidence on the part of defendants that they were given and accepted as payment. The court below submitted the conflicting evidence to the jury, instructing them that, if they were accepted as payment to the amount of them, there could be no recovery; on the other hand, if they were accepted as collateral only, to be used for the purpose of raising money, with the understanding that the book account was still to remain open, then the plaintiffs could recover. The verdict was for plaintiffs, and defendant, the surety company, brings this appeal.

The principal assignments of error raise but the single question, did the court err in not deciding as matter of law that the evidence showed an agreement for extension on part of Nicola Bros. without the consent of the surety? The facts that the creditors did agree to an extension of time on the notes to the principal debtor, and that they did accept the notes without the consent of the surety, are not disputed. Does it follow that

the surety was thereby released? We think not, from the bare facts. There is no implied promise from the agreement to extend the debt on the book account, or that by the acceptance of the notes the creditor would accept them as payment, nor is there an implication from them that the debt evidenced by the book account should be paid by the notes. The question is so fully discussed by Clark, J., in *Buck v. Willson*, 113 Pa. 423, 6 Atl. 97, and the authorities so extensively therein cited, that repetition would be a waste of time. The same subject is also fully discussed by Strong, J., in *Shaw & Leigh v. First Associated Reformed Presb. Church*, 39 Pa. 226, and by this court in many other cases. The creditor gave time, not on the original debt by book account, but on the notes, and, as held in *Buck v. Willson*, supra, there was no extension of time on the book account; it could have been sued on before the notes became due. Whether, outside what appeared in the letter of October 12, 1899, and on the face of the notes, there was an understanding other than the notes themselves expressed, was a question of fact which the jury answered in favor of plaintiff; and, under the decisions, the presumption is they were taken merely as collateral to the original debt, that is, they neither paid nor extended it.

Justice Strong, in the case last cited, while noticing the English cases which seem to decide that taking a time note suspends action on the original debt, at least until maturity of the note, says: "But the late Pennsylvania cases take different ground, and follow the ruling in *Pring v. Clarkson*, 1 Barn. & Cress. 14, in which it was decided that the acceptance of a new bill from the acceptor of a former bill, after it had become payable, for the payment of the same debt at a future day, could only be considered taking collateral security, and therefore did not amount to nor imply giving time to the acceptor." In the case before him, *Shaw & Leigh*, contractors for building a church, filed a mechanic's lien and issued a sci. fa. thereon. At the trial defendants offered a receipt from the contractors for three notes equaling the amount of the lien claimed, at 60, 90, and 120 days, for bricks delivered to the church, and signed by the contractors. There was some evidence as to the understanding of the parties when the notes were given, and the court below left it to the jury to find whether they were received as payment, reserving the point as to whether they were in law a payment, and thereby a relinquishment of the right to file a lien. The jury found for plaintiff, that is, that they were not, in the understanding of the parties, a payment; afterwards the court entered judgment for the defendant on the reserved point. This was the error assigned, and the question on which this court passed in the very full opinion by Justice Strong. It seems to me the ruling is decisive of the case before us.

If the acceptance of the notes of themselves implied a payment, notwithstanding the verdict of the jury that they were not so intended, the lien was ipso facto relinquished; so here, if, as argued by appellant's counsel, the notes themselves implied a payment of the original debt or an extension of it, notwithstanding the verdict of the jury that it was in fact not intended as a payment, but was only the taking of a collateral security, then the judgment ought to be reversed; but the court below, in the case cited, was reversed for deciding the point in the very way appellant now asks us to decide it. We will not do so, not only because such decision would be flatly against precedent, but also because the precedents are founded on sound reasons.

As to the fourth assignment, which complains of the refusal of the court to withdraw from the jury the charges for freight and demurrage on the timber, we think these were properly a part of the cost of the timber furnished by Nicola Bros. to defendants in the prosecution of the work. The expenses of transportation entered into the cost of the timber as much so as the cost of the chopping and hewing it in the woods.

All the assignments of error are overruled, and the judgment is affirmed.

SPEES v. BOGGS et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

STATUTES—REPEAL—REVERSAL OF JUDGMENT—SECOND ACTION—LIMITATIONS—RES JUDICATA.

1. Where there is a conflict between a prior and a subsequent statute, the presumption is that the latter repeals the former.

2. Act March 27, 1713 (1 Smith's Laws, p. 76), limiting the period to one year within which a new action must be brought after the reversal of a judgment without a venire, is repealed by Act June 24, 1895 (P. L. 236), providing that every suit for injuries not resulting in death must be brought within two years from the time the injury was done.

3. Plaintiff was injured in June, 1897. She sued May 28, 1898, and recovered judgment, which was reversed January 7, 1901, without a new venire, and began a new suit on April 15, 1901. Held, that the second suit was barred by Act June 24, 1895, § 2 (P. L. 236), requiring such an action to be brought within two years from the time when the injury was done.

4. Where a judgment is reversed without a new venire, it is not a bar to a second action for the same cause of action.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Action by Clara Spees against R. H. Boggs and Henry Buhl. From a judgment sustaining a demurrer to the statement, plaintiff appeals. Affirmed.

It appeared that on June 1, 1897, plaintiff was injured in an elevator in defendant's store. She brought suit for damages against the defendants in 1898, and recovered a ver-

dict for \$7,500. The defendants, on April 30, 1900, appealed to the Supreme Court. On January 7, 1901, the Supreme Court reversed the judgment of the court below without granting a venire de novo. Subsequently, on April 15, 1901, the plaintiff began this suit against the defendants for damages for the injuries sustained by her on June 1, 1897, to which the defendants interposed a demurrer, specifying, among other reasons, that the suit had been brought more than two years after the time when the cause of action arose, and that, therefore, her cause of action was barred by the operation of the second section of the act of June 24, 1895 (P. L. 236). The plaintiff relied upon the second section of the act of March 27, 1713 (1 Smith's Laws, p. 76), having laid the grounds by proper averments in the statement of claim.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. Schoyer, Jr., S. B. Schoyer, John P. Hunter, and William Kaufman, for appellant. Edwin S. Craig, for appellees.

MITCHELL, J. At common law a judgment arrested or reversed was not such an adjudication as would bar a second action. It was so assumed by counsel and court in *Sterrett v. Bull*, 1 Binn. 238, which appears to be the first precedent in this court for granting a venire de novo. In *Mercer v. Watson*, 1 Watts, 330, 342, it was held, after a learned discussion of the subject by Kennedy, J., that a judgment reversed for an incorrect ruling on evidence by the court below could not avail for the other party as one of the two judgments in ejectment which, under the act of 1807, would bar further action. And, finally, in *Fries v. Penna. R. Co.*, 98 Pa. 142, it was explicitly decided that a reversal of judgment without a new venire was not a bar to a second action for the same cause.

On these settled authorities it is clear that the demurrer in the present case could not be sustained on the ground that the cause of action was res adjudicata. We have, therefore, to consider the question of the statute of limitations. The act of March 27, 1713 (1 Smith's Laws, p. 76), in section 1, established a period of general limitation in personal actions. Section 2 then provided that: "If in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict passed for the plaintiff, and upon matter alleged in arrest of judgment, judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, then and in every such case the party plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit from time to time within a year after such judgment reversed or given against the plaintiff

¶ 4. See Judgment, vol. 30, Cent. Dig. § 1026.

as aforesaid and not after." This section is also a general statute of limitations as to all actions coming within the class described, and may either enlarge or curtail the period allowed in section 1. In *Downing v. Lindsay*, 2 Pa. 382, it was held that a second action, brought within a year after a reversal of a prior one for the same cause, was within the protection of the second section, though it was more than the six years allowed by the first section after the cause arose. And the reasoning of the case makes it clear that, if the second action had not been brought till more than a year after the reversal of the first, it would have been barred, though it might still have been within six years from the accrual of the cause.

This was the state of the law when the act of June 24, 1895, was passed. By section 2 of that act (P. L. 226) "every suit hereafter brought to recover damages for injury wrongfully done to the person in cases where the injury does not result in death, must be brought within two years from the time when the injury was done, and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law." The plain terms of this section include the present case. But it is argued that it is a general statute of limitations for the class of cases arising from wrongful injury to the person, and for such cases a substitute for the first section of the act of 1713. The latter applies only to original actions, and its substitute, it is said, should be construed in the same way. The second section of the act of 1713 creates a second class of cases, namely, those in which there has been a judgment and a reversal; and it is now argued that that distinction should be preserved, as there is no more inconsistency between the acts of 1713 and 1895 than between the two sections of the former. This argument is not without force, but there is one objection that seems to be insuperable. As already said, this case is within the plain words of the act of 1895 that the action "must be brought within two years from the time when the injury was done, and not afterwards." This action was not brought until nearly four years after the injury. To sustain it on the construction suggested is to make a distinction and an exception not warranted by anything in the act itself, and to produce a manifest repugnancy between it and the second section of the act of 1713. Conceding that this repugnancy is no greater than that between the two sections of the act of 1713, yet the rule of construction is different. When an apparent conflict is presented by different parts of the same act, it is the duty of the courts to reconcile them, if possible, by such construction as will give effect to all the parts. The presumption is that the Legislature did not intend any inconsistency. But when there is a conflict between a prior and a subsequent act, the presumption is that the lat-

ter repeals the former. The courts are not bound, nor even authorized, to seek a construction that will reconcile them, further than to inquire if the conflict is real, and not merely apparent. If it is real, the result is the repeal of the prior act. The conflict in the present case is real. The action belongs to the class provided for by the act of 1895—actions for injury wrongfully done to the person—and is in plain violation of the provision that it must be commenced within two years, "and not afterwards." In *Rodebaugh v. Phila. Traction Co.*, 190 Pa. 358, 42 Atl. 953, it was said that "the words of the act of 1895 are general, and there is nothing to indicate that they were not intended to establish a general rule applicable to all cases within their terms, to wit, every suit to recover damages for injury wrongfully done to the person." And in *Peterson v. Delaware River Ferry Co.*, 190 Pa. 364, 42 Atl. 955, it was held that the period of limitation—two years—in that act is mandatory, and makes no exceptions in favor of infancy or other disability. The principle of these cases is conclusive upon this.

Judgment affirmed.

HOWLEY v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MUNICIPAL IMPROVEMENTS—STREET GRADING—SALE OF LAND—RIGHT TO DAMAGES.

1. Where, after the passage of an ordinance authorizing the grading of a street, an abutting owner sells, the new owner can recover for the injury to his property caused thereby.

2. Before work was actually begun under a contract for grading a street, a conveyance was made of the land on which the street was laid out, and viewers were appointed to estimate the damages. They assessed benefits and refused damages, and the new owner appealed. An issue was framed, and a verdict rendered for the owner. Held that, as the viewers were appointed after the grading was done, the new owner was entitled to recover, apart from Act May 16, 1891 (P. L. 75), requiring viewers to report as to both benefits and damages in a single sum, or Act May 26, 1891 (P. L. 117) requiring that the award of damages shall include all damages done; such acts applying only when viewers were appointed before the grading.

Appeal from Court of Common Pleas, Allegheny County.

Action by Nellie G. Howley against the city of Pittsburgh. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared that the grade of Beacon street was established on January 6, 1896, and an ordinance authorizing and directing the actual work of grading was approved on July 13, 1896, and a contract in accordance with said ordinance was awarded for the work of grading on June 14, 1897, and approved by councils on July 21, 1897. The work was begun on August 10, 1898, and completed on

¶ 1. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 408, 410.

June 7, 1899. After the time of the passage of the various ordinances relating to this street, including the ordinance for the grading of the street, and after the contract for the same had been let, but before the work of grading had actually begun, the plaintiff, Nellie G. Howley, acquired title to a tract of ground fronting about 400 feet on Beacon street. Viewers appointed at the instance of the city refused the plaintiff damages, and assessed benefits against her in the sum of \$321.65. Nellie G. Howley appealed from the award of the jury of view. At the trial of the issue, William G. Howley, a witness for plaintiff, was asked this question: "Q. Tell us what amount of damage has been sustained by this property by reason of the grading of the street, with reference to the time immediately after the grading was completed. (Objected to for the reason that, under the evidence, Mrs. Howley did not become the owner of that property until December 23, 1897, and the ordinance for actual grading of the street, according to the evidence here, was passed and approved July 13, 1896. Mrs. Howley, therefore, was not the proper party to claim damages in this proceeding for that property.) The Court: Objection overruled. (To which ruling of the court, counsel for defendant excepted. Exception allowed, and bill sealed.) The Court: Q. What was the difference between the market value before this work was done and immediately after? A. I would consider it was about \$10,000."

A. M. Thompson, Asst. City Sol., and T. D. Carnahan, City Sol., for appellant. E. G. Ferguson, E. J. Kent, and J. S. Ferguson, for appellee.

FELL, J. The assignments raise the single question whether an owner of land, who acquired title after the passage of an ordinance authorizing the grading of a street, can recover for the injury to his property caused by the grading. The rule established by our decisions is that it is the physical change, and not the mere establishment of a grade on the official plans, that gives a right of action, and that no damages are recoverable for a change of grade until the actual work on the ground is begun. In *re* Plan 166, 143 Pa. 414, 22 Atl. 669; *Ogden v. Philadelphia*, 143 Pa. 430, 22 Atl. 694; *Clark v. Philadelphia*, 171 Pa. 30, 33 Atl. 124, 50 Am. St. Rep. 790; *Philadelphia Ball Club v. Philadelphia*, 192 Pa. 632, 44 Atl. 265, 46 L. R. A. 724, 73 Am. St. Rep. 835. From this rule it follows that the owner of the property at the time when the actual injury is done is the person entitled to recover.

The appellant's contention is that as the act of May 16, 1891 (P. L. 75), provides for the appointment of viewers to assess damages before the entry and injury, and the act of May 26, 1891 (P. L. 117), requires that the awarding of damages for the opening or widening of a street shall include all dam-

ages due to the grading at which such street is to be opened or widened, a new rule is necessary, as the old rule is applicable only in cases where the grading has been done before viewers are appointed. And it is suggested that a rule fixing the date at which the work is ordered to be done as the date for the assessment of damages would be of uniform application and equitable to both parties, in not exposing the municipality to speculative damages for a change that might not be made, and in allowing compensation to the owner when the actual change is made on the land.

Whether the legislation of 1891 calls for a new rule for the assessment of damages caused by grading a street need not now be considered, as in this case the viewers were appointed after the grading was done, and the rule heretofore established can be applied to it. Moreover, the defendant has no standing to interpose the objection urged against the right of the plaintiff to recover. The petition was filed by the city, and the viewers, as required by the act of May 16th, estimated and determined the damages and the benefits, and to whom and by whom they were payable. To this report no exceptions were filed, nor was an appeal taken by the city. The plaintiff appealed, and the issue framed was to determine what benefits, if any, had been received by her, and what damages, if any, she had sustained. The plea was that her property had been benefited "over and above all damages, and over and above the amount of special benefits assessed against the same." It made no denial of her right to recover damages if her property had been injured, and no one has intervened and objected that she is not the party entitled. The city by its own proceeding determined that her property was liable to assessment for benefits. It cannot, on her appeal from the finding, attempt to hold her liable for the benefits, and deny her right to damages, there being no intervening rights.

The judgment is affirmed.

CARSON v. CARSON.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WIFE'S SEPARATE PROPERTY.

1. A woman conducting a hotel business married the barkeeper, and after the marriage the husband and wife continued the business. The income was kept by the wife in her own bank account, and drawn out only on her checks. *Held*, that real estate bought by her from such income, title to which was taken in her name, was her separate property.

Appeal from Court of Common Pleas, Allegheny County.

Action by Alexander Carson against Sarah Jane Carson. Judgment for defendant, and plaintiff appeals. Affirmed.

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 443, 456.

The court charged as follows: "This is an action of ejectment by Alexander Carson against Sarah J. Carson, his wife, to recover a lot on Anderson street, in the city of Allegheny, conveyed to her by deed of Joseph Carson, dated September 30, 1887. The action being an equitable ejectment to establish and enforce a trust resulting from the alleged payment of the purchase money, our Supreme Court has said in *Braun v. First German Evangelical Lutheran Church*, 198 Pa. 152, 47 Atl. 903, that the evidence in support of the trust must be clear, precise, convincing, and satisfactory to the conscience of the chancellor; and in an action of ejectment to enforce a resulting trust the trial judge acts as a chancellor. If, in his judgment, that evidence is insufficient to establish the trust, it is his duty to direct a verdict for the defendant. The plaintiff's right of recovery is barred by equitable limitation, and is barred by the statutory limitation of the sixth section of the act of April 22, 1856 (P. L. 533), citing 198 Pa. 157, 47 Atl. 963. If these limitations have no application, the plaintiff's right of recovery is barred for other reasons. No fraud, accident, or mistake is alleged in the execution and delivery of the deed to Mrs. Sarah J. Carson in September, 1887, of which execution and delivery at that date Mr. Carson had actual knowledge. Through all the years from the purchase of the property in 1887 to the commencement of this action in 1900 there is not a syllable of testimony that he ever claimed an interest in the lot, or a right to the conveyance of it, or asserted a trust for his use, or that any funds of his paid in whole or in part the consideration expressed in the deed.

"In the light of the substantial separate estate of the defendant in realty, rents, and the profitable hotel business at the time of her marriage to the plaintiff in 1886, and the continuance of the business thereafter, she was entitled solely to the principal, income, and earnings of the property and business, though the labor of her husband mingled in the production. That was true under the act of 1848, the act of 1872, and later acts of assembly. *Bucher v. Ream*, 68 Pa. 426; *Rush v. Vought*, 55 Pa. 437, 93 Am. Dec. 769; *Brown v. Pendleton*, 60 Pa. 419. From these sources of her separate estate various pieces of real estate, including the lot in controversy, were purchased and paid for by her. Nor is this conclusion changed by the testimony of the husband—flatly contradicted by her, his wife—that after their marriage in 1886 the hotel business was conducted by them as a partnership. From the overwhelming weight of the facts and circumstances and inferences therefrom it irresistibly follows that there was no such partnership; but, even if the purchase money was paid by him—a fact unsupported by any credible testimony, and unequivocally denied by his wife—there is no evidence that at the

execution and delivery of the conveyance to Mrs. Carson it was understood by both her and her husband that she was taking the title in trust for her husband. *McCormick v. Cooke*, 199 Pa. 635, 49 Atl. 238. The plaintiff's testimony in support of the trust, in every link essential to its support, is not clear, precise, convincing, and satisfactory; nor does it bear the equitable impress of two witnesses, or of one witness and strong corroborating circumstances equivalent in weight to a second witness. It is wholly lacking in credible elements that would move a chancellor to reform the plain meaning of a solemn conveyance by reading into it after the silent lapse of many years a trust that nowhere appears upon its face. Measured by the testimony, and by the principles and reasons given, we are clearly of the opinion that the plaintiff's case has failed, and therefore we direct a verdict for the defendant. With your consent, gentlemen, the verdict will be so taken."

Argued before MITCHELL, DEAN, FEIL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph Forsythe and A. Blakeley, for appellant. D. F. Patterson, J. M. Garrison, and A. S. Morehead, for appellee.

MITCHELL, J. Without going into the question whether or not the plaintiff has brought himself within the conditions permitting an action against his wife under the act of June 8, 1893 (P. L. 344), it is clear that his case failed on the evidence. At the time of the marriage in December, 1886, the wife owned and conducted a hotel business. The husband had been employed by her as bar-keeper, and after marriage first assisted her, but claims to have carried on the business subsequently in his own name, though in the same premises, and in conjunction with her. The property now in dispute was bought out of the earnings of that business. Appellant claims that under the law as it was at the date of the marriage his wife's earnings, whether separate or jointly with him, were his property. It may be conceded that the presumption ordinarily was so at that time. But the income from her separate property was hers. If the hotel had been leased to a third party, the rent would unquestionably have been her separate estate, after as well as before marriage. The conduct of the parties, as appears from the undisputed evidence, shows that it continued to be so regarded and treated by both the parties here. The income from the business was handed over to her, deposited in her name in her own bank account just as it had been before the marriage, drawn out only on her checks, and, when used to pay for the property now in suit, the title was, with knowledge and assent of plaintiff, taken in her name, and so remained for 13 years until this suit. The action is an equitable ejectment on the

ground of a resulting trust from a purchase with plaintiff's money. Without stopping to discuss the other objections raised in the argument, it is enough to say that plaintiff wholly failed to show that the purchase money was his. As the judge could not have sustained a finding for plaintiff on the admitted facts, he was right in directing a verdict for defendant.

Judgment affirmed.

PURITAN COKE CO. v. CLARK et al.
(Supreme Court of Pennsylvania. Jan. 5, 1903.)

SALE—REFUSAL TO ACCEPT—MEASURE OF DAMAGES.

1. Where a vendor of chattels is ready to deliver them in accordance with the contract, the measure of damages, on failure to receive them, is the difference between the contract price and the cost of manufacturing and delivery.

2. Plaintiff sold, at a fixed price, coke which had no real market value in ordinary times, and was only manufactured in quantities on orders by the consumers. At the time of the breach of the contract by the vendee's refusal to accept delivery, the vendor could have sold the article at a certain price. *Held*, that such price was not controlling in fixing the measure of damages, but the vendor can recover the difference between what it would have cost him to manufacture and deliver the coke and the contract price.

3. A coke company contracted to make daily delivery of coke during a specified period. For a ground which the jury found to be insufficient, after a certain amount of the coke had been delivered and paid for, the vendees refused to receive the balance. At the time the vendors had on hand about one-third of the balance to be delivered. There was no general market for coke at the time, and it is an article which depreciates in value, and the vendor only succeeded in selling what it had in small lots at a much lower price. There was evidence that the vendor, because of the contract, had added largely to the number of its coke ovens, and increased, in many respects, its capacity. *Held*, that the vendor could recover, for the coke which it had manufactured and sold to others, the difference between the selling and the contract price, and, as to the coke not manufactured, the difference between the cost of manufacturing and the contract price.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Puritan Coke Company against John M. Clark and Charles S. Guthrie. Judgment for plaintiff, and defendants appeal. Affirmed.

The court charged, in part, as follows:

"Under ordinary circumstances, where there is a breach of contract for the sale and delivery of personal property the measure of damages is the difference between the market price at the time of the breach of the contract and the price at which the parties had agreed that the personal property or chattels should be delivered. But that supposes that there is a market for the sale of the personal property in dispute. The evidence in this case shows conclusively that coke in quantities is sold on contracts that are made before delivery is commenced, and covering a period of some months—usually six months'

time in the delivery; that there is practically no open market at which furnace coke can be sold in any quantities. There were some 21,000 tons of this coke undisposed of, not taken by the defendants, and there is no evidence in this case that would justify you in finding that there was such a market for this coke that the plaintiff could have disposed of it during the month of June. Therefore I charge you that in this case the difference between the market price and the contract price is not the measure of damages, because it would not help the plaintiff in this case if the market price was \$1.50 per ton, if it could not sell its coke. But there is another way of arriving at the question as to how much the plaintiff was injured in this case—of course, assuming that it was injured at all—and that is the difference between what it cost the plaintiff to manufacture this coke and the price at which the defendants had agreed to take it; and that, I charge you, is the measure of damages in this case. You have the testimony on the subject of what it cost to manufacture this coke. There is no dispute as to what the defendants were to pay for the coke under the contract; that is, \$1.50 per ton. If you find that the plaintiff is entitled to recover, then its damages will be the difference between what it cost to manufacture this coke and the price that these defendants had agreed to pay for it.

"There is another element, however, which you will take into consideration. There was some of this coke manufactured at the time of the breach, and the plaintiff sold that coke. If it sold that coke for more per ton than it cost to manufacture it, then the difference between what it received per ton for that coke and the cost of its manufacture should go as a credit upon the amount which the plaintiff would otherwise be entitled to recover under the instructions which I have given you as to the measure of damages. I believe it is accepted in this case that it sold that 7,300 tons for something over \$7,400, which would be about \$1.01 a ton for the 7,300 tons. Now, if they got fairly all that could be gotten for the coke, and that was as low as or less than the cost price, then that item does not enter into the question of damages at all. I believe, if you find that that was a fair price for the coke, that it was as low as the lowest evidence here of the cost of its manufacture; but it is for you to determine, under the evidence, whether they should have gotten more for that coke than they did, and whether that was above or below the cost of manufacture. If it was above the cost of manufacture, or if they should have fairly gotten more than the cost of manufacture, then, to that extent, the defendants would be entitled to a credit on the amount of damages as determined by the measure of damages for the entire case which I have given you. In order that I may make myself clear, you start out in the consideration of this case with the one question pre-

sented to you: This coke was to be suitable for making Bessemer pig iron. If it was suitable for making Bessemer pig iron, then it was the duty of the defendants to accept it, and their refusal to accept it would be a breach of the contract, for which they would be liable in damages. If it was unsuitable for the manufacture of Bessemer pig iron, by reason of the phosphorus in it being too high, because that is the only question here; the question of its strength and other questions which enter into the suitability of coke for making pig iron not being in dispute— If it was unsuitable for making Bessemer pig iron, by reason of the phosphorus in it being too high, then the defendants had a right to rescind the contract and refuse to receive any more coke. That is the first question which you will determine. If you determine that question in favor of the defendants—that is, find that the coke was not suitable for making Bessemer pig iron—then your verdict should be for the defendants, and you quit right there. If you find that it was suitable for making Bessemer pig iron, then the next question you will determine is the damages, and you will determine them upon the lines that I have laid down to you in my charge. You will determine the damages in accordance with the measure—that is, the way to compute the damages—which I have given you in the former part of my charge.

"Defendants' counsel has asked me to charge you as follows: '(2) The measure of damages in this case is the difference between the market price and the contract price at the time and place of delivery. Answer. That point is refused.' '(6) That if the plaintiff intended to hold the defendants liable for damages in this case, it was its duty to so notify them, and to sell the undelivered coke for their account at the market price; and if there was no market for immediate delivery, but was a market for contracts in May and June, it was its duty to dispose of this coke on contract at the market price. In that case its measure of damages is only the loss in the delay in payments in the way of interest and the costs of storage. Answer. That point is refused. (7) That there is no evidence in this case of loss on 14,000 tons of coke undelivered, and there can be no recovery in damages as to such 14,000 tons. Answer. That point is refused. (8) That under the law and evidence in this case their verdict must be for the defendants. Answer. That point is refused.'"

The jury, after being out for about an hour, returned for additional instructions, when the court charged them as follows: "Gentlemen: I tried to make myself clear on the measure of damages which the plaintiff is entitled to recover, if it is entitled to recover anything; that is, the difference between what it had cost to produce this coke and the price of the coke as specified in the contract, provided that, if the plaintiff either did sell or should have sold the 7,300 tons of

coke for more than it cost to produce it, then the defendants are entitled to a credit for that excess. Let me illustrate, and take figures which cannot apply to this case at all: Supposing it should have sold this 7,300 tons of coke for \$2 a ton, and it only cost it \$1 a ton to produce it, then, on the amount which you would find the plaintiff was entitled to recover, basing your calculation on the difference between the cost of producing the 21,000 tons of coke and the \$1.50 per ton (the contract price), the defendants would be entitled to a deduction of \$1 a ton—the difference between the \$2 that the plaintiff sold the 7,300 tons for, and the \$1 which it cost to produce it. Now, those are purely imaginary figures, because there are no such figures as that in the case. Consequently I used them so far from the actual figures that they would not mislead you. The first proposition is that the measure of damages in this case is the difference between what it would have cost this plaintiff to have produced this coke, if it had gone on and manufactured it, and the \$1.50 per ton which the defendants, under their contract, agreed to pay for it; that is, the plaintiff is entitled to recover the profit which it would have made if it had gone ahead and produced it and turned it over to the defendants. From that, if you find that it sold or should have sold the 7,300 tons for more than it cost to produce it, the defendants are entitled to a deduction of just that difference between what it sold for and what it cost to produce it."

Verdict and judgment for plaintiff for \$10,290.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

J. J. Miller, John L. Prestly, and Harry J. Nesbit, for appellants. Edwin W. Smith, George E. Shaw, J. H. Reed, and J. H. Beale, for appellee.

DEAN, J. In September, 1897, plaintiff and defendant made the following contract:

"Puritan Coke Company, Pittsburg, Pa., agree to sell and Messrs. Naylor & Company, Pittsburg, Pa., agree to buy forty-five thousand (45,000) tons of 2,000 pounds Pennsylvania Railroad weights, Puritan-Connellsville coke suitable for making Bessemer pig iron.

"Time of delivery: 300 tons per day or 7,500 tons per month for the first six months of 1898.

"Price: \$1.50 per ton of 2,000 pounds, f. o. b. cars Baggage Pa., Southwestern Pennsylvania Railroad.

"Terms: Monthly settlements in cash on the 15th day of each month.

"Strikes, accidents or causes beyond our control to be sufficient excuse for any delay in any shipment.

"This contract shall terminate on the 30th day of June, 1898, whether the total amount

of coke specified above has been shipped or not, unless the parties hereto shall otherwise agree in writing."

Under this contract the coke company delivered to Naylor & Co. up to May, 1898, 24,000 tons of coke, and were paid the contract price. At that date Naylor & Co. notified the coke company they would not receive any more coke, because, on account of an excess of phosphorus, it did not come up to the standard in quality specified in the contract, and it was not suitable for the manufacture of Bessemer iron; thus leaving at the date of the notice 21,000 tons undelivered. Seven thousand three hundred tons had been manufactured, but was on the wharves at the ovens. The coke company, alleging an unwarranted breach of the contract by defendants, brought this suit in assumpsit to recover damages, and obtained a verdict in the court below for \$10,290. Defendants bring this appeal, assigning seven errors. The first alleges an unwarranted assumption of fact in the charge; second, that evidence was excluded which was material to the issue; the third, fourth, fifth, and sixth allege error in the instruction of the court on the measure of damages; the seventh, that the court erred in not directing a verdict for defendants.

It will be noticed the contract provides for the delivery of "Puritan-Connellsville Coke suitable for making Bessemer pig iron." Defendants set up as the excuse for refusing to receive the remaining 21,000 tons that it was not suitable for making that grade of iron. This, then, became a pure question of fact for the jury, and much of the testimony bore on it. On correct instructions, the court submitted the evidence to the jury, saying plainly to them that, if the coke was not suitable for the manufacture of Bessemer pig, they should find for defendant. Their verdict shows the jury found it was suitable. Therefore there was no lawful excuse for defendants' refusal to receive the remaining 21,000 tons of the contract quantity.

The specifications of error, except the second, all in substance relate to the question of damages, and can be discussed together. As to the first, the court used this language to the jury: "There were some 21,000 tons of this coke undisposed of, not taken by the defendants; and there is no evidence in this case that would justify you in finding that there was such a market for this coke that the plaintiff could have disposed of it during the month of June."

It was the undisputed evidence that coke, generally, is sold on contracts covering a fixed number of months. It was not a stock product, like flour and sugar. Preparation for coal mining, ovens, and different kinds of labor must be made in reliance upon a contract covering months of output. In this case it was made to cover the first six months of 1898. There may be made sales of small

lots of coke on the wharf, but such sales are very uncertain as to quantity and price. No iron manufacturer would start his furnace, relying on such an uncertain supply. No coke manufacturer, except from some imperative necessity, stocks coke upon his wharves in anticipation of such sales. This, substantially, is the testimony of all the witnesses who had knowledge of the business. The court below therefore committed no error in the language complained of.

The 3d, 4th, 5th, and 6th assignments all allege error in the court's instructions as to the measure of damages which should be adopted by the jury in case they found for plaintiff, on the refusal by defendants to accept the 21,000 tons. On this question the court charged as follows:

"I charge you that in this case the difference between the market price and the contract price is not the measure of damages, because it would not help the plaintiff in this case if the market price was \$1.50 per ton, if it could not sell its coke. But there is another way of arriving at the question as to how much the plaintiff was injured in this case—of course, assuming that it was injured at all—and that is the difference between what it cost the plaintiff to manufacture the coke, and the price at which defendants had agreed to take it; and that, I charge you, is the measure of damages in this case."

We concur with appellants' counsel in his argument that for a breach of contract the general rule for damages is to put the party in the same position as if the breach had not occurred; but the question in this case still remains, how? The market price is based almost wholly on contracts running on weekly or monthly deliveries, covering long periods. The evidence shows that at the date of the breach no such contracts could be made for 21,000 tons, for there was no market price for it. If plaintiff could have found other buyers to take for immediate delivery, or within a short time, the 21,000 tons at the contract price, \$1.50 per ton, on the contract terms, it would have been bound to sell to such buyers although several well-considered cases do not place that obligation on the vendor; but there is no evidence that such buyers could have been found. There were on hand, stocked on the wharf, when the contract was broken, about 7,300 tons. It took plaintiff, using every reasonable effort, four months to sell this in small lots at prices ranging from 90 cents to \$1.30 per ton, averaging \$1.01 per ton. This coke had deteriorated to some extent in quality by being stocked on the wharf. The furnaceman wants as nearly pure carbon as he can get to dump into his furnace head. Stocked coke absorbs moisture, gathers ashes and dirt, and its price is thus depreciated. Plaintiff, therefore, could not be put in the same position by continuing to manufacture the remaining quantity on this contract. There are some products which, owing to their par-

ticular uses, are unsalable, except on special contracts for purchase and delivery. A builder purchases, according to a schedule of lengths and sizes, many thousand feet of lumber at so much per thousand. The lumberman takes it to the forest and cuts down the timber into lengths, and then transports it to the sawmill, where it is cut into the proper sizes. If the builder violates his contract, the lumberman cannot sell it to others, because it suits no other builder, yet at the time the contract was made the market price of bill lumber was that to be paid under the contract. The same with structural steel and some other products of the factory. There was a market for this coke by the terms of delivery under that contract when it was made. Practically, there was no other market when the contract was broken. The difference between the delivery price and the price it could have been sold for at the wharf when the 21,000 tons were to be delivered was far less than the contract price, and, as to some lots, less than the cost of manufacture, and would by no means have put plaintiff in the same situation as before the contract was broken. In *Ballentine v. Robinson*, 46 Pa. 177, the court below charged the jury "that where the manufacturer of an article ordered has completed it, and upon notice of its completion the buyer refuses to accept or pay for it, the measure of damages is the contract price." This court held the instruction correct; *Strong, J.*, saying: "And why should they, without fault of their own, be subject to the risk and trouble of a resale for defendant's benefit? * * * And such is the doctrine laid down in the better decisions;" citing *Parsons on Contracts and Sedgwick on Damages*. In *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788, *Clark, J.*, discussing the same question says: "The manifest tendency of the cases in the American courts now is to the doctrine that, when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price, as his measure of damages." To the same effect is *Gallagher v. Whitney*, 147 Pa. 184, 23 Atl. 560. and *Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. In these cases the chattels to be paid for under the contract were practically valueless when the buyer refused to accept them. That cannot be said of coke. It was worth something, although much less than the contract price, when the breach occurred. The law therefore is, and ought to be, that in a contract for the delivery of chattels upon a special stipulation as to quantity and quality, where the vendor is ready and willing to deliver, the measure of damages is the difference between the contract price and the cost of manufacture and delivery. Where, on a resale, he receives more than the cost of manufacture, he is entitled to the differ-

ence between the price if sold for and the contract price.

But it is argued by appellant that while such a rule, if adopted, might apply to the 7,300 tons manufactured and ready for delivery on the wharf, it ought not to apply to the almost 14,000 tons not yet manufactured. The application of the rule does not depend on the exact state of manufacture of the thing sold at the date of the breach, but on the uncertainty incident to the adoption of any other than the contract price as the measure of damages. Plaintiff was bound to make a sale of the coke on the wharf, and did make a sale at the best price it could get for it, and credited defendants with that price; but it was not bound to go on and manufacture 14,000 more tons, and also sell that at a greatly reduced price, perhaps less than the cost of manufacturing it, as it actually did sell a part of the 7,300 tons.

"When the subject of a contract of sale, at a fixed price, is an article to be manufactured by the vendor, perishable in its nature when kept for any length of time (such as silicate of soda), having but a limited demand and no real market, and only manufactured in quantities upon orders by consumers, the mere fact that, at the time of the breach of the contract by the vendee's refusal to accept delivery, there was a price at which the vendor had been able to effect sales of the article, is not controlling in fixing the measure of damages, but the vendor will be entitled to recover the difference between what it would cost him to manufacture and deliver the article under the contract and the contract price." *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225.

In *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. 45, 20 Atl. 937, the facts were about these: Plaintiff had a plant of 60 coke ovens not in operation, and many of them out of repair. The defendant operated a coal mine. They entered into a contract by which defendant agreed to supply plaintiff with slack coal sufficient to run the ovens at their full capacity for six months in the year; plaintiff to be paid \$1 per ton of coke for manufacturing it. Plaintiff, at great expense, repaired his ovens, and made ready to perform his side of the contract. At the end of three weeks, defendant refused to supply more coal, and at no time furnished sufficient to keep the ovens going. While the ovens were in operation, 445 tons of coke had been made. Plaintiff brought suit for damages, claiming \$1 per ton (the contract price) for the coke actually manufactured, and the profits he would have made if he had operated the ovens for the entire six months under the contract, which the evidence showed would have been about 50 cents per ton. The court below charged the jury thus: "If you believe the contract was an entire contract, that the coal was to be sufficient in quantity to keep the plaintiff's sixty ovens in operation

for a period of six months at \$1 per ton, and the defendant failed to comply with the contract, the plaintiff would be entitled to the profits that he lost by reason of defendant's fault." On appeal by defendant, this was specially assigned for error, but in the opinion affirming the judgment we said as to this assignment: "While it is undoubtedly true that mere speculative profits cannot be recovered in an action for breach of contract, a careful examination of the assignment shows that the profits in question were not within this rule. The jury have found the contract to be as plaintiff alleged. * * * The profits were not speculative. They did not depend upon the fluctuations of the market or the demand for coke, and they could be ascertained with mathematical accuracy. As the plaintiff corporation was obliged to equip itself at a heavy expense to perform the contract, it is only just, upon its breach, it should recover for the net profits which it certainly would have made."

On the evidence before us, there is ample room for the application of precisely the same principle. The appellee, in view of its large contract for coke with defendants, erected additional miners' houses, added largely to the number of its coke ovens, and in many other particulars increased its capacity to meet its increased output. Why is not the contract price the just measure of its damages, deducting the cost of manufacture? It is argued, the coke, in the form of coal, remained in the ground for future use. There would be some force in this if plaintiff were a capitalistic corporation investing in coal lands, depending on the future appreciation in the value of land for its profits. But it had not invested for that purpose. It was a manufacturing corporation, investing in what might be called the raw material (coal), to be soon manufactured and sold in the shape of a new product. Its large capital was invested in coal, miners' houses, and coke ovens, for but the one purpose of making its profits out of the manufacture of coke. We see no error, on the facts of this case, in the charge of the court below on the measure of damages; nor do we see that any injustice resulted to defendant. A computation shows, clearly, that the jury awarded plaintiff the difference between the contract price and the sales price on the 7,300 tons on the wharf; and the difference between the contract price and the cost of manufacture on the remaining 14,000 tons, which, in justice and law, the defendants ought to pay.

Appellants' second assignment is to a ruling on an offer of evidence. The offer was to prove what contracts could have been made in June and July of 1898 for future delivery. This was wholly immaterial. Plaintiff was under no obligation to defendants to make contracts for future delivery. Their contract called for delivery the first six months of that year. That time had about expired. Could they then have sold it in the

market for the contract price? That was the material and only material fact to be ascertained.

All the assignments of error are overruled, and the judgment is affirmed.

OPP et al. v. CHESS et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

FOREIGN WILLS—PROBATE—EFFECT—DECREE—CONTEST.

1. Under Acts 1705 (1 Smith's Laws, p. 33) and Act March 15, 1832 (P. L. 135), foreign wills proved and recorded as provided by those acts have the same force in the state as if they were domestic wills duly proved and recorded.

2. A probate of a will is conclusive as to real estate if no contest is commenced within three years as provided by Act June 25, 1895 (P. L. 305).

3. The entering of a formal decree probating a will is unnecessary, and an adjudication by the register will be presumed where the foreign will is admitted to the records of the register's office.

Appeal from Court of Common Pleas, Allegheny County.

Action by Clara Opp and others against Goodman Y. C. Chess and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

H. M. Scott and Charles E. Brown, for appellants. Charles P. Orr, for appellees G. Y. C. Chess, Burt Dunlap, and J. W. Riley. W. A. Challener, for appellee Pittsburg, N. L. & C. St. Ry. Co. Reed, Smith, Shaw & Beal, for appellee Pittsburg & L. E. R. Co. S. Duffield Mitchell, for appellees W. L. Mellon Pipe Lines and Southwest Pennsylvania Pipe Lines. R. W. Cummins, for appellee Forest Oil Co. John G. MacConnell, for appellee Pittsburg Refining Co.

FELL, J. The will of a married woman who died while domiciled in Ohio was admitted to probate in that state in November, 1889. In March, 1892, a properly certified copy of the will and of the proceedings admitting it to probate were filed in the register's office of Allegheny county, Pa., and the will and certificates were copied at length in a will book in that office. The husband of the testatrix was the sole devisee under her will. In March, 1892, he conveyed the real estate devised, which was situated in this state, to the grantor of the defendants in the ejectment. In July, 1896, proceedings to contest the will were instituted in Ohio, and terminated in March, 1898, in a judgment in favor of the contestants. In October, 1899, the heirs at law of the testatrix, having secured a conveyance to themselves of the husband's interest in the real estate, as tenant by the curtesy, brought this action.

The will was executed in the manner prescribed by the laws of this state, and the

testimony of the subscribing witnesses conformed to the requirements of our laws, but no letters testamentary nor of administration cum testamento annexo were issued. It will be observed by the dates named that no proceedings were had in the state of Ohio to set aside the will until more than six years after the date of the decree admitting it to probate, and the validity of the will was not called into question by proceedings in this state until almost ten years after the decree was made, and more than seven years after a certified copy had been filed in the office of the register of Allegheny county.

The effect of the act of 1703 (1 Smith's Laws, p. 33) and the act of March 15, 1832 (P. L. 135), is to give to foreign wills proved and recorded as provided by these acts in this state the same force as if they were domestic wills regularly proved and recorded. *Hoysradt v. Tionesta Gas Co.*, 194 Pa. 251, 45 Atl. 62. The seventh section of the act of April 22, 1856 (P. L. 538), provides that the probate by the register of the proper county of any will devising real estate shall, as to such realty, be conclusive, unless within five years of the date of such probate those interested to controvert it shall contest its validity. The limit of time is now reduced by the act of 1895 (P. L. 305) to three years. No contest having been commenced within the period of time fixed by the act, the probate of the will is conclusive as to the real estate in question, unless the failure of the record to show the entry of a formal and specific decree of probate is a fatal defect which invalidates the proceeding in the register's office of Allegheny county. This is the appellant's first contention, and, unless it is sustained, the others need not be considered.

While there is no decision directly in point on this question, it has been held in a number of cases that a presumption of probate arises from acts of the register that would be unauthorized and unlawful if the will had not been proved. In *Holliday v. Ward*, 19 Pa. 485, 57 Am. Dec. 671, it was said by Black, C. J.: "It is not usual to enter a formal decree of probate on the record, but the want of it is not fatal. It will be presumed from the issuing of letters testamentary, or perhaps from other acts of the register which he would have no legal right to do in a case where proof of the will had failed." In *Guthrie v. Kerr*, 85 Pa. 303, in referring to a paper purporting to be a will, as to which no action had been taken by the register, it was said: "If it had been expressly declared to be proved, if without that it had been recorded, or letters testamentary or of administration cum testamento annexo had been issued, or, perhaps, if it had been simply filed, an adjudication by the officer would be presumed." To the same effect are *Coleman's Appeal*, 163 Pa. 334, 30 Atl. 161, and other cases.

In principle these cases govern the one

under consideration. In the first two the wills were executed in the state, but there is no ground for a distinction between the judgment of a register admitting to probate a domestic will on the oaths of witnesses, and his judgment on a foreign will proved here by a duly certified record. His jurisdiction in both cases is derived from the same source, and the same rule of policy should apply to them. *Lovett's Executors v. Mathews*, 24 Pa. 330. In probating a will, the register acts judicially under power conferred and defined by statutes which do not require the entering of a formal decree, and an adjudication by him will be presumed from the fact that a foreign will is admitted to the records of his office.

The judgment is affirmed.

HAMMER et al. v. PRESSED STEEL CAR CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

1. Evidence in an action by a brakeman to recover for personal injuries examined, and held insufficient to show, as a matter of law, that plaintiff was guilty of contributory negligence.

Appeal from Court of Common Pleas, Allegheny County.

Action by Leo Hammer, by his next friend, F. J. McCabe, and Annie Hammer, against the Pressed Steel Car Company. Judgment for Leo Hammer for \$6,000, and for Annie Hammer for \$1,000, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. S. Dalzell, for appellant. F. C. McGirr and John Marron, for appellees.

POTTER, J. These appeals are from two judgments entered in the one case—one in favor of the plaintiff Leo Hammer, a minor, for \$6,000, and one in favor of the mother, Annie Hammer, for \$1,000. The appeals were argued together, and this opinion is applicable to both.

The defendant company, in carrying on its business of manufacturing cars, operates a railroad through its yards, and does its own switching. The plaintiff Leo Hammer was employed as a brakeman at the time of the accident which resulted in the injuries here complained of. The negligence charged against the defendant company was the failure to keep its tracks in reasonably safe repair. The jury found that the tracks were defective, and the fact is conceded in the argument for appellant; and it is further contended that the danger in using the tracks was so obvious that the plaintiff assumed all risk of injury therefrom, and for that reason was not entitled to recover. The particular defect complained of was a lack of solidity,

which had existed for some time, at and near the point where the accident occurred. The tracks were laid upon a cinder bed, which caught fire and burned, or smoldered away, under the surface. This seemed to change the character or condition of the cinders, and weakened the cohering power of the ballast or support under the rails, which, in turn, brought about an uneven lowering of the track. The track was also curved just there, and when rounding the bend the swaying of the engine caused the rail on one side to sink, so that the result was to increase and emphasize the swinging of the engine and cars. This was not so extreme, however, as to cause the place to be considered impassable, nor did it appear from the testimony that an engine had ever before left the track at that point. When the accident occurred the plaintiff was riding upon the engine, and passing over the tracks as he had frequently done before, without injury; and we cannot find anything in the evidence which would justify us in saying, as a matter of law, that the danger was so palpable that he was guilty of contributory negligence in so doing. Under the circumstances, this was a question for the jury, and it could not properly have been withdrawn from them. The facts of this case, we think, are such as to bring it within the principle of *Pa. R. Co. v. Zink*, 126 Pa. 288, 17 Atl. 614, rather than under that of *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662.

As the only assignment of error here is to the refusal by the trial judge of binding instructions in favor of the defendant, the judgment is affirmed.

PATTON v. McDONALD.

(Supreme Court of Pennsylvania. Jan. 5, 1908.)

INJURY TO EMPLOYE—ASSIGNMENT OF CONTRACT—LIABILITIES.

1. A government contractor assigned the contract to a corporation of which he was a large stockholder, though the assignment was prohibited by law. He thereafter employed a workman, without any representations to him as to who employed him, and the workman was injured by the negligent acts of the superintendent of the corporation. *Held*, that the original contractor was not liable to the workman, though the latter may have known from the newspapers of the original award of the contract, and may not have known that he was working for the corporation.

Appeal from Court of Common Pleas, Allegheny County.

Action by Montgomery Patton against C. I. McDonald. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

J. M. Swearingen and W. H. S. Thompson, for appellant. Rody P. Marshall and Thomas M. Marshall, for appellee.

BROWN, J. It does not seem to be disputed that the appellee was injured through the negligence of some one, but the appellant says he is not the person who was guilty of it. He insists that, under the undisputed facts in the case, the suit ought not to have been brought against him, but against McDonald, Fogle & Co., a corporation chartered by the state of West Virginia, in whose actual employ the plaintiff was at the time of the accident. On November 22, 1897, a contract was awarded by the United States government to C. I. McDonald, the appellant, which included the building of a lock and dam on the Monongahela river at Morgantown, W. Va. There was a clause in it prohibiting its assignment, but on January 13, 1898, McDonald assigned it to the corporation named. The court below properly held that the plaintiff in this suit could not raise the question of his right to make the assignment, and that McDonald owned the larger portion of the stock of the corporation was not material.

Patton, the plaintiff below, testified that he saw by the papers that the contract had been awarded by the government to McDonald, and, in February following, called to see him; that in the latter part of June, 1898, he called upon McDonald at his office, in pursuance of a postal card received from him in reply to a note he had written him; and that, after calling upon McDonald, he "hired with him" as carpenter foreman in the construction of the lock and dam on the Monongahela river. When Patton called to see McDonald in February, the contract had already been assigned to McDonald, Fogle & Co., and, when he contracted to serve as carpenter foreman, the work was being prosecuted by the corporation. Nowhere in his testimony does the plaintiff state that McDonald told him he was employing him individually and as contractor, and nowhere does it appear that anything was said or done by McDonald for the purpose of deceiving Patton as to who was or would be his real employer. Patton did testify, it is true, that, when he went to work, McDonald was almost daily in charge of it, that he never knew any other employer, and that McDonald gave him most of his instructions. He further stated that he did not know at the time he was working that the corporation, McDonald, Fogle & Co., was doing the work, and had not noticed a sign on the office door, and stamps on the tools, which indicated, or ought to have indicated, to him that the corporation was doing the work. His contention is that, because he was hired by McDonald and was under the honest belief that he was working for him at the time he was injured, he ought to recover from him, even if the corporation was his real employer and its negligence caused his injuries; and the court instructed the jury that, if he did honestly believe that McDonald was the contractor, without any knowl-

edge that the company was doing the work, McDonald would be liable for the consequences of the negligence complained of. Under this instruction, the plaintiff has recovered judgment against one who was not his real employer, and who clearly was not the employer of the man for whose negligence he is asked to respond under the rule of respondeat superior. The claim of the appellee is not for damages resulting from the breach of a contract entered into with him by the appellant, but is for injuries resulting from the negligence of one alleged to have been employed by the appellant. Keeping this in mind, with the testimony on both sides before us, the error into which the learned trial judge fell is manifest. The real question to be determined is not, who hired Patton, but who injured him—who was the master of the negligent servant?

All that can be gathered from the testimony of the appellee and other employes of McDonald, Fogle & Co. called by him is that they had been hired in the first instance by McDonald, and directed by him to go to work, without a word or representation of any kind by him that he was the contractor and that they were to work for him. The assumption of the plaintiff is that, because he saw in a newspaper an announcement that the contract had been awarded to McDonald, and he had "hired with him," he ought to be allowed to recover from him as the real contractor, though the contract had been assigned to the corporation nearly six months before he went to work, and the corporation had at once commenced the prosecution of the work, and was engaged in it when he was injured by the falling of the boom of a derrick in charge of one of its employes. Eliminating the statement of the plaintiff that he had seen in the papers, sometime prior to February, 1898, that the contract had been awarded to McDonald, there is nothing else in the case, in the face of the undisputed facts, upon which he can pretend to support his charge of negligence against the appellant as the one who ought to be regarded as the real contractor. In all other respects the case as presented is the ordinary one of an agent or representative of a company employing a man to work for it without subjecting himself to liability for its negligence, even if he was present when the work was being done and took part in its direction as a representative of the company; and, but for what the plaintiff saw in the newspaper, it is hardly conceivable he would have brought this suit. That the newspaper announcement of the award of the contract in the first instance to McDonald cannot be regarded as anything said or done by him to mislead Patton when he was employed does not deserve discussion. It does not even appear that McDonald saw the announcement. At any rate, when he hired Patton he neither said nor did anything to indicate that the corporation, McDonald, Fo-

gle & Co., was not the contractor engaged in the prosecution of the work called for in the contract. If McDonald had practiced actual deception upon the appellee by inducing him to believe by what he said and did that he was the real employer, he might be estopped from denying his liability, but, under the facts in the case, that is not the question before us.

Some of the employes of McDonald, Fogle & Co., called by the appellee, testified that they were employed by Mr. McDonald personally, and yet, on the cross-examination of some of them, it was clearly developed that they ought to have known their real employer was McDonald, Fogle & Co. G. M. Cryster, one of them, was confronted with the following order for his transportation, which he says he did not read, when he was sent to Morgantown to go to work:

"An Order for Transportation.

"McDonald, Fogle & Company, Incorporated,
Contractors.

"Morgantown, W. Va., Sept. 10, 1898."

"Pittsburg & Morgantown Pack. Co.—Dear Sirs: Please carry the bearer, M. G. Cryster, from Pittsburg to Morgantown at our rate of \$1.00. Yours respectfully,

"McDonald, Fogle & Co."

Christian Winterburg, another witness, was paid by a check of McDonald, Fogle & Co., drawn against its account in the Bank of the Monongahela Valley, for \$38.97. Still another, Robert Ross, was paid by the corporation by its check drawn on the same bank.

Turning to the evidence submitted by the defendant, we find the uncontradicted facts to be that, by formal action of the board of directors of McDonald, Fogle & Co., the company had taken a transfer of the contract from McDonald several months before he saw Patton; that it at once commenced the work of constructing the lock and dam; that machinery and materials were shipped to it in its corporate name; that all bills for consignments to it were paid by the checks of the company, drawn against its account in the Bank of the Monongahela Valley; that, from time to time, it gave its employes, in its corporate name, orders on J. C. Pickenpaugh, which were accepted by them; that kegs of nails which were used by the appellee had been consigned to and marked "McDonald, Fogle & Company"; that the company had an office on the ground, on which there was a sign "McDonald, Fogle & Company," giving the office hours; that its tools were all marked "McD. F. & Co."; and that its secretary paid the men, including the appellee. The learned trial judge charged the jury that McDonald "could not escape responsibility by secretly, as between him and this man, having this company do the work instead of him, if he was the real employer and the other party worked without a knowl-

edge that the company was doing the work"; and that if McDonald as an individual hired the plaintiff, and as an individual put him to work, and the plaintiff believed that he was working for him under the honest belief that McDonald was doing the work, without any knowledge that the corporation was really doing it, the plaintiff was entitled to recover. But there was no secrecy on the part of the company in doing this work, and any honest belief on the part of Patton that he was working for McDonald, and not for the company, must have been the result of something that McDonald said or did, which, as already stated, nowhere appears. He does not, as the learned judge inadvertently states in his charge, testify that he was employed by McDonald "as an individual, and not as an agent of this company." He simply states that he was employed or hired by McDonald, without anything more.

There is no allegation or proof that C. I. McDonald was present when the accident occurred, or that he was personally superintending the work at the time. The averment, on the contrary, is that one Fogle, the superintendent for McDonald, was guilty of the negligence complained of; and this is the material allegation to be proved, if, under the rule, "Respondeat superior," McDonald, as the master, is to be liable for the negligence of Fogle, alleged to have been his servant. Proof cannot be found in the testimony supporting this material allegation of the plaintiff. Even if McDonald as an individual did hire Patton, and the latter's contention on this point could be sustained, he did not hire him to be protected against the negligence of the employé of another; and yet such is the appellee's case under the testimony before us. Fogle was not McDonald's employé; he was, beyond dispute, the employé of McDonald, Fogle & Company. He could have but one superior to answer for his dereliction of duty. That superior was not McDonald. It was the corporation that had employed him, for which he was working at the time the accident occurred, and to which alone Patton can say "respondeat," if he was negligent. "A person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exists between them." *Painter v. Mayor, etc., of Pittsburgh*, 46 Pa. 213. "The immediate employer of the agent or servant who causes the injury is alone responsible for such injury; to him alone the rule of respondeat superior applies, and there cannot be two superiors severally responsible." *Wray v. Evans*, 80 Pa. 102. There can be no recovery against one charged with negligence upon the principle of respondeat superior, unless it be made to appear that the relation of master and servant in fact existed, whereby the negligent act of the servant was legally imputable to the master.

McCullough v. Shoneman, 106 Pa. 169, 51 Am. Rep. 194.

The learned judge, in his opinion refusing a new trial, cites *Goodwin v. Smith* (Ky.) 66 S. W. 179, but there is nothing in it to sustain him. There a partnership had employed a man to work for it, and he had been working for it some time before May 15, 1900, the day he was injured. On that day, the members of the partnership merged the firm, with its assets and liabilities, into a corporation, to continue the business with the same relative positions of the partners. The corporation was not entitled, under its charter, to begin business until the very day the plaintiff was injured. There was no apparent change of ownership, and nothing to show that the partnership had ceased to exist, and that the corporation had succeeded to it at the time of the accident. That the case so relied upon by the learned trial judge has no application to the present one is clear from the following extract from the opinion of the court: "According to the proof, the most that can be said in favor of the corporate proposition is that the partners had determined to merge the firm, with its assets and liabilities and the partners' holdings, into a corporation, with the same relative positions among themselves. But it is not pretended that any knowledge or information of this change was actually given to appellee or to other employes. Under the proof, the court would not be authorized to say, as a matter of law, that appellee was employed by a corporation of whose existence he had not learned. There was no contract of employment entered into on May 15, 1900. The old contract simply continued, and appellee went to work as usual. He had been engaged by the partnership, and had neither been discharged nor re-employed." If, in the case now before us, McDonald, as the actual contractor, while prosecuting the work, had employed Patton, and subsequently, without the knowledge of the latter, had assigned the contract to the corporation, the case relied upon might have some application. In *Thorpe v. New York Central & Hudson River R. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325, and *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, the liability of the railroad company to the passengers injured in drawing-room cars was based solely upon the ground that, as the company had contracted to use these cars as part of their trains, the employes of such cars were their employes when the question of safe transportation was involved. No authority brought to our attention sustains the position taken by the court below, and none can be found to do so.

Further discussion could not make it plain that the employment here was what we have already styled it, an ordinary, everyday transaction, in which a representative of a company, having an interest therein,

hires and sends into its service men seeking employment; and, no matter how the terms of the contract entered into may be enforced against the person doing the hiring, his liability does not extend to the negligence of the person or company for whom he employs the workmen. In the absence of deception or actual misrepresentation, liability for negligence can be enforced only against the person actually guilty of it. Binding instructions should have been given to the jury to render a verdict in favor of the defendant. The fourth assignment of error is sustained.

The judgment is reversed, and is now entered for the defendant.

APFELBACH v. CONSOLIDATED GAS CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

NEGLIGENCE—ESCAPING GAS—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff's house was built on a hillside, and entrance from the street was to the upper story. An odor of gas had been noticed for several days, and there had been an explosion in a house on the other side of the street. Neither house was piped for gas, and there were no gas pipes within 125 feet of plaintiff's house. Plaintiff had warned his children not to take a light into the cellar. The children of the neighbor whose house had been injured were brought to his house, and plaintiff and his son slept in the dining room, on the lower floor, and were injured by inhaling gas. *Held*, that the court could not say that plaintiff was guilty of contributory negligence in sleeping where he did.

Appeal from Court of Common Pleas, Allegheny County.

Action by Caroline Apfelbach, administratrix of Charles Apfelbach, against the Consolidated Gas Company. From an order refusing to take off nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

F. C. McGirr, G. H. Stengel, J. E. O'Donnell, and John Marron, for appellant. Edwin W. Smith, J. H. Reed, George E. Shaw, and J. H. Beal, for appellee.

FELL, J. The negligence of the plaintiff in sleeping in the basement of his house when he knew gas was escaping in the vicinity was not, under all the circumstances, so clear as to warrant a nonsuit. The house was built on a hillside, and the entrance from the street was to the upper story. The front room of the lower story was used as a cellar, and extended under the pavement. The back room was above the ground, and was used as a dining room. The odor of gas had been noticed in the vicinity for several days, and three days before the plaintiff was injured

there had been an explosion in a house on the other side of the street. Neither this house nor the plaintiff's was piped for gas, and there were no gas pipes in the street between them, nor within 125 feet of the plaintiff's house. After the explosion, it was learned that the gas had escaped from a pipe of the defendant company in a street on the opposite side of the house in which the explosion had occurred. The odor of gas was noticed in the vicinity and in the plaintiff's house after the explosion, and he had warned his children not to take light into the cellar. The children of the neighbor whose house had been injured were brought to his house, and, in order to make room for them, he and his son slept in the dining room, and were injured by inhaling gas. No one knew at this time where the gas came from, and it is still in doubt whether it was forced by pressure from the pipe through the 125 feet of earth and rocks, or passed through the pipe into an abandoned mine which was under the street, and thence to the surface, or whether it escaped from the pipes at all, or was generated in the mine which was then on fire. That the odor was stronger in the cellar than in other parts of his house was not notice to the plaintiff that the gas was entering the house through the earth around it, as the stronger odor there might have been due to the less thorough ventilation. He guarded against the danger from fire which he knew, but there was no other danger so imminent as to require him to abandon the house. Without knowledge that the gas was entering the house through the cellar, the danger in sleeping in an adjoining room was not so manifest as to be declared by the court as matter of law.

The judgment is reversed, with a *procedendo*.

In re PITTSBURG WAGON WORKS' ESTATE.

Appeal of GWINNER et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

APPEAL—TIME OF TAKING—DISMISSAL.

1. Under Act May 19, 1897 (P. L. 67), providing that no appeal shall be allowed in any case unless taken within six months from the entry of judgment, a party must appeal within six months from the entry of the judgment, though an appeal has been taken by the other party.

Appeal from Court of Common Pleas, Allegheny County.

In the matter of the Pittsburgh Wagon Works' estate. From a decree dismissing exceptions to the auditor's report, Frederick Gwinner, trustee, and others, appeal. Quashed.

From the record it appeared that this was a petition under the Price act for an order to sell real estate held by petitioner, trustee, for

the contributors to a fund used in the purchase of a mortgage upon the property described in the petition, and to which the trustee took title under a sale on lev. fa. to collect the mortgage debt.

Exceptions to the report of the auditor distributing the fund were dismissed on March 13, 1900. On March 30, 1900, W. J. Kountz, executor, took an appeal to the Supreme Court. On September 29, 1900, Frederick Gwinner and others took this appeal.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William A. Sipe, for appellants. D. F. Patterson and J. Charles Dicken, for appellee.

MESTREZAT, J. Frederick Gwinner presented his petition to the court below, and on October 11, 1896, procured an order, under the Price act, authorizing him to sell certain real estate held by him as trustee. No sale having been made on this order, an alias order was granted April 16, 1898. The property was sold on the alias order, and the sale was confirmed July 11, 1898. The trustee filed his account, and, exceptions having been filed thereto, an auditor was appointed to pass upon the exceptions and report a distribution of the proceeds of sale. The auditor made his report on October 24, 1901, to which exceptions were filed by W. J. Kountz, executor of Peninah W. Kountz, deceased, and also by Frederick Gwinner et al., creditors of W. J. Kountz. The court dismissed the exceptions and confirmed the report on February 19, 1902. W. J. Kountz, executor of Peninah W. Kountz, deceased, appealed from this decree March 10, 1902, and Frederick Gwinner et al., creditors of W. J. Kountz, appealed on September 30, 1902.

It will be observed that the appeal of Gwinner et al. was taken more than six months after the entry of the final decree in the court below. For this reason the appellee has moved this court to quash the appeal. The fourth section of the act of May 19, 1897 (P. L. 87), provides, *inter alia*, that "no appeal shall be allowed in any case unless taken within six calendar months from the entry of the sentence, order, judgment or decree appealed from. * * * Appeals taken after the times herein provided for shall be quashed on motion."

The intention of the act of 1897 was that the six months' limitation should begin to run when a judgment or decree was entered against the party claiming the right to appeal. If, in the trial of a cause, exceptions are taken to rulings of the court by a party, but a verdict and judgment is in his favor, he need not and cannot appeal. If that judgment is reversed by this court, and a judgment is entered against him, then his right to appeal is complete, and he may exercise it within six months from that date. But, where the right to an appeal has accrued by the entry of a judgment or decree against a party, he must take his appeal within six

months from that date, notwithstanding an appeal has been taken by the other party.

We are clearly of opinion that the motion to quash this appeal must prevail. There was no reason or necessity for delay in taking the appeal. A final decree had been entered against Frederick Gwinner et al., and the right to appeal was thus fixed. The decision of the questions in Kountz's Appeal from the same decree (54 Atl. 316) could not determine or affect those raised on this appeal. The two appeals raise entirely separate and distinct questions, and hence there was no necessity for the appellant in either appeal to await the determination of the other appeal. The time in which the statute required the appeal to be taken, therefore, began to run from the date of the decree.

Hughes v. Miller, 192 Pa. 385, 43 Atl. 976, has no application to the case in hand. There the judgment of the trial court was in favor of the defendant, and consequently he had no occasion for taking an appeal. But on appeal by the plaintiff the case was reversed, and judgment was directed to be entered against the defendant. Then for the first time there was a judgment against him and the necessity for him to appeal. Similar facts exist in Gates v. Pennsylvania R. R. Co., 154 Pa. 566, 26 Atl. 598. Here, however, the decree was against the appellants, and it could not be affected by the result of the appeal by the other party.

The motion is allowed, and the appeal is quashed at the cost of appellants.

McNALLY v. MERCANTILE TRUST CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

BOND—CONSTRUCTION—DEFAULT—LIABILITIES.

1. A bond given by a subcontractor to a city contractor gave the surety no opportunity, on default of the subcontractor, to complete the work, but by its terms the contractor was given such right. *Held*, that the surety, in an action on the bond by the contractor after default by the subcontractor, could not allege as a defense that he was given no opportunity to complete the work.

2. Where a contractor, without the knowledge of the surety of his subcontractor, overpays the latter, such overpayments are in relief of the surety's liability on the bond.

Appeal from Court of Common Pleas, Allegheny County.

Action by Thomas McNally against the Mercantile Trust Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented the following points:

"(1) Under all the evidence in this case the verdict must be for the defendant. Answer. Refused.

"(2) The burden of proof is upon the plaintiff to satisfy the jury that the work on the contract entered into between the defendant, Thomas McNally, and Gustave Kaufman, for so much of the work as was un-

completed by the said Gustave Kaufman at the time he abandoned said work on August 5, 1898, the same being for the completion of part of the Beechwood Boulevard, in the city of Pittsburg, has been done as cheap by the said Thomas McNally as it could have been done by the defendant herein, the Mercantile Trust Company, by reletting the said balance of the work to be completed under said contract to some other contractor, and the plaintiff, failing to satisfy the jury that the work has been so completed, cannot recover in this action, and the verdict of the jury must therefore be for the defendant. Answer. Refused.

"(3) The plaintiff's estimate, without any evidence whatsoever of consultation with other contractors, or attempting to take bids from other contractors for the completion of the said work, is not sufficient to warrant the jury in finding that the work was completed as cheaply as it could have been done by some other contractor. Answer. Refused.

"(4) The Mercantile Trust Company, being the bondsmen, were not only entitled to notice of the fact that Gustave Kaufman had abandoned the work to be done and performed by him, under the contract referred to between him and Thomas McNally, the plaintiff herein, but an opportunity to complete the contract referred to, under such contractors as they might select, should have been given, and the plaintiff, having failed to allow the defendant herein to complete the said contract, is not entitled to recover in this case, and the verdict must therefore be for the defendant. Answer. Refused.

"(5) The plaintiff in this case, not having accorded the defendant the opportunity to complete said contract, is not entitled to recover for any expenses incurred, in the absence of proof that such expenses were directly authorized by the Mercantile Trust Company. Answer. Refused.

"(6) Under the terms and conditions of the bond sued on in this case, the defendant herein was subrogated to the rights of its principal, Gustave Kaufman, and one of those rights, being the right to complete the said contract by the said Kaufman, having been denied this defendant by the plaintiff herein, he is not entitled to recover in this action, and the verdict must therefore be for the defendant. Answer. Refused.

"(7) It appearing from the evidence that about 40 per cent. of the work had been done by the said Gustave Kaufman on his said contract with the said plaintiff herein, Thomas McNally, at the time the said Kaufman abandoned the said contract, and he had drawn from the city of Pittsburg, upon warrants indorsed and approved by the plaintiff herein, about 60 per cent. of the contract price for the completion of the entire work, the same being a contravention of the provisions of the contract, which provided that the said Kaufman was only to receive the actual value of the work done and material fur-

nished, that such an act by the plaintiff, in paying to the said Kaufman more than was due under the terms and conditions of the contract, was such a material variation of the said contract as would discharge the defendant herein, the surety under the bond sued on in this case, and therefore the plaintiff cannot recover, and the verdict must be in favor of the defendant. Answer. Refused, for the reason that the point assumes a certain exact proportionate percentage, of which there is no evidence.

"(8) If the jury believe that, at the time the final estimate to Gustave Kaufman was made, the figures were made by the plaintiff personally, and these entitled Gustave Kaufman to a much less sum than the city engineer's estimate at that date, it was the duty which the plaintiff owed to the Mercantile Trust Company, as surety, to refuse to assign said estimate of the work, and, failing to do so, he released the said surety from all liability on the bond in suit. Answer. Affirmed. In the absence of fraud on the part of McNally, these estimates would be binding."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Homer L. Oastle, William A. Stone, and Stephen Stone, for appellant. A. M. Imbrie and Leander Trautman, for appellee.

BROWN, J. The first reason given by the appellant why the appellee ought not to recover from it is that, upon the default of the subcontractor, a proffer ought to have been made to it, as the surety on his bond, of the privilege of completing the work, and, the appellee having himself proceeded to do so without such proffer, it is discharged from all liability. The default occurred on August 5, 1898. On the same day McNally notified the Mercantile Trust Company, in writing, of Kaufman's default, and that he would look to it, as his surety, for all damages he might sustain under the contract by reason of such default. A day or two afterwards he called upon E. L. Porter, vice president of the company, and talked to him about Kaufman's abandonment of the work. Porter said: "We won't admit liability;" when McNally replied: "The only thing for me to do is to go ahead on the contract." That this took place between them is not denied by Porter. Three days after the abandonment, on August 8th, McNally notified the company that he would proceed to complete the work abandoned by Kaufman, his subcontractor, and that, while he was under no obligation to consult the company, he was willing to consider any suggestions it might make, and would confine the cost of finishing the work to the lowest possible figure, that the loss might be as low as possible. To this, reply was made within a few days, stating that the company admitted no liability on the bond, but was willing to extend any cour-

tesy that would facilitate the completion of the contract at the least expense.

There is nothing in the contract or the bond providing that, upon the default of Kaufman, McNally was to give the surety an opportunity to complete the work. The bond was executed by the Mercantile Trust Company with the terms of McNally's contract, as the original contractor with the city of Pittsburg, as well as his contract with Kaufman, before it. Both contracts entered into the bond, for Kaufman's with McNally expressly provided that certain portions of the latter's contract with the city were made parts of it. Among the terms of McNally's contract with the city there was one providing that at any time the director of the department of public works should be of opinion that the said work, or any part of it, was unnecessarily delayed, or that the contractor was willfully violating any conditions or covenants of his agreement, or executing the same in bad faith, he should have power to notify the contractor to discontinue all work under the contract, and that thereupon the contractor should cease, and the director himself have the power to complete the work at the expense of the contractor. In Kaufman's contract with McNally there is a stipulation that nothing contained in it "shall limit or modify the right of said McNally to discontinue work by said Kaufman upon said Beechwood avenue, and prosecute the same to completion, under the provisions of said original contract, in the same manner as the director of the department of public works has power to do, upon the condition there made." The condition of the obligation was that Kaufman would be bound by the terms of the contracts.

Though McNally had the clearly reserved right under the contract "to discontinue work by said Kaufman," he did not attempt to do so. He took it up and carried it on to completion, under his obligation to the city of Pittsburg, only after the subcontractor had absolutely defaulted by abandoning the contract. If he had not done so, heavy penalties awaited him. He did all he was required to do, so far as this surety is concerned, when he notified it of the default of the principal in the bond. It might, as a matter of grace, but not of right, in view of what it knew was in the two contracts, have asked to be allowed to complete the work, but it did not do even that. It persistently denied all liability, and now inconsistently complains that the opportunity was not given it of completing the work. Under the circumstances, there was nothing for McNally to do except to go on and complete it himself in accordance with the terms of his contract with the city. If he had waited on the arbitrary will and pleasure of the appellant, very serious consequences would have awaited him, which, it is very plain, the trust company would not have

assumed for him. The jury were instructed that "he was to complete his contract, paying for labor the ruling prices in the market at the time, paying for material the market prices which were ruling in this district at that time, and to use every economy that was possible to do this work in a reasonable and careful manner, in order to carry out the contract with the city of Pittsburg, under which he was primarily bound. He must convince you by the weight of the evidence that he did complete this contract practically as cheaply as it could have been done, * * * acting in good faith towards this surety." By their verdict the jury found that he had fully discharged the duty that was upon him. This disposes of the first reason given for reversing the judgment.

Appellant's second ground of complaint is that Kaufman had been overpaid, and that the overpayments, having been in excess of the claim made upon it, were to its prejudice, and it is therefore discharged from all liability on the bond. If McNally did overpay Kaufman, without the knowledge or consent of the surety on his bond, such overpayments were in relief of it. *General Steam-Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Calvert v. London Dock Co.*, 2 Keen, 638. The answer to this is that Kaufman's contract with McNally provided that, for material and labor furnished, he should be paid "in certificates issued by the department of public works of the city of Pittsburg, as from time to time received therefrom by said McNally, and as from time to time made upon estimates calculated on measurements taken by the city's engineer," and "such certificates, when delivered by McNally to Kaufman, shall be accepted to the amount thereof for work done and material furnished under this contract." The city did not know Kaufman. It paid McNally, its contractor, in the mode just indicated, and he in turn gave to Kaufman, out of what he received, what was coming to him under the terms of the contract. Kaufman was to receive full payment, not only for all the work he had done, but for all material furnished. The estimates included not only the work actually done on the ground, but material as well that had been furnished, but not used, at the time of the abandonment. Measurements were to be made by the engineer of the city of Pittsburg, and, on estimates based upon them, payments were made from time to time to McNally, and by him to Kaufman. These estimates were given to McNally by the city engineer. In one or two instances McNally may have helped to make the measurements, but the city engineer went over them to see that they were all right. He testifies that all of the certificates that had been issued were based on measurements made by the city force, with the possible exception of two that were based on measurements made by

McNally, but that the city had not issued the certificates until these two measurements had been checked up and found to be satisfactory. The court submitted to the jury, for their determination, whether McNally, by anything he had done, had participated in overpayments, to the prejudice of the surety, and whether, if Kaufman actually was being overpaid, he knew it, and assisted in deceiving the city authorities, under whose estimates the payments were made. We have carefully scanned all the testimony, and nothing can be found in it that would have justified a finding that McNally had been unfaithful to this appellant. There is not a line in it even showing that the measurements made were inaccurate, or that the estimates were for amounts which exceeded the work actually done and the value of the material on the ground. A finding by the jury that overpayments had been made to Kaufman, to the prejudice of the trust company, could not be sustained.

Under the assignments of error, no other question remains to be considered.

Judgment affirmed.

DOYLE v. PITTSBURG WASTE CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—WARNING TO MINOR—CONTRIBUTORY NEGLIGENCE.

1. An employé does not assume the risk in the use of tools and machinery, but has a right to suppose that they are provided with such guards and protection from injury as are usual, unless the absence is apparent, or his attention has been called thereto.

2. An employer should take notice of the age and ability of an employé, and use proper means to protect him from a danger which he cannot appreciate.

3. Plaintiff, a boy about 16 years old, was placed at a rag-cutting machine in defendant's factory. He received no instructions as to the manner of cleaning waste from the fan of the machine, nor how to stop a revolving cylinder connected with it. In attempting to clean the fan, his hand was hurt in the cylinder. It was conceded that the machine was a dangerous one. *Held*, that the question whether the manner in which he attempted to clean the fan was so manifestly dangerous as to convict him of negligence was for the jury.

Appeal from Court of Common Pleas, Allegheny County; Evans, Judge.

Action by William T. Doyle, by his next friend, Walter Sullivan, against the Pittsburgh Waste Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Rody P. Marshall and Thomas M. Marshall, for appellant. Clarence Burleigh, for appellee.

MESTREZAT, J. William T. Doyle, the plaintiff, a minor of the age of 16 years and 4 months, was engaged by the defendant company to work on a baling machine in the yard of its manufactory in the city of Pittsburgh. After he had been thus employed for a week he was put to work by the foreman on a rag-cutting machine in the manufactory. He had worked at this employment four hours, when, in attempting to clean the fan—a part of the machine—his hand was caught in the revolving cylinder, and so badly injured that the amputation of his arm became necessary. It is claimed that the machine was dangerous, and that the plaintiff's injuries resulted from the negligence of the defendant company in not giving him adequate instructions as to the mode of operating the machine.

The learned trial judge granted a nonsuit on the ground that the plaintiff was guilty of negligence which barred a recovery. In his opinion refusing to take off the nonsuit, he says: "The cylinder was in full view and revolving when he started to clean out the waste, and, although he had only been working at the machine about four hours, he knew the danger to him of any part of his person coming in contact with the revolving cylinder, as though he had been an adult, or the danger fully explained to him. For four hours he had seen the cylinder grinding the rags which he was feeding it, and, of course, he knew its danger." In addition to the defense of contributory negligence, the learned counsel for the defendant company alleges that "when he [the plaintiff] attempted to clean the fan he was simply a volunteer, working not only outside the scope of his employment, but in reality violating his orders." The position of the defendant company is that Doyle was properly instructed in regard to the work he was employed to perform, and that he was injured by his negligent conduct in the performance of work outside of his employment, and in violation of his instructions.

The dangerous character of the machine, and the consequent necessity for instructing the employes engaged in operating it, seem to be conceded. Doyle and at least one other person previously employed in operating the machine were instructed as to their duties, and how to perform them. The issue, therefore, raises the question whether Doyle's employment required him to clean the fan, and, if so, whether the manner in which he attempted to do so was so clearly dangerous as to convict him of negligence.

We think both of these questions were for the jury. On this appeal the testimony, as introduced by the plaintiff, must be regarded as true. The only instructions given Doyle, as appears by his own testimony, are the following: "When I was put on that machine to work, the instructions that was given me was to keep the rags straight on this belt; and there is a place around in

¶ 1. See Master and Servant, vol. 24, Cent. Dig. §§ 547, 615.

here to put oil in, and to watch for fire; and, if it would catch fire, put the water in, and put the fire out, and start the machine, and just go to work again." It thus appears that he was not instructed as to the manner of cleaning the waste from the fan, nor as to the proper way of stopping the motion of the revolving cylinder. The waste frequently caught fire in passing through the machine, and after the fire was extinguished it was necessary to remove the burnt waste that had accumulated in the fan before the machine could be started again. The man who operated the machine removed the waste. A former employé engaged on the machine did this with a small hook which he used for the purpose, and while the cylinder was not revolving. Prior to this employment Doyle had not worked on a cutting machine, and was ignorant of the manner of operating it.

While Doyle was running the machine, the waste took fire, and, pursuant to his instructions, he threw water into the machine and extinguished the fire. He then threw off the small belt and stopped the fan, which he attempted to clean while the cylinder was in motion. His hand slipped, and was caught in the teeth of the cylinder, injuring it very severely. It is contended on the part of the plaintiff that his instructions necessarily implied that he should remove the waste. It was his duty to put out the fire, and the testimony shows that the waste had to be removed before the machine was started again. Doyle's instructions, while not directing him to do so, did not inform him who would clean the fan; and, as he was required to put the machine again in motion, it was impliedly his duty, the plaintiff claims, to remove the waste after the fire. It is contended the facts disclosed by the testimony in the case convict the defendant company of negligence for which it is liable in this action.

If Doyle's employment included the cleaning of the fan, and it involved a hazardous risk, not reasonably incident thereto, and requiring instruction to the employé to perform it in safety to himself, the failure to give the employé the necessary adequate instructions to enable him to safely perform the service would be negligence on the part of the defendant company. In *Rummel v. Dilworth*, 131 Pa. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827, the injured boy was of the age of 17 years. In that case, speaking of the duty of the employer and the risks assumed by the employé, Mr. Justice Williams says: "He [employé] has the right to suppose that his employer has provided such guards and means of protection from injury, in the use of the machinery, tools, and appliances, as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. If the business is one with which he is not familiar, he has a right to ex-

pect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risk of dangers of the existence of which he has no knowledge. In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed." In *Grizzle v. Frost*, 3 Post. & Finl. 622, the injured person was 16 years old, and the revolving rollers, the cause of the injury, and the manner in which they were worked, were visible. Chief Justice Cockburn, delivering the opinion, says: "If the owners of dangerous machinery, by their foreman, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper, and which are likely to lead to danger, of which the young person is not aware, as it is their duty to take unusual care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

In support of the contention that Doyle was guilty of negligence, it is claimed that the danger in attempting to clean the fan with his hand was obvious to any person with ordinary intelligence, and that therefore he knew he would be injured when he inserted his hand in the machine. If the danger was obvious and apparent, and Doyle had the capacity to comprehend and appreciate it, it would be negligence in him to assume the risk. The mere fact that he was a minor would not, under these circumstances, relieve him from the duty of protecting himself by the exercise of care. But whether the facts necessary to charge him with negligence exist, and whether, with a due appreciation of those facts, he acted in defiance of them, cannot be determined by the court as a matter of law, but are questions for the consideration of the jury. It may be observed in this connection that, conceding Doyle knew he would be injured by the contact of his hand with the cylinder, it does not necessarily follow that he knew his hand would come in contact with the cylinder when he attempted to remove the waste from the fan. The nonsuit was granted, as we understand from the language of the learned trial judge, because Doyle knew that contact with the revolving cylinder was dangerous, and not because he also knew that in attempting to remove the waste his hand would necessarily be cut by the cylinder. A knowledge or reasonable belief of the latter fact would be necessary to convict him of negligence.

Under the testimony submitted by the plaintiff, we think the case was for the jury, and the nonsuit was therefore improperly granted. The assignment of error is sustained, and the judgment is reversed, with a *procedendo*.

RALSTON et al. v. IHMSEN et al.
(Supreme Court of Pennsylvania. Jan. 5,
1903.)

SPECIFIC PERFORMANCE—UNCERTAIN DAMAGES—DEATH OF PARTNER—PURCHASE OF INTEREST—ARBITRATION—FINDING.

1. Where damages at law are an insufficient remedy for breach of contract, because there is something peculiar in the subject of the contract, that cannot be represented by damages, and such damages are uncertain, a specific performance of the contract will be decreed.

2. Specific performance of a contract by the administrators of a deceased partner to sell his interest to the surviving partners in a glass manufacturing business will be decreed, where the interest of the decedent was of specific value to the purchasers, as enabling them to continue without interruption a business to which they had contributed most of the capital.

3. The jurisdiction to enforce the specific performance of a contract by the administrators of a deceased partner to sell his interest in the business to the surviving partners is in the court of common pleas, and not the probate court.

4. An agreement for the sale of the interest of a deceased partner to his surviving partners provided that the value thereof should be determined by two referees, who, on disagreement, should choose a third, and that their finding, or that of two of them, should be conclusive. *Held*, that where two of the referees originally chosen agreed on the value of all the property, except certain furnaces and ovens, and chose a third referee, who, as an expert, valued them, and accepted the valuation of the original referees as to the other property, a finding by such third referee and one of the others as to the value of all the property was sufficient.

Appeal from Court of Common Pleas, Allegheny County.

Bill by John Ralston and others against Herbert L. Ihmsen and others, administrators of Thomas O. Ihmsen, deceased. Decree for plaintiffs, and defendants appeal. Affirmed.

Bill in equity for specific performance of an agreement to sell the interest of decedent in a business conducted by the plaintiffs and decedent as partners. The agreement was as follows:

"Now, therefore, this agreement witnesseth, that we, Herbert L. Ihmsen and D. O. Ihmsen, administrators of the estate of Thomas O. Ihmsen, deceased, John Ralston, William S. Cunningham, B. J. Stenger, and B. J. Stenger and Mary A. Stenger, executors of the estate of Robert Cunningham, deceased, do hereby agree to submit to arbitrators or referees without exception or appeal, the question as to the value of the interest of Thomas O. Ihmsen, deceased, in the partnership association of Cunninghams & Company, Limited, and the copartnership of Cunninghams & Company and Cunninghams & Company, Limited, to include all interest which said Thomas O. Ihmsen's estate has or may have in said real estate, leasehold and all of the copartnership assets of said firm or partnership association, and for that purpose the said Herbert L. Ihmsen and D. O. Ihmsen, administrators as aforesaid, have selected D. C. Snyder, of the city of Pittsburg, as one of the arbitrators or referees, and the said John Ralston, William S. Cunningham, B. J. Sten-

ger, and B. J. Stenger and Mary A. Stenger, executors of the estate of Robert Cunningham, deceased, have selected C. Frederick Leng, of the city of Pittsburg, aforesaid, as the other arbitrator or referee; the said D. C. Snyder and C. Frederick Leng to proceed at once to determine the value of the interest of the said Thomas O. Ihmsen, deceased, in said real estate and all copartnership assets of Cunninghams & Company and Cunninghams & Company, Limited. But in case said D. C. Snyder and C. Frederick Leng cannot agree between themselves as to the value thereof, then they shall call in a third party to be mutually chosen by them to act with them as an arbitrator or referee in said matter. And it is mutually agreed and understood that the award in writing of the said arbitrators or referees, or any two of them, shall be final and conclusive as to the value of the interest of said Thomas O. Ihmsen, deceased, in the said firm of Cunninghams & Company, Cunninghams & Company, Limited, and said real estate and on any matter or thing touching or concerning the interest of said Thomas O. Ihmsen, deceased, therein; and each and every of said parties to this agreement do hereby waive any right of action, suit or suits or other remedy at law or otherwise touching the interest of said Thomas O. Ihmsen in said copartnership or partnership association, so that the decision of said arbitrators or referees, or any two of them, shall be in the nature of an award in writing, final and conclusive as determining the value of the interest of said Thomas O. Ihmsen aforesaid.

"And immediately after the value of said interest is fixed and determined by said arbitrators, or any two of them, and on the payment of the amount thereof to them, the said Herbert L. Ihmsen and D. O. Ihmsen, administrators as aforesaid, covenant and agree that they will, at their own proper cost and charges, grant, convey and assure unto the other parties to this agreement, all of the interest of the said Thomas O. Ihmsen, deceased, in said copartnership property, real estate, and partnership association in such a manner as will fully vest the title and ownership thereof in said other parties."

The referees named a valuation of all of the property, except the furnaces and ovens. They selected H. L. Dixon as a third referee, and as one having expert knowledge of the value of furnaces and ovens. Dixon accepted the valuation of the other property made by the other two referees, and appraised the furnaces and ovens himself. His valuation was accepted by Lane, but not by Snyder.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

L. C. Barton, for appellants. Levi Bird Duff and L. B. D. Reese, for appellees.

FELL, J. The court had jurisdiction in this case, and it was properly exercised in

granting the relief prayed for. The bill was to enforce the specific performance of a contract made by the administrators of a deceased partner to sell the interest of the decedent to the surviving partners at a price to be fixed by referees. The contract was not that of the decedent, but that of the administrators for the settlement of the partnership affairs by the statement of an account, the ascertainment of the interest of the deceased partner, and the sale thereof. The jurisdiction was in the common pleas, and not in the orphans' court. *Wiley's Executors' Appeal*, 84 Pa. 270; *Miller's Estate*, 136 Pa. 349, 20 Atl. 565. The value of the interest having been determined in the manner provided for, and payment tendered and refused, the plaintiffs were entitled to a decree for specific performance. The thing contracted for was an interest in a glass manufacturing business, nearly the whole value of which was in the plant and fixtures. The purchase was not with a view to the general profit, but because the interest was of peculiar and specific value to the purchasers, as the possession of it enabled them to continue without interruption a business to which they had contributed five-sixths of the capital. For the breach of this contract the law could furnish no complete remedy. The purchasers could be made whole only by the delivery of the thing bought. Specific performance of a contract will be decreed on account of the damages at law being an insufficient remedy, where there is something peculiar in the subject of the contract, that cannot be represented by damages, and where the measure of damages at law is uncertain or unascertainable because of the contingent nature of the property. *Notes to Cuddee v. Rutter*, 1 White & T. Lead. Cases in Equity, 1094. Referring to the instances in which contracts relating to personalty will be specifically enforced because the damages in money cannot be ascertained, it is said in *Bispham's Equity*, § 370: "In short, an agreement will be enforced specifically in a court of equity where the specific thing or act contracted for, and not mere pecuniary compensation, is the redress practically required."

The referees chosen by the parties agreed upon the value of all the property of the firm, except the furnaces and ovens, of the value of which they had no knowledge. As provided by the agreement, they chose a third referee, who was an expert as to the value of these things, and the appraisal was completed, and an award made, which by the agreement was to be final and conclusive, as determining the value of the interest. The objection that all of the referees did not pass on the value of each item of property in estimating the value of the interest is without merit. The two appraisers selected by the parties agreed as to the value of certain items, and the third appraiser was selected with the understanding that there

had been an agreement as to these matters, which he was to accept, and that he was to assist in the appraisal of the remaining items only. He accepted the appraisal made, as far as it went, and it was not a subject of dispute. There was no revocation of the agreement of reference. The notice given by the appellants was not to the surviving partners, but to the third referee, objecting to his acting for the reasons stated—that he had not been chosen, and that there had been an adjournment because of the failure of the referees to agree. Neither of these reasons was valid, and the notice was without effect.

The decree is affirmed at the cost of the appellants.

DAUGHTERS OF AMERICAN REVOLUTION OF ALLEGHENY COUNTY v.

SCHENLEY et al. (two cases).

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

DEED—RESERVATION—CONSTRUCTION—ATTORNEY IN FACT—RATIFICATION OF ACTS—APPEAL—VACATING STREET.

1. An owner of land in a city conveyed a small lot in the midst of it, reserving the right to represent the property in all proceedings looking to the vacation of certain streets. Thereafter an attorney in fact of the grantor, under a letter authorizing him to lay out lots fronting on such streets and alleys as in his judgment might be deemed advisable, petitioned the council to vacate streets mentioned in the reservation in the deed without express authority of the grantor. Subsequently the owner ratified such act. *Held*, that the grantee could not question the authority of the owner's representative.

2. If, under a letter of attorney, such attorney had no right to petition for the vacation of certain streets, a subsequent ratification of his act by his principal was equivalent to precedent authority.

3. Though the appellate court cannot go outside of a record on an appeal from an order in a road case to ascertain if the finding of fact by the court below was correct, it can determine that the conclusion of the lower court on the facts as found was not warranted by law.

4. Under Act May 16, 1891 (P. L. 75), giving a right of appeal to abutting owners from ordinances opening, widening, extending, or otherwise improving any street, no appeal lies from the vacating of a street.

Appeal from Court of Common Pleas, Allegheny County.

Petitions by the Daughters of the American Revolution of Allegheny County against Mary E. Schenley and others to quash ordinances to vacate Fort street and Point alley in the city of Pittsburgh. From orders quashing such ordinances, defendants appeal. Reversed.

Shafer, J., filed the following opinion in the court below in the Fort street case:

"This is a proceeding under the act of May 16, 1891 (P. L. 75), to determine the sufficiency of the petition to the councils of the city of Pittsburgh, upon which an ordinance was passed for the vacation of Fort street. Mrs. Mary E. Schenley is the owner of all

the land abutting on Fort street, except a lot which was some years ago conveyed by her to the Daughters of the American Revolution, a corporation, for certain purposes, stated in the deed, which deed created a base fee in that corporation. The deed of Mrs. Schenley to the corporation also contained a reservation to herself of the right to represent the property described in the deed in a petition concerning the vacation of the street in question, with a provision that, in case any damages should arise from the vacation, that she should not be liable for the same, so far as concerned that property. Mrs. Schenley is a resident of England, and Mr. John W. Herron has a power of attorney from her, which is of record in the recorder's office of Allegheny county, whereby he is authorized to do for her a considerable number of specific things. Some time prior to the signing of the petition in question, Mrs. Schenley, by articles of agreement, agreed to sell some or all of the lands abutting on the street to Mr. F. F. Nicola. The petition was signed by Mr. Nicola and by Mary E. Schenley, by her attorney in fact, John W. Herron, and was sworn to by each of them. At the time of the signing and presentation of the petition and the passage of the ordinance, Mrs. Schenley had no knowledge of the transaction. Some time afterwards she heard of it, and was satisfied with the action of Mr. Herron in signing the petition.

"The legal questions which appear to arise on this state of facts are, first, whether the act in question gives jurisdiction to this court in the case of a vacation of a street to inquire into the signing of the petition by a sufficient number of qualified petitioners; and, second, whether the plaintiffs have standing to object to the petition; third, whether the power of attorney of Mr. Herron authorizes him to sign such a petition, and, if not, whether the subsequent ratification of his signature by Mrs. Schenley will cure the original want of power; and, further, whether, in either event, the signature of Mrs. Schenley's attorney in fact is sufficient to bind the Daughters of the American Revolution in respect to their land, under the reservation in their deed.

"The question of jurisdiction, discussed to some extent by this court in the case of *Ebe's Appeal*, reported in 31 Pitts. Leg. J. (N. S.) 361, was one raised by the court, and not argued by counsel, and the case was decided upon other grounds. In that case we expressed an opinion that it is at least doubtful if the provisions of the tenth section of the act of May 16, 1891 (P. L. 75, 79), gave an appeal to the court in the case of a petition for the vacation of a street. The word 'vacating' does not appear in the section, and, if a vacation is included in its provisions, it must be under the head of 'otherwise improving.' It is true, on the one hand, that the words appear to be taken from the eighth section, which speaks of 'grading, paving,

macadamizing, and otherwise improving,' and may, therefore, be well interpreted to refer to improvements of a similar kind. Yet it is also true that the vacation of streets is, in the same act, more than once spoken of as an improvement, and the word 'improvement' is used as a generic word, including not only the change of the physical nature of the street, rendering it more convenient than before, but also the opening, widening, extending, and vacating of streets. This use of the word in the act was not observed in the discussion in the *Ebe Case*. If the act be interpreted to cover all the 'improvements' authorized and regulated by the act, including the vacation of streets, it will remove an apparent anomaly. It is not apparent why a petition of a certain kind should be required for all these improvements, and the determination of the question whether the petition is in fact of that kind should be different in different cases.

"As to the standing of the appellants as owners of abutting lands, we think there can be no doubt, as they have at least a base fee in the lands, and, notwithstanding the reservation in their deed, are liable for damages.

"That Mr. Herron's power of attorney is not sufficient to authorize him to sign such a petition for Mrs. Schenley is, we think, very plain. We can find nothing in it which even approaches such a power. The evidence is, however, that Mrs. Schenley afterwards ratified his act. In transactions in which the public is not concerned, and no third person's rights are involved, no doubt the ratification would amount to a previous authority; but the power of councils to pass a valid ordinance depended on the petition, and it cannot be that the validity or invalidity of the legislation can be made to depend upon the subsequent action of a private person at some indefinite time thereafter. If the petition was not sufficiently signed when acted upon by councils, their action was wholly void, and cannot be brought to life by the ratification of an act which was a prerequisite to it. Neither do we understand how the general conduct of Mrs. Schenley in not objecting to the previous acts of her representative in regard to streets gives Mr. Herron any greater authority. There might be something in it if it were not for the fact that he had a minutely specific power of attorney, and professed to act under it. Besides, it does not appear that Mrs. Schenley had any specific knowledge of the fact that her representative had signed such petitions for her at any time.

"A further matter to be considered is what is meant by the reservation of the deed of the right to 'represent the property' conveyed to the plaintiffs. The act calls for the signatures of the abutting owners. Is Mrs. Schenley to be deemed the abutting owner of all the land, including that of the plaintiffs, because she reserved the right to represent the property in such a petition? We are of

the opinion that the utmost she could be said to have is a power of attorney to represent the plaintiffs, irrevocable because coupled with an interest. If this be correct, she could not sign such a petition on behalf of the plaintiffs by an attorney in fact, there being no power of substitution in her own authority to act for them. We are clearly of opinion that the petition is not in fact signed by the requisite number required by the act.

"As to the question whether there is an appeal in the case of a petition for the vacation of a street, we think the law to be doubtful. If we hold the act to extend to the vacation of a street, and declare the ordinance invalid, there can be no doubt that an appeal will lie from such decision. From a contrary decision it is possible that no appeal would lie. We prefer, therefore, to resolve the doubt in favor of the petitioners.

"It appearing to the court, therefore, that the ordinance in question was not petitioned for by the requisite majority in interest and number of the owners of property abutting on the line of the proposed improvement, the ordinance founded thereon is quashed; the costs to be paid by the city of Pittsburgh."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William W. Smith and T. D. Carnahan, City Sol., for appellant. John Reed Scott, S. W. Childs, and J. H. White, for appellee.

DEAN, J. Mary E. Schenley, of London, England, is the owner of many pieces of land in and about the city of Pittsburgh. One of these is what is known as the "Point Property," being about $9\frac{1}{2}$ acres, at the junction of the Allegheny and Monongahela rivers. It is bounded on the east by Third street, and on the north, west, and south by Duquesne Way and Penn avenue. On a part of this $9\frac{1}{2}$ acres is what is known as the "Blockhouse," an outpost of old Ft. Pitt. The fort itself has long since disappeared. The blockhouse is 20 by 80 feet and about 25 feet in height. Mrs. Schenley, by deed dated March 15, 1894, conveyed the blockhouse, with the tract of land 100 feet by 90, on which it stood, to the Daughters of the American Revolution, a patriotic corporation, for the nominal consideration of \$1, stipulating, however, that if used for any other purpose than that of maintaining and preserving the blockhouse, it should revert to the grantor and her heirs; and, further, the grantor reserved the right to represent the property in all proceedings looking to the vacation of Fort or First street and Point alley. The significance and value of this reservation is indicated by a mere glance at the plot of the $9\frac{1}{2}$ acres—the 100 by 90 feet plot, about the middle of which stands the old blockhouse with 25 feet of clear space on every side of it. At its length, 100 feet, it extends a few feet over onto First street, and slightly over onto Point alley on the other side. All the

other part of the $9\frac{1}{2}$ acres is around and about it, and is the property of Mrs. Schenley. Of course, for the improvement of her other property by the opening or vacation of streets and alleys, it is of the highest importance that she should have an influential voice. If the donee of the small blockhouse piece of land had the right of a landowner to obstruct public improvements in that locality, all her other land might be made less valuable. This was the situation in the fall of 1901, at which time Mrs. Schenley sought to improve the "Point" property, and to that end, desired the vacation of certain streets and alleys, so that the property would be eligible for the kind of improvements she contemplated. Thereupon petitions were presented to city councils to pass ordinances vacating two streets and two alleys running through the property; among them First street, or Fort street, and Point alley. These petitions were signed by Mrs. Schenley, by her attorney in fact, John W. Herron; also by Frank Nicola, who had an agreement with Mrs. Schenley to purchase part of the land. The petitions, on their face, thus represented the owners of every foot of property abutting on the streets to be vacated; that is, assuming that Mrs. Schenley, under the reservation in her deed to plaintiff, had authority to represent it in such proceedings. Ordinances vacating the streets were duly passed by councils, signed and approved by the city recorder, as required by law. The Daughters of the Revolution thereupon presented a petition to the court of common pleas, praying the court to quash the ordinances vacating Fort street and Point alley on the ground that John W. Herron had no authority from Mrs. Schenley to sign for her the petitions to vacate, and that, leaving her out as an owner of abutting property, the petition was not signed by a majority of the property owners in interest and number abutting on said streets. The court ordered notice to be served upon all of defendants to appear. All did appear by counsel, and denied the averment of fact in the petition, and further denied the jurisdiction of the court to entertain the appeal. The court, on hearing, found as a fact that Mr. Herron had no authority from Mrs. Schenley to sign the petition, and further affirmed its jurisdiction to entertain the appeal, and thereupon entered this decree: "It appearing to the court, therefore, that the ordinance in question was not petitioned for by the requisite majority in interest and number of the owners of property abutting on the line of the proposed improvements, the ordinance founded thereon is quashed."

Leaving out of view for the present the question of jurisdiction, it is palpable, as concerns substantial merit, that the decree is founded on the baldest technicality. In the deed of Mrs. Schenley to the Daughters of the Revolution of the 190 feet and the blockhouse, after expressing the nature of

the gift as one for patriotic and historical purposes, and her desire to aid and assist the Daughters of the Revolution in carrying out their patriotic purpose, she expressly stipulates as follows: "Subject to the right of the party of the first part [Mrs. Schenley] to represent said above-described real estate in all proceedings looking to the opening of O'Hara avenue, the purpose of the party of the first part being to retain, reserve, and not part with the right to petition the city of Pittsburg in behalf of said real estate to open O'Hara avenue and to vacate said Fort street and Point alley, and she hereby reserves the said right to herself, her heirs, executors, and administrators, without liability, however, for any assessment of benefits on said real estate by reason of said opening or vacation." This deed is made part of the petition to quash, and therefore part of the record in the court below, as is also Mrs. Schenley's power of attorney to Mr. Herron, in which is this clause: "The said John W. Herron is also hereby authorized and empowered to lay out lots in such form and fronting on such streets, lanes, and alleys or areas as in his judgment may be advisable." This is the only written authority he had at the time he joined in the petition to vacate. It was evidently a right to establish streets and alleys on the land. Afterwards, however, Mrs. Schenley expressly and formally ratified his authority to sign the petition. We think it clear that under the reservation in the deed the appellee had no standing to question the authority of Mrs. Schenley's representative. She could then and could now question it if she chose. The city legislature, before acting, might have demanded an exhibition of the authority, but the Daughters of the Revolution, by acceptance of the deed with the reservation, have no such interest as authorizes them to represent either Mrs. Schenley or the city in questioning the agent's authority. The court below decides that the power of attorney to Mr. Herron was not so explicit as to cover the act of signing the petition to vacate, and, although she swears in her deposition, "He had full authority from me to sign in my name the petitions," yet on its own interpretation of the written power narrows it so as to exclude any such authority, not heeding the rule that in case of even doubtful and ambiguous writings the interpretation put upon them by the parties to them will be adopted by the courts. The court concedes that, subsequent to the action of councils on the petition, Mrs. Schenley expressly ratified her agent's act, but this the judge argues was too late, because the validity of a public ordinance cannot be made to depend upon the subsequent action of a private person. This reasoning confounds her ratification of the act of her agent in representing her on the petition with a ratification of the ordinance. To the validity of this last her ratification was not necessary. It was a perfectly valid ordinance without her con-

sent. She only ratified the act of her agent, and her ratification of his act in signing the petition, even if he had no authority when he signed, was fully equivalent to precedent authority. "The adoption of a contract made on our behalf by some one we did not authorize is a ratification, and relates back to the execution of the contract." *Hare on Contracts*, 272.

If the unauthorized act involved a crime, or was a transaction opposed to public policy, it could not be ratified at all. In discussing this point, on which the decree of the court below is solely based, we do not overlook the fact that this appeal is, in substance, a writ of certiorari, and that on review we cannot go outside the record. But here, as part of the petition and record, are brought up the deed, the power of attorney, and the averment that Mrs. Schenley did not sign the petition to councils, which petition is part of the record. The learned judge, in substance, finds as a fact that Mrs. Schenley did sign the petition, though by his interpretation of the law his conclusion is that she did not. His decree is not in accordance with the facts of record, but in the teeth of them. We would not go outside the record to ascertain if his finding of fact be correct. We take the fact as he finds it, and say his conclusion was not warranted by the law. And this we have jurisdiction to do under the law as announced in the *Diamond Street Case*, 196 Pa. 254, 46 Atl. 428, and the authorities there cited.

But we do not care to rest the decision on this ground alone. Appellant raises another question, which is broader, and may rule other cases which will naturally arise under the act of May 16, 1891, the act under which the petitions were framed, and on which councils acted. As we said in the *Diamond Street Case*, where the statute does give the right of appeal: "The jurisdiction of the court below was purely statutory. The Legislature might have conferred on councils the right to widen the street without being first petitioned to do so by a majority in interest and number of property owners. It might have stopped just there; but it went further, and not only made the petition a condition precedent, but gave a right of appeal to the common pleas within 60 days by any one interested. The statute, however, gave no further remedy to the discontented property owner." It is argued by appellants, in support of their first assignment of error, that, while the act authorizes an appeal to the courts from the action of councils in enacting ordinances for opening, widening, and improving streets, it is silent as to ordinances vacating streets, and therefore the court below was without jurisdiction on this appeal, because none was given by the statute. In statutory proceedings it has been ruled in very many cases that there can be no appeals to the courts from the action of municipal legislatures, except such as are allowed

by statute. Section 10 of the act of 1891 expressly gives the right of appeal to abutting owners from ordinances "opening, widening, straightening, extending, grading, paving, macadamizing, or otherwise improving any street or alley." Not a word is said about an appeal from ordinances vacating streets. It is argued by appellee's counsel that the words "otherwise improving" would embrace the vacating of a street. They do not convey that meaning to our minds, and were doubtless inserted to meet the ever-growing new methods of paving, some of those then well known being enumerated. If the act were to be passed to-day, it is probable asphaltting would have been named. The word "vacating" could as easily have been inserted as the words "opening, widening," etc., altogether eight words; but it was not. "Vacating" is not suggestive of improvement, but of abandoning, abolishing, or destroying. We do not think the words "otherwise improving" within any reasonable interpretation give the right of appeal for vacating. The act contains 12 sections, and is very comprehensive. It expressly gives the right of appeal only in the tenth section, and, as we think, intentionally omits giving it there from ordinances vacating streets.

The Legislature was doubtless aware of the law as it then stood with reference to this particular exercise of municipal power. The right of appeal on assessment of damages for private property taken for public use by municipal and other corporations, and the right to a trial by jury to either party according to the course of the common law, are guarantied by the eighth section of the sixteenth article of the Constitution. But whether, in any given case, private property has been taken, and the use to which it is sought to appropriate it is a public one, are necessarily judicial questions to be determined by the courts; and this is the declared law in all the states and in the United States courts. The facts here do not, as we have more than once decided, bring the case under the section of the Constitution referred to.

In *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649, this court decided that the Legislature had the power to vacate a public street without the consent of the abutting owners; that such an act was in no sense of the word a taking of private property for public use, but was nothing more than a surrender of the public right of way to the owners of the soil. In *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237, it was held that the power of the Legislature to vacate streets and to invest municipal corporations with the same power was not restricted by the Constitution. The same was held in *Wetherill v. Penna. R. R. Co.*, 195 Pa. 156, 45 Atl. 658. In this last case Justice Mitchell, in rendering the opinion of the court, says: "But vacating a street takes no property from any one. It merely restores to abutting owners their portion of the

land freed from the servitude of the public way. There is no constitutional right to damages, even on the ground of injury, under the present Constitution." As under the law thus established the abutting owner could not be damaged in his property by the vacation of a street or highway, he had no tangible interest which gave him a right of complaint. A sentimental interest or artistic taste might be shocked by the closing up of an ancient street or highway, but this affected no property right, and the complainant was not given the rights of an appellant. The Legislature, by the act of 1891, adopted no new rule when it did not confer the right of appeal for vacation of a street on the abutting owner. It merely accepted the law as it stood. He was not damaged, and therefore had nothing to appeal from.

We think the court had no jurisdiction to entertain the petition, and, even if it had on the record, the decree was erroneous. Therefore the decree of the court below in Nos. 136 and 137, October term, 1902, are both reversed, and the petitions to the court of common pleas to quash ordinances vacating Fort street and Point Alley are both dismissed.

DAUGHTERS OF AMERICAN REVOLUTION OF ALLEGHENY COUNTY v.

SCHENLEY et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

POWER OF ATTORNEY—CONSTRUCTION—RATIFICATION OF ACTS.

1. An owner of unimproved lands situated in a city authorized her attorney in fact to lay out lots in such form and fronting on such streets, lanes, alleys or areas as in his judgment might be advisable. *Held*, that such attorney could petition the common council to vacate streets, and if his act was afterwards formally ratified by his principal, there was no ground to attack the validity of the ordinance passed in response to such petition.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Daughters of the American Revolution of Allegheny County against Mary E. Schenley and others. From a decree dismissing the appeal, the plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John Reed Scott, J. W. White, and S. W. Childs, for appellant. William W. Smith and T. D. Carnahan, City Sol., for appellees.

DEAN, J. This bill was filed, praying the court to quash the ordinances in Nos. 136 and 137, October term, 1902, which the same court was petitioned to quash in proceedings at law. The appeals in those cases and from this decree in equity were all argued together before us. We reversed the decree of the court below in Nos. 136 and 137, quashing the ordinances of councils vacating Fort

street and Point alley in opinion handed down herewith. 54 Atl. 368. Anticipating such possible or probable event, the Daughters of the American Revolution filed this bill, substantially averring the same facts as in the petitions to quash, and praying for the same decree. The answer denied the averments of the bill. The court below, after hearing, dismissed the bill for the reason that plaintiffs had already invoked the statutory remedy, and therefore could have no relief in equity. This decree is directly in appellees' favor, but it can do them no harm except in so far as the findings of fact by the learned judge of the court below may be inconsistent with it. In the ninth finding of fact the court says: "At the time of the signing and presentation of the petition to councils and the passage of the ordinances, Mary E. Schenley had no knowledge of the transaction. Some time after the passage of the ordinances she first heard of it, and was satisfied with what John W. Herron had done, and afterwards ratified his act." This finding is too narrow. It does not bring out the scope and full significance of the fact. Mrs. Schenley was a resident of London, England. To manage, control, and supervise her extensive and large property holdings in Pittsburg, from the very nature of the case, she could not minutely know all the specific acts necessary to or incident to the proper management of her estate. By her letter of attorney of July 23, 1900, she conferred on him very large powers over her property. It does not specifically authorize him to sign for her petitions to councils for vacation of streets and alleys on which her land abutted, but such power is plainly implied in the fifth clause of the letter, thus: "The said John W. Herron is also hereby authorized and empowered to lay out lots in such form and fronting on such streets, lanes, and alleys or areas as, in his judgment, may be advisable." She owned many large plots of land, unimproved, and which, when streets and alleys were opened, would cut up into many city lots suitable for occupation and building. This both the principal and attorney knew. She desired to utilize and realize on this property. It was practically useless without streets and alleys; so she gave her attorney full power to lay out lots in such form and fronting on such streets, lanes, and alleys as in his judgment might be advisable. Take the plot before us, 9½ acres, the whole of which was hers, and over which she had full control. What the buying or leasing public would demand in means of access to the lots carved out of this large tract of land was wholly problematical when the power was executed. It might desire the lots to conform to older streets extended through this tract in accordance with general plans, and the vacation of streets and alleys already laid out. The demands, and even whims, of the public, would appreciate or depreciate the value of lots. So far as her

property was concerned, her agent could lay out a street or alley on any part of it, but she did not contemplate an independent settlement on her land, or the establishment of a village within the city. She knew in the general management of this property it must be made to conform to the general plan and improvement of the city. In the process of creating streets, others must be vacated which did not so conform and which became useless. The agent could exercise no judgment if, in laying out and fronting lots, he was tied down to streets already planned. It seems to us clear the power to join in asking for vacation of streets and alleys which, in his judgment, would be of advantage to the property of his principal, was plainly implied in the power. Besides, both the principal and agent so interpreted the written authority, and the principal afterwards formally ratified his act, which is equivalent to precedent authority.

Nor do we think the court's tenth and twelfth findings of fact are correct. The tenth is as follows: "By the vacation of Fort street and Point alley all access to the blockhouse property is entirely destroyed, except through the dwelling house on Penn avenue." How access to the blockhouse property is destroyed when the very deed conveys to the Daughters of the Revolution an entrance way from Penn avenue 20 feet wide to the blockhouse, we do not see. True, at present this entrance is obstructed by an old building, the property of Mrs. Schenley; but, if she does not tear this down, they can, for it is on their land.

As to the twelfth finding—that the blockhouse will be irreparably damaged—that is a mere inference, not warranted by the facts. There will no longer be a street at the one side of the 100 by 90 feet plot, but there will be a clear 20-foot space all around it, with a 20-foot entrance from one of the principal streets of the city. The outside view of the blockhouse will be unobstructed. The replacement of the old and tumbledown buildings on Mrs. Schenley's land by new, improved, and more sightly structures will but add to its conspicuousness as a relic of time long past.

Therefore, while we concur in the decree of the court below, we do so for different reasons than those given by the learned judge who made it. As the facts found by him are wholly contradictory of those developed by the record in Nos. 136 and 137, October term, 1902, on which last we based our decree in those cases, it is proper we should give our reasons for affirming the decree in this case. Plaintiffs have no equity on which to base a decree in their favor. We have considered with care the able argument of the counsel for appellant, tending to demonstrate that equity has jurisdiction, according to the old definition that equity is the correction of that whereof the law, by reason of its universality, is deficient. We neither affirm nor deny

his conclusion. The illustrations, however, put in his argument are not necessarily conclusive of its soundness. Says appellant's counsel: "If a property owner have no recourse to the courts for the purpose of attacking an ordinance passed upon a petition purporting to be signed by a majority in number and interest of abutting owners, then the careful provision in the act of 1895 [P. L. 106] as to a three-fourths majority is absolutely nugatory. Under such condition any street in the city of Pittsburg could be vacated by a simple majority vote of councils upon a petition signed by any two individuals, provided they averred they were the majority of owners in number and interest of the abutting property. There might be a thousand other owners of property abutting on that street, and is it possible they would be utterly helpless and unable to take any legal steps to strike down an ordinance passed on such a petition? Must these property owners stand calmly by, and see their rights swept away from them by the passage of an ordinance under an act of assembly, but in plain violation of its purpose and spirit, and, being without statutory relief, have no relief in equity?" It is easy to put extreme and remotely possible cases as illustrations of what might result if those intrusted with power under our government abuse it. As is said by Chief Justice Black in *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. 147, 59 Am. Dec. 759: "The great powers given to the Legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power to answer its legitimate ends and at the same time incapable of mischief." The power to councils to vacate streets and alleys without appeal from their action may be abused, but they are the power next to the people, and are directly answerable to them for any abuse of power, and under our form of government there is no other cure for such abuse. It may be that our republican form of government is not the best that could be devised; but the people think it is, and appellants will have to rest content with it.

The decree is affirmed.

WOOD v. PAGE et al.

(Supreme Court of Rhode Island. Jan. 26, 1903.)

TENANT BY SUFFERANCE—LEASE FOR A YEAR—HOLDING OVER.

1. Gen. Laws, c. 269, § 6, enacts that the time agreed on in a definite letting shall be the termination thereof for all purposes. A landlord leased premises for one year, and died during the year, and the tenant held over after the expiration of the year. *Held*, that after the expiration of the year the defendant became a tenant at sufferance, and was not a tenant from year to year.

Action by Alberto E. Wood, as executor of Richard M. Grayson, against William R.

Page and others. Judgment for plaintiff. Defendants' petition for new trial denied.

Argued before STINESS, C. J., and DOUGLAS and DUBOIS, JJ.

C. E. Salisbury and J. C. Collins, Jr., for plaintiff. F. P. Owen and Page, Page & Cushing, for defendants.

DUBOIS, J. At the trial of the case before Mr. Justice TILLINGHAST and a jury, it appeared that Richard M. Grayson made a parol lease of the premises described in the declaration to the defendant Page, for one year from the 1st day of November, 1900, and died testate on the 1st day of March following; that his will was duly proved on the 13th day of April of the same year, and letters testamentary were issued to the plaintiff, the executor named therein; that William R. Page occupied the premises under the lease until November 1, 1901, and continued in occupation after the service of the writ, April 11, 1902, although served with a notice on the 1st day of said April to quit and deliver up possession of the premises to the plaintiff on the 5th day of that month, he claiming to be a tenant from year to year by virtue of such occupation, and entitled to a quarter's notice ending November 1, 1902. The presiding justice directed the jury to return a verdict for the plaintiff, upon the ground that when the year expired the term expired, and after that the defendant Page became simply a tenant at sufferance. The petition for a new trial is based upon this ruling, which is claimed to be erroneous.

It has been held that the nature of an estate from year to year is a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it; consequently, the moment any new year begins, the tenant has a right to hold to the end of that year, but it is not to be considered as a continuous tenancy, but as recommencing every year. *Gandy v. Jubber*, 5 B. & S. 78; *Oxley v. James*, 13 Mees. & W. 214; *Cattley v. Arnold*, 1 Johns. & H. 651. Under Gen. Laws, c. 269, § 6, "the time agreed upon in a definite letting shall be the termination thereof for all purposes; and if there be no time of termination agreed upon, it shall be deemed a letting from year to year."

However the case might have been had Mr. Grayson lived beyond November 1, 1901, and had permitted the defendant to continue in occupation beyond that time, such is not the case; and we do not believe it will serve any useful purpose to incumber the estates of persons deceased with tenancies created by implication after death of the lessors, and not arising out of the acts or nonaction of the decedents themselves. As in the case at bar the agreement as to time was definite, the letting terminated at that time, and the defendant became tenant at sufferance thereafter, subject to be divested of the same by

notice to quit, which was duly served upon him as hereinbefore set forth. Hence the ruling of Mr. Justice TILLINGHAST was correct, and must be sustained.

Petition for new trial denied, and case remanded to the Common Pleas Division for further proceedings.

McLEAN v. BRYER et al.

(Supreme Court of Rhode Island. Jan. 28, 1903.)

OVERDUE NOTES—INTEREST—ESTOPPEL.

1. A note payable on demand, transferred 18 months after date, cannot be considered overdue when transferred, so as to be subject to equities in favor of a maker, interest having been paid monthly to and after the transfer.

2. The maker of a note, who monthly paid 5 per cent. thereon, and who knew when he paid it that it was received and applied as interest, without protest on his part, is estopped to claim the payments were on the principal.

Assumpsit by James H. McLean against Stafford W. Bryer and others. Plaintiff petitions for a new trial. Granted.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Huddy & Easton, for plaintiff. George T. Brown, for defendants.

STINESS, C. J. The plaintiff sues as holder of two notes—one for the sum of \$200, payable on demand to Thomas B. Cory, dated May 1, 1899; the second for the sum of \$400, payable to said Cory on demand, with interest, dated July 24, 1899. These notes were transferred for value, by indorsement, to the plaintiff, 18 and 16 months, respectively, after their issue, and on each the defendant Mrs. Bryer, wife of the maker, signed her name on the back before delivery of the notes to the payee. The defense was that, as the notes were taken by the plaintiff so long after their issue, he took them as notes overdue, and subject to equities between the parties, the special equity relied on being payments made as principal which had been credited as interest, amounting in all to enough to pay the notes with interest at the legal rate. Upon this defense the question was whether there was an agreement on the part of Mr. Bryer to pay interest on said notes at the rate of 5 per cent. per month.

As to the first note, for \$200, the defendant Mrs. Bryer was a joint maker, the note having been given prior to the negotiable instruments act (Pub. Laws 1899, c. 674), which went into effect July 1, 1899. *Carpenter v. McLaughlin*, 12 R. I. 270, 34 Am. Rep. 638; *Perkins v. Carstow*, 6 R. I. 505. The note was taken by the plaintiff 18 months after its date. This fact, standing alone, would have made the note overdue in this state. *Guckian v. Newbold*, 23 R. I. 553, 51 Atl. 210, and cases cited. But, unlike previous

cases, this note was kept alive by continuous payments of monthly interest to the original payee and to this plaintiff after he took the note. Mrs. Bryer testified that she signed the note for her husband's accommodation, who has died since the trial, leaving her the sole defendant; that she expected to pay the principal as she could; that she left the payment of interest to her husband, and that any arrangement he made about the interest was satisfactory to her. Under these circumstances, the note cannot be considered as overdue at the time of transfer. In *Bacon v. Harris*, 15 R. I. 599, 10 Atl. 647, the defendant was an accommodation maker of a note, which bore indorsements of interest paid to a time beyond the sale of the note to the plaintiff. The court held that the question should have been left to the jury whether Mrs. Harris, the defendant, knew of, assented to, or ratified such payments of interest, thereby implying that, if she did, the note could be regarded as overdue. Upon the first note the verdict for the defendant was wrong, and contrary to the substantial instructions of the court.

As to the note of \$400, dated July 24, 1899, the defendant stands in a different relation. Upon this note she was an indorser. Pub. Laws 1899, c. 674, §§ 71, 72. As indorser she was entitled to notice of dishonor. It appears from the testimony that notice was duly given to the defendant. It further appears that the note was secured by a mortgage on personal property. It was agreed that Mr. Bryer, the maker of the note, was to pay 5 per cent. a month to Cory, and the only question in dispute was whether this was payable as interest or as principal. Mr. Bryer testified that he was to pay 5 per cent. a month as principal; that no interest was agreed upon, but that he intended, after the principal was paid, to use the payee liberally as to interest. He also testified that he knew that the payee understood that he was receiving the 5 per cent. per month as interest; that they had conversations about it when Mr. Bryer was behind in his payments, but that he said nothing, because he "did not want a rupture"; and that Cory gave him receipts for the payments as interest. The defendant's contention shows clearly that the notes were to run more than 20 months, unless he should pay them sooner, and hence that they could not be regarded as overdue when the plaintiff bought them, even if we disregard the fact that they were kept alive by the payment of interest—a fact not disputed, and as to which no contrary claim was made to the plaintiff when Mr. Bryer paid his money after the transfer and the plaintiff gave him receipts for interest. It also shows that the maker of the notes knew that when he paid his money it was received and applied as interest, without protest on his part. He is therefore estopped from setting up afterwards that the payments were made on the principal. *Draper v. Horton*, 22 R. I.

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 375.

592, 48 Atl. 945; *Pettis v. Ray*, 12 R. I. 344. It cannot be assumed that the holder of the note would have allowed it to run so long if he had known that the rate of interest was disputed. Mr. Bryer evidently had doubt about this when he gave his reason for not disputing the interest that he "didn't want a rupture," and was fearful that Cory might foreclose the chattel mortgage. "A person is estopped to set up the truth in contradiction to his conduct, so as to make the truth an instrument of fraud." *East Greenwich Inst. v. Kenyon*, 20 R. I. 110, 37 Atl. 632. Moreover, Mr. Bryer's claim that a man whose business was letting money at high rates of interest, even though he was a friend, would loan money for whatever the debtor might see fit to pay him, under an agreement that might run 20 months, is too contrary to common business transactions, and too inconsistent with the conduct of the parties in this case, to be credible. Upon the second note, also, the verdict for the defendant was clearly against the evidence.

New trial granted.

COLEMAN v. McKEE.

(Supreme Court of Rhode Island. Jan. 26, 1903.)

TRUST—MORTGAGE SALE—PURCHASE FOR MORTGAGOR—PLEADING.

1. Though a mortgagor may redeem at or before the time of sale under the mortgage, she may, instead, make arrangements with one to purchase for her at the sale, so that he, having so purchased, becomes her trustee.

2. A mortgagor may purchase at the mortgage sale, though the mortgagee is a trustee for him.

3. A bill by a mortgagor, to charge the purchaser at the mortgage sale as trustee for her, need not in terms allege that respondent was complainant's agent in the purchase, but it is enough to state that she arranged with his mother to get him to bid it off in his name for her, and that his mother informed persons at the sale that he was bidding for complainant, in consequence of which they ceased bidding, and he got the property for less than the mortgage and its value, and that he knew of the doing and representations of his mother in the matter.

Bill in equity by Elizabeth Coleman against William H. McKee. Respondent demurs to the bill. Demurrer overruled.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

C. J. Farnsworth and J. F. Murphy, for complainant. Thomas Riley, Jr., and Hugh J. Carroll, for respondent.

TILLINGHAST, J. The first ground of demurrer to this bill is untenable. It is quite immaterial whether the complainant could have redeemed the mortgaged premises at or before the time of the sale thereof under the mortgage by paying the note secured thereby and the expenses incurred in connection with the foreclosure proceedings. It was wholly

optional with her as to whether she would thus prevent a sale under the mortgage, and the mere fact that she did not see fit to do so in no way prejudiced her rights as against the respondent, whom she seeks to charge as trustee for her in the purchase of the estate in question at the mortgagee's sale thereof. It is true the complainant might have prevented the sale under the mortgage in the manner suggested by the demurrer; but, instead of doing so, she saw fit to rely upon the respondent to purchase said estate for her at the foreclosure sale, which she had the undoubted right to do. And we fail to see that it lies in his mouth to question her conduct in this regard.

As to the second ground of demurrer, we are of the opinion that it is also untenable. The law is well settled that a mortgagor may bid for and purchase the mortgaged property at the mortgagee's sale thereof, the same as any other person. *Jones on Mortgages* (4th Ed.) vol. 2, § 1887; *Pingree on Mortgages*, vol. 2, § 1391. Indeed, under our statute (Gen. Laws R. I. c. 207, § 16), a mortgagee, by giving notice of his intention so to do, may bid for and purchase the mortgaged property in the same manner as any other person may do, and this even though the mortgagee is in law a trustee for the mortgagor. And, having thus purchased, he may by deed convey the purchased property directly to himself. *Woonsocket Institution for Savings v. Worsted Co.*, 13 R. I. 255. In case the mortgagee does avail himself of his right to purchase, however, he will, of course, be held to the strictest good faith and the utmost diligence in the exercise of this right for the protection of the rights of the mortgagor, and his failure in either particular will give occasion to allow the mortgagor to redeem. *Montague v. Dawes*, 14 Allen. 369; *Jones on Mortgages*, supra, § 1883.

The third ground of demurrer is also untenable. It is not necessary for the complainant to allege in terms in her bill that the respondent was her agent in the purchase of said estate. All that is required in order to state a case against him is that it be clearly made to appear that he was authorized to act, and did act, for and in behalf of the complainant in making the purchase in question. And we think this sufficiently appears by the fifth clause of the bill, which sets out in substance that the complainant attended the auction sale and was anxious to purchase the mortgaged estate, or have the same purchased for her—which was the same thing—and that an arrangement or understanding was entered into between the complainant and one Mary Ann McKee, the mother of the respondent, whereby she was either to bid off said property for the complainant, or get her son, the respondent, to bid it off in his name for and in behalf of the complainant, and to advance whatever sum was necessary to secure the same at the auction sale.

It is further alleged that, in pursuance of this understanding, said Mary Ann McKee informed sundry persons there present that the respondent was bidding on said estate for this complainant, and that some of the persons so informed ceased to bid against the interest of the complainant on account thereof, and that the estate was finally struck off to the respondent for the sum of \$1,775, the same being less than the amount due on said mortgage.

The bill further alleges, in the sixth paragraph thereof, that the amount paid by the respondent for said estate was less than the actual value thereof, and that a larger sum would have been obtained for the same had it not been for the representations made by said Mary Ann McKee that the respondent was purchasing said estate for the complainant. The complainant also alleges that the respondent well knew the doings and representations of said Mary Ann McKee in the premises, and that he is now contriving to keep the complainant out of said property, and deprive her thereof, and is also endeavoring to take advantage of her on account of the low figure for which the estate was sold.

In view of these allegations, we think it appears that the respondent has been enabled to get the land in question by virtue of the understanding aforesaid, which amounted to a promise on his part to purchase it for the complainant, and that the latter has parted with an interest in the land upon the faith of such promise. And, this being so, the respondent was trustee for the complainant in the transaction, and the complainant is therefore entitled, in the absence of any denial of said allegations, to the relief prayed for.

As the case falls within the principles adopted by this court in *Jenckes v. Cook*, 9 R. I. 520. *Aborn v. Padelford*, 17 R. I. 143, 20 Atl. 297, and *Place v. Briggs*, 20 R. I. 540, 40 Atl. 419, there is no occasion for any further consideration thereof.

The demurrer is overruled.

RUSSELL v. RIVERSIDE WORSTED MILLS.

(Supreme Court of Rhode Island. Jan. 23, 1903.)

MASTER—INJURIES TO SERVANT—DANGEROUS MACHINERY—KNOWLEDGE OF SERVANT—PLEADING—ALLEGATION OF DUE CARE—NEGLIGENCE OF MASTER.

1. A servant who was engaged in operating a dangerous machine, with which she was familiar, and which was not defective, cannot recover for an injury received by having her hand caught in the wheels of such machine when suddenly ordered by a section hand, in threatening language, to wipe up the floor near the machine.

2. The defect in a declaration in an action for injuries to a servant, in failing to allege any circumstances whereby plaintiff was prevented from observing the danger to which she was exposed in doing certain work, is not sup-

plied by a general averment that she was in the exercise of due care when the accident occurred.

3. A declaration in an action for injuries to a servant which does not allege any breach of duty in the master in failing to provide her a safe place to work, or reasonably safe appliances to do the work, or show any occasion for warning her as to the dangers of the work which she was ordered to do, since she was perfectly familiar with the machinery by which she was injured, fails to show any negligence on the part of defendant.

Trespass on the case by Agnes Russell against the Riverside Worsted Mills. Heard on demurrer to the fourth count of the declaration. Demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Clarence A. Aldrich and B. W. Grim, for plaintiff. Walter B. Vincent, for defendant.

TILLINGHAST, J. The fourth count in the plaintiff's declaration sets out that the defendant was operating a certain swift-running and dangerous machine in its mill, where the plaintiff was employed, to wit, a spooler, with certain cogwheels and gears attached thereto; that the plaintiff was under the direction and control of the defendant in tending said machine, and was subject to the orders of the section hand; that, while she was so employed, certain water was accidentally overturned upon the floor under and near said machine, and that the plaintiff was then and there called from her regular employment by said section hand, to whose orders and directions she was subject, and directed to wipe up said water from the floor; that, being suddenly and unexpectedly called upon and directed to wipe up said water, in loud and threatening language and signs, she had no opportunity to examine and estimate the danger to which she would be subjected in obeying said direction of the section hand, and that neither he, nor any other person, warned her of the danger to which she would be exposed in obeying said order; that she proceeded to comply with said order, and, while in the exercise of due care in attempting to wipe up said water under and near said machine, her left hand was suddenly caught and entangled therein, and so badly crushed that it had to be amputated. To this count the defendant has demurred on the ground that, so far as appears therein, the defendant was not negligent in the premises. We think the demurrer must be sustained.

The plaintiff does not allege that the machine by which she was injured was defective in any way, or that she did not know that it was dangerous. Indeed, she alleges that it was a swift-running and dangerous machine, and that it had certain cogwheels and gears attached thereto. It also appears that it was the machine which she was employed to tend; and hence it must be assumed that she was familiar with its operation, and also familiar with such parts there-

of, whether cogwheels, gears, or other appurtenances, as were open to her observation. She must have known that, if her hands came in contact with said cogwheels and gears, she was liable to be seriously injured, and hence that for her own protection she must take care not to expose herself to injury by coming in contact with such parts of said machine. See *Morancy v. Hennessey*, 24 R. I. 205, 52 Atl. 1021.

The mere fact that she was called from her regular employment by the section hand, and directed to wipe up water from the floor near to and underneath said machine, did not excuse her from exercising proper care to protect herself from injury while doing said work. Nor do we see that it is material that she was suddenly and unexpectedly ordered to do said work, or that the order was couched in threatening language. That she could see the machine about which she was at work, and knew that it was dangerous to put her hand in close proximity to said cogwheels and gears, or other parts of said machine which were in rapid motion, must be taken for granted, for she does not allege that she was lacking in common sense.

We think it necessarily follows, therefore, that the accident must have been caused by her own carelessness. If the plaintiff had been suddenly ordered to work on some machine with which she was not familiar, and thereby been subjected to a risk which she did not appreciate, and of which she was not informed or cautioned, the case would have been different, and would then fall within the rule laid down by this court in *Mann v. Oriental Print Works*, 11 R. I. 152, cited by plaintiff's counsel, and the plaintiff would be entitled to go to the jury on the questions involved. But the case stated is clearly distinguishable from that one, and hence is not controlled by it.

Again, no peculiar circumstances are alleged to have existed, whereby the plaintiff was prevented from observing the danger to which she was exposed in wiping up the water from the floor underneath or in close proximity to said machine. And hence the averment that she was in the exercise of due care when the accident happened is overcome and virtually contradicted by the allegations pertaining to her surroundings. And as we held in the recent case of *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 50 Atl. 841, the mere fact that a plaintiff alleges in his declaration that he was in the exercise of due care does not have the effect of rendering it proof against a demurrer, if this allegation is clearly inconsistent with the other allegations contained in the declaration. See, also, *Corning Steel Co. v. Pohlplotz* (Ind. App.) 64 N. E. 476.

Coming now to speak more particularly of the specific ground relied on in the demurrer, namely, that, so far as appears in said count, the defendant was not negligent in the premises, we have to say that we are of the opin-

ion that it is well taken. In order for the plaintiff to state a case of negligence against the defendant, it must be made to appear that the defendant owed her some legal duty which it has failed to discharge, whereby she has suffered injury. That it owed her the duty of providing a reasonably safe place in which to do her work, and of furnishing reasonably safe appliances for the doing of said work, is undoubtedly true. But it is not alleged in said count that the defendant failed to discharge its duty in either of these regards. That the defendant also owed to the plaintiff the further duty of instructing her in the discharge of her duties, and particularly as to the dangers incident thereto, if the dangers were of such a character as not to be obvious to a person of ordinary intelligence, is also true. But so far as appears in the count in question, there was no occasion for any instruction to be given, as the danger connected with the doing of the particular work which the plaintiff was ordered to do was just as obvious to her as it was to the defendant. She was simply ordered to wipe up some water which had been accidentally spilled upon the floor near to her machine. And there was no occasion for any one to tell her that if, in doing this simple work, she should put her hands into said machine, she would probably get hurt. We fail to see, therefore, that the count in question charges the defendant with any actionable negligence. Whether, in case the plaintiff had alleged in said count, as she does in the first one, that the defendant was guilty of negligence in failing to provide the gearing of said machine with proper safeguards, as required by Gen. Laws 1896, c. 68, § 6, a prima facie case would have been stated, we are not now called upon to decide.

The demurrer to the fourth count is sustained, and the case remanded for further proceedings.

FLAHERTY v. O'CONNOR.

(Supreme Court of Rhode Island. Jan. 23, 1903.)

TRUSTS—CREATION—EVIDENCE—GIFTS INTER VIVOS—REVOCATION.

1. Where evidence to prove a trust of certain money delivered by plaintiff to defendant was conflicting, and some witnesses testified that plaintiff, on delivering the money, told defendant to pay the bills incident to a decedent's death, and use the balance for the interest of the children, and others stated that the balance was "to be divided between the young ones, and placed to their credit in the bank," and others that defendant was to divide the rest with the children, and still another that he was to do whatever he wished with the balance, it was not sufficiently definite to establish a valid trust.

2. Where plaintiff delivered money to defendant with which to pay the funeral expenses of her deceased daughter, and to apply the balance to the benefit of others, and, before such application was made, plaintiff demanded a return of the money, such demand revoked de-

defendant's authority as plaintiff's agent to further apply the fund to the purposes of the gift, and rendered him liable for the return of the fund to plaintiff.

Action by Mary Flaherty against Jeremiah J. O'Connor. A judgment was rendered for defendant, and plaintiff applies for a new trial. Granted.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

C. J. Farnsworth and Joseph A. Hughes, for plaintiff. Charles E. Gorman, for defendant.

STINESS, C. J. The plaintiff received the sum of \$439 upon a policy of insurance on the life of a daughter, made payable to the plaintiff. The plaintiff handed the money over to the defendant, as claimed on her side, to pay the funeral expenses and bills of the daughter, and to return the balance to her. The defendant claims that she gave the money to him to pay the bills, and to use the rest for the interest of the daughter's children. Before he had completed the payment of the bills, the plaintiff demanded the balance in his hands, which he refused to pay to her, and thereupon she brought this suit. The jury gave a verdict for the defendant.

The plaintiff requested the court to instruct the jury (1) that the plaintiff had the right to revoke the gift at any time up to the time of delivery of the money or the completion of the direction of the plaintiff as to the disposition of the same; (2) that no trust was created under the circumstances of the transaction; (3) that, to make a gift *inter vivos*, there must have been a delivery of the money to the children, and that the defendant's duty was to hand it over to her on demand; and (4) that the defendant was the agent of the plaintiff, whose agency could be revoked before the completion of what he was called upon to do. The requests were denied, and exceptions taken.

Nine persons were present when the money was turned over. Of these, three—the plaintiff and Mr. and Mrs. Maher, the plaintiff's daughter and her husband—testified that the balance was to be returned to the plaintiff with the receipts for bills paid. The defendant and the other five state the directions differently from the plaintiff's witnesses, and in most cases differently from each other.

Gifts may be regarded as of five kinds: (1) Absolute to the donee; (2) to one for delivery to another; (3) to one as a trustee; (4) *inter vivos*; and (5) *causa mortis*. There is no claim in this case that there was an absolute gift to the defendant, nor that there was a gift *causa mortis*.

We will first consider whether it was a gift in trust. The defendant testified that the words were, as he understood them, "Take that money, and pay the bills, and use it for the interest of the children." Mrs. Casey states it in the same way. These words would constitute a discretionary trust,

but not necessarily for all the children or for any particular child; for the defendant might think that those earning money did not need it, and that "the interests of the children" required its expenditure for the younger ones, who were dependent. Mr. Quigley's statement was: To "be divided between the young ones, and placed to their credit in the bank." This would be a definite trust, if we take "young ones" to mean all the children; but he is the only one who states it in this way. Mr. Kenney and Miss O'Connor said: "Divide the rest with the children." This would be a delivery of the money to the defendant to be delivered to others, the real donees. Mrs. Patnaud said: "Pay the bills, and you can do whatever you wish with the rest of it." This would amount to an absolute gift of the balance to the defendant. From this conflict of testimony among the defendant's own witnesses, it does not appear that there is any trust which could be enforced by any one or more of the children. A trust should be sufficiently definite to be capable of enforcement. Trusts are passive and active. In a passive or naked trust the trustee simply holds property for another, with no duties to perform. In such a case the law regulates the trust by giving the whole equitable title to the *cestui que trust*, and enabling him to call in the legal title. A common illustration of this is the deposit of money in a bank in the name of one as trustee for another. An active trust is where special and particular duties are pointed out, to be performed by the trustee. 1 Perry on Trusts (5th Ed.) § 18; Bouv. Law Dict. tit. "Trusts." The testimony, as a whole, does not clearly show a case of either one of these classes of trusts. With no issue to determine the fact or the terms of a trust, the request of the plaintiff to that effect should have been allowed.

If the defendant has not shown himself to be a trustee, he must have been an agent of the plaintiff. In such cases, before the execution of the agent's authority by delivery, the donor may revoke the authority and resume possession of the property, thus defeating the gift. The right of revocation in a case of agency and a gift *inter vivos* is the same, since a gift is not complete until delivery. In *Sessions v. Moseley*, 4 Cush. 87. Shaw, C. J., said: "The difference between a gift *inter vivos* and a gift *causa mortis* is this: The former is absolute, irrevocable, and complete, whether the donor die or not. The subject of it must therefore be delivered to the donee or to some other person, with his consent, for his use, and must be accepted by him. *Grover v. Grover*, 24 Pick. 261. 35 Am. Dec. 819. If, therefore, it be delivered to a third person, with authority to deliver it to the donee, this depositary, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift; and therefore, if the

delivery do not take place in the donee's lifetime, the authority is revoked by his death; the property does not pass, but remains in the donor, and goes to his executor or administrator." See, also, *Thompson v. Dorsey*, 4 Md. Ch. 149; *Wells v. Collins* (Wis.) 43 N. W. 160, 5 L. R. A. 531; *Pearson v. Pearson*, 7 Johns. 26; *Dicheschied v. Exchange Bank*, 28 W. Va. 340. In this last case the court corrects an apparent misprint in the above quotation from *Sessions v. Moseley* by saying: "If the delivery does not take place during the donor's lifetime, the authority is revoked by his death; the property does not pass, but remains in the donor, and goes to his executor or administrator."

A gift causa mortis is not intended to take effect until after death of the donor. There having been no delivery in this case to any one prior to the demand by the plaintiff, the gift was not complete, and she had the right to revoke it. *Woonsocket Institution v. Hefernan*, 20 R. I. 308, 38 Atl. 949.

New trial granted.

24 R. I. 571

JOHNSON et al. v. JOHNSON.

(Supreme Court of Rhode Island. Jan. 5, 1903.)

DEEDS—DEPOSIT WITH THIRD PERSON—DELIVERY—EFFECT AS WILL.

1. Grantor executed a deed to defendant, and left it with M., with directions that, in case anything happened to grantor, M. should deliver the deed to defendant. M. testified that he understood that the grantor intended to retain the right to recall it, and the right to sell the property before her death. The grantor thereafter advertised the property for sale, collected the rents, and paid interest and taxes. After grantor's death, M. delivered the deed to defendant. Held, that the deed was void for want of a sufficient delivery, in the grantor's lifetime.

2. Where a deed was deposited with a third person to be delivered to the grantee on the grantor's death, but was not executed with the formalities required for the execution of a will, it could not operate as a will.

Bill by Peter Johnson and others against Mary A. Johnson to set aside a deed. Decree for complainants.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Claude J. Farnsworth, for complainants. Edward W. Blodgett, for respondent.

TILLINGHAST, J. The only question presented for our decision by the bill, answer, and proof in this case is whether the deed under which the respondent claims title to the real estate described in the bill was so deposited or left with the witness Charles P. Moles by the grantor during her lifetime as to constitute an absolute delivery thereof for the use and benefit of the grantee.

The material facts in the case are these: On May 9, 1899, Mary Johnson made and executed a quitclaim deed of the premises referred to, to the respondent, Mary A. John-

son, and left it with said Charles P. Moles, with direction that in case anything happened to her (she meaning thereby, as Moles understood it, that in case she should die), he should then deliver the deed to her daughter, said Mary A. Johnson. He did not understand, however, from the instructions given him, that the grantor intended by said acts to place the deed beyond her control, but, on the contrary, he understood that she retained the right to recall the deed at any time, and also that she retained the right to sell and dispose of the property thereafterwards if she saw fit. In short, the substance of Moles' understanding, from the instructions given him, was that the deed was left with him subject to the control of the grantor during her life, and that in case of her death, without having disposed of the property, he was to deliver the deed to the grantee named therein. The grantor continued to exercise dominion over said real estate up to the time of her death, which occurred on the 13th day of November, 1901. She advertised it for sale, and in other ways attempted to effect a sale thereof; she paid the taxes, collected the rents, and paid the interest on the mortgage thereon, and generally treated the estate as her absolute property. After her death said deed was delivered to the grantee by Moles, and by her caused to be recorded in the registry of deeds in Pawtucket. And the complainants now seek by this bill to have said deed set aside and declared void and of no effect, on the ground that no delivery thereof was ever effected by the grantor.

In view of the facts aforesaid, we are of the opinion that said deed was ineffectual to pass any title to the estate. In order to convey title to real estate, it is necessary that the deed thereof shall be delivered to the grantee or to some one for his use. And the ordinary test of delivery is: Did the grantor, by his acts or words, or both, intend to divest himself of the title to the estate described in the deed? If so, the deed is delivered. But if not, there is no delivery; and hence no title passes. See Am. & Eng. Ency. Law, vol. 9 (2d Ed.) 154-158; *Brown v. Brown*, 66 Me. 316. In order to constitute a delivery, the grantor must absolutely part with the possession and control of the instrument. *Younge v. Guilbeau*, 3 Wall. 636, 18 L. Ed. 262; *Hawkes v. Pike*, 105 Mass. 562, 7 Am. Rep. 554.

That a deed may be effectual to convey title, although delivered to a third person to hold until the grantor's death, and then to deliver it to the grantee, there can be no doubt. But, in order to make such a delivery valid, the deed must be left with the depository without any reservation on the part of the grantor, either express or implied, of the right to recall it or otherwise to control its use. *Walter v. Way*, 170 Ill. 96, 48 N. E. 421; *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. In other words, in order to make a delivery of a deed valid when it is

made to a third person for the benefit of the grantee, such delivery must be an absolute one on the part of the grantor; that is, he must divest himself of any right of future control thereof. And, if such control is retained by the grantor, no estate passes.

The law relating to delivery of a deed is well stated in *Prutman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, as follows: "To constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed, and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself, or to some person for him, which is called an absolute delivery; or, otherwise, he must part with all present or temporary right of possession and control until the happening of some future event or the performance of some future condition, upon the happening or not happening or performance or nonperformance of which his right of possession may return, and his dominion and power over the deed be restored; in which case the delivery is said to be contingent or conditional. An essential, characteristic, and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee, at the time of delivery." *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 131; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455.

In the case at bar the evidence shows that, while there was a parting with the manual possession of the deed by the grantor, she did not part with the control thereof; and hence a very essential element of delivery was lacking. Her intended disposition of the property was evidently of a testamentary character. "In case she died," as Moles testifies, "she wanted the property to go that way." But an instrument which is intended to operate as a will, without being executed in accordance with the provisions of the statute relating thereto (Gen. Laws R. I. c. 203), cannot be allowed to have the effect of a will. See *Providence Institution for Savings v. Carpenter*, 18 R. I. 287, 27 Atl. 337, and *Coulter v. Sheimadine* (Pa.) 53 Atl. 638.

For the reasons above given, the deed in question must be set aside and declared null and void and of no effect. Decree accordingly.

In re MELCHER et al.

(Supreme Court of Rhode Island. Jan. 7, 1903.)

WILLS—CONSTRUCTION—VESTING OF REMAINDER—DEVISES.

1. Testator devised real estate to his wife for life, and added, "Upon the decease of my said wife, the property * * * devised shall belong to my children, the descendants of any deceased child to take the share their parent

would have taken if living, and if no descendants of mine survive my said wife, then said property shall belong and be delivered" by my executors to the residuary legatees named in the succeeding clause of the will. *Held*, that the interest of testator's children did not vest until the termination of the widow's life estate, and hence a child dying without issue before that time had no interest in the land which he could devise by will.

2. On the death of the life tenant the real estate so devised passed in equal moieties to testator's two children who survived the widow.

Application by Ellen S. Melcher and others for the construction of the will of Paran Stevens, deceased, on a case stated.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Samuel R. Honey, George Zabriskie, and John S. Melcher, for Ellen S. Melcher. Charles H. Koehne, Jr., and John A. Garver, for trust companies. Robert M. Franklin, for Alfred Wills. Andrew Jameson, Matthews Duncan, and John W. Sterling, for trustees.

STINESS, C. J. The case stated for an opinion sets forth that title to real estate in Newport is involved under a clause of the will of Paran Stevens, which gave said real estate to his wife for life, and then added: "Upon the decease of my said wife, the property by this and the preceding clause devised shall belong to my children, the descendants of any deceased child to take the share their parent would have taken if living, and if no descendants of mine survive my said wife, then said property shall belong and be delivered over by my executors to the same persons named as residuary legatees, in case of such failure of descendants, in the next clause of this will and in the same proportions."

Paran Stevens died in 1872, leaving Marietta Stevens, his widow, and three children—Mrs. Melcher, Mrs. Paget, and Henry L. Stevens. Henry L. Stevens died without issue in 1885, before the termination of his mother's life estate, leaving a will which gave one-half of his property to her, and one-half in trust for his sister, Mrs. Paget. Mrs. Stevens, the life tenant, died in 1895, leaving a will giving her property in trust for Mrs. Paget.

The questions presented are whether the devisees of Henry L. Stevens took an undivided third of the real estate in question, and what are the respective interests of the parties therein? The answers to these questions depend upon the decision of the effect of the will of Paran Stevens as to the interest taken by Henry L. Stevens thereunder. On the part of Mrs. Paget it is claimed that he took a vested interest, which passed under his will; and on the part of Mrs. Melcher, that the estate did not vest in the children upon the testator's death, but if it did, it was only a vesting defeasible in respect to any child upon the death of that

child prior to the termination of the life estate, whether with or without issue, in favor of the issue, if any; but, if none, in favor of the surviving children of the testator.

We quite agree with the counsel for Mrs. Paget that the legal effect of the provisions of a will, plainly expressed, must prevail over an implied intention. *Chapin v. Hill*, 1 R. I. 446; *Perry v. Hunter*, 2 R. I. 80; *Derby v. Derby*, 4 R. I. 414; *Grant v. Carpenter*, 8 R. I. 36. The first inquiry, therefore, is the legal effect of the terms of the will. This involves three things—the time of taking, the persons to receive, and the quantity of the estate devised. Upon these points we think that the will is explicit. The time when the interests of the children or their descendants were to attach was “upon the decease of my said wife.” That is the focal point. That was the time when the interests were to be determined. The persons who were then to receive the property were the living children or their descendants, *per stripes*. The persons, therefore, who were to take, were uncertain. It could not be known which, if any, of them would be alive to take an interest in the estate. If one or more of the children did not live, the estate was not to go to their heirs, as heirs, nor to their assigns, but to certain described persons. For example, had Henry L. Stevens left children, a third interest would have gone to them, not as heirs of their father, but as devisees under the will. In this respect the will differs from that in *Loring v. Arnold*, 15 R. I. 428, 8 Atl. 335, where the remainder to A., B., and C., “their heirs and assigns,” was absolute as to persons, and contingent only upon the death of the first devisee dying without leaving children. Hence the remainder was descendible, and so devisable.

The main contention, however, is upon the third element of the devise—the resultant quantity of the estate devised. On the part of Mrs. Paget, who claims under the will of Henry L. Stevens, it is urged that, by the terms of the will in question, said Henry took a vested estate, subject to be divested by the two contingencies (1) of his death before the life tenant, leaving issue him surviving; (2) the death of all issue of the testator before that of the life tenant. As neither of these contingencies happened, it is claimed that the estate was in him unimpaired. On the part of Mrs. Melcher it is claimed that the remainder was a contingent remainder, taking effect at the death of the life tenant, and so giving no interest to said Henry, prior thereto, which was either descendible or devisable. Both views have been ably and learnedly presented.

Cases upon the construction of wills and upon vested and contingent remainders have been too numerous and conflicting for an attempt to review or to reconcile them. Indeed, the task would be well-nigh impossible. In view of the fact that the case involves

only title to realty in this state, and that the law applicable to it is settled by decisions of this court, we will confine our attention to such decisions. In *Watson v. Woods*, 3 R. I. 226, the devise was to a daughter, Mary, for life, remainder after her decease to her children and their issue; but if no issue, or in case of a subsequent failure of issue, then to other children of the testator. The terms of the gift were the same as in this case. It was held that it was the testator's intent to pass the estate to the descendants of Mary as long as there were any in being, and that until her decease her children could have no vested interest. In referring to the devise “after the decease of my said daughter,” *Brayton, J.*, said: “That language evidently contemplates the estates vesting at that time in the descendants of his daughter, such of them as were then living, and he is now limiting the estate which they take to the issue of their bodies, respectively.” The counsel for Mrs. Paget suggests a distinction in the use of the word “after” the death in that case, instead of “upon” the death, as in this case. We are unable to see force in the distinction, if there be one. We do not see that the use of either word imports a different legal effect from the other. “Upon” or “on” the death means at the time of; and such a reference to the devolution of an estate points as clearly to the time of the death as the word “after.” Certainly “upon” does not imply an estate before the death. The case was decided by the court, and not, as counsel assumes, by a single judge. *Brown v. Williams*, 5 R. I. 309, construed a devise similar to the one before us, upon a fuller examination of the law. The devise was to trustees for the life of a daughter, Mary, with remainder in fee to her issue, and, if none, to the children of another daughter, Ann. A son of Ann Brown died during the life of Mary, leaving a will devising his interest in the estate to his wife, who brought the bill for partition between herself and the surviving children of Ann Brown. Counsel for these children took the point that, as there was a contingent remainder in fee between the life estate and the second contingency, the latter was not vested. The court, however, based its decision upon a broader ground. Admitting that, as contingent and executory estates will descend to an heir, so they may be disposed of by will, the language of Lord Mansfield in *Noden v. Griffiths*, 1 W. Bl. 605, was quoted: “In all contingent, springing, and executory uses, where the person to take is certain, so that the same are descendible, they are devisable; these being convertible terms.” *Ames, C. J.*, added: “It will be noticed that the qualification is ‘where the person who is to take is certain’; for if the contingency is to decide who is to be the object of the contingent limitation as the person or of the persons to or amongst whom the contingent or future interest is directed, as it cannot be

determined in whom the interest is, until the contingency happens, no one can claim, before the contingency decides the matter, that any interest is vested in him to descend from, and hence to be transferred or devised by him." He also said: "The issue of children living at the determination of the life estate were certainly to take the share which their parents, if living, would have taken, as purchasers; and such an interest in them seems to us utterly incompatible with a right on the part of the parent to alienate his share, which would follow the vesting of any interest in the children pending the life of Mary. The issue were to take the shares which their parents, 'if living, would have taken,' which strongly implies that their parents were to take nothing, unless living at the death of Mary." The same words appear in the will before us. Judge Ames added: "Although it is a general rule that contingent interests, as well as vested interests, pass to the real and personal representatives of the person entitled, so as to entitle such representatives to them when the contingencies happen, it is an equally well ascertained exception to the rule that the contingent devisee has no such title to pass to his representatives, and none, therefore, to devise or bequeath, where the contingency is such that his own existence at some particular future time is to determine whether any interest is to take effect in him or not." *Fear. Rem.* 364, note "e," 365, 370, 371; 1 *Jarm. on Wills* (2d Am. Ed.) 653. In *Daboll v. Field*, 9 R. I. 266, the words of the will were somewhat different. There the devise was to nephews and nieces, their heirs and assigns, "provided they all survive me, if not, to the survivors." None of them survived the testatrix, and it was held that they took no estate, and that, as to that devise, she died intestate; the words "heirs and assigns" being used as words of limitation of the estate in case of a taking, and not to denote substituted devisees. In *Bailey v. Hoppin*, 12 R. I. 560, there was a deed in trust for life, remainder to children who should be living at the decease of the survivor of grantor or wife, and to such issue then living of deceased children. The question was whether the equitable remainders were vested or contingent, and they were held to be contingent. *Durfee, C. J.*, said: "They were limited, after the death of the grantor and his wife, not to their six children, but only to such of them as should then be living, and to the issue of such of them as should be dead. It was uncertain at the creation of the trust, and it continued to be uncertain during the life of the surviving parent, who, if any, of the children would survive." That is exactly this case. The intervention of an express trust estate is not significant, since equitable interests pass under the same rules that apply to legal estates. *R. I. Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750, is to the same effect. See, also, *Ross v. Net-*

leton, 24 R. I. 124, 52 Atl. 676. The cases in this state relied on by the counsel for Mrs. Paget are quite different from the case at bar. In *Staples v. De Wolf*, 8 R. I. 74, the devise was to children and their heirs—an absolute estate, with only a postponement of the time of enjoyment. In that case the interest was held to be vested. *Rogers v. Rogers*, 11 R. I. 38, was in similar terms. So, also, *Grosvenor v. Bowen*, 15 R. I. 549, 10 Atl. 589. *Spencer v. Greene*, 17 R. I. 727, 24 Atl. 742, was an application of the well-settled rule that when futurity is not annexed to the substance of the gift, but only to the time of payment, the right vests immediately. In that case the uncertainty was the death of a nephew. The remainder, the death happening, was held to be vested; the gift being absolute to the children of the sister of the testatrix, because the persons who were to take were certain. The case involved personal estate only. In all of these latter cases there was no remainder over. We think that the decisions we have quoted are conclusive of the case at bar.

We therefore give as our opinion (1) that the devisees of Henry L. Stevens took no interest in the real estate in question; (2) that said real estate belongs in equal moieties to Mrs. Melcher and to the trustees under the antenuptial settlement of Mrs. Paget.

Decree accordingly.

PECK v. WILLIAMS.

(Supreme Court of Rhode Island. Jan. 20, 1903.)

DOGS—BITING PERSON IN CART ON STREET.

1. Under Gen. Laws 1896, c. 111, § 3, providing that, if a dog bite a person traveling the highway, the owner shall be liable, without proof that he knew that the dog was accustomed to do such damage, it is no defense that the person was committing a trespass by climbing onto the cart of the dog's owner, though it would be if he willfully provoked the dog, and thereby caused it to bite him.

2. A dog in the owner's cart in a street is out of the owner's inclosure, within Gen. Laws 1896, c. 111, § 3, providing that if a dog bites a person while traveling the highway, or out of the inclosure of the dog's owner, the owner shall be liable.

Action by Forrest A. Peck, pro aml, against Walter A. Williams. Plaintiff demurs to a plea. Demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Wm. M. P. Bowen, for plaintiff. Page & Page & Cushing, for defendant.

TILLINGHAST, J. This is an action of trespass, and is brought to recover damages for injuries alleged to have been sustained by the plaintiff from the bite of a dog while the plaintiff was traveling upon a highway in the city of Providence. The action is based upon Gen. Laws 1896, R. I. c. 111, § 3, which provides that "if any dog * * * shall as-

sault or bite or otherwise injure any person while traveling the highway, or out of the enclosure of the owner or keeper of such dog, the owner or keeper of such dog shall be liable to the person aggrieved, as aforesaid, for all damage sustained, to be recovered in an action of trespass on the case, or in an action of trespass, with costs of suit, * * * and it shall not be necessary, in order to sustain any such action, to prove that the owner or keeper of such dog knew that such dog was accustomed to do such damage."

In addition to the plea of the general issue, the defendant has filed a special plea in bar, in which he sets up that the plaintiff ought not to have or maintain his action against him, because, he says that before and at the time when, etc., in the declaration mentioned, a certain cart or vehicle of the defendant was being driven along a certain public highway in the city of Providence, in charge of a servant of the defendant, and that the said dog was then and there in and upon said vehicle. And the defendant avers that the said Forrest A. Peck then and there, without the invitation, leave, or license of the defendant, either by himself or through his servant, suddenly and without right, took hold of and climbed up upon the rear part of said vehicle, whereupon the said dog attacked and assaulted him as charged, he being then and there a trespasser. And the defendant avers that he was in the exercise of due care in the management of said dog. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him. To this plea the plaintiff has demurred on the ground that the statute upon which the action is based makes the owner or keeper of any dog absolutely liable to any person who shall be assaulted or otherwise injured while such person is traveling on the highway or is out of the inclosure of the owner or keeper of such dog.

The only question raised by the demurrer is whether, under the statute aforesaid, the plaintiff can recover, notwithstanding the fact that he was a trespasser at the time when he was attacked and bitten by defendant's dog. Counsel for plaintiff contends that, the statute being absolute in its terms, and containing no exception whatsoever, the defense set up by said special plea is of no avail, and hence that the plea should be overruled. Counsel for defendant, while admitting that defendant is liable, under the statute, regardless of any question of negligence on his part in the care and management of said dog, claims that the defendant is not liable if the plaintiff by his negligence provoked the dog, or if, by the exercise of ordinary care, he could have prevented the action of said dog.

At the common law the mere fact that the plaintiff was a trespasser at the time of being bitten by a dog was no defense to an action for the recovery of damages for the

injury sustained, if the dog was vicious, to the knowledge of the owner or keeper thereof. *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Sherfey v. Bartley*, 36 Tenn. 58, 67 Am. Dec. 597; *Woolf v. Chalker*, 81 Conn. 121, 81 Am. Dec. 175; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6. See, also, *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645. But in order to state a case against the owner, the plaintiff was called upon to allege what was technically called the "scienter" (that is, knowledge of the dog's vicious propensity), and also to prove the same at the trial. And we think it is quite evident that the statute now in question originated in view of the well-known fact that personal injury was frequently sustained from dogs, for which the injured party had no adequate remedy, by reason of the practical difficulty of proving the owner's knowledge of the vicious character of his dog. And therefore it was thought best to make the owner or keeper liable for the injuries caused by his dog, regardless of the question as to whether he actually had knowledge of its vicious character. *Kelly v. Alderson*, 19 R. I. 544, 37 Atl. 12. See, also, *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921. As the statute thus enlarges the common-law liability of the owner or keeper of the dog so as to include damages sustained by his misconduct by any person while traveling on the highway, or while out of the inclosure of the owner or keeper of the dog, whether the dog is vicious or not, we are of the opinion that the mere technical trespass set up in the special plea aforesaid is not a bar to the action. The case of *Quimby v. Woodbury*, 63 N. H. 370, which is mainly relied on by defendant's counsel, is not in point, for the reason that the statute upon which that action was based, while it allows any person who has been injured by a dog not owned or kept by him to recover of the person who owns or keeps the dog, yet it expressly excepts from its operation those cases where the injury has been occasioned to the party suffering the damage while engaged in the commission of a trespass or other tort. As our statute contains no such exception, the defense set up by the special plea aforesaid is not available.

If it be claimed that, under the facts set up in the plea, the dog, being in the defendant's cart at the time the plaintiff was attacked by him, was not "out of the enclosure of the owner," within the meaning of the statute, we reply that we do not feel warranted in construing the term "enclosure" as including the cart of the defendant when on the highway. The word "enclosure," in its ordinary legal signification, imports land inclosed with something more than the imaginary boundary line; that is, by some visible or tangible obstruction, such as a fence, hedge, ditch, or an equivalent object, for the protection of the premises against encroachment. Thus, in *Taylor v. Weibey*, 38 Wis.

42, the court held that the word "enclosure," used in the statute of that state relating to damage done by cattle, means a tract of land surrounded by an actual fence, together with such fence, "and does not include that part of a public highway of which the fee belongs to the owner of such adjoining inclosure." In *Porter v. Aldrich*, 39 Vt. 326, the term is defined substantially in the same manner. We therefore feel constrained to limit the meaning of said term as thus indicated.

If, however, it shall be made to appear that the plaintiff willfully provoked the dog, and thereby caused him to attack and bite him, we think he must be considered to have purposely or recklessly brought the injury on himself, and hence should be left to bear it, although the owner of the dog was in the wrong in allowing him to be on the highway, for in such a case it cannot be said, in a legal sense, that the keeping of the animal produced the injury. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Fake v. Addicks*, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716. This was the rule at the common law in cases where the animal was known to be vicious. And we do not think the statute in question was intended to so far modify the common law as to enable a plaintiff to recover where he purposely brings the injury upon himself. But so far as appears from the plea in the case at bar, the plaintiff was not interfering with the dog, and may not even have been aware of his presence until attacked by him in the manner alleged.

The demurrer is sustained, and case remanded for further proceedings.

SLATER v. FEHLBERG et al.

(Supreme Court of Rhode Island. Jan. 7, 1903.)

PLEADING—DECLARATION—VARIANCE FROM WRIT—AMENDMENT—PLEA—WAIVER OF OBJECTION.

1. Where plaintiff declares in trespass, after suing out a writ in case, there is a fatal variance between writ and declaration, and the action must be dismissed.

2. The statute relating to amendments is not sufficiently broad to permit a change in the form of the action.

3. A variance between writ and declaration may be taken advantage of at any stage of the action, and the filing of a plea by defendant is not a waiver of the objection.

Trespass on the case by John H. Slater against John H. Fehlberg and another. On petition of plaintiff for a new trial. Petition denied, with direction to dismiss the action.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Leon L. Mott, for plaintiff. Francis Colwell, Albert A. Baker, and Frank T. Easton, for defendant Parker. Frederick Rueckert, for defendant Fehlberg.

TILLINGHAST, J. There is a fatal variance between the writ and declaration in this case, and hence we are of opinion that the action must be dismissed. The form of action set out in the writ is trespass on the case, while that set out in the declaration is trespass.

Our statute relating to amendments is not sufficiently broad to enable the court to permit the form of action to be changed. *Wilcox v. Sherman*, 2 R. I. 540; *Thayer v. Farrell*, 11 R. I. 305; *Barnes v. Mowry*, Id. 422; *Dowling v. Clarke*, 13 R. I. 650; *Vaill v. Town Council*, 18 R. I. 405, 28 Atl. 344; *Wilson v. Ry. Co.*, 18 R. I. 598, 29 Atl. 300. See, also, *Hobbs v. Ray*, 18 R. I. 84, 25 Atl. 694.

As a variance like the one in question may be taken advantage of at any stage of the case, the mere fact that the general issue and other pleas were filed by the defendants before taking the objection is immaterial. *Rathbun v. Ry. Co.*, 19 R. I. 463, 36 Atl. 1134.

The case is remanded to the Common Pleas Division, with direction to dismiss it.

MOWRY et al. v. MOWRY.

(Supreme Court of Rhode Island. Dec. 31, 1902.)

DOWER—MORTGAGED LANDS.

1. A widow is entitled to dower in the full value of the real estate, against the heirs, though it is subject to mortgages, which, in the absence of personal property, are paid by sale of real estate by order of the probate court.

Appeal from Probate Court.

Application by Helen L. Mowry, administratrix cum testamento annexo, for an order to sell real estate to pay debts. From such order, Raymond G. Mowry and others appeal. Affirmed.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Thomas A. Jenckes, William J. Brown, and Raymond S. Mowry, for appellants. William H. Sweetland, for appellee.

PER CURIAM. Approving the decision of Mr. Justice DOUGLAS in this case, we adopt his opinion as the opinion of the court.

DOUGLAS, J. This is an appeal from the order of the municipal court of the city of Providence directing the administratrix of the will annexed to sell certain real estate for the purpose of paying the debts of the estate, the personal estate being insufficient.

Jencks Mowry died in 1898, leaving a number of children by his first marriage, who are the appellants here, and a widow, his second wife, who is the administratrix with the will annexed, and the appellee here. The will of the deceased was probated. That will contained but one devise, and that was of the testator's farm in Smithfield to his grandson. This will did not name any executor, and the widow was, by the municipal court, appointed administratrix with the will an-

† 3. See Pleading, vol. 39, Cent. Dig. § 1373.

nexed. The personal estate of the testator was inventoried at \$118.21.

The testator at the time of his death was possessed of four parcels of land: First parcel, farm in Smithfield, which was unincumbered, taxed for about \$2,000, and devised to his grandson, Harold Mowry. Second parcel, homestead estate on Academy avenue in Providence, valued at about \$10,000. On this estate were two mortgages, one for \$3,000, reduced by payments to \$2,000, given by Mr. Mowry, before his marriage with Mrs. Mowry, to the City Savings Bank. The other for \$1,500, given by Mr. Mowry after his marriage to Mrs. Mowry, and in which Mrs. Mowry released her right of dower to the mortgagee, the City Savings Bank. These two mortgages, with interest in arrears, amounted to \$3,742.10. Third parcel, Academy estate on Academy avenue, valued at about \$7,000. On this estate was a mortgage given by Mr. Mowry, before his marriage with Mrs. Mowry, to the Mechanics' Savings Bank, which mortgage, with interest in arrears, amounted to over \$1,600. Fourth parcel, estate on Amity street, in Providence, valued at about \$3,000. On this estate was a mortgage given by Mr. Mowry, after his marriage to Mrs. Mowry, in which Mrs. Mowry did not release her right of dower to the mortgagee. Mortgage now held by Mrs. Anderson, one of the heirs of Jencks Mowry. Mortgage amounted, with interest in arrears, to about \$1,900. In all, real estate valued at about \$22,000, upon which was mortgage indebtedness of about \$7,300. There was other indebtedness of the estate, of about \$2,000; in all, an indebtedness of \$9,300.

In 1889, for the purpose of paying debts, the administratrix obtained permission from the municipal court to plat the first parcel, or homestead estate, into eight house lots, and to sell seven of these house lots, retaining one house lot, on which the homestead was situated. The administratrix sold these seven lots at public auction, including in said sale her right of dower in said seven lots, and, as widow, executed a release of her dower to the purchasers at said sale. The proceeds of said sale, including the right of dower, amounted to \$5,230. At that time Mrs. Mowry was 54 years old, and her dower right in said \$5,230 was, by the combined experience tables, worth \$988. With the balance, after deducting her dower right, as she claimed it, which balance amounted to \$1,242, the administratrix paid the two mortgages on the homestead estate, amounting to \$3,742.10, leaving a balance in her hands of \$499.90 from the sale of said homestead estate. It then came to the knowledge of the administratrix that one of these appellants, Joseph E. Mowry, had purchased from the Mechanics' Savings Bank the mortgage upon the third parcel, or Academy property, and had advertised the property for sale under the mortgage. Fearing a loss to the estate by this sale, she advanced to the estate \$988,

which she had retained as dower in the second parcel, and, with other money in her hands belonging to the estate, paid the mortgage on Academy estate, amounting to \$1,611.63. The administratrix afterwards applied to the municipal court to have her dower assigned in the remaining land of her husband, particularly describing in her petition the farm in Smithfield, the one lot not sold in the homestead estate, the Academy estate, and the Amity street estate. This proceeding was compromised by the widow releasing her dower in the farm and receiving therefor a certain sum of money; by the widow releasing dower in Academy estate and Amity street estate and receiving therefor a life estate in the one lot not sold in the homestead estate. The administratrix in all these proceedings insisted that she still claimed the \$988 advanced by her to the estate to pay debts. There then remained of indebtedness against the estate the mortgage of \$1,900 on the Amity street estate, which the holder, one of these appellants, does not claim against the administratrix (in accordance with some family arrangement), and also the sum of \$2,803.15, which included debts of the deceased, expenses of administration, allowance to widow, and the sum of \$988 advanced as aforesaid. The administratrix made the application now under consideration for leave to sell the third parcel, or Academy estate, for the purpose of paying these debts. Since this application was made the appellants have paid all other claims against the estate.

The appellants claim that the widow is entitled to dower in the surplus of the money for which the seven lots were sold over the amount paid to satisfy the mortgage debts, or \$1,480, instead of on the whole value of these lots, or \$5,230. They further claim that the contribution which the widow made to redeem the Academy estate was due from her as her proportion of the mortgage debt, and so she has no claim for reimbursement of that sum. They also claim that the conveyance of the life estate in the homestead lot was accepted by the widow in full satisfaction of all her claims against the estate arising from rights of dower.

I do not consider the third claim established by the evidence. It seems pretty certain that, while the heirs may have thought they were settling all these claims, the widow did not in any way give up the claims she now makes, and there is nothing in the documents which passed to extend the scope of the settlement beyond the parcels of land which these conveyances affected.

The most serious question arises with respect to the estimation of dower in the seven lots sold from the homestead estate. It is undoubtedly true that, where the personal property of an estate is sufficient to pay debts, it must be used to exonerate the real estate from mortgages; and, when relieved from such liens, the whole land is subject to the widow's dower. Whether the mort-

gages were made before marriage or after, and whether she has joined in making them or not, the debts are considered to be debts of the husband, for which she is only surety, even when she releases dower in the mortgage; and, as long as the husband has personal property wherewith to pay them, the personal property, and not her dower, must be used for that purpose. In Rhode Island, dower attaches to an equity of redemption as if the husband were still seised in fee, the equitable view of the relation between mortgagor and mortgagee being adopted for this purpose, *inter alia*, by the common law. *Eddy v. Moulton*, 13 R. I. 105; *Peckham v. Hadwen*, 8 R. I. 165; *Gould v. Winthrop*, 5 R. I. 319. When there is no personal estate, and the mortgage is satisfied out of the land itself, most of the courts in this country adopt a different rule; but in Rhode Island an early case took the ground that the wife is entitled to full dower in all her husband's lands if there is either personal or real property wherewith to pay the debts. *Mathewson v. Smith*, 1 R. I. 22, 25. In that case land was sold by the administrator, by license of the probate court, the purchaser assuming the mortgage and the payment of dower. It was argued that this dower should be estimated upon the surplus remaining after payment of the mortgage, but the court allowed full dower in the whole value of the estate. While this decision may not govern in case of the actual foreclosure of a mortgage by power of sale (*Chaffee v. Franklin*, 11 R. I. 578), it is controlling in support of the appellee's claim that she is entitled to have her dower in the whole value of the land when it is sold by order of the probate court. I am forced to conclude, therefore, that in this case the sum of \$988, which the widow received of the proceeds of the seven lots, was her own money.

Upon the second question the same case seems to me to be decisive. It holds, in effect, that the widow's claim is paramount to that of the heirs, even if it exhausts all the real estate left after payment of incumbrances. In *Kenyon v. Segar*, 14 R. I. 490, where a widow was required to contribute towards the payment of a mortgage in which she had joined before being allowed to claim her dower, it did not appear that there was other land or property available for the payment of the mortgage. The question there arose between the dower and one not liable to pay the debt. In this case there is the Academy avenue estate still liable to satisfy the testator's debts, which the administratrix now asks license to sell. This is valued at about \$7,000. So that, deducting the value of her dower in that, which she has already received in another form, and the mortgage of \$1,611.63, there will be left, doubtless, enough to repay her the money she has advanced and the advances made by the heirs.

I conclude, therefore, that the administra-

trix is entitled to a license to sell this estate to pay these debts, and the order of the municipal court must be confirmed.

SMITH et al. v. BANK OF NEW ENGLAND.

(Supreme Court of New Hampshire. Hillsborough. Jan. 7, 1903.)

CORPORATIONS—CONTRACTS—ULTRA VIRES—AUTHORIZATION—RATIFICATION—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—DIRECTORS' MEETINGS—PAROL TESTIMONY OF TRANS-ACTIONS.

1. Defendant's charter (Laws 1887, p. 646, c. 280, § 2) conferred on it "all the powers and privileges of a loan, trust and guarantee company," including power to act "as a trustee for persons, firms, and corporations." Defendant entered into a contract with a trust company, wherein it was provided that the trust company should issue certificates of deposit, transferring to defendant, as trustee, real estate, mortgages, stocks, bonds and tax certificates as security; and defendant agreed to rate and hold such securities at their actual worth, according to their best judgment, certify on each certificate of deposit that it was so secured, and to faithfully discharge all the duties imposed upon them. *Held*, that the contract was not one of guaranty of the actual worth of the securities deposited with them, and was not on that ground *ultra vires*.

2. To show that a contract was authorized by a corporation, it is not necessary to show a formal vote of the directors authorizing the president and treasurer to execute it.

3. As between a corporation and innocent third parties who have dealt with its agents, authority in the agent to execute a contract may sometimes be inferred from a course of dealing.

4. Evidence of the manner in which the directors of a corporation generally permitted the president and treasurer to act for it in the transaction of its business was sufficient to justify the jury in finding that they authorized a particular contract which was within the charter powers of the corporation.

5. To validate a contract executed by the president and treasurer of a corporation, it is not necessary to show that the directors have given prior authority therefor; subsequent knowledge and assent, either actual or constructive, is sufficient.

6. Evidence, in an action against a corporation on certificates of deposit executed pursuant to a contract, considered, and *held* to justify the jury in finding that defendant's president and treasurer executed the contract with the knowledge, actual or constructive, of the directors.

7. Instructions embracing abstract statements of law, and which are misleading as applied to the issues, are properly refused.

8. The fact that the president and treasurer of a corporation executed the contract in question for the corporation could be considered, with other executive acts performed by them without special authorization, as bearing on the question of implied authority to execute the contract.

9. On an issue as to the implied authority in certain officers of a corporation to execute the contract in question, parol testimony as to what had been said and done at meetings of the board of directors, and which was not of record, was admissible.

10. The admission of parol testimony as to matters disclosed in the records of the corporation was harmless, the records themselves being in evidence.

11. On an issue as to the validity of a con-

§ 5. See *Corporations*, vol. 12, Cent. Dig. §§ 1707, 1710, 1713, 1716.

tract executed by a corporation, evidence of what it received as compensation for its services under the contract in question was properly excluded.

Transferred from Superior Court; Young, Judge.

Bill in equity by Anna L. Smith and others against the Bank of New England. Verdict for the plaintiffs, and defendants except. Transferred from the superior court by Young, Judge. Exceptions overruled.

March 29, 1892, the Union Trust Company and the defendants entered into a contract, for the benefit of all parties who should become interested in the subject-matter, wherein it was provided that the trust company should issue certificates of deposit, and as security therefor should assign and transfer to the defendants, as trustees, real estate mortgages, stocks, bonds, and tax-sale certificates, the face value of which should exceed by 10 per cent. the amount of certificates issued; and the defendants agreed to rate and hold such securities at their actual worth, according to their best judgment, to certify upon each certificate of deposit that it was so secured, and to faithfully discharge all the duties imposed upon them. The Union Trust Company failed in June, 1893. The plaintiffs, who are holders of unpaid certificates of deposit issued by the trust company and countersigned by the defendants, sought to recover from the defendants upon the ground that the latter were negligent in their management of the trust estate, and in approving stock of certain Iowa and Missouri corporations which was deposited with them as a part thereof. After the question of negligence had been determined in the plaintiffs' favor by the verdict of a jury, and the exceptions taken at the former trial had been overruled (*Smith v. Bank*, 70 N. H. 187, 46 Atl. 230), certain shareholders in the defendant corporation were permitted to intervene and contest the validity of the trust agreement, upon their claim that the contract was ultra vires, and that the officers by whom it was executed acted without authority from the corporation. Upon a trial of the issue thus presented, the plaintiffs' evidence tended to show the following facts, in addition to those stated in the opinion: The defendants' business consisted of a savings-bank department, a banking department, and a trust department, all carried on in the same banking rooms in Manchester, under the general superintendence of Elliott, the treasurer and active manager. Briggs, the president, was frequently about the bank, and advised and assisted Elliott to some extent. The board of directors consisted of 24 members, and held monthly meetings, at which times the treasurer made general reports concerning the business of the bank. These meetings were not largely attended, and it was frequently difficult to secure a quorum. An executive committee of five directors had charge of the investment of funds, the negotiation of securities, and such other business

as the directors might determine. The president and treasurer acted generally for the bank in the transaction of routine business. It was admitted that the execution of the trust agreement was neither authorized nor ratified by vote of the stockholders or directors of the bank. For this reason, and upon the further ground that the evidence was insufficient to warrant a finding that Briggs and Elliott were authorized to execute the contract in behalf of the bank, at the close of the plaintiffs' evidence the defendants moved for a nonsuit; at the close of all the evidence they moved that a verdict be directed in their favor; and, after a verdict for the plaintiffs, they moved to set the same aside as against the law and the evidence. These motions were severally denied, and the defendants excepted. The following questions were submitted to the jury, the words in brackets being requested modifications which were refused, subject to the defendants' exception: "Did the bank give the Union Trust Company reason to believe that Briggs and Elliott were authorized to make this contract [except what was said and done by Briggs and Elliott at the time; if so, by whom and in what way]? Did the bank know, or ought it to have known, of this contract when it was made [except such knowledge as Briggs and Elliott had at the time; if so, what was it, and who had knowledge thereof other than Briggs and Elliott]? Did the bank know, or ought it to have known, of this contract before the failure of the Union Trust Company [except such knowledge thereof as Briggs and Elliott had; if so, how and when and by whom did it obtain such knowledge]? Did the bank know, or ought it to have known, of this contract before January 1, 1896 [except such knowledge thereof as Briggs and Elliott had; if so, how and when and by whom did it obtain such knowledge]?" The defendants also excepted to the denial of a request for certain specific instructions; to an instruction that the execution of the contract by Briggs and Elliott might be considered as bearing on the question of implied authority; to the admission of oral testimony as to proceedings at meetings of the board of directors of the defendant bank; and to the exclusion of evidence tending to show that the amount received by the defendants, as compensation for their services as trustees, was no more than sufficient to pay for the clerical work required to be done.

David A. Taggart and Thomas G. Frost, for plaintiffs. Mitchell & Foster and Oliver E. Branch, for defendants.

REMICK, J. This case has been here twice before. First it came up on demurrer to the bill, and the demurrer was overruled. *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082. A trial upon the merits followed; verdict for the plaintiff, exceptions to this court, and the exceptions were overruled. *Smith v. Bank*,

70 N. H. 187, 46 Atl. 230. The case was then in order for judgment for the plaintiff; but as the validity of the trust contract, out of which the rights and obligations of the parties arise, was admitted at the former trial, the sole question there being whether the defendants as trustees had exercised due care in the performance of the duties imposed by it, certain shareholders of the defendant corporation moved for leave to intervene and contest the validity of the contract, claiming (1) that it was not authorized by the charter of the corporation, and (2) that it was not authorized by the corporation. The motion was granted, and there was a jury trial of the questions of fact involved. The jury found for the plaintiff—that the contract was authorized by the corporation—and the case is now here for the third time upon exceptions.

The substantial questions presented for our consideration are: First, was the contract *ultra vires* of the defendants' charter? Second, if not, was the evidence that its execution was authorized by the corporation sufficient to warrant the court in leaving that question to the jury?

1. Was the contract *ultra vires*? The charter expressly confers upon the defendants "all the powers and privileges * * * of a loan, trust, and guarantee company," including power to act "as a trustee for persons, firms, corporations, or estates of deceased persons." Laws 1887, p. 646, c. 280, § 1. In view of such general and comprehensive terms of authorization, there would seem to be no room for doubt that the trust contract in question is within the letter of the charter. But it is urged with much earnestness and ability that the contract constituted the defendants guarantors of the actual worth of the collateral deposited with them, and in effect required them to make examination and appraisal, in the West, of each piece of property behind the collateral deposited, and constant re-examination and reappraisal to guard against subsequent depreciation; that even then the actual worth of the property would be subject to so many contingencies that the assets of the defendants would be in continual jeopardy; and that the Legislature could not have intended to authorize a guaranty so hazardous. Without considering the authority of the court to declare a contract of guaranty *ultra vires* of a charter conferring, in general terms, all the powers and privileges of a guaranty company, upon the ground that the particular contract is so hazardous in nature the Legislature could not have contemplated it, it is sufficient for the purposes of the present case to say that the contract in question imposed upon the defendants no guaranty obligation, but only the ordinary duty of a trustee to exercise reasonable care in the discharge of the trust, they had undertaken. *Smith v. Bank*, 70 N. H. 187, 46 Atl. 230. This much the defendants expressly assumed

with reference to the plaintiffs, when, in the language of the trust contract, they accepted "said trust," and covenanted "with said company, and with all parties who shall become in any wise interested, that they will faithfully discharge all the duties herein imposed upon them." While reasonable care as to keeping on hand securities of the kind and value provided for by the trust contract might not require the defendants to have somebody constantly in the West, appraising and reappraising the property upon which their value depended, as has been suggested, it would require the defendants, as provided by the contract, to act according "to the best of their judgment;" and, as charged by the court at the trial, to exercise such care as men of average prudence, under precisely the same circumstances, would have used. *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Raynes v. Raynes*, 54 N. H. 201, 202, 210; *Mattocks v. Moulton*, 84 Me. 545, 551, 24 Atl. 1004; *State v. Washburn*, 67 Conn. 187, 188, 34 Atl. 1034; *Speakman v. Tatem*, 48 N. J. Eq. 136, 148, 149, 21 Atl. 466; *Gilbert v. Kolb*, 85 Md. 627, 634, 37 Atl. 423; *Lew. Tr.* 243; 1 Per. Tr. § 401; *Und. Tr.* 253, 256; 2 Pom. Eq. Jur. § 1067. We can hardly be expected to declare a contract *ultra vires* merely because it is of such a nature that failure to exercise the ordinary care required of every trustee, and for that matter of everybody, may subject the trustee to an indemnity payment wholly disproportionate to his compensation. In the present case it is more reasonable to suppose that the Legislature assumed that the defendants would protect themselves against the possibility of heavy loss from peculiarly difficult and hazardous trust undertakings by not accepting them, than that they intended to exclude such undertakings from the general authority conferred. The conclusion is that the contract was within the terms of the charter.

2. Was the contract authorized by the corporation? It was not necessary to show a formal vote of the directors authorizing *Briggs and Elliott* to execute the contract. As between a corporation and innocent third parties who have dealt with its agents, authority may sometimes be inferred from a course of dealing. *Hilliard v. Goold*, 34 N. H. 230, 239, 66 Am. Dec. 765; *Holland v. Association*, 68 N. H. 480, 41 Atl. 178; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *U. S. Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Martin v. Webb*, 110 U. S. 7, 8, 3 Sup. Ct. 428, 28 L. Ed. 49; *Pittsburg, etc., Ry. v. Bridge Co.*, 131 U. S. 371, 382, 383, 9 Sup. Ct. 770, 33 L. Ed. 157; *G. V. B. Co. v. Bank*, 36 C. C. A. 633, 95 Fed. 23, 34; *Colorado Springs Co. v. Company*, 38 C. C. A. 433, 97 Fed. 843; *Salem Iron Co. v. Iron Mines*, 50 C. C. A. 213, 112 Fed. 239. Evidence of the witness Healey and others, as to the way and manner in

which the directors had commonly permitted Elliott and Briggs to act for the company in matters generally, was sufficient to warrant the jury in finding that they authorized this particular contract, it being a contract in pursuance of the objects for which the defendants were incorporated, and within the express terms of their charter. But prior authority, neither express nor implied, was necessary to give validity to the contract. Subsequent knowledge and assent may be equivalent to previous authority. *Libby v. Land Co.*, 68 N. H. 444, 44 Atl. 602; *Pittsburg, etc., Ry. v. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; 6 *Thomp. Corp.* § 5285. And it is not necessary that knowledge should be actual, or that assent should be formal, to effect such a result. If the directors, in the exercise of ordinary care, ought to have known of the execution of the contract by Briggs and Elliott, it is in law as if they knew. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Salem Iron Co. v. Iron Mines*, 50 C. C. A. 213, 112 Fed. 239, 243; *Hanover Bank v. Company*, 148 N. Y. 612, 623, 43 N. E. 72, 51 Am. St. Rep. 721; *Corn Exch. Bank v. Company*, 163 N. Y. 332, 57 N. E. 477; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 776; 3 *Thomp. Corp.* § 4108; 4 *Id.* §§ 4894, 5190, 5224, 5285, 5308. Knowing, their assent might be shown by silence and acquiescence, as well as by formal vote of ratification. *Libby v. Land Co.*, 68 N. H. 444, 445, 44 Atl. 602; *Pittsburg, etc., Ry. v. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; 4 *Thomp. Corp.* §§ 5285, 5286, 5298. The evidence tended to show that the contract was executed by Briggs and Elliott, as president and treasurer, respectively, of the corporation, and kept among its papers without any fraud or concealment; that the securities deposited pursuant to the contract were kept in the defendants' vaults; that an account was kept of the transactions under the contract in a book opened expressly for the purpose, and also kept in the defendants' vaults with the other books; that, during the year immediately following the execution of the trust agreement, the certificates of deposit to which the contract related were being countersigned and issued from day to day, in the defendants' office, by the defendants' agents, without pretense of fraud or concealment; that compensation was twice received for services under the contract, and entered upon the defendants' cashbook; that the books and accounts of the defendants were examined and audited by committees especially appointed for the purpose by the directors and stockholders of the defendant corporation. Briggs testified, in effect, that the board of directors were informed from time to time of the general course of the business; that he was perfectly satisfied in his own

mind that some of the directors knew about the contract; that he had not said it was not submitted to the directors. Elliott testified, in effect, that he had the making of the contract in charge for the bank and the executive committee; that at the meetings of the board of directors they went over the business of the bank in general; that he made no concealment of the making and execution of this agreement, as far as the directors were concerned; and that he thought some of the directors knew about it, or might have known about it. We think these facts and circumstances quite sufficient to warrant a finding of knowledge, actual or constructive, on the part of the directors as a board; and their silence and acquiescence for nearly 10 years leave no doubt of their assent.

3. The defendants' motions for nonsuit and verdict, and to set the verdict aside, were properly denied.

4. The questions submitted to the jury, as to whether the defendants gave reason to believe that Briggs and Elliott had authority to make the contract, and whether the defendants had knowledge of the contract, were warranted by the evidence; and the court properly refused to modify them as requested by the defendants.

5. The requests for instructions, to which the defendants have given attention in brief or argument, were properly refused. They called for abstract statements of law not applicable to the issues before the jury, and misleading as applied to those issues.

6. The fact that the particular contract was executed by Briggs and Elliott might be considered, with other executive acts performed by them without special or formal authorization, as bearing on the question of implied authority arising from a course of conduct or dealing. The charge in this particular was therefore unexceptionable.

7. Upon the question of implied authority from a course of dealing, much that is relevant may be said and done at directors' meetings which may not be of record. That such matters may be legitimate subjects of inquiry upon such an issue as between the corporation and third parties cannot be doubted. So far as the directors were allowed to testify concerning matters which were actually of record, the error would not seem to be material, in view of the fact that the records were put in evidence by the plaintiffs.

8. The fact that the amount received by the defendants as compensation for their services as trustees was no more than sufficient to pay the clerical work, was irrelevant, and properly excluded.

Exceptions overruled.

BINGHAM, J., did not sit. The others concurred.

CARRIGAN v. STILLWELL.

(Supreme Judicial Court of Maine. Jan. 1, 1908.)

**DEATH BY INJURY—PLEADING—NEGLIGENCE—
FIRE ESCAPE—TENANT—LIABILITY—OWNER.**

1. While chapter 124, Pub. Laws 1891, gives only a right of action to the personal representative of a deceased person, whose immediate death was caused by the negligence or fault complained of, and while it necessarily follows that the declaration in an action under this statute must contain a sufficient averment of such immediate death, it is not necessary that any particular words should be used for this purpose. It is sufficient if it necessarily appears from the phraseology of the averment that the death of the deceased was immediate.

2. Where the negligence complained of is the failure of the defendant to provide and maintain suitable fire escapes upon a building owned and controlled by him and under his management, and the allegation is that the deceased, being properly in the third story of the building at the time that the fire broke out therein, by reason of such fault of the defendant, and without fault upon her part, "was then and there burned to death and consumed by said fire, and then and thereby lost her life," held, that the necessary meaning of this averment is that the immediate death of the deceased, within the meaning of the statute, was caused in the manner described.

3. By Rev. St. c. 26, § 26, as amended by chapter 89, Pub. Laws 1891, the duty of providing and maintaining suitable fire escapes upon a building, to which the statute is applicable, is imposed upon the owner, notwithstanding the building is in the possession of a tenant, or, being in the possession of a tenant, is so used as to bring it within the application of the statute.

4. The court does not decide, because apparently the question does not arise, whether or not this would be so if a building, not itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section, should come within the provisions of the law by reason of its use by the tenant for any of such purposes, without the knowledge and consent of the owner.

5. This duty thus imposed upon the owner of a building coming within the designated classes does not depend upon the action of the municipal officers or fire engineers, or upon their failure to take action.

6. If the defendant's failure to perform a duty imposed upon him by statute for the benefit of persons lawfully employed in the building was the proximate cause of the death of the plaintiff's intestate, and if her death was the natural and ordinary consequence of this failure upon the part of the defendant, then it is at least evidence of actionable negligence upon his part to be submitted to a jury.

(Official.)

Exceptions from Supreme Judicial Court, Penobscot County.

Action by William Carrigan against Cleveland S. Stillwell to recover for the death of plaintiff's intestate, who was burned to death in the defendant's building on October 16, 1901. It was claimed that the defendant was liable because he had not provided any fire escape on the building. The defendant filed a general demurrer to the declaration, which was sustained by the court below, and plaintiff excepts. Sustained.

At the hearing upon the demurrer at nisi prius the defendant contended that the plain-

tiff's declaration was defective for the following reasons:

First. That there was no allegation in the declaration that the death of the plaintiff's intestate was immediate.

Secondly. That it is a condition precedent to any liability of an owner of a building for failure to provide it with suitable fire escapes that said owner should first receive from the municipal officers or fire engineers written notice of their determination as to the sufficiency of said fire escapes, as provided in Rev. St. c. 26, § 28, and that no liability is incurred for failure to provide fire escapes until 60 days after the receipt of said notice, and that there was no allegation in the plaintiff's declaration of the performance of this condition.

Thirdly. That under the statute the duty to provide a building with fire escapes rests upon the tenant or occupant, and not upon the owner.

Argued before WISWELL, C. J., and WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

F. J. Martin, H. M. Cook, and M. McCarthy, for plaintiff. C. H. Bartlett, for defendant.

WISWELL, C. J. This is an action under chapter 124, Pub. Laws 1891, to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the fault of the defendant. The defendant filed a general demurrer to the declaration, which was sustained pro forma by the court at nisi prius, and the case comes here upon the plaintiff's exception to this ruling. It will only be necessary to consider the objections to the declaration that are urged by counsel in support of his demurrer.

1. It is contended that the declaration contains no such sufficient allegation of the immediate death of the deceased as is necessary in actions under this statute, under the construction thereof by this court in *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660, and *Conley v. Portland Gas Light Company*, 96 Me. 281, 52 Atl. 656. The negligence complained of was the failure of the defendant to provide and maintain suitable fire escapes upon a building owned, controlled, and under the management of the defendant, by reason whereof, it is alleged, the deceased, being properly in the third story of the building at the time that the fire broke out therein, and without fault upon her part, lost her life. The allegation is that the deceased, by reason of such fault of the defendant, "was then and there burned to death and consumed by said fire, and then and thereby lost her life."

It is, of course, well settled that the statute under which this action was brought gives only a right of action to the personal representative of a deceased person whose immediate death was caused by the negligence or fault complained of, and it neces-

sarily follows that the declaration must contain a sufficient averment of such immediate death. But it is not necessary that any particular words should be used if it necessarily appears from the averment that the death of the deceased was immediate. Even in criminal pleading it is well settled that a statutory offense may be sufficiently set out without using the precise language of the statute, by the employment of language which is the full equivalent thereof. In this case we think that the necessary meaning of the allegation above quoted is that the immediate death of the deceased, within the meaning of the statute, was caused in the manner described. Not that the deceased received injuries from which she subsequently, however shortly thereafter, died, but that she then and there lost her life by being "burned to death and consumed."

2. The action is against the defendant, as owner of the building described. The declaration contains sufficient averments as to the defendant's ownership; that the building was one in which a business was carried on "requiring the presence of workmen above the first story"; that it was the duty of the defendant to provide and maintain suitable fire escapes for such building; that the defendant failed to perform this duty; and that by reason thereof the deceased, without fault upon her part, lost her life. The contention of the defendant is that this building was at the time of the fire in which the deceased lost her life in the possession of a tenant; that it was the duty of the tenant, if of anybody, to provide fire escapes; and that, therefore, this action cannot be maintained against the owner. Strictly, the question does not arise upon demurrer, because it does not appear from the declaration that the building was in the possession of a tenant at the time of the fire. But, as the question will necessarily arise later, if such was the case, and as both sides have fully argued it, we deem it proper and advisable to decide the question now, in view of our conclusion.

The duty of maintaining fire escapes upon certain buildings was created by statute. By Rev. St. c. 26, § 26, as amended by chapter 89, Pub. Laws 1891, "every building in which any trade, manufacture, or business is carried on, requiring the presence of workmen above the first story," as well as certain other classes of buildings, "shall at all times be provided with suitable and sufficient fire escapes, outside stairs, or ladders from each story or gallery above the level of the ground, easily accessible to all inmates in case of fire or of an alarm of fire." The next two sections of the chapter provide that in towns having no organized fire department the municipal officers, and in cities, towns, and villages having an organized fire department the board of fire engineers, shall annually make an inspection of the safeguards required by the preceding section, pass upon their sufficiency and state of repair, and direct such

alterations, additions, and repairs as they adjudge necessary, and shall give written notice to the occupant of such building, "also to the owner thereof, if known," of their determination as to the sufficiency of the precautions and safeguards required, and as to the alterations, additions, and repairs that they adjudge necessary. By the next section a penalty is provided for any owner or occupant who neglects to comply with such order of these officers within the time allowed, and for any owner who lets or occupant who uses such building in violation of this order.

The question is whether, by these sections of the Revised Statutes, the duty of providing and maintaining sufficient fire escapes upon buildings to which the statutes are applicable, where the building is in possession of a tenant, or where, being in the possession of a tenant, it is so used as to bring it within the application of the statutes, is imposed upon the owner. The question is by no means free from difficulty, and little assistance can be obtained from the decisions of the courts of other states, construing statutes of the same general nature, because the statutes of the different states upon this subject differ in respects more or less essential as bearing upon this question.

It will be noticed that the first section relating to the subject does not specifically enjoin the duty upon any particular person. It simply requires that the classes of buildings enumerated, and the buildings used for the purposes specified, "shall at all times be provided with suitable and sufficient fire escapes." The next two sections relate to the enforcement of this requirement by certain officers. Section 28 provides that such officers shall give "written notice to the occupant of such building, also to the owner thereof, if known," of their determination as to the sufficiency of such fire escapes, and as to the changes that they adjudge necessary. We think that this section throws some light upon the legislative intent. Why, when such a building is in the possession of some one other than the owner, should the statute require notice to the owner, unless it was the intention of the Legislature to impose this duty upon him?

The next section, as we have seen, imposes a penalty upon "any owner or occupant who neglects to comply" with the order of the designated officers within the time limited, and further provides that, "if the owner or occupant of said building lets or uses the same in violation of such order," he shall be subject to a penalty. If it is made an offense, and subjects the owner to a penalty, for him to let a building without complying with the order relative to the sufficiency of the fire escapes, it would seem to follow that the duty in relation thereto enjoined by the first section was imposed upon him.

In *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, where the court, in the construc-

tion of a statute which imposed upon the owners of factories and workhouses the duty of providing fire escapes, held that the statute was not applicable to the owners of premises in the possession of lessees, the court bases its reasoning and conclusion to a considerable extent upon the fact that by the language of the statute the duty is not imposed upon the owner of a building, but upon the owner of a factory or workshop, and that a factory or workshop is not synonymous with a building. And *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201, in which the court reached the same conclusion, in construing a similar statute, is based upon the same reasoning. But the language of our statute is entirely different in this important respect. These safeguards are not merely required upon factories and workshops, but upon any building in which any trade, manufacture, or business is carried on "requiring the presence of workmen above the first story."

In Illinois the statute in relation to this subject is somewhat similar to the one in this state. One section requires that certain buildings shall be provided with fire escapes, without more specifically imposing the duty of providing such fire escapes upon any particular person. Another section provides for notice to be given by the designated authorities to "the owners, trustees, lessee or occupant or either of them." The court held in *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501, that the owners of a building were not relieved from liability for a failure to perform this duty, because a part of the premises was in the possession and under the control of tenants of the owners instead of being directly in their possession. It is said in the opinion: "The injunction being in the alternative, the notice may be given to the one as well as to the other, and therefore to the owner, as well as to the lessee, or occupant." In *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357, this construction of the statute is reaffirmed.

By our statutes, as we have seen, the penalty for failure to comply with the order of the municipal officers or fire engineers is imposed, in the alternative, upon the owner or occupant. And the provision in regard to the notice in writing, especially applicable to cases where the owner is not in possession, requires that, notwithstanding that fact, such notice must be given to the owner, if known. Upon the whole, we are of the opinion that the statutes which we have referred to impose the duty upon the owner of a building, within the application of these sections, or which, by reason of its use, is brought within their application, to provide and maintain suitable and sufficient fire escapes upon such a building, notwithstanding it is in the possession of a tenant. We do not decide, because apparently the question does not arise, that this would be so if a

building, not itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section, should come within the provisions of the law by reason of its use by the tenant for any of such purposes without the knowledge or consent of the owner.

If the defendant's failure to perform a duty imposed upon him by statute for the benefit of persons lawfully employed in the building was the proximate cause of the death of the plaintiff's intestate, and if her death was the natural and ordinary consequence of this failure upon the part of the defendant, then it is at least evidence of actionable negligence upon his part to be submitted to a jury.

3. Finally, it is contended by counsel for defendant that by these sections of the statutes no duty is imposed upon either owner or occupant until after action shall have been taken by the municipal officers or fire engineers, and notice given as provided therein. We do not think that this is so. The first section imposes the duty to provide certain buildings with fire escapes. The provisions of the subsequent sections show, we think, that it was the intention of the Legislature to impose this duty upon the owner even if the building was in the possession of a tenant. It is undoubtedly true that under the provisions of the subsequent sections relative to the enforcement of the law and to penalties for failures to comply with it, the owner is not subject to the penalty provided by section 29 until he shall have failed to comply with the orders of the officers designated for a space of 60 days. But the very language of the section which makes it the duty of the municipal officers or fire engineers to "annually make careful inspection of the precautions and safeguards provided in compliance with the foregoing requirements, and pass upon their sufficiency as to arrangement and number, and upon their state of repair," presupposes that these safeguards are to be provided before such inspection, and that their duty is to inspect safeguards already supplied, and pass upon their sufficiency in number and other respects.

Under these sections it is not the duty of the officers named to determine what buildings shall be provided with fire escapes; that is done by the statute itself; but to see that the requirements of the law are complied with, and to pass upon the sufficiency of safeguards already provided. The duty of an owner to place fire escapes upon the buildings designated does not depend upon the action of the municipal officers or fire engineers, or upon their failure to take action. Such has generally been the construction of similar statutes in other states. *Willy v. Mulledy*, 78 N. Y. 310, 314, 34 Am. Rep. 536; *McRikard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Arms v. Ayer*, supra; *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, 15

L. R. A. 160. The Massachusetts statute construed by the court in *Perry v. Bangs*, 161 Mass. 35, 36 N. E. 683, is so different from the one in this state in this respect that that case, somewhat relied upon by counsel for defense, is not an authority upon this question.

For these reasons we think that the demurrer should have been overruled.

Exceptions sustained. Demurrer overruled.

BOSTON v. BUFFUM et al.

(Supreme Judicial Court of Maine. Dec. 29, 1902.)

INJURY TO EMPLOYE—NEGLIGENCE—MACHINERY—PRINTING PRESS—SHAFTING—STEAM ENGINE—OVERLOADING POWER—CONTRIBUTORY NEGLIGENCE—NEW TRIAL.

1. A proposition which, if not mechanically impossible, is exceedingly improbable, should not be permitted to serve as the basis for the verdict of a jury.

2. Where a verdict is so manifestly wrong as to induce a belief that it was the product of misapprehension, bias, or prejudice on the part of the jury, it should be set aside.

3. Plaintiff was operating a printing press supplied with power by the same engine which operated the other machinery in defendants' box factory, printing strips of board for box covers. The lower jaw of the press falling after an impression made, it was the duty of the plaintiff to remove the printed strip from the platen with his right hand, and with his left, during the upward movement, to put a new strip in place to be printed. He testifies that in the instance in controversy the press opened more slowly than usual, and closed more quickly, and did not give him time to take his hand out before it was caught, but testified to no jump, and used no similar graphic word to suggest any such sudden motion of the lower jaw of the press as the word "jump" does. It is self-evident, and the previous action of the press under similar variations of the load on the shaft, as described by the other witnesses and the plaintiff himself, showed, that the first effect of a sudden quickening in speed of the shaft would only be to cause the belt to slip, and then to gradually accelerate the speed of the press.

Held, that a theory that at the time when plaintiff was feeding the press its lower jaw gave a sudden jump, caused by a rapid increase in the speed of the main power shaft of the factory, and caught the fingers of plaintiff's left hand between the framework of the platen and the die before he could, by the exercise of due care, discover the danger and remove his hand, is not well founded.

(Official.)

Action by Roy J. Boston, by his next friend, against Samuel Buffum and others. Verdict for plaintiff. Motion by defendants for a new trial. Granted.

Case for injuries to the fingers of plaintiff's left hand, which were crushed between the framework of the platen and the die plate of a printing press in defendants' box factory in North Berwick. Plaintiff's declaration was as follows:

"In a plea of the case, for that the said plaintiff says the defendants are the owners of a box factory situated in said North Berwick, and operated the same on the ninth day

of August, A. D. 1900; that the said plaintiff was employed by said defendants to work in their said box factory at a printing press; that said plaintiff's duties consisted in feeding said press with the materials to be printed; that said printing press was run by force transmitted by machinery connected with an engine which was used to furnish the motor power for said box factory; that it was the duty of said defendants to furnish said plaintiff with proper, safe, and suitable machinery and implements to work; that said defendants, wholly regardless of this duty, negligently and carelessly furnished this mill or box factory with an improper, dangerous, inadequate, and defective engine, which furnished the motor power that run said printing press; that, by reason of said defendants' negligence and carelessness in furnishing said defective engine as aforesaid, said printing press worked and run in an irregular, defective, and dangerous manner, and opened and closed at irregular and deceptive intervals; and while said plaintiff was engaged in the work for which he was employed by said defendants at said printing press, and while he was in the exercise of due care and diligence, on the ninth day of August, A. D. 1900, at said box factory in said North Berwick, said plaintiff's left hand was caught in said printing press and crushed, the bones of said hand and wrist fractured and displaced, and said hand was seriously and permanently injured, and the plaintiff has thereby been prevented from doing any labor or using said hand, has been put to great expense for medicine and medical attendance, and has suffered great distress of mind and body, to the damage," etc.

The defense was the general issue, with a brief statement in effect alleging knowledge and assumption of the risk by the plaintiff, also contributory negligence.

The facts are stated in the opinion.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

E. P. Spinney, for plaintiff. H. B. Cleaves, S. C. Perry, B. F. Cleaves, H. T. Waterhouse, and G. L. Emery, for defendant.

SAVAGE, J. Action for personal injuries. The defendants were the owners and operators of a box factory in North Berwick. In the factory were two resaws, a planer, a groover, a cutting-off bench, a nailing machine, a printing press, and other machines, all belted to a single main shaft overhead. Power was supplied by an engine of 25 horse power, which was connected with the main shaft by a single belt. The governor upon the engine was adjusted to a maximum or normal speed of 185 revolutions a minute. The printing press, concerning which this controversy has arisen, was the "Prouty Press," so called. The die, or type, was placed in a nearly perpendicular position.

The platen, upon which the matter to be printed was placed, was fastened to a yoke, and constituted what some of the witnesses called the "lower jaw" of the press. The platen and yoke were so adjusted to the framework of the press that in operation they moved with a hingelike movement, the hinge being at the bottom of the die. The outer edge of the platen, that is, the edge nearest to the operator, who stood in front of the press, moved upwards, carrying the matter to be printed until it was impressed evenly against the die. Then the jaw opened, and the platen and yoke went back towards a horizontal position. When closed, the framework of the platen was within three-eighths of an inch of the die. In opening or closing the outer edge of the platen passed through a distance of 18 inches. There were guards on the platen to keep in place the matter to be printed, and they were so situated that the operator, in feeding the press, would necessarily extend his hand into the jaw, about to the wrist. The belt connecting the printing press with the main shaft was an inch and a half wide. The pulley on the main shaft was 6 inches in diameter, and the one on the press was 12 inches. The latter pulley was double, consisting of a loose pulley 2 inches in width, and a fast pulley of the same width. The press was started by shipping the belt from the loose pulley to the fast one. The exact weight of the platen and yoke is not known, but it was estimated, and we think fairly, at about 200 pounds. This weight, turning upon the hinge, had to be lifted by mechanical power for each impression. Its own weight helped to carry it back. Attached to the press was a balance wheel, 40 inches in diameter, with a solid iron rim 3 inches across the face and four inches deep. The rim was supported by seven or eight solid iron spokes, each an inch in diameter. The weight of the balance wheel was fairly estimated, we think, at about 150 pounds. The balance wheel was upon the same shaft as the press pulley was, and, consequently, was turned with the pulley. Ordinarily the press made about 20 impressions a minute. The plaintiff testified that it was 22, and the defendants that it was 17. But, approximately, it took three seconds for the jaws of the press to open and close.

The plaintiff had been employed in the defendants' factory for a year and a half, and at the time of his injury was tending the press, and had been doing so for much of the time for six months. He was printing upon strips of board prepared for box covers. The strips were $5\frac{1}{4}$ inches long, $3\frac{3}{4}$ inches wide, and $\frac{3}{16}$ of an inch thick. While the lower jaw of the press was falling, after an impression had been made, it was the duty of the plaintiff to remove the printed slip from the platen with his right hand, and with his left hand to place a slip to be printed upon the platen, during its upward move-

ment, and before it reached the point of impression.

The plaintiff, in argument, claims that, while so placing a slip upon the platen, it made a sudden jump, owing to an acceleration of the speed of the main shaft, and that the fingers of his left hand were caught between the framework of the platen and the framework of the die, three-eighths of an inch apart, and severely injured. He claims that the speed of the revolutions of the main shaft was irregular, and that in this instance it suddenly increased, with the effect of making the lower jaw of the press "jump." His testimony was that the press opened more slowly than usual, and closed more quickly, and did not give him time to take his hand out of the press before it was caught. He used no language as graphic or significant as the word "jump" is. And he attributes this sudden acceleration of speed to the fact that the engine was not possessed of sufficient power to carry evenly the load which was placed upon it. He says that on many occasions, while working on other machines, he had noticed variations in the speed of the shaft, or in the machines which took their power from the shaft, but that once, and only once, he had noticed a variation in the speed of the press itself. He does not characterize that variation as a "jump." Nothing in the case has any tendency to show that there was any fault in the engine and machinery or their operation, except that the engine was too small for the load put upon it.

It is both proved and admitted that the engine was overloaded; that, when all the machines were running, the speed of the engine was retarded below the normal speed fixed by its governor; and that when one or more machines ceased to run, and their load was taken off, the speed of the engine was thereby accelerated. And it is shown that this happened frequently, if not daily. But the defendants claim that this acceleration was gradual, and not sudden, like a jump; that the increase in speed was controlled in part by the governor upon the engine; and that, particularly as to the press, its variations in speed were so regulated by the balance wheel as to make it mechanically impossible, belted as it was to the main shaft with a belt only an inch and a half wide, for the jaw of the press to make a sudden jump. It is claimed that the inertia of the balance wheels would so far resist a sudden acceleration of speed in the shaft as to cause the belt to slip momentarily upon the pulley, and that the quickening of the speed of the jaw would be gradual, and not sudden. And the defendants contend that such an acceleration of speed would be noticeable to an operator who was duly careful, and that, in any event, it would be no greater acceleration than should have been anticipated by an operator of the age, intelligence, and experience of the plaintiff, who knew of the frequent variations in the speed of the machinery; that

the danger was obvious and appreciable, and hence that the risk was assumed by the plaintiff, under the rules of law governing the relation of master and servant.

And the bite of the chief contention between the parties in this case is whether, on the one hand, upon the plaintiff's testimony that the jaw "opened slowly and closed quickly," its speed was increased so suddenly and so greatly, like a jump, that the plaintiff could not reasonably have anticipated it or have seen it, and so avoided the consequences, or whether, on the other hand, the acceleration of speed necessarily was gradual, and no greater than should have been anticipated by the plaintiff, with his knowledge of previous variations in shaft and press, and no greater than would have been noticeable to an attentive operator with his eyes and his mind upon his work and the press. For the defendants say, in this connection, that the injury to the plaintiff was due to his own careless inattention, which has been said to be the very essence of negligence. *Tasker v. Farmingdale*, 85 Me. 524, 27 Atl. 464.

It is evident that the plaintiff's employment was one attended with danger. The general danger was obvious, and, without doubt, appreciable by the plaintiff. To feed the press, moving normally, without endangering the hand of the plaintiff, required constant attention and watchfulness on his part. This is so, even if long-continued work at the press had made the movements of his arm and hand more or less automatic, as he claims. And it is all the more his duty to be watchful if he knew, as he says he did, that the speed of the engine was irregular. For, if he knew that, he must have known also that an irregularity in the speed of the engine tended to create an irregularity in the speed with which the lower jaw of the press rose to meet the die.

There is no evidence that at the time of the accident any load was taken off the engine. It is only presumed. But we think that, if there were any acceleration in the speed of the press, it might fairly be inferred, under the circumstances, that it was due to a lessening of the load of the overloaded engine. This would account for the quickening of speed testified to by the plaintiff, though we are unable to see how it can account for the change in the prior downward movement of the jaw, which the plaintiff says was slower than usual.

The defendants, as already stated, claim that the action of the governor upon the engine had a tendency to prevent a sudden increase of speed like a jump. But we are not satisfied that this would be so when the engine was overloaded. In such case the load, and not the governor, holds back the engine, and keeps its speed below the normal rate. If, however, the load is taken off, the engine increases its speed, the governor thereby is made to revolve more rap-

idly, and the centrifugal force tends to extend its arms towards a horizontal line. The mechanical effect of this movement is to shut off steam as the speed nearly approaches the maximum, and thereby prevent the speed exceeding the maximum. Now, if, at the time the load is taken off the engine, the speed is so near the maximum point that any further increase would have the effect at the same time of shutting off steam by the governor, the governor may prevent a sudden jump. But we think, if the speed was much below the maximum, the governor would not at once have any material effect in retarding speed.

We must therefore examine another claim of the defendants, namely, that the balance wheel on the press would itself prevent a sudden jump in the speed of that machine. The object of a balance wheel, of course, is to balance or regulate the speed of the machine, and to steady its movements. When the yoke and platen of this press were being raised to make an impression, their weight constituted a load to be lifted. That weight would have a tendency to retard the press. During the falling movement of the platen and yoke, the press, without a balance wheel, would recover its speed. There would therefore be a constant tendency towards an irregularity—an unevenness—in speed. The balance wheel is designed in part to overcome this unevenness. Its rapid revolutions, three for each printed impression in this case, created a momentum which helped to carry the load up evenly, and also tended to prevent a quickening in speed while the platen and yoke were falling. It carried the machine over the bunches, so to speak. But a balance wheel regulates the movements of a machine, not only as against uneven loads, but as against uneven power. Its momentum tends to carry the machine along evenly if the power slackens momentarily, and likewise its inertia resists and tends to retard any sudden acceleration of speed.

It appears clearly in this case that the inch and half belt running on the press pulley, unless very tight, would not lift the platen and yoke, when lying down, without the aid of the momentum of the balance wheel. When the machine was at rest, the belt, unaided, would slip upon the upper or six-inch pulley. To start the press, the operator had to start the balance wheel with his hand.

Now, under these conditions, the question is whether the jury were justified by any reasonable inference in finding that any acceleration of speed in the engine and main shaft could be transmitted by that belt to that press, and so overcome the inertia of that balance wheel as to give the platen and yoke a jump, such as the plaintiff now complains of, and at a time when the platen and yoke were being lifted. We think they were not. We think the proposition, if not

mechanically impossible, is so very improbable that it should not be permitted to sustain this verdict. Under the conditions which the case discloses, it seems to us self-evident that the first effect of a sudden quickening in the speed of the main shaft would only be to cause the belt to slip, and then gradually, and probably quickly, to increase the speed of the press. To the suggestion that perhaps the jump occurred when the platen and yoke were falling, or at the point of momentary rest between the downward and upward movements, and so when they were not a load upon the power, it is only necessary to say that that is not the jump which the plaintiff claims hurt his hand, nor does it describe the movements he testified about.

Our conclusion is strengthened by the fact that although there were frequent daily, if not hourly, variations in the speed of the overloaded engine, caused by changing the load, and although the plaintiff had worked at this press for six months whenever it was in operation, and had observed the variations in the speed produced by the engine, he does not claim that he ever saw the press vary its motion before, except on one occasion; and, of the several other witnesses who had worked on the press, none, as they testify, had ever seen it vary at all.

We also find it difficult to rid ourselves of the conviction that, if the plaintiff had been paying proper attention to his work, with his mind as well as with his eyes, he would not have failed to discover his hand approaching the die, more quickly perhaps, but in season to have removed it, so far as respects any acceleration of speed which has been testified to, or would have been possible under the circumstances.

We think the verdict was clearly wrong.
Motion sustained. New trial granted.

FRYE v. BATH GAS & ELECTRIC CO. et al.

(Supreme Judicial Court of Maine. Jan. 1, 1903.)

ACCIDENT INSURANCE—CASUALTY COMPANY — INDEMNITY — LIABILITY TO THIRD PERSONS.

1. The plaintiff's intestate, while in the employ of a gas company, sustained bodily injuries through the latter's negligence. In an action commenced by him against the gas company to recover damages for such injuries, his administrator, he having died pending the litigation, recovered judgment. This judgment has been in no part satisfied, and is now worthless, the gas company having made an assignment for the benefit of such of its creditors as became parties thereto, and neither the plaintiff nor his intestate ever became a party to this assignment.

At the time of the accident wherein the plaintiff's intestate received his injuries, the gas company had a contract with a casualty insurance company, wherein the latter had agreed to indemnify the gas company, for the period of time named therein, "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally

suffered by any employé or employées of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, caused by the negligence of the assured, and resulting from the work described in the said schedule, subject to the following special and general agreements, which are to be construed as coördinate, as conditions." One of these conditions was as follows: "No action shall lie against the company (the insurer) as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Upon a bill in equity brought by the judgment creditor against the gas company, the casualty insurance company, and others, wherein the complainant prays that the insurance company may be compelled to pay to the complainant the amount of his unsatisfied judgment, held: That the contract of the insurance company was not one of insurance against liability, but of indemnity against loss by reason of liability; that it was not the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employées; that the undertaking of the insurer was to reimburse or make whole the assured against loss sustained by it on account of its liability to its employées for negligence; and that, independently of the condition in the contract of insurance above quoted, the court would be compelled to construe this contract as one of indemnity only.

2. Also, that there can be no doubt about the meaning of the language of the condition above quoted, and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties, or either of them; that, by this unequivocal language in the condition above quoted, the undertaking of the insurer was expressly limited to liability in an action brought by the insured "to reimburse him for loss actually sustained and paid by him."

See *Frye v. Bath Gas, etc., Co.*, 46 Atl. 804, 94 Me. 17.

(Official.)

Report from Supreme Judicial Court, Sagadahoc County.

Bill by Michael J. Frye, administrator, against the Bath Gas & Electric Company and others. Case reported, and bill dismissed.

Bill against the Bath Gas & Electric Company, its assignees under a common-law assignment, the trustee of a mortgage given by the gas company to secure its bonds, and the Fidelity & Casualty Company, alleging that the latter-named company refuses to pay the amount of the judgment recovered by the plaintiff (see *Frye v. Bath Gas, etc., Co.*, 94 Me. 17, 46 Atl. 804), and that the gas company, its transferee, and its assignees, neglect to enforce the contract with the casualty company, or to pay the amount of the aforesaid judgment; and praying that the casualty company be compelled to pay the same.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and PRABODY, JJ.

F. E. Southard and S. L. Fogg, for plaintiff. C. W. Larrabee and G. E. Hughes, for defendants.

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1298.

WISWELL, C. J. At the December term, 1898, of this court for Sagadahoc county, the plaintiff's intestate entered an action against the Bath Gas & Electric Company to recover damages for personal injuries sustained by him on March 10, 1898, while in the employ of that company, and by reason of its alleged negligence. After a trial before a jury, in which a verdict was rendered for the plaintiff, the case was taken to the law court upon the defendant's motion for a new trial, and, finally, at the April term, 1900, judgment was rendered against the gas and electric company in favor of the complainant, as administrator of the plaintiff, in that action, the latter having previously died, for the sum of \$4,416.65 and costs.

At the time of the accident wherein the plaintiff's intestate received the injuries complained of in the suit above referred to, the defendant in that suit had a contract of indemnity with the Fidelity & Casualty Company, one of the present respondents, wherein the latter, for a valuable consideration, had agreed to indemnify the Bath Gas & Electric Company, for the term of 12 months from December 1, 1897, "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any employé or employées of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, caused by the negligence of the assured, and resulting from the work described in the said schedule, subject to the following special and general agreements, which are to be construed as coördinate, as conditions." One of these conditions was as follows: "No action shall lie against the company (the insurer) as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The defense of the original suit was partially assumed by the casualty company, and was conducted by its counsel in conjunction with that of the gas company, under a clause in the contract of insurance which gave the insurer the right to defend such suits.

In August, 1898, the Bath Gas & Electric Company, being insolvent, made a common-law assignment, for the benefit of such of its creditors as became parties to the assignment within the time limited therein, of all its property of every description. The assignees subsequently sold and conveyed all of such property to George F. West, one of the respondents; and on September 6, 1898, this contract of insurance with the casualty company was transferred by the assignees to West, with the consent of the insurer.

Execution was duly issued upon the judgment recovered by the complainant, and was placed in an officer's hands for enforcement, but he was unable to find any property of the judgment debtor, and the judgment has

remained wholly unsatisfied. This judgment, as against the gas company, is entirely worthless.

The complainant has commenced this bill in equity against the defendant in the original suit, its assignees under the common-law assignment, the transferee of the property, the trustee of a mortgage given by the gas company to secure its bonds, and the Fidelity & Casualty Company, alleging, in addition to some of the facts above stated, that the Fidelity & Casualty Company refuses to pay the judgment above referred to, that the gas company, its assignees, and the transferee of its property, neglect to enforce the contract of the casualty company, or to pay the amount of the judgment, and praying that the casualty company be compelled to pay to the complainant the amount of such judgment.

We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the gas company to indemnify that company "against loss" from liability for damages on account of bodily injuries accidentally suffered by an employé and caused by the negligence of the assured. The use of the word "indemnify" shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employées. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability.

This distinction was clearly recognized in the case of *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. There is no stipulation in this contract that the insurer shall pay to the employer "all sums for which it shall become liable to its employées," as in *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. Nor did the insurer contract to pay "all damages with which the insured might be legally charged, or required to pay, or for which it might become liable," as in *American Employers' Liability Insurance Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, in which this distinction is noticed in this language: "The difference between a contract of indemnity and one to pay legal liabilities is that, upon the former, an action cannot be brought and a recovery had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches."

In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employées, but for its own benefit exclu-

sively, to reimburse it for any sum that the company might be obliged to pay, and had paid, on account of injuries sustained by an employé through its negligence. Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only.

But this provision puts an end to all questions or doubt, if any there could be. The parties have expressly provided, in the contract which they chose to make, that "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." By reason of the unequivocal language of this provision, the undertaking of the insurer was expressly limited to liability in an action brought by the insured "to reimburse him for loss actually sustained and paid by him." There can be no doubt about the meaning of this language, and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties or of either of them.

Precisely similar language in a contract of this nature was construed by the court in *Moses v. Travelers' Insurance Company* (N. J. Err. & App.) 49 Atl. 720, wherein it was held "that not the amount of the employé's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible." In this case the court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States bankrupt act, was payment within the requirement of this clause, and perfected the liability of the insurer for so much as the employé was entitled to receive out of the bankrupt's estate, that this liability of the insurer passed to the trustee in bankruptcy, and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employé's judgment.

But this doctrine is not applicable to the case under consideration, for various reasons. The common-law assignment of the gas company was for the benefit of such of its creditors as became parties thereto within the time limited, long since elapsed, and neither the complainant, nor his intestate during his lifetime, became a party to this assignment. Again, it does not appear that any dividend has ever or will ever be paid; upon the contrary, it is said, in argument, that there were no assets to be divided.

For these reasons the bill cannot be sustained against any of the respondents. A decree will be made below dismissing the bill, at which time such order will be made

in regard to costs as seems proper to the justice who makes the decree.

So ordered.

STAFFORD v. MORSE.

(Supreme Judicial Court of Maine. Dec. 29, 1902.)

MORTGAGE—FORECLOSURE BY PUBLICATION—TIME OF RECORD—EVIDENCE.

1. When it is sought to foreclose a mortgage on real estate by publication, the foreclosure will be ineffectual, unless it appears by record that a copy of the printed notice, and the name and date of the newspaper in which it was last published, were recorded in each registry in which the mortgage deed was, or by law ought to have been, recorded, within 30 days after such last publication.

2. The time of record must appear of record, and when the record is silent it cannot be shown by evidence aliunde the record.

3. When the record is silent as to time of recording, it cannot be amended after the 30 days have expired, so as to show that the recording was within the 30 days.

Emery, Peabody, and Spear, JJ., dissenting. (Official.)

Report from Supreme Judicial Court, Somerset County, in Equity.

Bill by John N. Stafford against George H. Morse for the redemption of a mortgage. Case reported, and bill sustained.

The bill, answer, notice of foreclosure, record, and certificate of the register of deeds, demand for an account, and response, were put in evidence.

The plaintiff offered to prove that he had no knowledge of where the newspaper in which the notice of foreclosure appeared was printed and published, and it was agreed that the same should be taken as proved if the evidence was legally admissible.

The defendant offered to prove, by oral evidence, by the production of the mortgage, by assignments and quitclaim deed, by the original notice of foreclosure, a copy of which is on the register's certificate, by the production of the newspapers in which the notices of foreclosure were printed and published, by introduction of the records of the registry of deeds of Somerset county, in addition to other evidence stated in the report, all the allegations set out in his answer, to establish the fact of foreclosure of the mortgage—the same to be taken as proved if legally admissible.

The defendant also asked leave to have the register of deeds amend his record and certificate of foreclosure in accordance with the facts stated in his answer, which was to be done if legally admissible.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, EMERY, PEABODY, and SPEAR, JJ.

E. N. Merrill, for plaintiff. J. W. Manson, for defendant.

SAVAGE, J. Bill in equity to redeem from a mortgage. The defendant, holding under

the mortgagee, claims an absolute title through a complete foreclosure by publication. The plaintiff denies that the mortgage was legally foreclosed. And this is the sole issue here. The plaintiff urges several objections to the foreclosure proceedings, only one of which do we consider, as we think that one is necessarily fatal.

The statute (Rev. St. c. 90, § 5) requires one who seeks to foreclose a mortgage by publication to cause a copy of the printed notice, and the name and date of the newspaper in which it was last published, to be recorded in the registry of deeds in which the mortgage deed is, or by law ought to be, recorded, within 30 days after such last publication. That the printed notice was recorded in this case is not in dispute. The defendant says in his answer that it was recorded within 30 days after the last publication. But the certificate of the register, which by statute is made *prima facie* evidence of the fact of such publication, does not prove the allegation. It is not dated, and there is no record evidence that the printed notice was seasonably recorded. By statute every instrument is "considered as recorded" at the time when the minute of its reception is made by the register upon the instrument itself. Rev. St. c. 7, § 15. In order to effect a legal foreclosure, all conditions required by statute must be strictly performed. *Freeman v. Atwood*, 50 Me. 473; *Bragdon v. Hatch*, 77 Me. 433, 1 Atl. 140; *Hollis v. Hollis*, 84 Me. 96, 24 Atl. 581; *Belfast Savings Bank v. Lancey*, 93 Me. 422, 45 Atl. 523, 74 Am. St. Rep. 361. And to support a foreclosure title, the performance of all statute conditions must be proved.

The defendant seeks to supply the want of record evidence by oral evidence, or by an amendment of the record. And it is agreed by the parties that, if this can legally be done, it is to be regarded as done. We are brought, therefore, to a consideration of the question whether evidence allunde the record is admissible, when the record is silent, to prove that the printed copy was received for record within 30 days from the last publication, or whether that fact must appear upon the record itself. Much has been said in argument upon the question whether the statute contemplates that the register's certificate of publication should be recorded. The defendant contends that it does not, and then argues that, *ex necessitate rei*, the time of recording the printed copy must be proved allunde. It is true that there is no statute specifically requiring registers to record the time when notices of foreclosure are received for record, either by certificate or otherwise. So there is no statute requiring registers to record upon the book where the instrument is recorded the time when any other instrument is received. Yet it is believed that, throughout the entire history of this state, registers have well-nigh universally recorded, and have regarded it as a part of their duty to record, on the book, with the record of the instru-

ment, the date on which it is received for record, which, of course, is the date of record, and that failure to do so, if any, has been due to inadvertence. The very universality of the practice for so many years is of itself significant of the proper interpretation of the statutes of registry. It is the interpretation which seems to have suggested itself to all concerned. The statute requires the register to minute on every instrument the time it is received for record. Rev. St. c. 7, § 15; Id. c. 73, § 28. And the official memorandum seems to have been then regarded as a part of the instrument itself for recording purposes. The courts and the profession have invariably regarded the records of the date of receiving instruments for record as they appear in the books, with the records of the instruments, as satisfactory and sufficient evidence to determine priority of title by priority of record; and yet, unless these records are made as a part of the official duty of the registers, they are not evidence at all.

But if we were to concede the premises of the defendant, we do not think it would necessarily follow that it need not appear of record that the printed notice of foreclosure was seasonably received for record. The design of the statute undoubtedly is that the record shall give notice of the foreclosure. To give notice of the foreclosure, it must give notice of the successive essential steps necessary to complete foreclosure, because, if any are missing, it is not a foreclosure, and notice of such imperfect proceedings would not be notice of a foreclosure. A defective record is not notice. *Hill v. McNichol*, 76 Me. 314. The time of recording is essential, because the foreclosure proceedings are null and void unless the printed notice is recorded within 30 days after the last publication. The argument, therefore, is not based upon any specific provisions of any statute, but, rather, upon what is believed to be the reasonable and proper, if not necessary, interpretation of the statute requiring registry of a published notice of foreclosure within 30 days. To restate it, it is that registry within 30 days is essential to the very validity of the foreclosure. Ordinarily an instrument of conveyance becomes effective without any regard to the registry. It is valid whether registered or not. It conveys title whether registered or not. Registry merely serves to give notice to third parties. In law, it is notice. But a foreclosure does not become a foreclosure unless it is recorded, and recorded within 30 days. The record becomes a part of the muniment of title. And if there is no title by record within the 30 days, there never can be. Inasmuch as the time of record is essential to the validity of the title created by record, that also must appear of record, or else there fails to appear a complete record title. All that appears of record may be true, and yet no title. It is not a muniment of title. It does not prove title.

One cannot set it up as the last step in the proof of a record title—that is, a title not merely protected, but created by registry—without showing something that the record does not contain. The step is not long enough to reach across the chasm. Hence we think that the time of recording must appear of record.

It is suggested that the statute provision making the register's certificate *prima facie* evidence of the fact of publication raises a fair implication that the fact of publication may be shown otherwise. Whether that be so or not, it is certainly true that the fact that there was no publication may be shown otherwise. It is *prima facie* evidence, but not conclusive. The certificate may be attacked, but is sufficient as far as it goes, if not attacked. Whether or not there may be a vital distinction, in respect of the *prima facie* evidential force of the certificate, between the case of one who seeks to prove a title created by record, and who may stand with a record or fall for want of one, and that of him who would attack such a title, need not be decided. Here we are not concerned with the contents of the certificate, but with what it does not contain, or, to speak more exactly, with the fact that it is not shown by record, either in the certificate or out of it, that the notice was recorded within 30 days from the last publication.

There being no record evidence that the printed notice was recorded seasonably, can the want of it be supplied by evidence allunde? We think not. Besides the reasons already stated, there is a strong reason to be deduced from the very purpose of our system of registration of land titles, and that is certainly and security of land tenure. The stability of land titles depends in a large degree upon the certainty of record evidence.

In *Chase v. Savage*, 55 Me. 543, a mortgagor sought to extend the time when foreclosure would become absolute by showing that the mortgagee had fraudulently misstated to him the time when the right of redemption would expire. The court, after saying that the claim was not sustained by the evidence, added words which are peculiarly appropriate here. "Besides," the court said, "the record was the only fountain from which such information could flow. To that place all parties interested could and must resort. Otherwise the record, designed to protect the interests of all, becomes a nullity, since it might be avoided by parol testimony, or the weight of testimony as judicially decided, based upon the imperfection of human memory, rather than the recorded certainty."

Nor can the record be now amended. The record which makes a foreclosure legal and complete must be made within 30 days from the last publication. The record as it is on the last one of these 30 days is the record that must stand. No later amendment could be recorded within the 30 days, and so be in compliance with the statute requirement. A

record which is a muniment of title, and which must exist as such within 30 days, or not at all, cannot be subsequently amended so as to make that good which never was good within the 30 days.

The foreclosure relied upon by the defendant is therefore ineffectual to give him absolute title. It is unnecessary to decide, and we do not decide, the other questions discussed by counsel, namely, whether the publication of notice as described in the register's certificate was sufficient, and, if not, then whether proper publication in fact may be otherwise shown.

The plaintiff is entitled to redeem. In accordance with the stipulation, the case is to be remanded to the court below to ascertain the amount due on the mortgage.

Bill sustained, with costs.

Case remanded in accordance with stipulation.

EMERY, PEABODY, and SPEAR, JJ.
We dissent for the following reasons, among others:

1. Our system of registration of titles is wholly the creature of statute. The registering officer is purely a statutory officer. He has only statutory duties, which, of course, he must perform carefully and faithfully. The statute requires the register of deeds to minute on the instrument to be recorded the day and time of day when received. Rev. St. c. 7, § 15. It does not require him to minute such time or any time on the page where the instrument is eventually recorded. The majority opinion concedes this, but proceeds to add that duty to his statutory duties. This seems to us legislation, which the Constitution forbids the court to undertake.

The Legislature has required the town clerk, as a registering officer of chattel mortgages, to note the time on the record as well as on the instrument. Rev. St. c. 91, § 2. It has made no such requirement of the register of deeds. There is no presumption that this omission in the case of the register of deeds was unintentional, but if it be a *casus omissus*, and much inconvenience and loss must result unless the omission be supplied, it is for the Legislature, and not for the court, to supply it. *Parsons v. Copeland*, 33 Me. 370, 375, 54 Am. Dec. 628. A general custom of registers of deeds to note upon the page of the record the time when recorded is assumed without evidence, but such a custom, if it exists, cannot make a statute, nor add to one. Suppose this register to be indicted for this omission; will the court convict and punish him criminally because of the custom of other registers, without any statute? Can other registers make a law to convict him?

2. The register of deeds was authorized by the statute to record this notice of foreclosure if filed within 30 days from its last publication. For him to record it if filed after that 30 days would be an unauthorized

and unlawful act. *De Witt v. Moulton*, 17 Me. 418. The notice was recorded, and there is nothing showing it to have been unlawfully recorded.

The ancient and favored rule is, "Omnia rite acta presumuntur." It has been repeatedly applied by this court to sustain interests otherwise imperiled by acts or omissions of public officers. *Treat v. Orono*, 26 Me. 217; *Shorey v. Hussey*, 32 Me. 579; *Blanchard v. Dow*, Id. 557; *Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 759; *McClinch v. Sturgis*, 72 Me. 468; *Snow v. Weeks*, 75 Me. 105, 108; *Maxcy v. Bowle*, 96 Me. 435, 52 Atl. 905. The majority of opinion, however, holds, in effect, that it must be presumed, not only *prima facie*, but conclusively, that the record was unlawfully made, and that the register was guilty of an illegal act. No authority is cited in support, and we think none can be found.

3. The report of the case shows that the mortgagee in fact did all that the statute required of him to perfectly foreclose the mortgage. He caused the proper notice to be published in the proper newspaper, and, within 30 days after its last publication, furnished to the register of deeds a copy thereof to be recorded, and the register "received" it for record within that time. There was nothing more for the mortgagee to do, or that he could do. The register was not his agent. The state then took charge of the procedure through its own agent or officer—the register. The report authorizes us to assume that the register minuted on the copy of notice furnished him the time when it was received, and hence when to "be considered as recorded." The only slip by anybody, according to the report, was the omission to also minute on the record the time when received, if that be a slip. This slip was not that of the mortgagee, nor of his agent, but solely that of the state's officer—the register.

We think reason and authority both hold that the mortgagee, having fully complied with the state's requirements, should not suffer from a subsequent omission of the state's officer, but that the consequences should fall on the searcher, who, after all, only relies on such visible omission to establish his own title. We are to assume, as above stated, that the register minuted upon the copy of the copy of the notice the time when received for record. In *Gillespie v. Rogers*, 146 Mass. 610, 612, 16 N. E. 711, the court declared the law as follows: "If the recording officer places upon it [the instrument to be recorded] his certificate that it has been so received, even though he afterwards falls in his duty, by recording it inaccurately, by omitting material portions of it, or even by altogether suppressing it from the records, yet in contemplation of law the whole world has constructive notice of it, just the same as if it had been accurately copied in full upon the records. It is obvious that, under this rule, one searching the records may fail

to find all that is necessary for his protection, but nevertheless he will be bound." See cases cited in that opinion—especially *Sykes v. Keating*, 118 Mass. 517, 519. Also, see, *Monaghan v. Longfellow*, 81 Me. 278, 17 Atl. 74; *Maxcy v. Bowle*, 96 Me. 435, 52 Atl. 905; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *People v. Bristol*, 35 Mich. 28; *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238; *Chase v. Bennett*, 58 N. H. 428; *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264; *Steam Stone Cutter Co. v. Sears (C. C.)* 23 Fed. 313; *Lytle v. Arkansas*, 9 How. 314, 13 L. Ed. 153; 1 Devlin on Deeds, 686. All the above cases, and many others, sustain the doctrine that the person seasonably filing the instrument for record is protected, and the consequences of the recording officer's subsequent omissions fall upon the searcher of the records. Only one case is cited in the majority opinion on this point (*Hill v. McNichol*, 76 Me. 314), in which there was not an omission—something left out—as here, but a complete record, apparently full and correct, with nothing to suggest to the searcher any error or incompleteness. In the case at bar the incompleteness was apparent, and it was also apparent that the incompleteness was the error of the register. Even if it could not be presumed that the record was in fact seasonably made, nothing appearing to the contrary, the record was made, and was visible. It put the searcher upon inquiry, if he doubted whether seasonably made. He should not base his title on such an omission.

The effect of the majority opinion is to deny the citizen, without fault of his, an acknowledged legal right, earned by his full performance of every legal duty imposed upon him, and though not necessary to protect the rights of innocent third parties. This seems to us an injustice which could be easily avoided by a reasonable application of approved legal principles.

CONLEY et al. v. INHABITANTS OF WOODVILLE.

(Supreme Judicial Court of Maine. Jan. 1, 1903.)

PAUPER—RELIEF BY NONRESIDENT.

1. No statute of this state creates any liability upon part of a municipality to reimburse an inhabitant of another town for expenses incurred by him in such other town for the relief of a pauper whose settlement is in the town sought to be held liable for such expenses. Consequently an action for such expenses so incurred, not based upon any contract, express or implied, with the defendant town, cannot be maintained. (Official.)

Agreed Statement from Supreme Judicial Court, Penobscot County.

Action by Laura A. Conley and another against the inhabitants of Woodville. Submitted on agreed statement. Judgment for defendant.

Action for board for 77 days of an aged woman, whose pauper settlement, for the purposes of this suit only, was admitted to be in the defendant town.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, POWERS, PEA-BODY, and SPEAR, JJ.

A. W. Weatherbee, for plaintiffs. Hugo Clark, for defendant.

WISWELL, C. J. Rev. St. c. 24, § 43, provides that "towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them." But neither this nor any other statute creates any liability upon the part of a municipality to reimburse an inhabitant of another town for expenses incurred by him in such other town for the relief of a pauper. *Warren v. Islesborough*, 20 Me. 442; *Boothby v. Troy*, 48 Me. 560.

In this case the plaintiffs, living in the town of Lincoln, sue the inhabitants of the town of Woodville for the board of a person having her pauper settlement in the latter town, which board was furnished in the town where the plaintiffs reside, after notice to the defendant town. The statute gives no such remedy.

It is undoubtedly true that a town may become liable to an inhabitant of another town for relief furnished a pauper, by virtue of a contract between the town and the person furnishing relief, but no such contract, either express or implied, is shown in this case.

In accordance with the stipulation of the report, the plaintiffs will be nonsuited.

Plaintiffs nonsuit.

HAINES et al. v. HAINES et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

ACTION AGAINST HEIR—DEBT OF ANCESTOR—JUDGMENT—LIABILITIES—LIMITATIONS.

1. In a suit against the heir for the debt of the ancestor, if the heir has not aliened the lands descended, the judgment must be special, to be levied of the lands.

If he has aliened the lands before suit brought, the recovery will be only for the value of the lands in the condition in which they were at the time of the descent cast.

2. The liability of the heirs is several, and not joint, each heir being liable for what he receives from the ancestor, and not for what the other heirs receive.

3. The liability being several, and not joint, payment by one heir on the debt of the ancestor does not take the case out of the statute of limitations as to the others.

4. The action against the heir is an action under and by force of our statute concerning heirs and devisees, and, while it is true that the statute of limitations cannot be pleaded in bar of a claim resting on a statute, the claim against the heir is based primarily upon the

debt of the ancestor, and, if there is no legal subsisting claim against the ancestor, no obligation is imposed on the heirs; therefore the statute may be pleaded by the heir.

(Syllabus by the Court.)

Action by Martha A. Haines and others against Burwood M. Haines and others. Verdict for plaintiffs. Rule to show cause made absolute.

Argued at November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

F. D. Weaver, for plaintiffs. C. K. Chambers, for defendants.

VAN SYCKEL, J. This is a suit against Burwood M. Haines, Joseph M. Haines, Samuel W. Haines, Walter Haines, and Nancy M. Leeds, heirs at law of Abel Haines, who died in 1883, for the bond debt of the said decedent, amounting to \$2,000. The defendants admit that they inherited a farm containing 132.75 acres, situate in the county of Burlington, on which the said Abel Haines in his lifetime executed a mortgage, in which his wife joined, for the sum of \$5,934. The defendants Burwood M. Haines and Joseph M. Haines pleaded that, after the death of their ancestor, Abel Haines, and before the commencement of this suit, they paid to the plaintiffs on account of said bond debt the sum of \$408.40, with all interest due thereon, in full discharge of their share of the said debt. In addition to this plea, all the defendants pleaded the statute of limitations. The verdict was for the plaintiffs, against all of the defendants.

The descent of lands upon the heir creates his liability; and if he has not aliened the lands, but has title at the time he is sued, he may admit the debt and confess and specify, as was done in this case, the lands descended, in which case the lands only will be subject to the debt, and the judgment must be special to be levied of the lands. *St. Mary's Church v. Wallace*, 10 N. J. Law, 311.

If the heir at law has aliened the lands before suit brought, the recovery will be only for the value of the lands in the condition in which they were at the time of the descent cast. *Fredericks v. Isenman*, 41 N. J. Law, 212; *Muldoon v. Moore*, 55 N. J. Law, 410, 26 Atl. 892, 21 L. R. A. 89.

Two of the defendants (as before stated). Burwood and Joseph, made payments on the bond, which takes the case, as to them, out of the statute of limitations. The weight of evidence clearly is that the value of the lands descended, over and above the mortgage given by the ancestor, was not equal to the bond debt sued for. The amount paid upon the bond by the two last-named heirs was therefore more than the amount for which they were liable, each having paid more than one-fifth of the ancestor's debt. The liability is several, and not joint. Each heir is liable severally, and not jointly, for

* 2. See *Descent and Distribution*, vol. 16, Cent. L. g. §§ 454, 456, 461, 492.

what he receives from the ancestor, and not for what other heirs receive. When the share descended to an heir is taken in execution before alienation, or the value of it is applied to the debt after alienation, the heir is exonerated from further liability for the ancestor's debt.

The debt being several, and not joint, payment by Burwood and Joseph did not take the case out of the statute of limitations as to the other three heirs at law, and therefore the statute is, as to them, a bar to recovery. *Disborough v. Bidleman*, 21 N. J. Law, 677.

This action against the heirs is an action under and by force of our statute concerning heirs and devisees, and, while it is true that the statute of limitations cannot be pleaded in bar of a claim vesting on a statute (*Outwater v. Passaic*, 51 N. J. Law, 345, 18 Atl. 164), the claim in this case rests primarily upon the bond of the ancestor, and, if there is no legal subsisting claim against the ancestor, no obligation is imposed upon the heir. If the statute is not a bar, it would leave the lien for the debt of the ancestor unlimited in its duration upon the lands descended, although expressly barred as against the personal representative. Such a construction should not be favored, as the lien would extend to the heir of the heir who died intestate seised of the land he inherited. Although it is uniformly held that the plea of the statute of limitations is a personal privilege, in some of the states heirs and legatees may avail themselves of the statute, although originally intended for the benefit of the personal representatives, and for the reason that heirs and legatees are privy in estate. *Woods v. Woods*, 99 Tenn. 52, 41 S. W. 345; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Wood on Limitations* (3d Ed.) § 41.

This action is not like *Outwater v. Passaic*, supra, founded upon a claim created by statute, but upon a contract entered into by the ancestor, and, therefore, is not within the reason of the rule in that case. That it must be dealt with as an action on contract is evinced by the case of *Joss v. Mohn*, 55 N. J. Law, 407, 26 Atl. 987, holding that, in an action against heirs under the statute, the heirs are representatives of the deceased debtor, and the plaintiff is incompetent to testify to any transaction with or statement by the deceased debtor.

The rule to show cause should be made absolute.

BISHOP & BABCOCK CO. v. KEFFER.
(Supreme Court of New Jersey. Feb. 24, 1908.)

REPLEVIN — PLEADING — DECLARATION — AMENDMENT — RECOVERY — DESTRUCTION OF PROPERTY.

1. The pleadings in replevin in a suit under the thirty-third section of the statute are the same as in other cases in replevin.

2. If the plaintiff would have the right to amend his declaration after plea in a suit in replevin where the plaintiff had given the bond required by the thirty-eighth section of the replevin act, or where the defendant had made claim of property, and given the bond required under the ninth section of the act, he would have the same right in a proceeding under section 33 of the act.

3. In all these actions the value of the property, under proper pleadings, as well as damages for its detention, may be recovered by the plaintiff or defendant, as the case may be, who is entitled to the same.

4. The fact that goods and chattels mentioned in the writ of replevin have been destroyed by fire since the writ issued is immaterial upon the question of pleading.

(Syllabus by the Court.)

Case certified from circuit court, Atlantic county, for advisory opinion.

Action by the Bishop & Babcock Company against Thomas S. Keffer. Cause certified for advisory opinion. Plaintiff held entitled to amend declaration.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

William M. Clevenger, for plaintiff. Samuel E. Perry, for defendant.

FORT, J. The advisory opinion of this court is asked upon the following question: "The plaintiff having instituted its replevin suit without bond, and without demanding immediate possession of the goods under its writ by virtue of the provisions of section 33 of the replevin act (3 Gen. St. p. 2776), should the court amend the pleadings under the practice act, when it has been made known to the court that the goods sought to be replevined have been destroyed?"

The declaration filed in the cause is laid in the detinue, and not in the detinet. After the institution of the suit and the filing of the declaration, but before plea filed, the goods and chattels mentioned in the declaration were destroyed by fire. The plaintiff now applies to amend his declaration so that he may recover a judgment in the action, if he be entitled so to do, for the value of the goods.

By the thirty-third section of the supplement to "An act to regulate the action of replevin," approved June 13, 1890, it is provided: "That in any action of replevin, if the plaintiff does not require the immediate delivery to him of the property in question the official to whom the process shall issue shall, if so directed by the plaintiff or his attorney, serve the process and other papers given him as in other cases, without taking possession of or delivering the property in question, and upon the process being returned into court the cause shall be put at issue and brought on for trial or judgment by default may be entered, as in other cases, and upon judgment being entered awarding the possession of the property in question to the plaintiff an order may be made by the court as a part of the judgment, directing the prop-

er officer to take possession of and deliver the property in question in accordance with such judgment, and it shall thereupon be the duty of the officer so directed to execute such order and deliver the property to the party to whom it has been so awarded." 3 Gen. St. p. 2776.

The question certified relates simply to a matter of practice. At the common law, in replevin, when the sheriff executed the writ, if the defendant made claim of property in the goods sought to be replevied, that question was required to be first tried and decided before the sheriff could proceed to execute the writ by delivering the property to the plaintiff in replevin. *Frazier v. Fredericks*, 24 N. J. Law, 170. By our statute, in order to avoid the necessity of trial before delivery, the plaintiff enters into bond, in double the value of the property intended to be replevied, that delivery may be made; the defendant in replevin being protected by the bond. 8 Gen. St. p. 2777, § 38. If the defendant does not re-plevy by giving bond within 24 hours, as provided by statute, the property is delivered to the plaintiff, and the suit proceeds to try the right of property as it would have done at common law, before the sheriff delivered the property under the writ. Where, under the thirty-third section of our replevin act, suit is instituted, the case proceeds as it would have done at common law after the issuance of the writ, and before the delivery of the property. By the statute the plaintiff simply waives the sheriff's taking into his possession the property replevied, and the delivery of it to the plaintiff, and consents that pending the suit the sheriff may leave the property in the possession of the defendant. The effect of this statute is simply a waiver of any claim against the sheriff for failure to obey the command of his writ. The pleadings are the same as in other cases in replevin in a suit under the thirty-third section of the statute. The same issues may be raised as in any of the other conditions arising where the possession of the property is delivered or redelivered under the writ to the plaintiff or defendant under the various bonding processes provided by the statute. If the plaintiff would have the right to amend his declaration after plea in a suit in replevin where the plaintiff had given the bond required by the thirty-eighth section of the replevin act, or where the defendant had made claim of property, and given the bond required under the ninth section of the act, he would have the same right in a proceeding under section 33 of the act. In all these actions the value of the property, under proper pleadings, as well as damages for its detention, may be recovered by the plaintiff or defendant, as the case may be, who is entitled to the same. *Shinn on Replevin*, §§ 43, 381, 623, 661. The language of Chief Justice Green in *Frazier v. Fredericks*, *supra*, that "there is nothing in the statute to give countenance to the idea

that the legislature designed to turn the plaintiff round to a new action by depriving him of his common-law remedy," is very apt upon the question before us. *Fletcher v. Wilkins*, 6 East, 283. Always, at common law, if the declaration was in the detinet, the plaintiff recovered the value of the goods, damages for the taking, and costs, but never the goods themselves. *Harwood v. Smethurst*, 29 N. J. Law, 195, 203, 80 Am. Dec. 207. The statute under review expressly provides that "the cause shall be put at issue * * * as in other cases."

The fact that the goods and chattels mentioned in the writ of replevin have been destroyed by fire since the writ issued is immaterial upon the question of pleading. The chattels existed when the writ issued.

There seems to be no reason for refusing leave to amend the plaintiff's declaration, and it should be granted upon proper terms. The circuit court is so advised.

HOUSTON et al. v. PATERSON STATE LINE TRACTION CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

EMINENT DOMAIN—TRACTION COMPANY—NOTICE OF PROCEEDINGS.

1. In proceedings brought to condemn lands within the filed route of a traction railway company under and pursuant to the traction act of 1893 (P. L. p. 302; 3 Gen. St. p. 3235), a conveyance of the lands by the owner, at any time after the application is made and notice given to the owner as directed by the order of the justice, will not defeat the proceedings nor require notice thereof to be given to the grantee.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Charlotte A. Houston and others, against the Paterson State Line Traction Company. Judgment affirmed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Cornellus Doremus, for plaintiffs. Preston Stevenson, for defendant.

HENDRICKSON, J. This writ is brought to review the appointment of commissioners made in proceedings to condemn lands of the plaintiffs in certiorari, at the village of Ridgewood, in Bergen county, for the purpose of establishing a right of way for the traction railway of the defendant company. The proceeding is taken pursuant to the act entitled, "An act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways and to regulate the same," approved March 14, 1893, and the acts supplementary thereto. P. L. p. 302; 3 Gen. St. p. 3235.

The portion of the defendant's line involved in these proceedings approaches said village from the line of Midland Park on the west, and, after crossing Goodwin avenue and Mon-

roe street in said village, passes in a northeasterly direction through private lands of the plaintiff and upon private roads therein previously laid out by her, called "Washington Place," and thence to and along Franklin avenue to the Erie Railroad station in said village. Charlotte A. Houston was the holder of the legal title and the occupant of the premises; and although others are joined with her in prosecuting the writ, she will be referred to as plaintiff in this discussion. The plaintiff seeks to set aside the appointment on the ground that the roads known as "Washington Place" covered by the defendant's application, are public highways of the village of Ridgewood, and under the jurisdiction of the board of trustees of said municipality; and that the failure to make such municipality a party to the proceedings, by notice or otherwise, is a fatal defect in the proceedings. The contention that these roads were public highways is based upon the alleged effect of a deed of conveyance by the plaintiff of the roads in question to the "trustees of the village of Ridgewood," dated July 25, 1902, acknowledged on the same day, and delivered to and accepted by said board on July 30, 1902, at 3 o'clock in the afternoon. This deed conveys the lands, "to be used as public highway by the inhabitants of the village of Ridgewood forever," and would probably be effective as a dedication from the time it was so accepted, but it did not go into effect until after the inception of the proceedings to condemn. The defendant company had applied to the plaintiff and to her attorney on the 24th day of July, 1902, and also upon one occasion prior thereto, to fix a price upon the lands in question, and to enter into negotiations for their purchase by the company, but after repeated efforts the latter was unable to get any reply to its application from the plaintiff or her attorney. Thereupon the company, by its attorney, on July 29, 1902, and before it had any notice of such intended conveyance, filed its petition for the appointment of commissioners with a justice of the Supreme Court, who thereupon made an order appointing September 9, 1902, for the hearing, and directing notice thereof to be given to the owners. It was at this hearing that the appointment now under review was made.

It should be stated that notice of the hearing was given to the plaintiff on July 30, 1902, at 12 o'clock noon, and that a written notice of the condemnation proceedings was left with the clerk of the municipality on the same day and at the same hour. The latter presented this notice to the board of trustees of the village at their regular session that afternoon, but not until after the deed had been presented and accepted.

When the petition and affidavit were filed with the justice pursuant to the statute, and notice duly given to the plaintiff, who was the owner and occupant of the premises, as directed in the order assigning a day for the hearing, the jurisdiction of the court over the sub-

ject-matter was complete, and no subsequent conveyance to another could defeat the proceeding. This rule is in accord with the adjudications, and fulfills the plain object of the act. The sixth section prescribes that when such a company files with the Secretary of State a description of the route and map, exhibiting the same with the courses and distances thereof, it shall thereby secure the exclusive right to build the road within the period limited. The thirteenth section enacts that, upon the filing of the survey of such location or locations of such right of way, then the company, upon payment or tender of such compensation as is fixed in the condemnation proceedings, may enter upon and occupy the lands so surveyed and proceed to construct such right of way, etc. From the filing of the survey and map a pre-emption to the lands embraced therein exists in favor of the company, which ripens into a vested right under the proceedings to condemn. *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635; *Amer. Trans. Co. v. N. Y. S. & W. R. R. Co.*, 59 N. J. Law, 156, 35 Atl. 1118. In *National Railway Company v. Easton & Amboy R. R. Co.*, 30 N. J. Law, 181, in proceedings to condemn under charter provisions similar to these, Mr. Justice Depue said: "The subsequent transfers of the legal title by conveyances made after the proceedings were commenced by presenting the application cannot impair the regularity of the proceedings which were then in conformity to the law."

It has been held that, where notice of condemnation proceedings has been given to the owner of the land, his grantee pendente lite is not entitled to notice of such proceedings, nor of subsequent proceedings. *Plumer v. Wausau Boom Co.*, 49 Wis. 449, 5 N. W. 232. Also that parties acquiring rights in lands pending proceedings for their condemnation for railroad purposes will be deemed to have notice thereof, and will take subject to the award. *Trodden v. Winona & S. P. R. Co.*, 22 Minn. 198.

It is contended, however, that the act of 1900 (P. L. p. 79), applies, and that the doctrine suggested is inapplicable because of the third section of this act, which requires a lis pendens to be filed along with the petition in order to bind persons acquiring interests in the property pendente lite. But this act, which is a revision of previous acts, with added provisions, does not repeal or modify any part of the act of 1893, under which these proceedings were had. Many reasons for this conclusion might be given, but the fact that the Legislature, on the same day the revision was enacted, passed an act repealing sundry acts covered by the revision, in which no reference is made to the street railway act of 1893, is quite convincing. P. L. 1900, p. 78.

It is further contended that before the right to condemn could be lawfully exercised the company must have first obtained the consent of the municipality to the construction of its

railway over and upon the streets of the village within the line of its survey. This consent is made a condition precedent to the construction of its railway in the streets, but not to the condemnation of lands to secure its right of way through private property. We are not referred to any authority for this proposition, and the opposite of this contention was held under similar proceedings in *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.* (Colo. Sup.) 69 Pac. 564. It was suggested that *Hampton v. Clinton Water Co.*, 65 N. J. Law, 158, 46 Atl. 650, might apply, but it is not in point.

Another objection urged is that the location on file is invalid, because, for a portion of the line not involved in the application, the survey includes two alternative routes.

But this point was not raised in the proceedings below, and therefore cannot be considered. The other points suggested in the reasons were not discussed at the argument; and, finding in them no ground for error, the proceedings below are affirmed, with costs.

SIEGMAN v. MALONEY et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

CORPORATIONS — ILLEGAL DIVIDENDS — SUIT BY STOCKHOLDER — EXCUSE FOR NOT REQUESTING THE DIRECTORS TO ACT.

1. In an action by a stockholder against certain individuals to compel them to repay dividends illegally declared by them while directors of the corporation, complainant admitted that, though only 5 of the present 12 directors were in office when the dividends were declared, he had not requested the board to bring the suit, but alleged as an excuse that one of the directors was a brother and business associate of one defendant, and another was an employé and representative of another defendant. *Held*, that these facts did not justify the conclusion that an application to the board to prosecute the suit would have been futile.

Appeal from Court of Chancery.

Suit by Richard Siegmán against Martin Maloney and others. From a decree (51 Atl. 1003) sustaining a demurrer to the bill of complaint, and dismissing the bill, complainant appeals. Affirmed.

James E. Howell, for appellant. R. V. Lindabury, Charles L. Corbin, William H. Page, and Francis H. Kinnicutt, for respondents.

GUMMERE, C. J. The bill of complaint in this case was filed by a stockholder of the Electric Vehicle Company, in behalf of himself and of all other stockholders who might apply to be admitted as parties to the suit, against the company and certain individuals, who were its directors during the years 1899 and 1900, to compel the individual defendants to pay back into the treasury of the corporation certain dividends illegally

declared and paid by them during the period mentioned. It appears from an examination of the allegations of the bill that only five of the twelve directors in office at the time of the institution of the suit were upon the board at the time when the illegal dividends were declared and paid; and it is admitted in the bill that, notwithstanding this fact, the complainant did not apply to the board to bring suit for the purpose of obtaining the relief sought by the bill before beginning this action. He alleges in excuse of his failure in this regard that, in addition to the five members who participated in the declaration and payment of the illegal dividends, one other was a brother of, and connected in business with, one of the individual defendants, and that still another is "an employé and representative of one of the other individual defendants," and insists that for this reason he was justified in assuming that an application to the board to bring this suit would have been refused.

The right of a stockholder to prosecute a suit on behalf of the corporation can only be maintained by showing a refusal, either actual or presumptive, by the board of directors to do so. *Willoughby v. Chicago Junction Railways Co.*, 50 N. J. Eq. 667, 25 Atl. 277. And where there has been no actual refusal, the burden is on the stockholder who brings the suit to show the existence of such a state of facts as justifies the conclusion that an application to the board to prosecute would be futile. *Brewer v. Boston Theatre Co.*, 104 Mass. 387. The fact that a majority of the board of directors in office at the time of filing this bill had no part in the declaring or payment of the illegal dividends is sufficient to defeat the complainant's right to sue, unless the facts set out in the bill with relation to two of that majority afford sufficient grounds for concluding that one or the other of those two would, in willful disregard of the interests of the corporation, vote with the directors against whom relief is sought, and by doing so defeat an application to the board of directors to prosecute. But in our judgment, these facts justify no such conclusion. On the contrary, the presumption is that, notwithstanding the relations existing between the two directors and two of the individual defendants against whom relief is sought, the former would faithfully discharge the duty which they owed to the corporation and its stockholders, although their action would necessarily have an injurious effect upon the interests of those defendants. Neither the existence of blood nor of business relationship justifies a presumption of dishonesty under the conditions referred to.

The complainant having failed to show in his bill any necessity for prosecuting this action in his own name, and this having been specified as a ground of demurrer, the decree appealed from should be affirmed.

McCOOK et al. v. MUMBY et al.

(Court of Chancery of New Jersey. March 16, 1903.)

WILLS—CONSTRUCTION—LIFE TENANT—POWER OF DISPOSITION.

1. A testator by his will created a trust fund for the benefit of a son, to whom a life interest therein was given, and empowered the trustees thereof to advance and pay over to such son in his lifetime out of said fund any sum, not exceeding \$100,000, at their discretion, and further empowered such son by his will, made under certain circumstances, to dispose of \$150,000 out of said fund to any person he might see fit. The trustees advanced to said son from said fund an amount less than \$100,000. The son died under circumstances which rendered applicable the power conferred on him to dispose of \$150,000 out of the fund by his will.

Held that, upon the true construction of the will of the father, the son's power of disposition was not diminished by the amount previously advanced to him, but extended to the whole amount of the fund remaining in the trust after such advancement, if the same was less than \$150,000.

(Syllabus by the Court.)

Bill by John J. McCook and William T. Lawson, trustees, against Spencer M. Mumby and others, for directions as to the construction of a will. Decree rendered.

John O. H. Pitney, for complainants. Charles L. Corbin, for Adele Mittant Day. Elmer King, for Spencer M. Mumby and Malcolm Campbell, executors. George Holmes, for Sarah Lord McCormick and others. John E. Miller, for Susan De Forest Day Parker. William A. Barkalow, guardian ad litem of Mildred Day McCormick, an infant.

MAGIE, Ch. The complainants, John J. McCook and William T. Lawson, as trustees of a trust fund created under the provisions of the last will and testament of Henry Day, late of Morristown, in this state, deceased, and of the codicils thereto (which will and codicils were duly admitted to probate in the county of Morris on January 22, 1893), by their bill in this cause seek the direction of this court as to the disposition of the fund thus created which is now in their hands. They have made parties defendant to their bill, Spencer M. Mumby and Malcolm Campbell, executors and trustees under the will of George Lord Day, deceased; Adele Mittant Day, Susan De Forest Day Parker, Sarah Lord McCormick, Robert Hall McCormick, Henrietta Hamilton McCormick, Elizabeth Day McCormick, Phebe Lord McCormick, and Mildred Day McCormick (the last named being an infant); and they charge that conflicting claims to the trust fund in their hands have been made by the defendants, which claims conflict by reason of variant constructions of certain of the provisions of the will and codicils of Henry Day, in respect to which constructions the complainants have doubts. They therefore seek a judicial construction thereof, and directions for their conduct, for their protection. They called upon the defendants to answer and set

up their respective claims. Answers have been filed by the defendants which, it is sufficient to say, do indicate conflicting claims to the trust fund in the hands of complainants, dependent upon conflicting constructions of the will and codicils of Henry Day.

The clauses of the will which are thus drawn in question are contained in the sixth item and a portion of the seventh item thereof, which read as follows:

"Sixth: The remaining half of my residuary estate, real and personal, and in case my said wife should not survive me, the whole thereof, I direct to be disposed of in the following manner: I direct it to be divided into as many shares as I may leave children me surviving and children who may then be deceased leaving issue me surviving. One of these shares I give to be divided equally among the issue of each of my then deceased children per stirpes and not per capita.

"The other shares I direct my executors to hold each as a separate trust estate, one to the use of each child me surviving during the life of such child, to keep the same invested in securities by them considered good, to receive the rents, profits and income of the same and to pay over the net proceeds of the same to the use of such child half yearly or oftener during his or her life, and upon his or her death, I give the said sum so held for the use of such child to be disposed of as shall be directed by the last will and testament or appointment of any such child, made according to the powers hereinafter named and duly executed, and in default of any such will or appointment, I give said sum to the lawful issue of such child to be divided among them per stirpes and not per capita, and in default of any such will, appointment or issue, then to my lawful issue then living, such issue taking per stirpes and not per capita. And I hereby authorize any such child last named to dispose of the share limited to his or her use by will or appointment to or among his or her or my lawful issue, in such shares and upon such legal trusts as each child respectively may direct, and in default of any such issue of such child, then I authorize said child to dispose of one hundred and fifty thousand dollars of said fund held in trust for his or her use to any person or persons or charities he or she may see fit, and the remainder of said fund I give to my lawful issue then living, such issue taking per stirpes and not per capita.

"The share appropriated to the use of my son George under this clause, shall be held by my remaining executrix and executors; but the investments of the same shall be made by and with the consent of my said son.

"Seventh: I authorize my executrix and executors in their discretion and if they shall think it for the best interest of my son George at any time and from time to time to advance and pay to him any portion of the share above mentioned limited to his use, not

exceeding in all the sum of one hundred thousand dollars. * * *

In connection with these provisions, there is to be considered the first clause of the second codicil, which reads as follows:

"First. I do hereby appoint as trustees for the fund to be set apart for the use of my son George Lord Day, under the sixth clause of my said will, Daniel Lord, and John J. McCook, with all the powers and duties in said will and codicil thereto mentioned.

"I hereby revoke the appointment of other trustees for said fund in said will and codicil mentioned"—

And the sixth item of the same codicil, which reads as follows:

"Sixth: Inasmuch as the executrix and the executors of my said will, will not in every case be trustees of each trust fund in said will mentioned, wherever in my said will I have given any power or authority to my executrix or executors by name over any of the trust funds, it is to be understood that that authority shall apply to the respective trustees of such trust fund after said funds are appropriated and set apart and the power of the executors over the same shall from that time cease. This shall apply especially to the seventh article of my said will."

The circumstances under which the complainants' relief is sought, as established by the proofs, are the following: The complainant McCook was one of the trustees of the fund set apart for the testator's son George Lord Day, appointed by the first item of the second codicil. The complainant William T. Lawson has been appointed a trustee, with the complainant McCook, of the same fund, in conformity with the provisions contained in the said will and codicil. George Lord Day has died testate, and complainants have duly stated and settled their account, as trustees, in the orphans' court of Morris county, and there has been found to be in their hands \$119,636.20, which amount that court has directed them to pay over according to the terms of their trust. During the lifetime of George Lord Day the trustees of this fund paid to him out of the same in all the sum of \$96,813, which payments were made pursuant to the authority conferred by the provisions of the seventh item of the will and the sixth item of the second codicil. George Lord Day died without leaving children, but leaving a widow, Adele Mittant Day. By his will he bequeathed certain legacies, and then made therein the following provisions:

"All other property of which I shall be seized or possessed at the time of my death, whether such property be real or personal, and whether it shall be mine in absolute ownership, or held in trust for my benefit by trustees under the will of my father or of my mother, with powers granted to me to dispose thereof by my will, I give (intending hereby to exercise the said powers of disposition by my will) to my executors herein-

after named (acting as trustees) to have and to hold unto them, their successor or successors upon the following trusts, viz.

"To invest the same and keep the same invested as a trust fund and to hold the capital of said trust fund during the life of my wife Adele Mittant Day, and to pay over to her the net income thereof (after deduction of all necessary and proper expenses of said trust) in equal quarterly or semi-annual payments, according as my said wife shall desire; and upon the death of my said wife, to pay over the capital of said trust fund, in equal shares, to any child or children of mine, and any child or children of any deceased child or children, of mine, who shall be living at the decease of my said wife, such children and grandchildren to take per stirpes and not per capita; and if but one child of mine and no grandchildren or but one grandchild and no children, shall survive my said wife, then upon the death of my said wife, to pay over the entire capital of said trust fund to such child or grandchild.

"Should no child or children, grandchild or grandchildren of mine survive my said wife, then upon the death of my said wife, I give the entire capital of said trust fund to the issue, then living, of my father Henry Day, such issue to take per stirpes and not per capita.

* * * * *

"Furthermore, should the above disposition of the property bequeathed in trust for my benefit by the will of my father, he held to be invalid as an exercise of the power of appointment by my will, granted to me by the said will of my father, in respect of said property, then and in that case, I make no alternative disposition of said property bequeathed in trust for my benefit by the will of my said father with power to me to dispose thereof by my will; hoping that the person or persons, who, upon my failure to exercise said power, will, according to the terms of the said will of my father, be entitled to said property, will be able and willing to find means of carrying out my wishes in respect thereto, as hereinabove expressed."

It further appears that Henry Day had four children: Elizabeth, who married one Inglis; Sarah McCormick, one of the defendants; George Lord Day, deceased; and Susan De Forest Day Parker, also one of the defendants. Mrs. Inglis died intestate in the lifetime of Henry Day, without issue. Mrs. McCormick has five children. Four of them are adults, and one, named Mildred, is a minor. These children are also defendants. Mrs. Parker is now living, and has no issue.

The contention on the part of the executors and widow of George Lord Day is that, by the will of Henry Day, a power of appointment was conferred upon George Lord Day, extending to \$150,000 of the fund, and that the will of George Lord Day duly executed that power, and took effect upon the whole

of the fund in their hands, which was less in amount than the sum which he was empowered to appoint.

The contention of some of the defendants, and particularly of the infant, answering by her guardian ad litem, is that no power of appointment was conferred on George Lord Day by the will of Henry Day, but, if such a power was conferred, it extended only to so much of the \$150,000 named therein as had not been advanced and paid over out of the fund to him in his lifetime, and that, in case the power to appoint is discoverable, it extended only to so much of the fund in the hands of the complainants as remained after deducting the \$98,813 previously advanced and paid to him. Under this construction it is further contended that, by the will of Henry Day, so much of the fund as was not properly disposed of by the appointment of George Lord Day is to be distributed and paid by the trustees to the issue of Henry Day, and that the living children of Mrs. McCormick are entitled to share therein. The first question to be considered relates to the power of appointment conferred on George Lord Day, and its extent.

Under the provisions of the will of Henry Day, it seems to me that there can be no doubt that the testator conferred upon George Lord Day, his son, a power of appointment in connection with the fund in which he had an interest. The provisions of the sixth item of the will fall naturally into four categories: The first provides for the disposition of the fund in case George died leaving no will and leaving issue. The second, for the case of George dying leaving no will and leaving no issue. The third provides that if George died leaving issue he could dispose of the entire fund by his will among the issue of Henry Day, including his own issue. And, lastly, it provides for the case of George dying leaving no issue, in which case power is conferred to dispose of \$150,000 out of this fund, by his will, "to any person or persons or charities that he should see fit."

The whole clause conforms in substance to the usual testamentary description of powers of appointment. The testator, after indicating the right of the children having a life interest in the fund, bequeaths the sum held for the use of the child to be disposed of as directed by such child's last will and testament or appointment, under the powers conferred by the will. In case George had left living issue, he was empowered by will to appoint to whom of the issue of Henry Day, including his own issue, the fund should go. In case George left no issue, he was in like manner empowered to appoint by will to whom \$150,000 of the fund should go; and the testator disposed of any excess that might remain in the fund.

The facts proved establish the right of George Lord Day to make the appointment under the last category of the provisions of the sixth clause of Henry Day's will. He

died leaving no child. He was therefore empowered, by testamentary disposition, to appoint \$150,000 out of this trust fund to any person at his discretion. His will seems to have been executed with all the formalities required to make a valid testamentary disposition of his property, and it executed the power of appointment. It probably would have been a sufficient appointment if it had failed to indicate an intent to exercise the power conferred on him in that respect. But there is an express declaration in his will of an intent to make the appointment under the power conferred upon him by the will of his father, and, although he expresses some doubt whether his appointment can be effectuated, his doubt can have no effect upon the judgment of the court if in fact, his will, on a proper construction of the provisions of the will of Henry Day, was a valid appointment by George Lord Day. On that subject I have no doubt, and find in the circumstances nothing to indicate why George Lord Day expressed a doubt on this subject in his will, though it may be conjectured that he had in mind a possibility of issue being born to him and living at the time of his death. In such case the provisions of his will would have been, so far as the interest of his wife is concerned, ineffective.

Upon the execution of a power of appointment of this sort, it is well-settled law that the appointee takes, not from the person who appoints, but from the original donor or testator, so that the interest of any person in this fund acquired by the appointment of George Lord Day was an interest which emanated from the original testator, Henry Day, George being only the indicator pointing out to whom the testator's bounty should go. *Leggett v. Doremus*, 25 N. J. Eq. 122.

The provision contained in the seventh item of Henry Day's will, giving authority to the executors, at their discretion, and if they deemed it for the best interests of his son George to advance and pay to him any portion of the share limited to his use, not exceeding \$100,000 (an authority afterward extended by the sixth item of the second codicil to the trustees of the fund), indicates, in my judgment, a plain intent on the part of the testator to withdraw from the fund so much as was advanced and paid to George, which sum so paid became his property, and to leave the remainder of the fund under the trust. When, therefore, the testator gives authority to any child to appoint out of the trust fund limited to his use the sum of \$150,000, under certain circumstances, the trustees must recognize the interest of the appointee in the fund remaining in their hands after advancement and payment of the permitted sums to the child having a life interest. It results that the fund in the hands of the trustees, being less than the amount which George Lord Day was empowered to dispose of by appointment, is wholly disposed of by the appointment con-

tained in his will, and a decree must be made, giving this construction to the will, for the benefit of the trustees thereunder.

This result renders it unnecessary to give any attention to the further question asked respecting the persons to whom the residuum of this fund, if there were any, would pass under the provisions of the will of Henry Day.

A. A. GRIFFING IRON CO. et al. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Court of Errors and Appeals of New Jersey.
Feb. 25, 1903.)

INSURANCE POLICY—CONSTRUCTION.

1. Exemplification of the rule that, in construing a policy of insurance, the whole of its provisions are to be taken together.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the A. A. Griffing Iron Company and others against the Liverpool & London & Globe Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. V. Lindabury, for plaintiff in error. J. B. Vredenburg, for defendants in error.

PITNEY, J. This was an action upon a policy of fire insurance written by the plaintiff in error for the A. A. Griffing Iron Company. The sole question is whether the policy covered certain property that was destroyed by fire, and turns upon the construction of the descriptive portion of the policy. The proofs show that the iron company was the owner of extensive works at Jersey City, the greater part of which was contained in a large cluster of buildings adjoining each other, used for various purposes, and designated according to their different uses, viz., "Foundry," "Machine Shop," "Stock and Store Room," "Carpenter Shop," "Core Oven House," "Office Building," etc. Standing upon the same property, and used in connection with the buildings just mentioned, but detached by a considerable distance from them, was a frame building known as the "Sand Shed," in size about 210 feet long, and about 41 feet wide, with two additions or extensions of considerable size—one at the end and the other at the side of the main building. This building and its additions were used in part for the storage of molding sand, such as was used daily in the foundry of the insured. Portions of the building were used for the storage of patterns that were used in molding, and of machinery and merchandize of various kinds. In one part there were stalls for some of the horses used at the works, other horses being stabled in one of the clustered buildings. It was this sand shed

and its contents that were destroyed by the fire that gave rise to this action.

The situation of the property of the insured, and its customary use, were substantially as above detailed, both at the time the policy in suit was written, and also at the time of the fire. This policy was one of about 80 policies, substantially concurrent, written by nearly as many different insurance companies, all of which were in force at the time of the fire. The descriptive portion was printed upon a separate sheet of paper, and this was attached to the policy; the amount insured upon each item being inserted, however, in typewriting. The description was inserted immediately after that portion of the policy (it was in standard form) whereby the insurance company undertook to insure the iron company against loss or damage by fire, "to an amount not exceeding twenty-five thousand dollars, to the following described property while located and contained as described herein and not elsewhere, to wit:" (Then follows descriptive sheet, viz.:)

"A. A. Griffing Iron Company.

"On the several buildings and contents of their Ironworks as described in the form below, all situated on the east side of Morris Canal, south of Communipaw Avenue, in Jersey City, New Jersey. It being intended to cover in each group all the buildings and fences belonging to said Company, which are now standing within the limits of said group, except by name.

"Group No. 1 consists of foundry building, core oven house, tumbling room, grinding room, coke sheds, iron shed and sand shed, including additions.

"Group No. 2 consists of machine shop, testing room, pattern shop, store room, boiler and engine house.

"Group No. 3 consists of stock and storage room, including additions.

"Group No. 4 consists of stable, feed loft and fences surrounding the property.

"Group No. 5 consists of general offices and pattern vaults.

"Divided and to apply as follows:

"\$6,171.80. On all buildings contained in groups Nos. 1, 2, 3, 4, and 5.

"\$2,880.15. On all machines, foundations and conducts, flasks, cupolas, blowers, cranes, core shells and supplies pertaining thereto contained in group No. 1.

"\$3,703.05. On all machinery and tools, both fixed and movable, including engines, boilers, conducts, foundations, belting, shafting and steam pipe connections, all contained in group No. 2.

"\$3,291.55. On all radiator, heater, boiler or other castings, pipe, nipples and iron fittings, manufactured and in the process of manufacture, and supplies contained in groups Nos. 1, 2 and 3.

"\$2,468.80. On all stores and supplies as

manufacturers, jobbers and dealers in steam and hot water heating goods, including brass and iron fittings, bronze, bronzing liquid and mill supplies, contained in group No. 2.

"\$5,760.50. On all wooden and metal patterns of every description contained in groups Nos. 1, 2 and 5, and no one pattern to exceed \$1,000 in value.

"\$230.40. On horses, not exceeding \$300 on any one horse, single and double trucks, wagons, carts, carriages, harnesses, robes, blankets, and all stable utensils and feed, their own or held in trust by them, contained in groups 1, 2, 3, and 4.

"\$493.75. On office furniture and fixtures, including safes, stationery, advertising novelties, pamphlets, catalogues, books of account and record, cabinet containing files of mercantile credit information, and office supplies contained in groups Nos. 3 and 5.

"Reference had to plan of said premises, Book 6, page 95, Jersey City Insurance Maps.

"And also to plan on file in the office of Patterson & Rowlands, Jersey City, N. J."

In the descriptive portion of the policy, it will be noticed that the enumerated "groups" refer generally to groups of buildings, but that the insurance is distributed, not in accordance with the separate groups, but according to the separate items that are subsequently mentioned. The first item comprises all the insured buildings. The remaining items include personal property of various kinds, the location of each class of personal property being fixed by reference to the buildings mentioned in the groups. Then follows the reference to the maps and plans. These were introduced in evidence upon the trial.

The Jersey City insurance maps are not of material service in determining the present controversy. The Patterson & Rowlands plan consists of several parts. One is a bird's-eye view of all the buildings of the Griffing Iron Company, with designations on each indicating the use to which it is put, the material of which it is constructed, the general form and construction of the building, and the style of its roofing. Upon this part of the plan the "sand shed" is shown, under that designation, and its form, construction, and style of roof are indicated. Another part of the Patterson & Rowlands plan is a ground plan of the buildings. This shows the sand shed, situate detached from the other buildings, and indicates its size and other features with the same particularity that is observed in displaying the more extensive buildings. The latter buildings, however, are divided upon this ground plan into several groups by distinct red division lines, and these groups are numbered serially from 1 to 5. The demarcation of these groups corresponds pretty closely with the distribution of the buildings among the several groups as mentioned in the printed description attached to the policy. But the sand shed, being detached from the main cluster of buildings, is,

of course, not included within any of the groups thus indicated by red lines. Another portion of the Patterson & Rowlands plan consists of explanatory marginal notes, purporting to give information of importance to insurers. Among these notes are the following: "Construction: Floors of foundry, tumbling room, basement of office, and most of sand shed are incombustible. Other floors are light plank on joists. Roofs are boards on joists, supported by wood trusses." Again: "Materials of which walls of building are constructed are shown by colors: Brick—red; wood—yellow; stone or iron—grey." Again: "Property not belonging to risk has only margin colored." And again: "In views, roofs are colored grey if covered with material not easily ignited, as tin, slate, and gravelled tar; roofs are colored buff if covering material is easily ignited, as shingles, bare boards, or tarred felt on boards." In another part of the marginal notes a dotted line is set down as the symbol for "outline of awnings and open side of sheds"; a solid line is shown as indicating "fence"; and a characteristic symbol is shown as indicating "fire ladder to roof."

The significance of these explanatory notes appears when it is mentioned that the sand shed is shown on both the bird's-eye view and the ground plan, colored in solid color, whereas buildings not belonging to the risk are shown with the margin only colored. The sand shed is shown in yellow, indicating construction of wood. The main part of its roof is colored grey, indicating material not easily ignited. The remaining portion is colored buff, indicating combustible material, and upon this portion of the roof is inscribed the word "boards." Upon the grey portion is marked "P. & B. roofing." A fire ladder is shown at one end of the building. Upon the ground plan the dimensions of the building are given with as much particularity as is shown in the case of the other buildings. And along one of its sides is a dotted line, indicating that the shed is open on that side.

The argument of the plaintiff in error includes these propositions, viz.: (1) That "group No. 1," as that term is used in the policy, embraced only the buildings situate within the boundaries of the group thus numbered on the Patterson & Rowlands map; (2) that the sand shed was not insured by being named in the policy, because the words "except by name" do not relate to buildings outside the groups, but only provide against the misnomer of those within the groups; and (3) that if the sand shed was insured under the clause referred to—"except by name"—that did not bring the contents of the sand shed within the operation of the policy.

The argument, when analyzed, will be found to amount to this: That the reference to the Patterson & Rowlands plan was only for the purpose of showing what the policy did not show, viz., the limits of the several

groups, and that the plan was not for any other purpose, or to any other extent a part of the policy. And the argument includes the contention that the groups mentioned in the printed form upon the policy refer to the groups as shown upon the ground plan of Patterson & Rowlands, so that the grouping was intended to be by plots, and not by buildings. This statement of the argument is taken from the brief of the plaintiff in error. It will be seen that by selecting from all the descriptive terms of the policy the single word "group," by assigning to that word an arbitrary meaning, indicated by its use upon one part of the Patterson & Rowlands plan, and by discarding all other evidence of intention appearing upon the face of the policy, and upon the plan referred to in the policy, it is possible to arrive at a conclusion satisfactory to the plaintiff in error. But the law does not permit us thus to ignore all other descriptive terms in the policy contained, and the whole spirit and purpose of the contract. The whole of the policy must be taken together, including all the terms of description. The Patterson & Rowlands plan and the Jersey City Insurance Map are to be referred to in aid of the descriptive portion of the policy, and no part of either plan may be rejected. Nothing can be more clear than that this policy was intended to cover all the several buildings and their contents, constituting the ironworks of the insured, situate in the location mentioned. The buildings are divided into groups, not for the purpose of distributing the building insurance, for this is included in one item, but for the purpose of distributing the insurance on personal property with respect to the customary location of such property. In the printed description the word "group" may be given a rhetorical significance. In the Patterson & Rowlands plan it may be given, of course, a geographical significance. But there is nothing in the use of the word "group" that by any fair construction can limit the general scope and purpose of the policy.

Much stress was laid upon the following clause of the description, viz.: "It being intended to cover in each group all the buildings and fences belonging to said company, which are now standing within the limits of said group, except by name." After this follows "group No. 1," in which the last building mentioned is "sand shed, including additions." The words "except by name," in the connection in which they are used, evidently make necessary a somewhat loose construction of the sentence, as if it read, "which are now standing within the limits of said group, except where a building is included within a group by name, although not standing within its limits." This explains the mention of the sand shed and additions, together with "group No. 1," although a reference to the Patterson & Rowlands map shows that it is not included within "group No. 1" as there shown. It is thus abundantly evident that

the sand shed and its additions, and the contents thereof, are included within the terms of the policy. The building was a part of the ironworks. It was apparently included within the very boundary fences that were insured by the same policy. Its construction is particularly described upon the Patterson & Rowlands plan. It is there shown, both in the bird's-eye view and in the ground plan, with every particularity of detail. It is mentioned by name in the printed description attached to the policy, and is there included in "group No. 1," evidently for the purpose of insuring the contents as well as the building; for, if it had been intended to insure the building only, this would have been accomplished by adding it at the end of the first "item," so as to make that item read: "\$6,171.80. On all buildings contained in groups 1, 2, 3, 4, and 5, and the sand shed, including additions."

The judgment under review should be affirmed.

STATE v. SMITH.

(Court of Errors and Appeals of New Jersey.
March 4, 1903.)

CRIMINAL LAW—EVIDENCE—MAPS.

1. Maps, which are not original evidence, may be admitted on the trial of an issue and used only as illustrative of evidence otherwise offered and admitted. When the relation at a particular time of things of a movable nature to things which are immovable is in question, the former should not be delineated on a map to be thus used, unless it is made to appear by evidence of witnesses that they know their relation at that time, and had correctly pointed out their position to the maker of the map. The delineation thus made may be used to illustrate the evidence, and its force will depend on the credit given to the evidence of knowledge of the relative position, and of its having been correctly pointed out.

(Syllabus by the Court.)

Error to Court of Oyer and Terminer, Atlantic County.

Leander Smith was convicted of murder, and brings error. Affirmed.

Samuel E. Perry, for plaintiff in error.
J. E. P. Abbott, for the State.

MAGIE, Ch. The record and proceedings brought before us by the writ of error in this cause have been examined with care. We find no error pointed out by the exceptions to the admission or rejection of evidence. The charge of the court left the matter at issue to the judgment of the jury, with directions which, we find, are not open to any of the exceptions or criticisms made on the part of the plaintiff in error.

Nor have we been able to discover anything in the conduct of the trial, as disclosed by the proceedings certified, whereby the plaintiff in error suffered any wrong or injury.

Much criticism has been directed by counsel for the plaintiff in error to the conduct

of the court with respect to a map made by a surveyor who was called as a witness by the state, and the testimony in respect thereto. Maps, which are not original evidence, may be admitted and used only as illustrative of evidence otherwise offered and duly admitted. Generally, they should only delineate such physical facts as are permanent in character, or may be presumed to have existed in the same relations at the time to which the inquiry is directed. Things which are movable in their nature, and the relation of which to each other and to immovable things around them have a bearing on the question at issue, should not be delineated thereon, unless it is made to appear by the evidence of witnesses that they knew the position which they occupied at the time in question, and had truthfully and correctly pointed out their position to the maker of the map. The delineation of movable things made upon such information possesses no evidential force, but may be used to illustrate the evidence, and its force as illustrative must depend on the credit given by the jury to the evidence of persons who testify to their knowledge of the situation of such things, and to their having correctly pointed out their positions.

In this case, the surveyor who had made the map testified that it correctly delineated the room in which the homicide was said to have been committed, and the house in which the room was, and some of the surroundings of the house. It also appeared from his testimony that he had also delineated thereon certain articles of furniture in the room in question. He distinctly testified that the delineation of the furniture indicated its position at the time he made the survey, which was some weeks after the alleged homicide. As it seems to have been claimed that the position of the movable articles in that room, in their relation to the room and each other, was a question of importance in the cause, the map illustrative of the situation should not have shown them as they were at the time of the survey, unless upon independent evidence showing that they occupied the same position at the time of the homicide. But no legal error was committed by the trial judge in refusing to strike out the evidence. On the contrary, it would have been an injustice to the defendant to do so. The map had been exhibited, delineating the position of the furniture of the room. The proof that the delineation indicated its position at the time of the surveyor's observation deprived it of any value as illustrative of its position at the time of the homicide, and of that proof the defendant ought not to have been deprived.

As the witnesses afterward examined about this map testified that the situation of the furniture in the room in question at the time of the homicide was substantially identical with the situation as delineated on

the map, the exhibition of the map in the presence of the jury could have done no injury to the defendant. The map was not received in evidence, nor was it afterward used for illustration, another map being used for that purpose. We think that, while the map in respect to which the surveyor was first examined was not such as, in the absence of other testimony, could have been used to illustrate the position of the furniture, there was no legal error in permitting the examination, and there was no injury done to the defendant by the incident.

The judgment must be affirmed.

THORP v. SMITH et al.

(Court of Errors and Appeals of New Jersey.
March 4, 1903.)

MORTGAGE—UNDUE INFLUENCE—SETTING ASIDE—SUFFICIENCY OF EVIDENCE.

1. In a suit to have declared void a mortgage given by a father to his daughter without valuable consideration, it was shown that the father was naturally of a weak will, and that when he executed the mortgage, a few weeks before his death, he was advanced in years, feeble in health, with mental powers weakened by cerebral disease, and did not receive any independent advice as to the effect of the instrument, but was subjected to the influence of his daughter. It did not appear that the father understood that by giving the mortgage he put himself in the power of his daughter, or that he fully appreciated his obligations to the complainant, his son. *Held* sufficient to justify a decree setting aside the mortgage as void.

Appeal from Court of Chancery.

Bill by Edwin W. Thorp against Isabella T. Smith and another to have a mortgage declared void. From a decree for complainant, advised by Vice Chancellor Pitney (51 Atl. 437), defendants appeal. Affirmed.

Joseph Anderson, for appellants. James A. Gordon, for respondent.

PER CURIAM. Ezekial Thorp, the father of Isabella T. Smith, the appellant, and of Edwin W. Thorp, the respondent, died intestate, seised of certain lands and premises in the city of Jersey City. A few weeks before his death he executed and delivered to his daughter, Isabella, without any valuable consideration being paid by her therefor, a mortgage for \$3,000 upon these lands. The respondent (the complainant below) seeks by his bill of complaint to have this mortgage declared to be void and of no effect as to the undivided one-half part of the lands and premises which descended to him on the death of his father; the grounds of relief being that it was the product of undue influence exercised by the daughter, and that the father was mentally incapable of appreciating the legal effect of his act. The opinion of the learned Vice Chancellor who heard the case, after a very full recital of the facts proved before him, thus summarizes those

which led him to the conclusion that the complainant was entitled to the relief prayed by him: "The mortgagor was advanced in years, in feeble health, naturally of weak will, with mental powers weakened by cerebral disease so that he did not appreciate his pecuniary circumstances and moral obligations, and was unable 'clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just disposition of his property.' While in that condition he was subjected to the influence of the defendant, and executed the mortgage without having the benefit of the advice of independent and disinterested counsel, given in the absence of the mortgagee, to make him fully understand, realize, and appreciate the full effect and consequences of the instrument in all its bearings. It does not appear that he understood that by its execution he put himself in the power of his daughter, without anything in writing to protect him. It does not appear that he fully appreciated his obligations to his son, the complainant. The burthen is on the defendant to establish the affirmative of these propositions, and, in my opinion, she has failed therein." An examination of the testimony proves the accuracy of this summary. The facts set out therein justify the conclusion reached by the Vice Chancellor.

The decree below should be affirmed.

COLER v. TACOMA RY. & POWER CO. et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

CORPORATIONS — DISSOLUTION — ISSUE OF STOCK—VALIDITY—STOCK IN OTH- ER CORPORATION.

1. An arrangement having been made between the Tacoma Railway & Power Company, a corporation of this state, and the Seattle-Tacoma Interurban Railway, a corporation of the state of Washington, by which the New Jersey company should transfer all its property and franchises, except the franchise of being a corporation, to the Washington company, and the latter should issue therefor to the New Jersey company 20,000 shares of fully-paid stock of the par value of \$100 per share, or, in case any stockholder in the New Jersey company refused to accept such stock in exchange for his own stock share for share, then the Washington company should pay \$35 cash in lieu of each share so refused: *Held*, on bill filed by a stockholder in the New Jersey company, that the consummation of the arrangement ought to be restrained, because

(1) It was tantamount to a dissolution of the New Jersey corporation, within the meaning of our statute, and therefore could be legally carried out only by such proceedings as our statute prescribed for dissolution.

(2) Under the Constitution and judicial decisions in Washington, it is unlawful to issue corporate stock as fully paid for less than its par value, and the above arrangement shows on its face a purpose to issue such stock for 35 per cent. of its par value.

(3) Under the Constitution and judicial deci-

sions in Washington it is unlawful for any corporation to hold stock and exercise the usual rights of stockholders in a corporation of that state.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by William N. Coler, Jr., against the Tacoma Railway & Power Company and others. Application for preliminary injunction denied (53 Atl. 680), and complainant appeals. Reversed.

Chandler W. Riker, for complainant. Lindabury, for defendants.

DIXON, J. The Tacoma Railway & Power Company is a corporation organized under the laws of this state, having a capital stock of 20,000 shares, of the par value of \$100 each, and owning and operating a street railway in the city of Tacoma, in the state of Washington. The Seattle-Tacoma Interurban Railway is a corporation organized under the laws of the state of Washington. The present bill is filed by a stockholder of the New Jersey company against that company, its officers and directors, to prevent the consummation of an arrangement by which the company is to transfer all its property and franchises, except the franchise of being a corporation, to the Washington company, and is to receive therefor 20,000 shares of stock in the latter company, of the par value of \$100 each, besides certain assumptions and guaranties; but, if any stockholder of the New Jersey company should be unwilling to exchange his shares of stock for an equal number of shares of stock in the Washington company, then the latter company is to pay the New Jersey company \$35 in cash for each share held by the unwilling stockholder in lieu of an equal number of shares in the Washington company. The 20,000 shares of stock which the Washington company agrees to give will be created by an increase of its capital stock to that extent.

The power of the New Jersey Company to carry out this scheme is based by the defendants on the seventh paragraph of its certificate of incorporation, in these words: "With the assent in writing and pursuant to a vote of the holders of a majority of the stock issued and outstanding, and not otherwise, the stockholders having been formally convened in meeting, the directors shall have power and authority to sell, assign, transfer, mortgage or otherwise dispose of the whole property of this corporation." This clause does not confer the necessary power. It authorizes the transfer of property only, while the arrangement in question requires the transfer, not merely of all the property, but also of all the franchises of the company except the franchise of being a corporation. A corporation which has sold only its property, receiving therefor a valuable consideration, is still able to engage in new enterprises within the scope of its charter; but one which has parted with all its franchises

1. 3. See Corporations, vol. 12, Cent. Dig. §§ 1531, 1532.

except that of existence is for all purposes outside of the winding up of its affairs defunct. It is in the exact condition contemplated by our statute as that of a dissolved corporation, for the fifty-third section of our corporation act (P. L. 1896, pp. 277, 295) provides that "all corporations, whether they expire by their own limitations or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established." That such dissolution was regarded as the practical effect of the present arrangement, and so intended by the directors and stockholders who favored it, is made evident by the fact that at the same meetings at which the arrangement was approved they voted for a formal dissolution of the company under the statute. The mode in which a New Jersey corporation can voluntarily effect its own dissolution is prescribed by section 31 of our act, and, of course, no other mode can legally be adopted. It is conceded that this mode was not pursued, and it seems necessarily to follow that the plan which involves dissolution is not yet capable of lawful consummation.

But, if the proposed transfer be not considered as a dissolution within the intent of the statute, still there is reason why it should be enjoined. According to the decisions of the courts of Washington it is unlawful to issue corporate stock as fully paid up unless the corporation receives therefor money or money's worth to the face value of the stock, and, when such stock is issued for property, the judgment of the corporate directors respecting the value of the property is not conclusive against innocent creditors, in whose favor shares so issued will be assessable until the face value is paid in. *Adamant Mfg. Co. v. Wallace* (Wash.) 48 Pac. 415; *Manhattan Trust Co. v. Seattle Coal & Iron Co.* (Wash.) 53 Pac. 951. Besides these decisions, the State Constitution (article 12, § 6) declares that "all fictitious increase of [corporate] stock or indebtedness shall be void." This phrase "fictitious increase of stock" must, I think, include an issue of new stock when both the corporation and the recipient of the stock know that it is being issued for less than its face value. Such knowledge is shown in the present case by, the very terms of the proposal, for the Washington company offers a share of its stock having a face value of \$100, or in lieu thereof \$35 in cash, as the unit of the price at which it will buy the property and franchises of the New Jersey company; thereby indicating beyond dispute that in this transaction the share and the cash are deemed of equal value. To the extent of 65 per cent. of the issue the increase of capital stock will be,

therefore, "fictitious," and, according to the Constitution, "void." Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company. He is entitled to require that his company shall not be stripped of its property and franchises for a counterfeit which is offered and about to be accepted as genuine.

In yet another aspect this arrangement should be disapproved. The courts of Washington have decided that one corporation cannot subscribe for, purchase, hold, or vote upon the shares of stock of another corporation without legislative sanction, and that the Legislature of the state has never sanctioned such acts. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130; *Parsons v. Tacoma Smelting & Ref'g Co.* (Wash.) 65 Pac. 765. This doctrine rests altogether on considerations of public policy. But it is said that the policy as declared extends only to domestic corporations, and whether it should embrace foreign corporations is a matter to be decided by the courts of that state alone. I do not understand that the policy is so restricted. One of its objects is to prevent one corporation from interfering with the control of another. This was the purpose to be subserved by the decision in *Parsons v. Tacoma S. & R. Co.*, just cited, where, although the title of the stockholding company was not assailed, its right to vote upon the stock was denied. It is true that the stockholding company was a domestic corporation, but the denial of its right to vote could not be based on that circumstance. The doctrine that it was impolitic to allow a corporation whose chartered powers were subject to modification at the will of the state to exercise control over a domestic corporation, would seem necessarily to imply that it was deemed equally impolitic to permit such control by a corporation whose chartered powers were generally independent of the state. The application of the restriction to a foreign corporation is a mere interpretation, not an extension of the doctrine. But if it be an extension, the extension is made by the Constitution of Washington, which provides (article 12, § 7) that "no corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." The decisions already cited are clearly to this effect: that, if a Washington corporation owned property immovably fixed in that state, it could not lawfully bargain to exchange that property for stock in another Washington corporation, and after completion of the exchange exercise in the other corporation all the rights and privileges of a private stockholder. If this New Jersey corporation can legally do what is thus prohibited to a Washington corporation, then the foreign corporation is allowed to transact business in Washington on conditions more

favorable than those prescribed for its domestic corporations. The Constitution forbids this. On these grounds we think that the carrying out of the arrangement should be enjoined.

Let the order of November 22, 1902, discharging the rule to show cause be reversed, and a preliminary injunction be issued in accordance with the order of this court made on December 3, 1902.

WILSON v. AMERICAN PALACE CAR CO.
et al.

(Court of Chancery of New Jersey. Feb. 18, 1903.)

**FOREIGN CORPORATIONS—STOCKHOLDERS
—RIGHT TO SUE.**

1. A bill by a stockholder of a foreign corporation will lie against the corporation and others, where it could have sued as complainant in its own name, is a necessary party to the suit, and is made defendant only because controlled by the officers and directors, whose dealings with its assets are questioned by the bill.

Bill by Wallace Wilson against the American Palace Car Company and others. On bill and plea to jurisdiction. Plea overruled.

R. H. McCarter, for the plea. E. A. Keasbry, for complainant.

EMERY, V. C. The bill in this case is filed by a stockholder of the American Palace Car Company (a Maine corporation), against a New Jersey corporation of the same name, against individual defendants resident in New Jersey, and also against the Maine corporation, against the New York corporation of the same name, and against defendant Denham. The Maine corporation, the New York corporation, and Denham have filed a plea to the jurisdiction. The bill, in its general aspects, is that of a bill filed by a stockholder of the Maine corporation in the right of the company, and as representing its rights, to set aside a transfer of the assets of the company, made to the New Jersey company, which assets, it is alleged, are to be either wholly or in part further transferred to the New York company by the aid or contrivance of the defendant Denham, one of the officers of the New Jersey company. The transfer is alleged to be a fraud upon the Maine company and its stockholders. The plea to the jurisdiction is based upon the claim that neither the Maine corporation nor the New York corporation have been found within the state, nor served with process herein; that they transact no business here, have no place of business or agency here; and that the subject-matter of the suit is not within this state.

There can be no question that the Maine corporation could sue as complainant, and in its own name, upon the equitable right set up in this bill. The suit is really a suit

on behalf of the Maine company, and that company is a necessary party to a suit of this character, and the only reason it is made defendant instead of complainant is because the company itself is controlled by the officers and directors whose dealings with its assets are questioned by the bill. The general right and obligation of a stockholder in such representative suit to make the company he assumes to represent, and whose rights are the subject for adjudication, a defendant to the suit, is clear; and, if the company thus represented by complainant had been a New Jersey company, no question as to jurisdiction could have been raised. In these cases of representative rights, the company represented, although made formally a defendant, is strictly and properly the real complainant, and in matter of form could properly be made complainant. This is the usual practice in England. *Duckett v. Gover*, 6 Ch. Div. 82, 85 (Jessel, M. R., 1877). If the company applies to strike out its name as complainant, the court will allow it to be made a defendant. In this country the company represented is usually made defendant in the first instance, where the defendants or officers, whose dealings on behalf of the company are attacked, also control the company's action or defense. In the present case, had I considered that there was an insuperable technical difficulty in making the Maine company a defendant by reason of the impossibility of serving process or bringing the company into court, I should be inclined to direct that it be made a party complainant instead of defendant. But as the decree in the cause, if it should finally go for complainant, would be a decree in favor of the Maine company, I consider that company as now substantially the complainant in the suit, and that its plea to the jurisdiction cannot be sustained, except upon the theory that, as against New Jersey defendants, whether individual or corporate, the stockholders of a foreign corporation cannot prosecute the company's rights in any case without the consent of those who, for the time being, control the company's formal appearance and defense. This would lead often to great inequity and injustice, and I am not willing to adopt such a rule.

As to the New York corporation, which is alleged to claim under the New Jersey corporation, if the complainant is entitled to a decree against the New Jersey corporation, the question whether a decree shall be made against the New York corporation, and to what extent, if that corporation does not appear, must be left for future decision. There is clearly no objection to giving the New York corporation an opportunity to come into the suit, if it desires to do so, and, for this purpose, to serve by publication.

The same reasons apply to the defendant Denham's plea.

The plea will be overruled.

ROBINSON v. CENTENARY FUND & PREACHERS' AID SOC. OF NEW JERSEY ANNUAL CONFERENCE OF M. E. CHURCH.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

LIQUIDATED DAMAGES—PENALTY.

1. R. and L. entered into the following agreement: "Having disposed of the Ocean City Sentinel to Fenton & Robinson, I hereby agree not to start, directly or indirectly, or cause to be started or interested in any manner, a newspaper or printing office within Ocean City for the term of twenty-five years (25 years) under a penalty of twelve hundred dollars (\$1,200)." *Held*, that the \$1,200 was not a penalty, but liquidated damages.

2. When the term "penalty" is used in the agreement, and a single act is forbidden, if upon breach it is not possible to ascertain the damages, then the sum named may be recovered, if, upon any reasonable view of the case, the damages might equal that sum.

(Syllabus by the Court.)

Error to Supreme Court.

Action by R. Curtis Robinson against the Centenary Fund & Preachers' Aid Society of the New Jersey Annual Conference of the Methodist Episcopal Church, executor of Ezra B. Lake. Judgment for plaintiff for \$1,200. Defendant brings error. Affirmed.

Thompson & Cole, for plaintiff in error.
S. Stanger Izard, for defendant in error.

VROOM, J. In the year 1885 the plaintiff, R. Curtis Robinson, and his assignor, purchased from one Ezra B. Lake a newspaper known as the "Ocean City Sentinel," published at Ocean City, in the county of Cape May. In part consideration of the purchase the said Lake entered into the following agreement with the defendant in error and his assignor: "Ocean City, August 6, 1885. Having disposed of the Ocean City Sentinel to Fenton & Robinson, I hereby agree not to start, directly or indirectly, or cause to be started or interested in any manner a newspaper or printing office within Ocean City for the term of twenty-five years (25 years) under a penalty of twelve hundred (\$1,200) dollars. [Signed] E. B. Lake." In 1899 Lake purchased the capital stock of the Ocean City Ledger Publishing Company, the publisher of the Ocean City Ledger, a weekly paper in said city, then and still published, and also the plant, presses, and other equipment of said newspaper. No proof of damages was offered at the trial, and the trial judge, in his charge, said that the question turned upon the proper construction of the agreement in question—as to whether the plaintiff shall recover the amount of \$1,200, to be regarded as the amount of damages fixed by the parties to the contract in case of a breach, or whether the amount named is to be treated as a penalty, merely; the amount of damages to be proved, and to be assessed by a jury. The conclusion reached by the learned

trial judge was that upon the whole case the sum named should be regarded as the amount fixed by the parties to be paid in case of a breach.

In *Monmouth Park Ass'n v. Wallis Iron-works*, 55 N. J. Law, 132, 140, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626, Mr. Justice Dixon held that, "in determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in a contract, but the whole scope of their bargain, including the subject to which it refers." It is well settled that whether the entire sum specified in the agreement can be recovered does not depend entirely upon whether in the agreement it is termed "penalty" or "liquidated damages." As was said in *Whitefield v. Levy*, 35 N. J. Law, 149: "Calling the sum named a 'penalty' or 'liquidated damages' is not conclusive, if the intention appears otherwise, from the consideration of the whole agreement. If it be doubtful, from the whole agreement, whether it is intended to be a penalty or stipulated damages, it will be construed as a penalty; and, if it is called a 'penalty,' it will be held to be such, unless that construction is overcome by a very clear intention to the contrary, derived from the other parts of the agreement." And in 19 Am. & Eng. Ency. of Law, p. 400: "No rule as to distinguishing between liquidated damages and penalties is better settled than that the language of the parties to the contract, and the terms employed, descriptive of the amount to be paid, are not conclusive of the interpretation and legal effect. Thus a sum denominated 'liquidated damages' by the parties may nevertheless be held to be a penalty, and, though the word 'penalty' be used, the sum so termed may be deemed liquidated damages." Thus, in the case of *Sainter v. Ferguson*, 7 C. B. 716, A. and B. entered into the following agreement: "In consideration that A. of Maederfield, surgeon and apothecary, will engage me, the undersigned, B., as assistant to him as surgeon," etc., "I the said B., promise the said A. that I will not at any time practice as surgeon or apothecary at M., or within seven miles thereof, under a penalty of 500 pounds; and I the said A. do hereby agree with the said B. to engage the said B. as assistant to me as a surgeon," etc., "on the terms aforesaid." *Held*, that the £500 was a penalty, not liquidated damages. *Wilde, C. J.*, said it was clearly settled that, "whether the sum mentioned in the agreement to be paid for a breach is to be treated as a penalty, or as ascertained and liquidated damages, is a question of law, to be decided by the judge upon consideration of the whole instrument. This agreement does not prohibit the defendant's doing several distinct

¶ 1. See *Damages*, vol. 15, Cent. Dig. §§ 160, 166.

and independent acts, each of which might be incapable of exact estimation; nor does it involve any of the circumstances that have in any of the cases induced the court to hold the sum to be a penalty only. The whole object of the plaintiff was to protect himself from a rival, and it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement. It is not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid. And I think we can only give effect to the contract of the parties by holding the \$500 to be liquidated damages." Again, in *Monmouth Park Ass'n v. Wallace Ironworks*, supra, Mr. Justice Dixon says that when damages are to be ascertained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books, and recognized in the Judicial Reports of this state. *Cheddicks, Ex'r, v. Marsh*, 21 N. J. Law, 463; *Whitefield v. Levy*, 35 N. J. Law, 149; *Houglan v. Segur*, 38 N. J. Law, 230; *Lansing v. Dodd*, 45 N. J. Law, 525. To the same effect is the recent decision in the Supreme Court of the United States in the case of *The Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 397, where it is held: "Whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract; and it is the duty of the court, where the damages are uncertain, and have been liquidated by an agreement, to enforce the contract."

The rule may, then, be fairly stated to be that when the term "penalty" is used in the agreement, and a single act is forbidden, if upon breach it is not possible to ascertain the damages, then the sum named as penalty may be recovered, if, on any reasonable view of the case, the damages might equal that sum. The agreement is not one whereby Lake agrees not to do several things. The single stipulation was that he would not start, directly or indirectly, or cause to be started, or interested in any manner in, any rival newspaper or printing office, or, in other words, that the personal influence acquired by him through his connection with the concern he had sold should not be put in a rival establishment. And it may well be said that the doing of it in any manner is the doing of a single act which it is the sole object of the agreement to prevent. A moment's consideration will demonstrate the uncertain character of the damages, and that no feasible way exists of determining the same, or of finding out how or in what way the influence

of the vendor may be secretly exerted in this rival establishment. The very object and intent of the agreement in question was to forbid any pecuniary interest in a rival newspaper or printing office. As was said by Wilde, C. J., in the case of *Saint v. Ferguson*, supra, the whole object of the plaintiff was to protect himself from a rival, and it is not unreasonable that the parties themselves fix and determine the sum that should be paid. I am of the opinion that the intention of the parties will only be effectuated by considering the sum named in the agreement liquidated damages, and to be paid by the party committing the breach.

The judgment of the Supreme Court should be affirmed.

COLLINS et al. v. WARDELL et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

WILL—CONSTRUCTION—DEATH OF BENEFICIARY.

1. A testatrix provided by her will as follows: "I direct my executors hereinafter named out of the residue of my estate to set apart a fund sufficient to produce an income of six thousand dollars a year, and out of said income to pay my brother William Phye four thousand dollars a year, and to my brother Duncan Phye two thousand dollars a year, for the term of their natural lives, respectively, and after their death I direct the capital of said fund to be divided equally among" six persons named. William Phye predeceased the testatrix. Held that, immediately upon setting apart the fund sufficient to produce the income of \$6,000, the executors should divide two-thirds of the capital fund so set apart among those entitled to it under the will.

2. The words "after their death," in the above clause of the will, construed to mean "after their respective deaths."

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Gilbert Collins and others against Mary B. Wardell and others. From a decree of the Chancellor (52 Atl. 708), defendants appeal. Reversed.

The bill in this case was filed by the executors and trustees of the will of Mary P. Wintringham, deceased, to obtain a construction of the fifteenth, sixteenth, and seventeenth clauses of that will. These clauses are as follows:

"Fifteenth. I direct my executors hereinafter named out of the residue of my estate to set apart a fund sufficient to produce an income of six thousand dollars a year, and out of said income to pay to my brother William Phye four thousand dollars a year, and to my brother Duncan Phye two thousand dollars a year, for the terms of their natural lives, respectively, and after their death I direct the capital of said fund to be divided equally among the said Mary Wardell, Maria Wintringham, Thomas Wintringham, Joseph Wintringham, William Wintringham and Henry C. Wintringham.

"Sixteenth. It is my will that if any or

either of the above named legatees or devisees shall die before my death the bequest or devise to the person dying shall lapse.

"Seventeenth. All the rest, residue, and remainder of my estate, real or personal, of or to which I shall die seised, possessed, or in any way entitled, I do give, devise, and bequeath to the said Emma P. Purdy, Mary Wardell, Emily Haight, Henry C. Wintringham, William Wintringham, and to Franca Wintringham, the grandniece of my late husband, and the two children now living of the said Thomas Wintringham, to be divided equally among said persons, share and share alike, and I direct that any inheritance tax to be levied or charged against my estate be paid out of that portion thereof bequeathed in this paragraph."

William Phyfe, the brother of the testatrix to whom an annuity of \$4,000 was bequeathed by the fifteenth clause of the will, predeceased the testatrix. Thomas Wintringham, one of the persons mentioned in the fifteenth clause of the will, among whom the capital fund was to be distributed, also predeceased the testatrix. All the other persons named in the fifteenth and seventeenth clauses of the will are still living, some of those mentioned in the seventeenth clause being infants. The executors have now in hand a clear residue of personalty amounting to \$188,129.84. The bill asks the Chancellor to construe the will, and direct and advise the complainants how much to set apart as a trust fund provided by the fifteenth paragraph thereof, and how much to reserve from immediate distribution thereunder as security for the annuity to the said Duncan Phyfe, and how, when, and to whom to distribute such trust fund. The decree orders that the will be construed to the effect that, notwithstanding the death of William Phyfe and Thomas Wintringham before the death of the testatrix, a fund sufficient to produce an income of \$6,000 a year must be set apart under the fifteenth paragraph of said will, and that upon the death of Duncan Phyfe, named in said paragraph, and not until then, the capital of five-sixths of said fund will be payable to the legatees in remainder named in said paragraphs, who survived the testatrix, and that the one-sixth of the said fund, which, but for his death before the death of said testatrix, would have been payable to Thomas Wintringham, and all of the income of said fund until the death of the said Duncan Phyfe, except the annuity of said Duncan Phyfe, must be disposed of under the seventeenth paragraph of said will. The decree further orders that the fund set apart shall be not less than \$150,000, and that said complainants have leave to apply to the Chancellor, on the foot of the decree, for an order of reference to a master to ascertain and report how much larger, if any, such sum shall be, and which securities now in the hands of the executors shall constitute said fund, and what valuation shall be set

thereon for that purpose. Mary B. Wardell, Maria L. Wintringham, and Joseph P. Wintringham appeal from so much of the decree as orders that not until the death of Duncan Phyfe, named in the fifteenth paragraph of the will of the testatrix, will any part of the capital fund to be set apart under said paragraph be payable to legatees in remainder thereunder, and that the one-sixth of said fund, which, but for his death before the death of the said testatrix, would have been payable to Thomas Wintringham, and all of the income of said fund until the death of said Duncan Phyfe, except the annuity of said Duncan Phyfe, must be disposed of under the seventeenth paragraph of said will.

C. L. Corbin and R. Burnham Moffat, for appellants. William Brinkerhoff, for respondent Emma P. Purdy. Chauncey G. Parker, for respondents Frances Wintringham, Henry B. Wintringham, and Georgia Wintringham.

GARRETSON, J. (after stating the facts). We agree with the conclusion of the learned Chancellor that the complainants were entitled to the aid, advice, and direction of the court; that the death of William Phyfe before the testatrix did not operate to defeat the gift of the fund to the persons to whom she bequeathed it by the fifteenth paragraph of the will; that the executors are bound to set apart so much of the residue in their hands as will be reasonably sufficient, when properly invested, to furnish an income of at least \$6,000 a year; that a sum of not less than \$150,000 is such a sum; that the share of Thomas Wintringham, who predeceased the testatrix, given under the fifteenth paragraph of the will, by the provision of the sixteenth paragraph lapsed and fell into the residue to be disposed of by the seventeenth paragraph. We have reached a different conclusion, however, as to the time when the capital fund set apart by the executors to produce an income of \$6,000 a year, in accordance with the directions of the fifteenth clause of the will, shall be distributed. We think that distribution of two-thirds of that capital fund should be made as soon as it is set apart by the executors. William Phyfe, to whom two-thirds of the income of \$6,000 a year was by the will to go, having predeceased the testatrix, and the interest of those in this fund who survived her having become vested by her death, no reason exists, unless it so appears from the will itself, why any more of the fund than is sufficient to raise the annuity of \$2,000 for Duncan Phyfe should be retained by the executors. We are not able to find in the will the intention of the testatrix that the entire fund should be held by the executors until the death of Duncan Phyfe. The language used by the testatrix indicates an intention to have the capital fund distributed at such times as the necessity for holding it to accomplish the purpose

of the testatrix, namely, to produce \$4,000 a year for one brother for his life, and \$2,000 a year for the other brother for life, ceased. The will did not merely provide incomes for the brothers, but also fixed a certain sum for distribution among others therein named; also it might be said that there was no necessity for the executors to set apart more than enough to produce \$2,000 a year, but the testatrix wanted to give to those in that paragraph mentioned a certain sum absolutely, which she determined should be the principal sum, producing \$8,000 a year. The testatrix made no disposition of any accumulation of income beyond that necessary to pay the annuities, respectively. Such accumulation would arise because of the death of any annuitant before the other, unless the capital sum necessary to raise the annuity of the one who died first were distributed upon his death, and this circumstance bears upon the intention of the testatrix.

The direction of the testatrix, "and out of said income to pay to my brother William Phye four thousand dollars a year, and to my brother Duncan Phye two thousand dollars a year, for the terms of their natural lives, respectively, and after their death I direct the capital of said fund to be divided equally among," etc., means that the capital fund is to be divided upon the respective death of the annuitants; the income having been paid to them for their respective lives. The words "their death," in the connection used, can mean only "their respective deaths." These words were not expressive of a single event, but of the death of each one; that is, their respective deaths.

The cases seem to support the contention that where the income of a single fund is bequeathed to two or more persons for life, with remainder over "after their death," the courts construe these words to mean "after their respective deaths," and decree a present division of the fund, and a distribution of the part thereof not required to produce income for the life tenants. In *Woolston v. Beck*, 34 N. J. Eq. 74, a testator gave the use of a farm to his two daughters, S. and K., for life, S. to have two-thirds of the income, and K. one-third, "and after the decease of my two daughters" to their children, in fee, specific portions. S. died, leaving children. Held, that on her death the person to whom the remainder was given became entitled to the possession of the other two-thirds. The Chancellor held that the words "after the death of my two daughters" will be construed to mean after the death of the two, respectively. In *Stoutenburgh v. Moore*, 37 N. J. Eq. 68, the will provided, "All the rest and residue of my estate, real and personal, I give, devise, and bequeath the income to my two sons, Robert and Edward, to be equally divided between them during their lives, and at their death to be equally divided between my grandchildren—to them, their heirs and assigns." It was held that upon the death of

Edward his child was entitled to a moiety of the estate absolutely, the Chancellor saying: "He certainly intended that, at the respective deaths of his sons, the shares of the residue, of which he gave them, respectively, the income, should go over; for he directs that 'at their deaths'—by which he meant their respective deaths—the residue shall be divided between his grandchildren." *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. 170; *Pennington v. Rutherford*, 26 N. J. Eq. 313; *Jackson v. Luquere*, 5 Cow. 221.

The decree will be reversed.

COOPER HOSPITAL v. CITY OF CAMDEN.

(Court of Errors and Appeals of New Jersey.
March 9, 1903.)

CORPORATIONS—TAXATION—EXEMPTIONS—REPEAL—ACCEPTANCE OF CHARTER—CONTRACT—ENDOWMENT LANDS.

1. The charter of a private corporation, enacted before the adoption of the constitutional amendments of 1875, and containing an exemption of the property of the corporation from taxation, might, if granted for a valid consideration, moving to the state, and if accepted and acted upon by the recipient according to its terms, become a contract binding upon the state, and, by force of the federal Constitution, irrevocable.

2. Until such charter was accepted, and the consideration actually paid or delivered according to its terms, it remained subject to repeal, either by act of the Legislature, or by act of the people in amending the Constitution.

3. The constitutional amendments of 1875, providing, *inter alia*, that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value," had the effect of abrogating any special law for the assessment of taxes, and any special immunity from taxation theretofore granted, and not already accepted in such manner as to constitute a contract.

4. The charter of the Cooper Hospital, approved March 24, 1875 (P. L. 1875, p. 170; Laws 1877, p. 391), appears upon its face to have been enacted in consideration of certain donations of land, and the appropriation of certain moneys, proposed to be made by persons designated in the act; the same to be devoted to certain public purposes therein specified. The charter declared that the property and effects of the corporation, held or used for the purposes contemplated by the act, should not be subject to the imposition of any tax or assessment. The case shows that, before the corporation was endowed in the manner contemplated in the charter, the exemption from taxation was annulled by the adoption of the constitutional amendments of 1875.

Held (assuming, but not deciding, that the hospital is a private corporation, within the doctrine of irrevocable charters, and that the charter was in form such as to amount to a contract), that the case does not show an acceptance of the charter, and payment or delivery of the consideration according to its terms, so as to constitute a contract between the state and the Cooper Hospital, providing for the exemption of the property of the corporation from taxation.

5. Under the supplement passed May 16, 1894, to the general tax law of 1886 (Gen. St. p. 3320), lands held by a charitable institution as a part of its endowment are not exempted.

6. In the supplement of May 16, 1894, to the general tax law of 1886 (Gen. St. p. 3320), the

exemption of "buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof," is confined to buildings and land in and upon which the charitable work is actually conducted.

7. The case of *Cooper Hospital v. Burdsall*, 42 Atl. 853, 63 N. J. Law, 85, overruled.

8. The case of *Sisters of Charity v. Township of Chatham*, 20 Atl. 292, 52 N. J. Law, 373, 9 L. R. A. 198, distinguished.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Cooper Hospital against the city of Camden. Judgment for plaintiff (52 Atl. 210), and defendant brings error. Reversed.

H. M. Snyder, Jr., for plaintiff in error.
John S. Voorhees and Theodore B. Booraem, for defendant in error.

PITNEY, J. By this writ of error and five others that were brought on for argument at the same time, the city of Camden seeks to reverse judgments of the Supreme Court setting aside, as illegal, certain taxes that were assessed for city, county, and municipal purposes in the years 1897 and 1898 upon certain parcels of real estate that are alleged to be owned by the Cooper Hospital. By a seventh writ of error the city brings before us the judgment of the Supreme Court setting aside an assessment of sewer taxes for the year 1898 upon one of those properties.

The hospital claims immunity upon two grounds, viz.: (1) That an irrepealable contract is to be found in the charter of that institution, by which its property is exempted from taxes and assessments. Laws 1875, P. L. p. 170. (2) That if not thus exempted by the charter, the property in question is exempt under the general tax act of May 16, 1894 (Gen. St. p. 3320).

The Supreme Court held that the charter exemption was annulled, so far as relates to ordinary taxation, by the constitutional amendment adopted in September, 1875, requiring that property shall be assessed for taxes under general laws. But following the decision of the same court in *Cooper Hospital v. Burdsall*, 63 N. J. Law, 85, 42 Atl. 853, it held that an exemption of the property in question from ordinary taxation arises from the tax act of 1894. At the same time the court held that the constitutional amendment does not relate to assessments for special benefits derived from local improvements. *State, Protestant Foster Home, v. Mayor, etc., of Newark*, 36 N. J. Law, 478, 13 Am. Rep. 464; *Catholic Protectory v. Kearney*, 56 N. J. Law, 385, 28 Atl. 1043. Therefore, finding the charter exemption of the Cooper Hospital unrepealed, so far as such assessments are concerned, either by the constitutional amendments or by any subsequent legislative act, and dealing with case No. 7 between these parties as involving an assessment for special benefits, the court

set aside that assessment as violative of the charter exemption. The record in this case, however, discloses simply "a certain assessment for sewer taxes for the year 1898." We are referred to the act of March 8, 1882 (Laws 1882, p. 60; 1 Gen. St. p. 605), as showing the legislative authority for the construction of the sewer in question. That act authorizes the board of aldermen, under certain circumstances, to cause sewers to be constructed; and if, in the judgment of that board, the construction of such a sewer is likely to benefit any lands in its vicinity, the act provides for the appointment of commissioners, who are to determine what lands are peculiarly benefited, and what portion of the whole cost of the work is to be assessed upon the city at large, and what sum is to be assessed upon each parcel of land peculiarly benefited. In case the whole expense of the work exceeds the amount of the benefits, the excess is required to be paid by the city at large, and raised by general tax; and the duty is expressly imposed upon the board of aldermen to incorporate in the annual tax levy in each year such amount as shall be required to be paid by the city at large on account of any such improvement.

The form of the return in case No. 7 shows a general tax to defray the expenses of sewer construction or maintenance, and not a special assessment imposed upon the property in question by reason of the peculiar benefits conferred thereon. The distinction referred to in the *Foster Home Case*, 36 N. J. Law, 478, 13 Am. Rep. 464, and the *Catholic Protectory Case*, 56 N. J. Law, 385, 28 Atl. 1043, is between taxes imposed upon property at large, assessed according to the value of the property, and "exactions for special benefits derived from local improvements," which are laid in proportion to the benefits received by the several properties in question. The "sewer taxes" here in question belong in the former category, as well as the "city, county, and municipal taxes" that are involved in the remaining six cases.

Does the case show a contract between the state and the Cooper Hospital exempting from taxation the several properties in question?

By the federal Constitution (article 1, § 10) it is declared that no state shall pass any law impairing the obligation of contracts. That an irrepealable contract, within the meaning of this clause, may be embodied in the charter of a private corporation enacted by a Legislature having power to grant the same, is the necessary result of the doctrine laid down in the great *Dartmouth College Case*, 4 Wheat. 518. That such a charter may even contain a contract exempting the property of the corporation from taxation, and if so granted for a valid consideration moving to the state, and accepted and acted on by the recipient, may become bind-

ing on the state, according to its terms, is established by a line of decisions in the United States Supreme Court, and is, of course, recognized by this court. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Piqua Branch, State Bank of Ohio, v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *State Board of Assessors v. Morris & Essex R. Co.*, 49 N. J. Law, 193, 7 Atl. 826; *Mount Pleasant Cemetery Co. v. Newark*, 52 N. J. Law, 539, 20 Atl. 832; *Singer Mfg. Co. v. Heppenheimer*, 58 N. J. Law, 633, 34 Atl. 1061, 32 L. R. A. 643; *Hancock v. Singer Mfg. Co.*, 62 N. J. Law, 289, 41 Atl. 846, 42 L. R. A. 852.

Our Legislature is now prevented from granting an irrevocable charter, by force of the constitutional amendments of 1875. The charter of the Cooper Hospital antedates those amendments.

A contract that disables the state from exercising the sovereign prerogative of taxation with respect to the property of a given corporation is in derogation of common right, and, so far as it goes, is subversive of the power of government itself. Every reasonable intendment is against the existence of such a contract. He who comes into court asserting its existence must be prepared to show that in fact it was made as alleged, and that its terms are such as to reasonably admit of no other interpretation than that claimed.

Upon an examination of the charter of the Cooper Hospital, which is set forth in full below, two questions at once arise, viz.: First, can this institution be deemed a private institution, within the doctrine of irrevocable charters, in view of the fact that its powers were conferred solely for public purposes, and not for the individual profit of any person or persons? And, secondly, inasmuch as the charter was enacted while there stood upon the statute book the provision of section 6 of the general corporation act of 1846 (Revision 1847, p. 136) that the charter of every corporation thereafter granted should be subject to alteration, suspension, and repeal, in the discretion of the Legislature, is not this provision fairly to be read into the charter, so as to negative the notion that the charter was intended to embody a contract with respect to the exemption from taxes?

But these questions we have not found it necessary to consider, because the evidence in the case before us leaves the original making of the alleged contract, as a matter of fact, unproven. It is entirely clear that the mere enactment of a corporate charter does not, in and of itself alone, amount to the making of a contract, within the meaning of

the federal Constitution. In order to constitute a contract binding upon the state, there must be acceptance by the parties of the other part, accompanied by the passing of a consideration, substantially in accordance with the terms of the charter. Doubtless, such acceptance might follow within a reasonable time after the enactment, unless by the terms of the charter a limit of time were specified. But it seems too plain for argument that until accepted the charter remains subject to repeal, either by act of the Legislature, or by act of the people in the form of a constitutional amendment. And, if the charter be repealed in part before acceptance, a contract will arise only with respect to the part remaining unrepealed.

The Cooper Hospital was incorporated, under the name of the "Camden Hospital," by an act approved March 24, 1875 (P. L. 1875, p. 170), which is in the following terms:

"Whereas, it is proposed by the devisees of William D. Cooper, deceased, late of the city and county of Camden, in the state of New Jersey, and Alexander Cooper, to convey certain lands in the said city of Camden to Albert W. Markley, Peter L. Voorhees, Charles P. Stratton, Rudolphus Bingham, Thomas E. Cullen, Joseph B. Cooper, Augustus Reeve, Alexander Cooper and John W. Wright, as trustees for the purpose of erecting thereon a building or buildings to be used as a free hospital, and to appropriate moneys for the maintenance and support of the same, pursuant to the wishes and directions of the said William D. Cooper, deceased; and, whereas, it is considered that the benevolent intention of the projector of such institution and of the said donors can be better carried out, and the objects sought to be accomplished facilitated and promoted by an act of incorporation; therefore,

"Section 1. Be it enacted by the Senate and General Assembly of the state of New Jersey, that Albert W. Markley, Peter L. Voorhees, Charles P. Stratton, Rudolphus Bingham, Thomas E. Cullen, Joseph B. Cooper, Augustus Reeve, Alexander Cooper and John W. Wright, be and they are hereby constituted and made a body politic and corporate in fact and in law by the name of 'The Camden Hospital,' and by that name they and their successors shall have perpetual succession, power to sue and be sued, to make and use a common seal, to purchase, take, have, hold, receive and enjoy any lands, tenements or hereditaments in fee simple or otherwise, and any goods, chattels or property of any description, real or personal, whether acquired by gift, grant or otherwise, and to grant, convey, lease, assign, sell or otherwise dispose of the same for the purposes of the said corporation.

"Sec. 2. And be it enacted, that the object of said corporation shall be to afford gratuitous medical and surgical aid, advice, remedies and care to such invalid or needy persons, as, under the rules and by-laws of

said corporation, shall be entitled to the same, and to construct such buildings and make such provisions as are necessary for the accomplishment of said object.

"Sec. 3. And be it enacted, that the incorporators of this act shall continue the board of managers of said corporation, and shall have exclusive control of the management and business concerns of said institution, both external and internal; shall have authority to fill vacancies in their own board, however occasioned, and to make such constitution and by-laws for the regulation of their organization and the conduct of their business as they may deem necessary.

"Sec. 4. And be it enacted, that the property and effects of the said corporation, held or used for the purposes contemplated by this act, shall not be subject to the imposition of any tax or assessment.

"Sec. 5. And be it enacted, that this act shall take effect immediately."

A supplement, approved March 6, 1877 (P. L. p. 391), changes the name of the corporation, but makes no other amendment of the charter.

It will be seen that the consideration upon which the Legislature was induced to offer this corporate franchise and the immunity from taxes and assessments was the proposed conveyance to be made by the devisees of William D. Cooper, deceased, and Alexander Cooper, of certain lands in the city of Camden, to trustees for the corporation, for the purpose of erecting thereon a building or buildings to be used as a free hospital, and the appropriation by the same parties of moneys for the maintenance and support of the hospital, with the object of affording gratuitous medical and surgical aid, advice, remedies, and care to invalid and needy persons. Whether the trustees did or did not promptly assume the corporate functions conferred upon them by the act does not appear from anything that is before us. But, in our judgment, in order to sustain the claim that a contract had arisen, it would require something more than the mere assumption and exercise of the corporate powers. Unless the devisees of William D. Cooper, deceased, and Alexander Cooper, made over to the corporation or its trustees the lands and moneys contemplated by the act, there was no such acceptance as would bind the state to refrain thereafter from subjecting the property of the corporation to taxes or assessments. The case is devoid of evidence to show that Alexander Cooper ever conveyed any lands or made any appropriation of moneys for the purposes specified. The will of William D. Cooper is in evidence, and shows that his sole devisees were his brother, Richard M. Cooper, and his sisters, Sarah W. Cooper and Elizabeth B. Cooper. The evidence does not show that Richard M. Cooper or Sarah W. Cooper at any time conveyed lands or appropriated moneys to the uses of the hospital. And so far as appears, Elizabeth B.

Cooper did neither in her lifetime. She died in the year 1888, leaving a will by the terms of which it is claimed that the Cooper Hospital has acquired an equitable interest in three of the pieces of real estate that are involved in the present controversy. The other properties in question do not appear to have come from either of the devisees of William D. Cooper. One is claimed by devise from John W. Wright, who died in 1890; one by devise from Abigail M. Wright, who died in 1892; and one was acquired in satisfaction of a mortgage that was assigned to the Cooper Hospital in 1889.

The case, in short, does not show that the consideration contemplated by the Legislature in 1875 has passed to the corporation for the purposes of its creation. So far as any endowment of the hospital according to the scheme of the charter is shown, it took place not earlier than the year 1888. Meanwhile the people of the state, in the month of September, 1875, adopted certain amendments of the fundamental law, among which are the following: "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever." "The Legislature shall not pass private, local or special laws * * * granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever." "The Legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject nevertheless to repeal or alteration at the will of the Legislature." "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

The general purpose of these amendments is sufficiently clear. The one last mentioned, whether considered alone or together with the context, has the effect of abrogating any special law for the assessment of taxes, and any special immunity from taxation theretofore granted, and not already accepted in such manner as to constitute a contract. In *Sisters of St. Elizabeth vs. Chatham*, 51 N. J. Law, 89, 16 Atl. 225, at page 91, 51 N. J. Law, and page 226, 16 Atl., Mr. Justice Dixon, speaking for the Supreme Court, said: "That amendment was self-executing. *Proprio vigore* it annulled all laws which would interfere with its operation. There being in existence, at the time of its adoption, general laws under which property might be assessed for taxes, it commanded that assessments should be made under those laws and such other general laws as the Legislature might enact, and abrogated all special or local laws which provided for any different assessments. It is addressed not merely nor primarily to the Legislature, but directly to the assessing officers, and requires them to be guided by general laws, and by those only, in selecting the subjects of taxation, and in apportioning

the taxes thereon, and to disregard all statutes, ordinances, or other regulations which would thwart the operation of such laws." The view thus expressed was approved by this court in *Sisters of Charity v. Township of Chatham*, 52 N. J. Law, 373, 20 Atl. 292, 9 L. R. A. 198, although the decision of the Supreme Court was reversed on another ground. In a somewhat earlier case (*State, North Ward National Bank, v. City of Newark*, 39 N. J. Law, 380, 40 N. J. Law, 558), Mr. Justice Depue (afterwards Chief Justice), in delivering the opinion of the Supreme Court, elaborately expounded the reasoning that leads to this view, and the result was accepted by this court. Therefore the charter of the Cooper Hospital was annulled, so far as the tax exemption clause is concerned, before the hospital was endowed in the manner contemplated by the Legislature when the charter was enacted. Any subsequent endowment was subject to that pro tanto repealer, and could not have the effect of creating a contract for tax exemption. This view is fully sustained by the decisions of the Supreme Court of the United States:

In *Aspinwall v. Commissioners of the County of Daviess* (1859) 22 How. 364, 16 L. Ed. 296, it appeared that by the charter of a railroad company passed by the Legislature of Indiana in 1848 (Laws 1848, p. 619, c. 479), and a supplement in 1849 (Laws 1849, p. 428, c. 281), the county commissioners of a county through which the road passed were authorized to subscribe for stock in the railroad company, and issue bonds to pay for the same, provided a majority of the qualified voters of the county should so vote. A majority of the voters of Daviess county duly voted that a subscription should be made; but, before the subscription was made, the state adopted a new constitution, one of the articles of which prohibited such subscriptions, unless paid for in cash, and also prohibited a county from loaning its credit or borrowing money for the purpose. After this constitution went into effect, the county commissioners, pursuant to the vote previously taken, subscribed for stock in the railroad company, and issued their bonds for the amount. It was held that a mere vote to subscribe did not of itself form an irrevocable contract; that, until the subscription was actually made, the contract was unexecuted, and obligatory upon neither party; and that the bonds, having been issued in violation of the constitution of the state, were void. In *Wadsworth v. Supervisors* (1880) 102 U. S. 534, 26 L. Ed. 221, a substantially similar question was presented, and a like result was reached.

In *Town of Concord v. Portsmouth Savings Bank* (1875) 92 U. S. 625, 23 L. Ed. 628, it appeared that a statute of the state of Illinois in force March 7, 1867 (1 Laws 1867, p. 842), authorized certain towns, of which the town of Concord was one, to appropriate money to aid in the construction of a certain

railroad, to be paid to the company as soon as its tracks should have been located and constructed through the town. The people of Concord, pursuant to the terms of the act, voted in 1869 to make an appropriation, provided the company would run its road through the town. On June 20, 1870, the company gave notice of its acceptance of the donation, and on October 8, 1871, the town bonds were issued. Meantime, on July 2, 1870, the Constitution of the state came into operation, which forbade any city, town, or township to make donations or loan its credit to a railroad company. Held, that the Constitution rendered the act of 1867 thereafter ineffective; that the town was not empowered to make the donation until the road was located and constructed through the town; that the notice by the company that it would accept the donation did not amount to an undertaking that it would build the road through the town; that the authority of the town to make the donation had been revoked before the donation was complete, and therefore there was no contract, and the town bonds were void. To the same effect is *Norton v. Brownville* (1889) 129 U. S. 479, 9 Sup. Ct. 331, 32 L. Ed. 774.

In *Pearsall v. Great Northern Railway Company* (1895) 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838, it appeared that in 1856 (Laws 1856, p. 294, c. 160) a railroad company was incorporated by the Legislature of the territory of Minnesota, with authority to construct a railroad, and to connect its road by branches with any other road in the territory, or to become part owner or lessee of any railroad in the territory. By a subsequent act, passed in 1865 (Sp. Laws 1865, p. 27, c. 4), it was authorized to connect with, or adopt as its own, any other railroad running in the same general direction, and to consolidate the whole or any portion of its capital stock with the capital stock of any road having the same general direction, or to consolidate any portion of its road and property with the franchise of any other railroad company. In 1874 (Laws 1874, p. 154, c. 29) the Legislature of Minnesota enacted that no railroad corporation should consolidate its stock, property, or franchises with, or lease or purchase the works or franchises of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line, and in 1881 enacted that no railroad corporation should consolidate with, lease, or purchase, or in any way become owner of or control, any other railroad corporation owning or controlling a parallel or competing line. Prior to the enactment of 1874 the railroad company in question had accepted the rights, privileges, and franchises conferred by its charter and supplement, and had constructed and put in operation its railroad, but had not executed the power conferred by its charter to consolidate with other roads. It was held that this power, so long as it remained unexecut-

ed, was within the control of the Legislature, and might be treated as a license and revoked, and that such revocation did not amount to the violation of a contract. Therefore the railroad company was held subject to the provisions of the acts of 1874 and 1881. The reasoning of the court was summed up at the conclusion of the opinion in the following words: "We hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the Legislature to declare by subsequent acts that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines."

In *Bank of Commerce v. Tennessee* (1895) 163 U. S. 416, 16 Sup. Ct. 1113; 41 L. Ed. 211, the bank was chartered in 1856 by the state of Tennessee, and by its charter was required to pay to the state a fixed annual tax upon each share of the capital stock, "which shall be in lieu of all other taxes." The charter did not limit the maximum amount of the capital stock. In 1870, while the capital stood at \$200,000, the state adopted a new constitution, which provided for the taxation of all property—a provision that the court held would include the shares issued since 1870, if not protected by the exemption clause in the charter. It was held that the clause in the charter providing for taxation amounted to a contract that the shares of stock in the hands of the shareholders should be exempt from further taxation than that which was provided in the charter, but that this contract obligation did not attach to the stock issued after the adoption of the constitution of 1870, and that the new stock was taxable, notwithstanding the charter. As Mr. Justice Peckham put it in his opinion (page 424, 163 U. S., and page 1116, 16 Sup. Ct., 41 L. Ed. 211): "The Constitution impaired no obligation of an existing contract. It prevented the subsequent making of one."

In *Galveston, etc., Ry. Co. v. Texas* (1897) 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017, it was held (following *Pearsall v. Great Northern Ry. Co.*, and *Bank of Commerce v. Tennessee*) that a clause in a railway charter granting power to consolidate with or become the owner of other railroads is not a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted.

We hold, therefore, that the case shows no contract between the state and the Cooper Hospital, providing for the exemption of the property and effects of that corporation from the imposition of taxes. Had the making of such a contract been shown, the question would still remain whether the exemption must not be limited to such property and effects as were acquired previous

to the adoption of the constitutional amendments.

It remains to consider the claim of the hospital to exemption from taxes under the supplement, passed May 16, 1894, to the general tax act of 1866 (Gen. St. p. 3320). The Supreme Court did not find that in fact the parcels of real estate here in question, or any of them, are used exclusively for charitable purposes. The opinion below states that they are "held exclusively for the object for which the hospital was incorporated." This means only (what, indeed, is entirely clear from the evidence) that the real estate in question constitutes a part of the endowment of the Cooper Hospital, whose rents, issues, and profits are devoted to the support of the hospital itself. The buildings in which the work of the institution is conducted, and the lands upon which the same are erected, sufficient for the fair enjoyment of the hospital, are separate and distinct, are situate at a considerable distance from the properties now in question, and admittedly have not been taxed. The supplement of 1894 amends section 5 of the act of 1866. The amendment consisted in the insertion of the words indicated in italics below, and the accidental omission of the words "the children of," where indicated in parentheses near the end of the section. As thus amended, the exempting clause in question reads as follows: "That the following persons and property shall be exempt from taxation, namely: * * * (2) All colleges, academies, or seminaries of learning, public libraries, school-houses, buildings erected and used for religious worship, *buildings used as asylums or schools for the care, nurture, maintenance and education of feeble minded or idiotic persons and children, provided such institutions are duly incorporated under the laws of this state*, and the land whereon the same are situate, necessary to the fair use and enjoyment thereof, not exceeding five acres for each one, the furniture thereof and the personal property used therein, the endowment or fund of any religious society, college, academy, seminary of learning, public library or institution for feeble minded persons as aforesaid: provided, that no building so used which may be rented for such purposes and rent received by the owner therefor shall be exempted; the stock of any corporation of this state, which by charter or other contract with this state is expressly exempted from taxation, the stock of any corporation of this state, the capital whereof is by this act made taxable to and against said corporation, pews in churches, graveyards not exceeding ten acres of ground, cemeteries and all buildings erected thereon, and all buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof, and the furniture and personal prop-

erty used therein, the funds of all charitable institutions and associations collected and held exclusively for the sick or disabled members thereof, or for the widows of deceased members or for the education, support and maintenance of (the children of) deceased members." It will be seen at once that this enactment draws a clear distinction between buildings used for religious worship, etc., for asylums, and for exclusively charitable purposes, on the one hand, and the endowment funds of certain institutions, on the other. The endowments are exempted only when they pertain to a religious society, college, academy, seminary of learning, public library, or incorporated institution for feeble-minded persons. The exemption of buildings, with the land whereon they are erected, is confined to such as are used directly in the work of the several institutions in question. That the exemption depends upon such actual user is apparent from the proviso that excepts from the exemption declared in the first part of the section any building so used which may be rented for such purposes, and rent received by the owner therefor; the reference being to a building actually used for the purpose of religious worship, or the like, but owned by a lessor who is not engaged in the work. That the endowments of such an institution as the one now under consideration are not exempted is further apparent from the express exemption, in the latter part of the section, of "the funds of all charitable institutions and associations collected and held exclusively for the sick or disabled members thereof," etc.

Under the act as it stood prior to the amendment of 1894, this court held that an endowment of a religious society, college, academy, seminary of learning, or public library, that consisted of land, was not exempt from taxation. *State, Nevins, Pros., v. Krollman, Coll.*, 38 N. J. Law, 574. The decision in *Sisters of Charity v. Township of Chatham*, 52 N. J. Law, 373, 20 Atl. 292, 9 L. R. A. 198, did not proceed at all upon the theory that real estate held as a part of the endowment of a charitable institution was exempt from taxation under the act of 1866. The property there in question was the convent building of the Sisters of Charity, and was actually used for charitable purposes. The exemption of the residue of the property, which was a part of the same tract upon which the building was situate, proceeded upon a finding, as a matter of fact, that the land was no more than was necessary for the fair enjoyment of the building. The property was farmed, and its produce applied to the support of the inmates of the building.

The decision of the Supreme Court in *Cooper Hospital v. Burdsall*, 63 N. J. Law, 85, 42 Atl. 853, which was followed as a binding authority by the same court in the present case, was based, we think, upon a misapprehension of the effect of the decla-

sion in *Sisters of Charity v. Chatham*. In the *Burdsall Case* it seems to have been thought that, because the Cooper Hospital is engaged in a charitable work, therefore all its real estate whose revenues are devoted to advance the work must be exempted from taxation. The statute is by no means so broad. It confines the exemption to the building in which the work is actually conducted, and the land upon which the building stands, so far as necessary for the fair enjoyment of the building. Repeated adjudications in the Supreme Court and a recent decision in this court have established the principle that mere ownership of land by a charitable institution does not exempt the land, and that its exemption depends upon its actual devotion to the work of charity. *Trustees v. Paterson*, 61 N. J. Law, 420, 39 Atl. 655; *Litz v. Johnson*, 65 N. J. Law, 169, 46 Atl. 776; *Congregation v. Brakeley*, 67 N. J. Law, 176, 50 Atl. 589; *Presbyterian Church v. Fisher (Sup.)* 52 Atl. 228; *Children's Seashore House v. Atlantic City (N. J. Err. & App.)* 53 Atl. 399.

It results that the several parcels of real estate in question are not exempted by the general tax act of 1894. The several judgments of the Supreme Court will be reversed.

GUY B. WAITE CO. v. OTTO et al.

(Court of Chancery of New Jersey. Feb. 18, 1908.)

FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—NECESSITY OF LIEN—FOREIGN JUDGMENT.

1. A creditor of a living debtor, to maintain a suit to set aside a fraudulent conveyance, must have a lien, which is not created by a foreign judgment.

Suit by the Guy B. Waite Company against Peter Otto and another. Defendants demur to the bill. Demurrer sustained.

Mr. Minturn, for complainant. George J. Jaeger, for defendants.

EMERY, V. C. Complainant recovered a judgment in New York against Peter Otto, one of the defendants, and files this bill to have conveyances made to the defendant Gertrude Otto (the daughter of Peter Otto) of lands in this state set aside as fraudulent against it, and to have its debt, established by the New York judgment, declared to be a lien upon the lands and satisfied by their sale. No judgment has been recovered in this state upon the New York judgment, and the bill is demurred to for that reason. It has always been the law of this state that the creditor of a living debtor, who seeks to set aside alleged fraudulent conveyances of land by his debtor, and to charge lands as held in trust for the debtor with the payment of his debt, must have a lien on the

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 700, 706.

lands for the debt by judgment, attachment, or other lien. *Davis v. Dean*, 26 N. J. Eq. 436 (Runyon, Ch., 1875), also settles that a foreign judgment does not create such a lien. *Mechanics', etc., Transp. Co. v. Borland* (N. J. Ch.) 31 Atl. 272 (Pitney, V. C., 1895), is relied on as changing the rule as to the effect of foreign judgments declared in *Davis v. Dean*, and as further deciding that, where a bill alleges that judgment recovered upon the debt was recovered in the court of a foreign state, and that the debt is due, and that there is no other estate or property on which to levy, and these allegations are admitted by a general demurrer, complainant has a right to relief, and the demurrer should be overruled. Vice Chancellor Pitney's decision, however, did not affect, and was not intended to affect, the decision in *Davis v. Dean*, for in the *Borland* Case the bill was filed against the estate of a deceased debtor, who had died insolvent. *Haston v. Castner*, 31 N. J. Eq. 697 (Err. & App. 1879), had decided that by force of our statutes debts due from deceased debtors to creditors at large were liens on the lands of which he died seised, and that a creditor at large, whose claim had been admitted by the executor, had a standing to file a creditors' bill to set aside a conveyance made by the deceased to defraud his creditors. *Borland*, the debtor, being dead, Vice Chancellor Pitney, in his decision, expressly follows *Haston v. Castner* in relation to the lien of a creditor at large against the estate of deceased debtors, and made the further decision that the recovery of a judgment upon the debt in the foreign state, as it was conclusive upon the question of debt, was a sufficient establishment of it for the purpose of filing a creditors' bill. The decision, therefore, does not apply to the present case, where the debtor is living, and is a party to the suit. This case is governed by *Davis v. Dean*.

The demurrer, therefore, must be sustained.

ALLER v. CROUTER et al.

(Court of Chancery of New Jersey. March 7, 1903.)

DEED—REFORMATION—MISTAKE—TRUST— PAROL PROOF—CONSIDERATION— EXPRESS TRUST.

1. Reformation of a conveyance of lands will not be decreed except on clear proof that by mutual mistake of the parties thereto it expresses something which they did not intend, or omits to express something which they did intend.

2. A trust in lands will not result in favor of the grantor in a conveyance thereof, upon a valuable consideration therein expressed, upon parol proof that no part of the consideration was paid, and that the conveyance was wholly voluntary, because such proof is in contravention of the statute of frauds, and forbidden by the canon of evidence, which prohibits the admission of oral testimony to vary the effect of a written instrument.

3. Lands were conveyed by A. to B. for an expressed valuable consideration. Thereafter B. made and signed a lease thereof to a third person, in which it was expressed that he deeded the same as "trustee for A." and B. also opened an account in his book of accounts, headed, in his own handwriting, "A., account with B., trustee," in which account B. charged himself with rents received from the tenant in said lease, and claimed credits for payments made for the benefit and use of A. Held, that an express trust was thereby "manifested and proved," within the requirement of the statute of frauds.

(Syllabus by the Court.)

Bill by Mary Elizabeth Aller against Cornelius P. Crouter and others to reform a deed. Decree for complainant.

Cornelius Doremus, for complainant. David Ackerman, for some of defendants.

MAGIE, Ch. The labor involved in the examination of this cause has been largely increased by the manner in which it has been presented. No attention seems to have been paid to the rules of pleading or practice in the courts of equity, and I have had extreme difficulty in attempting to discover whether the case presented admits of determination by decree.

The bill in this cause was filed by Mary Elizabeth Aller, admitted to be a person of unsound mind, by a next friend. It states that she and her husband, Daniel J. Aller, on October 20, 1876, by deed, with full covenants of warranty and seisin, conveyed to one Peter Ackerman, for the expressed consideration of \$7,500, certain lands in the county of Bergen. It avers that, immediately upon the execution and delivery of the deed, Peter Ackerman, the grantee, went into possession of said lands, and received the rents, and continued in possession until his death, on August 17, 1901. It proceeds to state that the deed was made upon the express agreement, between the grantors and grantee, that Ackerman should hold the same as trustee for Mary Elizabeth Aller, upon a trust thus expressed, viz.: "Upon the express trust and agreement that said Peter Ackerman should rent said premises and pay the net income derived therefrom, after payment of all charges connected with the management of said property, to said Mary Elizabeth Aller, or use the same for her maintenance and support; and that, if said Peter Ackerman should sell said premises, that the proceeds of such sale, and all income derived therefrom, after payment of all expenses and charges touching the same, should be used for the support and maintenance of said Mary Elizabeth Aller; and that, upon the death of the said Mary Elizabeth Aller, any balance remaining in the hands of said Peter Ackerman should be paid to her lawful heirs." It is further stated therein that Peter Ackerman, together with his wife, on November 29, 1876, had conveyed a portion of the said lands to one Mason, at the request of the complainant,

and had afterwards died, on August 17, 1901, leaving a last will and testament, by the residuary clause of which he devised all the rest, residue, and remainder of his estate, to or for certain persons therein named, all of whom were made parties to the bill. The bill expressly avers that it was the intention and agreement of the parties thereto, at the time of the execution and delivery of the deed, that the same should be considered and treated as a trust deed, and that through "inadvertence, ignorance, and mistake, said deed was drawn as a warranty, and not as a trust deed." The prayer of the bill is for an answer without oath; for an account of the rents and profits; and for a reformation of the deed by the insertion of the words "trustee for Mary Elizabeth Aller" after the words "Peter Ackerman" wherever they occur in the deed, and by the substitution of apt words in the habendum clause, and other clauses, to show that the deed is a trust deed, and intended to convey an estate in trust for the complainant. The prayer also contains the extraordinary request that the warranty clause in the deed should be eliminated, together with all other words purporting to convey an estate in fee simple to said Ackerman.

To this bill, the next friend of the unfortunate complainant made parties Cornelius P. Crouter and Peter G. Zabriskie, who are the executors of the will of Peter Ackerman, James Turner Ackerman, David D. Ackerman, Mabel Harper, Anna M. Ackerman, and Edwin Ackerman, devisees under the residuary clause of said will, and John Pake, brother of the complainant, John H. Pake, his son, and Louisa Duryea, a niece of complainant, the three last named being made parties apparently on the theory that they are heirs presumptive or apparent. James T. Ackerman and Edwin Ackerman, and Crouter and Zabriskie, executors, each filed an answer expressing ignorance of the charges made in the bill, and leaving the complainant to make such proof of her allegations as she was advised to do. Louisa Duryea, John Pake, and John H. Pake unite in an answer admitting the charges of the bill, and praying for such decree as may be proper. David D. Ackerman, Anna M. Ackerman, and Mabel Harper unite in an answer by which they deny the trust set up in the bill, and deny that the complainant has any title to the lands in question, or that the deed was intended to be a deed in trust, or that it was made under any mistake with respect to the form of the deed and its meaning.

To this answer, which denies all the facts upon which the equity of the bill was based, no replication was filed within the time required by the practice.

On April 22, 1902, an order was made, with the written consent of the solicitors of all the parties. It recited that the matters in controversy were proper subjects of a ref-

erence to a special master, and that the parties had agreed that the issues in the cause should be heard by James N. Van Valen, a special master. It directed him to take evidence in respect to the allegations of the bill and answers, subject to objections, and to take and state an account of the transactions between the complainant and Peter Ackerman, and to report the same with the evidence.

The special master to whom the reference was thus made has reported to this court the evidence taken before him. Upon his report being filed, the cause was set down for hearing under a written stipulation of all the solicitors, and was submitted on briefs. When attention was called to the fact that the cause was not at issue, a replication was filed by the agreement of all the solicitors and the permission of the court. After the evidence had been taken, the death of Mary Elizabeth Aller, the complainant, was suggested to the court. The affidavit of her death stated that her sole next of kin were John H. Pake and Louisa Duryea, who were parties defendant in the cause. Thereupon an order was made for the amendment of the bill by admitting them to appear as complainants instead of defendants. As the contest relates to real property, and as the evidence discloses that they are the sole heirs at law of the deceased, Mary Elizabeth Aller, this circumstance has not been deemed to prevent consideration of the cause. As the cause has been thus presented, it has been deemed best to consider it as a cause submitted on evidence taken before an examiner, within the practice of the court, and it has been thus considered.

The apparent object of the bill is to reform a certain deed, and the main prayer thereof is for such reformation. But the evidence produced on the part of the complainant renders it perfectly clear that such relief cannot be granted, and should not have been asked. In respect to such relief, it has not been contended, nor is it open to doubt, that parol evidence may be admitted to establish a case for the reformation of such a deed.

The facts disclosed by the admissible evidence are, in the main, these: In 1876 the original complainant, Mary Elizabeth Aller, was the owner in fee simple of a tract of land in Bergen county, containing about 10 acres, which was improved by buildings. She was in possession of the property. She was a married woman, having been married to Daniel J. Aller some years before. The marriage had proved an unhappy one, and after a few months they had separated, and thereafter lived apart. Her marriage does not seem to have been generally known, for she resumed her maiden name of Pake, and was spoken of and to as "Miss Pake." In that year she contracted to sell a portion of the property, and the proposing purchaser discovered that she had been married, and

declined to take the deed without her husband joining in it. In that situation, Mrs. Aller sought the advice of Peter Ackerman, a person long resident in the county, whom she had known for many years. He appears to have been a man of position and character. After a conference with him, it was decided by them that a deed should be prepared, to be executed by her and her husband, to Ackerman, conveying to the latter the whole of said tract of land. The plain purpose of this conveyance was, primarily, to enable Ackerman to make a deed to the intending purchaser for the part of the land of Mrs. Aller which he had agreed to buy, and, secondarily, to enable Ackerman to make other conveyances if complainant desired to sell other portions, or the whole, of said land. The deed was so prepared, and Ackerman went with Mrs. Aller to her husband, and they procured the husband's signature thereto, upon the payment to him of \$100, which was either furnished by her, or advanced by Ackerman and afterwards repaid by her. This deed appears to have been duly executed by Mrs. Aller and her husband, and was recorded. Ackerman thereafter made conveyance of the part of the land which Mrs. Aller had agreed to sell. The evidence justifies the inference that the consideration which Ackerman received was used for Mrs. Aller's benefit.

The proofs above stated comprise substantially all the evidence having any bearing upon the relief now under consideration, viz., that of reformation of the deed in question. It seems obvious that they are insufficient to justify a decree for such relief. Reformation of such a deed can only be decreed when the proofs convincingly establish that by a mutual mistake of the parties thereto the deed as executed expresses something which they did not intend, or omits to express something which they did intend. The claim of the bill is that there was omitted from the deed a clause declaring that Ackerman, the grantee, held the lands conveyed in trust for Mrs. Aller. There is not a syllable of evidence that the parties intended that such a clause should have been inserted in the deed. On the contrary, the insertion of such a clause could not have been within their intention, for it would have defeated their purpose in executing the deed. For any intending purchaser would have declined to take title to any part of the land from Ackerman, under a deed so framed, without a conveyance from the cestui que trust, Mrs. Aller, which would have required the concurrence of her husband. The deed was undoubtedly made to avoid the necessity of seeking the concurrence of the husband to such conveyances, and it cannot be conceived that there was an intent to make it ineffective to serve the purpose for which it was designed. It may be that Mrs. Aller did not properly appreciate the extent to which the delivery of this absolute conveyance put it in the power of Ackerman

to deprive her of the land thus conveyed and take it to himself. But there is no evidence that Ackerman took advantage of her ignorance, if she was ignorant. It is equally credible that she was willing to confide in the honesty of her friend, and the proofs show that she was justified in such confidence, for they make it appear that neither by word nor act did Ackerman ever make claim to the land conveyed, or deal with it other than as the trustee of Mrs. Aller.

The failure of proof to justify a decree of reformation must result in a dismissal of the bill, unless there is relief prayed for thereby which is within its scope and justified by the evidence.

The bill contains no prayer for general relief. Under such a prayer, no question could arise but that an appropriate relief could be given in respect to matters falling within the scope of the bill.

The brief filed in behalf of Mrs. Aller contends that the prayer for a decree that the deed "should be held, construed, and regarded as having conveyed the said premises in trust," indicates relief that can be afforded upon the evidence. I am inclined to the view that, if the evidence justifies such relief, it ought to be afforded, and, if necessary, by an amendment of the bill, or even of its prayer. I will therefore consider the evidence to determine whether the facts proven justify relief of that nature.

It is first contended that the circumstances proved establish a case of trust by implication or construction of law, which is excepted from the provisions of the statute of frauds, and is provable by parol evidence. In addition to the evidence previously recounted, it was further proved that, notwithstanding the execution, delivery, and recording of the deed to Ackerman, Mrs. Aller remained in possession of the property. She employed it in the business of taking boarders, from whom she annually received an income which she applied, with the knowledge of Ackerman, in repairing the property, improving the buildings thereon, and keeping them in good condition. In short, she acted, and was permitted to act by Ackerman, precisely as if she were the owner in fee simple. This continued for some 11 or 12 years, when she lost her mind and became demented, in which state she continued to the day of her death, more than 13 years afterward. During all the time Mrs. Aller was thus incapacitated, Ackerman took charge of the lands and buildings in question. He permitted her at times to reside there with her niece, and at other times he leased the premises. He received the rents. He paid the taxes, or procured them to be paid by tenants on account of rents. He looked after and paid for repairs upon the property. He obtained insurance in his own name upon the buildings, and, in his book of account, he opened and continued to keep an account with Mrs. Aller, apparently including all his receipts

from the rent of the property, and all his disbursements on account thereof, and on her account. These disbursements include items paid for taxes, insurance, and repairs, as well as items paid for care and treatment of Mrs. Aller in asylums and sanitariums and elsewhere, where she was kept restrained by reason of her infirmity. In short, he acted, during the whole period of his life after she became insane, as an honorable man would act with respect to property, the title to which he had for the benefit of another person. His conduct was unchanged to the day of his death.

The facts above stated are proved by witnesses present at the negotiation between the parties, by witnesses who heard admissions of Ackerman, by the handwriting of Ackerman in his books of account, and upon some of the receipts for disbursements upon the lands, and by a lease of the premises, hereafter to be considered. Upon this evidence, the question is whether a resulting trust in the lands conveyed to Ackerman, for the benefit of Mrs. Aller, is sufficiently established to justify a decree for relief.

Resulting trusts have been considered, since the decision of Lord Hardwicke in *Lloyd v. Spillet*, 2 Atk. 148, to fall naturally within one of three classes, and the distinction has frequently been recognized by our courts. One class of such trusts arises when title to lands which are purchased, in whole or in part, with the money of one, is taken in the name of another, our leading case in respect to that class being *Cutler v. Tuttle*, 19 N. J. Eq. 549. Another class of such trusts arises when a trust is declared in respect to a portion of the title to lands, and nothing is declared in respect to the remainder of the title, which was considered in *Duval v. Duval*, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440. The remaining class, which is now more generally classified by the text-writers under the head of "constructive trusts," is that where title to lands is acquired by fraud or mala fide, of which we have many examples in cases where solicitors or agents have purchased for their principals at judicial sales and taken title in their own names.

The case with which we are dealing evidently does not fall within the second of these categories. Nor is there ground to contend that it is a case of constructive trust, for there cannot be the least pretense that Peter Ackerman acquired the title to the land by this deed by any species of fraud. If, therefore, a trust results from the covenants, it must be because the case falls within the first class of trusts thus distinguished. But it is plain that it does not bear the ordinary characteristics of that class, because nothing is clearer from the evidence than that no consideration was paid for the deed. So far as Mrs. Aller, the real owner, was concerned, it was wholly without consideration, and voluntary. Her husband had no estate there-

in, not even the estate by the curtesy intiate, and the small sum paid him would not support a trust for the whole property. If a trust results in this case, it must arise from the fact that the conveyance to Ackerman was purely voluntary, and conveyed to him an apparently absolute title, without a dollar having been paid therefor. Whether a trust results under such circumstances, was a matter considered by this court in *Lovett v. Taylor*, 54 N. J. Eq. 311, 34 Atl. 896. The well-reasoned and satisfactory opinion of Vice Chancellor Pitney in that case renders any discussion of the matter superfluous. It establishes convincingly that, by the settled law of this state and the weight of authority in this country, a resulting trust cannot be established by mere proof of the fact that no consideration was paid for a conveyance operating under the statute of uses. In my judgment, he properly criticised the modern English decisions as departures from correct principles. In this state, I apprehend there can be no doubt on the subject since the decisions of the court of last resort establishing that a grantor in one of the conveyances now used to pass title cannot claim a resulting trust in himself upon proof that there was no consideration paid, such evidence being deemed to be in contravention of the express provisions of the statute of frauds, and contrary to the canon of evidence which forbids the admission of oral testimony to vary the effect of a written instrument. *Whyte v. Arthur*, 17 N. J. Eq. 521; *Osborn v. Osborn*, 29 N. J. Eq. 385. It results that there is no proof upon which a resulting trust can be established by decree.

It only remains to consider the contention that, upon the evidence, an express trust has been established and may be decreed. In dealing with this contention, it is at once obvious that I must dismiss from consideration very much of the evidence taken by the master, some of which has been adverted to. The defendants did not attempt to impeach the credibility of the witnesses who gave the evidence. They did not contradict the evidence given. They produced no witnesses who testified that Peter Ackerman, in his lifetime, made claim to the lands in question. But the evidence was of a parol character. However adapted to convince my judgment that Peter Ackerman took the title to the lands without payment of a dollar for them, and thereafter held them for Mrs. Aller, and that, if living today, he would probably recognize the claim of her heirs at law, if the evidence is such as I am prohibited by law from considering, the defendants have a legal right to insist that I must shut my eyes and close my ears to it.

By the provisions of section 3 of our "Act for the prevention of frauds and perjuries" (Gen. St. p. 1603), which is a copy of the provisions contained in sections 7 and 8 of the English statute of frauds, it is enacted that all creations of trusts in lands (not be-

ing such as arise upon a conveyance by mere implication or construction of law) must be "manifested and proved" by some writing signed by a party having, by law, capacity to declare such trust, or by his last will in writing. The construction of this statute in our courts has been uniform and consistent. It excludes all parol testimony to the creation of an express trust in lands. It does not require that the trust shall be created by a writing, but only that it must be proved by such means. The written proof need not be contemporaneous with the creation of the trust, but will suffice if made after long intervals. The proof may be found and deduced from one or more writings if they bear a relation to each other and import a trust. The writing need not be of a formal character, but a trust may be imported and proved by letters, deeds, and other writings signed by the party to be charged. *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Smith v. Howell*, 11 N. J. Eq. 349; *Newkirk v. Place*, 47 N. J. Eq. 477, 21 Atl. 124; *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584; *Tynan v. Warren*, 53 N. J. Eq. 313, 31 Atl. 596; *Iauch v. De Socarras*, 56 N. J. Eq. 538, 39 Atl. 370; *Combs v. Brown*, 29 N. J. Law, 36.

There was produced in evidence in this case at least one writing which measures up to the requirements of the statute of frauds. It is an indenture of lease, bearing date February 4, 1891, at a time when Mrs. Aller was mentally incapacitated. It is proved to have been signed by Peter Ackerman. It is made between Peter Ackerman, "as trustee of Mary E. Pake, of the first part, and Elizabeth B. Kerr, of the second part." It demises to the party of the second part the "house, outbuildings, and about seven acres of land at Hohokus," in Bergen county, known as the "Osborn Place," or "Pake Place," for the term of one year, with the privilege of three additional years, at the yearly rent of \$600. By the description, the demised land is clearly identified as that which remained of the land conveyed to Peter Ackerman by the deed in question. That this instrument is an acknowledgment in writing, signed by Peter Ackerman, and that he held the lands in trust for Mary E. Pake, the name by which Mrs. Aller was designated, does not, in my judgment, admit of the least question. It is, to use the language of Mr. Perry, a writing in which the fiduciary relation between the parties, and its terms, can be clearly read. Standing alone, it satisfactorily establishes that Peter Ackerman held the naked title to the land for the use of Mrs. Aller, who had the beneficial interest therein.

While parol evidence of an express trust is to be rejected, yet, when an instrument is claimed to be an acknowledgment and proof of such a trust, the circumstances under which it was made may be used to elucidate its construction. *Morton v. Tewart*, 2 Y. & C. Ch. 67. In this connection, the

facts that the conveyance in question had been made and recorded many years before, that Mrs. Aller remained thereafter in possession of the lands until she became incapacitated, and that this lease was afterward made by Ackerman, the grantee in the conveyance, are extremely significant.

Nor can I yield to the defendants' contention that this instrument fails to disclose the terms of the trust. It affords as complete a description of the terms as would be afforded by a conveyance of lands to A., in trust for B. There could be no doubt that such a conveyance would vest the legal title in A., and B. would acquire thereby the complete beneficial interest, which he could convey or devise, and which would descend to his heirs at law. Precisely such a trust is acknowledged and proved by this instrument.

There are in evidence other writings which, I think, may be read with the lease above considered, and aid in its construction. Upon one page of the book of account kept by Peter Ackerman is an account headed thus: "Mary E. Pake, Account with Peter Ackerman, Trustee." The heading is shown to be in Ackerman's handwriting. Although this is not a subscription, it is a "signing" within the meaning of the statute of frauds. *Smith v. Howell*, *ubi supra*. The account which follows, on that and other pages, contains entries whereby he has charged himself with rent received from Mrs. Kerr, the lessee in the lease, and allowances in his favor for payments for Mrs. Aller's benefit. There are also other entries for rent in subsequent years, and allowances thereon. It may be added that the account shows that Ackerman, before he died, had advanced for Mrs. Aller's benefit more money than he had received.

There is also evidence that Peter Ackerman kept the vouchers for payments made by him on Mrs. Aller's account, in an envelope, on which he wrote, "Papers of Mary E. Pake, Peter Ackerman, Trustee," but the envelope was not produced. Many receipted bills for work done or materials furnished for the property were produced in evidence. They showed in many instances that the work or materials furnished for the property had been charged to him, and he had added to his name the word "Trustee." But, as it is doubtful whether these writings can be deemed to have been signed by him, I have given them no consideration. The lease and the account are signed by him, and thereby, in my judgment, he has acknowledged a trust which is proved in conformity with the provisions of the statute.

It results that a decree declaring the trust would be supported by this evidence.

If counsel desire it, I will hear them further on two questions: (1) Whether such a decree can be made without amendment of the bill, and (2) what the terms of the decree should be.

REDHING v. CENTRAL R. CO. OF NEW JERSEY.(Court of Errors and Appeals of New Jersey.
March 2, 1903.)**CARRIERS—DEPOT GROUNDS—INTENDING PASSENGERS—CONTRIBUTORY NEGLIGENCE.**

1. When the position of the station and tracks of a railroad company is such that passengers intending to take a train at the station must cross intervening tracks to reach their train, and a train approaching the station is so near and moving so slowly as to indicate to prudent people that it is about to receive the passengers, and the passengers then step upon the intervening tracks without apprehending danger, it is a question for the jury whether they have exercised proper care, even though the approaching train is not designed to stop at the station.

2. Under like circumstances it is a question for the jury whether the company is guilty of negligence if a train running on the intervening tracks strikes one of the passengers.

3. Although sentences in a charge may, if read apart from their connection, need some qualification to render them accurate, yet if the qualification be given in the context, so that the jury cannot reasonably be thought to have been misled by the charge taken in its entirety, there is no error.

4. Rulings on evidence which have done no harm to the complaining party afford no ground for reversal of the judgment.

Gummere, C. J., and Van Syckel, Garrison, and Pitney, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Thomas Redhing against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

William A. Barkalow and Sherrerd Depue, for plaintiff in error. Joseph E. Stricker and Alan H. Strong, for defendant in error.

DIXON, J. At the Roselle Station of the New Jersey Central Railroad there are six tracks lying south of the main station and ticket office, and in this case they are numbered from 1 to 6, beginning at the south. Tracks Nos. 1 and 3 are used by trains going east, tracks Nos. 2 and 4 by trains going west, track No. 5 is a switch track, and track No. 6 is used by a local train made up at Roselle to go east. About 6 o'clock in the evening of November 14, 1900, the plaintiff went to the station, intending to return by that road to his home in Perth Amboy, and having an excursion ticket for Elizabethport. On reaching the station he became engaged in a business conversation, after which he got a time-table, and ascertained, either by that or by information from a friend, that his train would soon be in. It is not clear whether the train he had in mind was one leaving at 6:15, which starts west of Roselle and arrives there on track No. 3, or one leaving at 6:34, which is made up in the yard just west of Roselle Station and comes in on track No. 6, but probably it was the latter. The plaintiff had no knowledge as to what tracks were used by the several trains.

At about 6:33 he was waiting at the station for his train, when he saw a train approaching from the west. As it approached, he noticed it slackening speed, and when "the engine was just opposite to him, going very slow—very nearly stopped, but not quite," he proceeded to cross the intervening tracks, and was struck on track No. 6 by the engine of the 6:34 train. Under the evidence there is room for doubt as to whether the approaching train was the 6:15 train behind time, or an express train on track No. 1, due to pass through Roselle at 6:32, but not to stop.

The foregoing statement indicates the case as contended for by the plaintiff, and, as it has some support in the evidence, we must on this writ of error deem it true.

On behalf of the defendant it is insisted that the plaintiff should have been nonsuited, or a verdict against him should have been directed, because there was no evidence of breach of duty on the part of the defendant, and because the plaintiff was indisputably guilty of negligence in attempting to cross the tracks before the approaching train had fully stopped, and without looking up or down the tracks to be crossed. These reasons may be considered together, as they seem to be in some degree correlative.

It is the settled rule in this state that, when the position of the station and tracks of a railroad company is such that passengers about to take or leave a train standing at the station must cross intervening tracks, it is negligence in the company to run cars over those tracks, and that it is a question for the jury whether a passenger who attempts to cross those tracks without looking for approaching cars is guilty of negligence. *Jewett v. Klein*, 27 N. J. Eq. 550; *Atlantic City R. R. Co. v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652; section 56, Cent. Law Journ. 41. Is this rule applicable to the case of a passenger who starts to cross intervening tracks when the train which he intends to take has not actually stopped, but is partly at the station, and moving so slowly as to indicate to prudent people that it is about to stop to receive passengers? An affirmative answer to this question was given by the language of Mr. Justice Dalrymple, speaking for this court in *Jewett v. Klein*, where he said of the passenger: "He was not bound to look to see whether another train was approaching, or wait, before crossing the easterly track, till the passenger train had come to a full stop." The rule, with this modification, was directly applied in *Terry v. Jewett*, 78 N. Y. 338, where the passenger, without having looked for danger, was walking diagonally across an intervening track to take an approaching train. To the same effect is also *Kohler v. Pennsylvania R. R. Co.*, 135 Pa. 346, 19 Atl. 1049, where it was held that "it was not necessarily negligent for the passenger to start for his train before it had come to a full stop. Whether or not the slowing up of

the train, and the other circumstances, justified the plaintiff in crossing the track when and as he did, was not sufficiently clear to be decided against him as a question of law."

Considering these cases as establishing the doctrine that a passenger, who is required by a railroad company to cross its tracks in order to reach a train which has stopped or almost stopped at a station to receive him, may cross those tracks without looking for danger, subject to the opinion of a jury as to whether he has exercised due care, it seems to follow that, if the servants of the company run him down on those tracks, the conduct of the company or its servants must in some particular be inconsistent with duty. For if, under conditions regularly occurring, the passenger need not apprehend danger on the track, which is usually a dangerous place, it must be because there exists a duty on the part of the company, the conduct of whose servants alone can make the track dangerous, to withhold or prevent the usual cause of danger; and such is the view taken in the cases cited. These considerations are controlling if the approaching train was one designed to receive passengers at Roselle.

But a further step must be taken to sustain the present judgment for the plaintiff, because the trial justice was asked, and refused, to charge that, if the approaching train was one not scheduled to stop at Roselle, that is, if it was the express train due at 6:32, the plaintiff could not recover. The fact that the train was not scheduled to stop can have no bearing on the question of the plaintiff's negligence, for he had no notice or duty to obtain notice of the fact. His conduct must be judged by the circumstances presented to him. But that fact has a bearing on the question of the defendant's negligence. If the train was the express, which regularly passed through Roselle at the rate of 50 or 60 miles an hour, its slackening of speed at that station so as to suggest a purpose to stop for passengers was an unusual occurrence, for which it was not so clearly the duty of the company to make provision as it is for ordinary conditions. But, on the other hand, we cannot judicially say that such occurrences must have been so rare that the company could not anticipate them, and hence should not be bound to provide for them. It was in evidence that over a hundred trains pass through Roselle between 7 o'clock a. m. and 8 o'clock p. m. daily, and that it is the duty of a flagman at the station to give to every express train a signal indicating whether it shall stop or proceed. These circumstances show that there is reason for expecting that express trains not scheduled to stop at Roselle may, nevertheless, sometimes be required to stop there, and in its own interest the company has made arrangements accordingly. A high degree of prudence might suggest further arrangements for the safety of passengers at the station. The time for the express due at 6:32 is so

close to the time at which the 6:34 train is to leave that there may be said to exist sufficient reason for anticipating such a condition as was presented on the evening of the accident, that is, the express train slackening speed to such a degree as to indicate a purpose to stop for passengers, and passengers unfamiliar with the precise movement of trains mistaking it for the 6:34 train, and crossing the tracks to reach it just as the 6:34 train was coming to the station. The likelihood of such occurrences is increased when, as in November, the darkness of the evening has made the discernment of moving objects less certain. The dangers incident to such a condition would surely be diminished, and perhaps be entirely obviated, by requiring the 6:34 train not to approach the station when the express was approaching; and the nonexistence or nonobservance of such a requirement gives room for an inference that the company or its servants had failed to exercise the high degree of care due to passengers. We conclude on this point that it was proper to leave the question of the defendant's negligence to the jury.

The next objection urged on behalf of the defendant is that the trial justice, in one clause of his charge to the jury, made the right of the plaintiff to cross the tracks depend on his "honest belief," instead of his "reasonable belief." But an examination of the whole charge shows that by frequent expressions the jury were instructed that it was incumbent on the plaintiff to "exercise ordinary care," to believe "only with reason," to act as a "prudent man would," to act as "a man of ordinary prudence, judgment, and discretion," not to do "anything negligent," and that, if he failed in this respect, the verdict must be for the defendant. It is unreasonable to suppose that, with these numerous utterances sounding in their ears, the jurors could have been misled by a single expression which omitted the proper qualifications. They must have understood that an "honest belief" meant such a belief as was stated in the charge generally—a belief having a reasonable basis. As was said by Mr. Justice Strong in *Evanston v. Gunn*, 99 U. S. 660, 668, 25 L. Ed. 306, "sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled."

Counsel for defendant further complain of two rulings on the admission of evidence. One is that the plaintiff was permitted to prove the rule of the company directing that, when a train is receiving or discharging passengers who are required or liable to cross the tracks, a train approaching on those tracks must stop. As this rule was no broader than the general legal rule, no harm could come from its reception, even if it be not legitimate evidence. The other complaint is that a question, put on cross-examination of

one of the plaintiff's witnesses, was overruled. But, as the same question was afterwards put to the same witness and answered, no harm was done by that ruling.

There is no other complaint requiring specific notice.

We find no error, and the judgment for the plaintiff should be affirmed.

GUMMERE, C. J., and VAN SYCKEL, GARRISON, and PITNEY, JJ., dissent.

WALLACE v. WALLACE.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

DIVORCE—JURISDICTION—RESIDENCE.

1. Where the proofs in an action for divorce show that the residence of the complainant in this state was acquired with the animus manendi, corroborated by satisfactory evidence as to such intention on her part to reside permanently in the state, her avowal that her object in coming into the state was to obtain a divorce, while it is a pertinent fact to be considered in determining the bona fides of her residence, is neither a controlling circumstance, nor a bar to her right to obtain a divorce under our statute.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Hester Wallace against William Wallace for divorce. From a decree dismissing the appeal, plaintiff appeals. Reversed.

The appeal in this case was from a decree advised by Vice Chancellor Pitney, dismissing a bill for divorce. The opinion is reported in 62 N. J. Eq. 509, 50 Atl. 788.

The reference in this case had been made to Frederick Adams, Esq., one of the special masters in chancery, and depositions were taken before him; he made his report on the 28th day of August, 1901, and therein stated that he had reached the following conclusions on the law and on the facts:

(1) A person may legitimately move to another state in order to avail himself or herself of the laws of that state. This is a general rule, applicable to suitors in divorce cases, as well as to other persons. Consequently, an avowal that the object in moving to another jurisdiction was to get a divorce does not show illegality or even impropriety of motive, though it may well induce the court to require strict proof of residence in good faith. *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683; *Pohlman v. Pohlman*, 60 N. J. Eq. 28, 46 Atl. 658. Chancellor Green in *Brown v. Brown*, 14 N. J. Eq. 78, leaned to the opposite conclusion, but the decree in that case was reversed by the unanimous vote of the Court of Errors. The grounds of reversal do not appear, as the opinion prepared by Chief Justice Whelpley was lost in the hands of the reporter. *Brown v. Brown*, 15 N. J. Eq. 490.

(2) Since mere residence, without an animus manendi, will not support a divorce suit, the existence of the animus manendi must be proved as fully as other material facts are required to be proved. The sworn statement of the complainant is not enough. It must be corroborated by facts preceding and attending the change of residence. *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533.

(3) The facts elicited by the re-examination of the complainant and Mrs. Boulanger corroborate, beyond a reasonable doubt, the complainant's declaration that her intention is to reside permanently in New Jersey. It is to be remembered that the complainant was married at 17, was a mother at 18, and was deserted by her husband and left to support herself and her child when only 24. It was natural and almost inevitable that she should resume her place in the household of her mother, who is a woman of evident force and capacity; that she should rely on her mother's aid, and conform to her mother's plans. It appears that Mrs. Boulanger, though she was born in New York City, and has married two men who lived and did business in New York, is yet very much of a New Jersey woman. Her father, Charles Hertel, spent most of his life in Jersey City, where he carried on the trade of wood turner. Her three brothers, Joseph, William, and Charles Hertel, were born and now reside in Jersey City, and have always lived and done business there. She has no relatives living in New York City. When her last husband, Cammillie Boulanger, died in September, 1896, she had to make a living for herself, and to contribute according to her ability to the support of her two children and granddaughter. After keeping boarders for not quite a year in New York City, she moved in November, 1897, to Jersey City, where prices were lower than in New York City, and has lived there ever since, near to her three brothers, and both she and her daughter, who is a member of her household, do work on neckties for a New York business house. Her son, who is an actor, and who is on the road a good deal, lives with her and votes in Jersey City. Mrs. Boulanger testifies that her brother Joseph Hertel, who is a real estate man, advised her to move to Jersey City on the ground of economy. This was evidently good advice, and that she should take it was the obvious and judicious thing to do. She and her daughter both testify that they do not intend to leave Jersey City, but that they expect to remain there. I not only see nothing in the cause to discredit their testimony on this point, but am persuaded of its truth.

Thomas S. Henry, for appellant.

VROOM, J. (after stating the facts). The report of the special master sets forth in a clear and concise manner all the essential features of the testimony taken in this cause and necessary to its determination. Based

¶ 1. See Divorce, vol. 17, Cent. Dig. §§ 213, 297.

upon this testimony, the finding was that the complainant's act in moving into this state for the purpose of getting a divorce did not show either illegality or impropriety of motive, and that at the time of exhibiting her bill she had an actual residence in this state to support a divorce, shown by her intention to reside here permanently, and proven not only by her own testimony, but corroborated beyond a reasonable doubt. A careful examination of the testimony has satisfied me that the conclusions reached by the master are correct.

Admittedly the only question in the case is that of the actual residence or domicile of the complainant, and whether this residence was such as entitled her to maintain this suit for divorce. There is no dispute as to the fact that the residence of the defendant was in New York, and that no service of process was had upon him within the jurisdiction of New Jersey, he having been brought into court by service of notice as a nonresident defendant in New York, in accordance with the provisions of our statute and the practice of the Court of Chancery. In dismissing the complainant's bill, the court below held that when a complainant in a divorce suit has been deserted in another state, and has moved into New Jersey for the purpose of securing a divorce in such state, she acquired no domicile, such as to give to the courts of this state jurisdiction, where no service of process is had on the defendant in New Jersey.

It is not deemed essential for the determination of this case to enter upon either an extended consideration of the extraterritorial service of notice, or of the power to grant a divorce based upon an extraterritorial service. That such decree may be made, and that it will have extraterritorial force, is settled in this court by the case of *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612, and I agree with the learned vice chancellor that "It has been finally determined in the great majority of jurisdictions, including the Supreme Court of the United States, as the final arbiter, that such a decree may be made which will have extraterritorial force." *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. In this case Mr. Justice Gray presents a very careful exposition of the question, and cites and comments at length upon the decisions of the courts of the different states. In order, however, to render the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to him as the law of the first state required. *Atherton v. Atherton*, supra; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298.

The statute of this state, in defining the causes for which divorces may be decreed by our courts, provides, "or when the complainant or defendant shall be a resident of this

state at the time of filing the bill of complaint and the complainant or defendant shall have been a resident of this state for the term of two years, during which such desertion shall have continued." In the case of *Tracy v. Tracy* (in this court) 62 N. J. Eq. 810, 48 Atl. 533, the definition of residence is adopted as the place where a person's habitation is fixed, without any intention of removing therefrom, and it was well said by the special master in his finding in this case that mere residence, without an animus manendi, will not support a divorce suit, and that the animus manendi must be proved as fully as other material facts are required to be proved.

But it was insisted by the learned vice chancellor that, in addition to the requirements of the statute as to residence as above defined, the residence cannot be acquired with the desire or intention to procure a divorce. On page 519, 62 N. J. Eq., 50 Atl. 792 (*Wallace v. Wallace*, supra), he says: "It has been my rule, and I believe that of the other members of the court, not to grant a decree for divorce for desertion based upon a service out of the jurisdiction and a domicile not matrimonial, unless such domicile has been acquired under circumstances showing sufficient and controlling reasons for its acquisition, other than the desire to procure a divorce, and certainly never when the avowed object was to obtain that relief."

The practical effect of this doctrine is to prevent a citizen who removes into this state from another, even though such removal be made bona fide with animus manendi, from acquiring a residence here sufficient to sustain an action for divorce, unless some reason for acquiring such residence be shown other than the desire to procure a divorce; its legal effect is to substitute for the public policy established by the Legislature a judicial policy of contrary import. I concur entirely in the principle laid down by the special master in this case that a person may legitimately move to another state in order to avail himself of the laws of that state, and this includes necessarily the right to remove into the jurisdiction of this state for the purpose of procuring a divorce, the only requirements being absolute good faith in the taking up of such residence and of the animus manendi. In other words, the factum of residence and the animus manendi prove the domicile. *Magowan v. Magowan*, 57 N. J. Eq. 324, 42 Atl. 330, 73 Am. St. Rep. 645; *Harral v. Harral*, 39 N. J. Eq. 285, 51 Am. Rep. 17.

It is true that Chancellor Green, in the case of *Brown v. Brown*, 14 N. J. Eq. 78, refused a divorce because "the actual residence in this state was adopted under circumstances which warrant the conclusion that the change of residence was made for the purpose of obtaining a divorce," and yet the decree in that case was unanimously reversed in this court. The opinion of Chief Justice Whelpley in this

court was not filed nor reported, yet there appears no warrant for assuming that such reversal "may have been based upon a different view of the facts." The opinion of Chancellor Zabriskie in *Coddington v. Coddington*, 20 N. J. Eq. 263, states the grounds upon which *Brown v. Brown* was reversed in this court. He says, on page 265: "And it was well understood that the last case (*Brown v. Brown*) was reversed in the Court of Appeals on the ground that the chancellor held that, notwithstanding the act of 1857, a residence of five years during the desertion was still required (the complainant had resided in the state more than three years during the desertion); and also because the chancellor held that a residence resumed in this state, seemingly for the purpose of bringing a suit, although there was an actual change of residence, was not sufficient under the requirements of the act."

This extract from the opinion in *Coddington v. Coddington*, it seems to me, leaves no doubt whatever as to the grounds of the reversal in this court of the decree in *Brown v. Brown*.

In the case of *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533, this court held that "the fact that a person comes into a state for a specified purpose does not necessarily prevent him from procuring a residence, if at the time of coming he has no definite idea of removing from the state when that purpose is accomplished, or at some definite period." The case of *McGean v. McGean* (N. J. Err. & App.) 49 Atl. 1083, in this court, was not decided upon the question of the bona fides of the residence of the petitioner in this state. The affirmance of the decree below was expressly put upon the ground that the petitioner had failed to establish the desertion of the defendant for the statutory period by that quantum of proof which the law requires.

I do not understand that the decision in *Sweeney v. Sweeney* (N. J. Ch.) 50 Atl. 785, referred to in the opinion below, comes to the same conclusion as that reached by the vice chancellor in this case. The chancellor in that case says, in referring to the proofs, that "they would perhaps justify the conclusion that the alleged residence was acquired with the main and predominant intent to enable the petitioner to seek relief for the desertion she complained of"; but he continues, "Without reference to that phase of the case, I feel bound to say that petitioner had not, at the acquisition of the alleged residence, the animus manendi in New Jersey which is essential to give jurisdiction to this court, or at least to leave the matter in such serious doubt that jurisdiction ought not to be assumed therein." It was upon this ground, and the fact that the proofs failed to show a willful or obstinate desertion, that the decree was not granted.

The proofs in this case showing that the residence of the complainant was acquired

with the animus manendi, and that she is corroborated by satisfactory evidence as to her intention to remain permanently in New Jersey, the avowal on her part that her object in moving into the state was to obtain a divorce cannot affect the bona fides of her residence, or her right to a divorce under the provisions of our statute.

The decree below should be reversed.

HOPWOOD v. BENJAMIN ATHA & ILLINGSWORTH CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

INJURY TO EMPLOYEES—NONSUIT—DEFECTIVE APPLIANCES—INSPECTION—FELLOW SERVANTS—DIRECTING VERDICT.

1. Plaintiff's evidence tended to show that a chain, furnished by the defendant, his employer, for use by the plaintiff and others in lifting heavy objects, broke while carrying a weight considerably less than it was designed to bear, and under circumstances that excluded the existence of any immediate cause other than the weakness of the chain. There was evidence tending to show that the chain was an old one; that its links were materially worn where they bore upon each other; that this wear was sufficient to weaken the chain, and was easily discoverable upon inspection; and that the link which broke parted at one end, where the wear had occurred. There was in the plaintiff's case no evidence that the employer had caused any inspection, test, or repairs of the chain to be made prior to the occurrence, nor any evidence of negligence on the part of the plaintiff or those who with him were using the chain. In an action to recover damages for personal injuries sustained by the plaintiff through the breaking of the chain, *held*, that a motion to nonsuit was properly refused.

2. There being nothing to show that the duty of inspecting or repairing the chain had been imposed upon or assumed by the plaintiff and other workmen who were using it, and nothing to show that such inspection and repair were incidental to its use, *held*, that those employees whose duty it was to inspect and repair were not fellow workmen engaged in a common employment with the plaintiff.

3. The refusal of a motion to direct a verdict in favor of the defendant, where the bill of exceptions does not show that any ground was assigned for the granting of the motion, will not be considered upon writ of error.

4. Exceptions not discussed in argument need not be considered.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Cornelius Hopwood against the Benjamin Atha & Illingsworth Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward A. & William T. Day, for plaintiff in error. Samuel Kalisch, for defendant in error.

PITNEY, J. The plaintiff below was employed as an ordinary laborer in the steel foundry of the defendant company. At the time of the occurrence that gave rise to this action, he was engaged, with other work-

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 406.

men, in moving, from one part of the works to another, certain heavy iron frames known as "flasks" or "boxes." In so doing, they were required to lift the flasks from a tram car to the floor of the foundry, using a hoisting crane for this purpose. In order to facilitate handling, the several flasks were formed with trunnions on either side. The evidence does not clearly show the construction of the crane, but it does show that the hoisting chain or other lifting mechanism terminated in an inverted hook that was raised or lowered with the aid of power. In order to attach the burden to this lifting apparatus, there was in use a detachable steel chain, known as a "sling chain." This contrivance consisted of two pieces of chain, each about five feet six inches long, called "branches," which were joined together by a heavy ring that fitted over the inverted hook just mentioned. Each of the branches terminated at its outer end in a ring of suitable size to receive one of the trunnions of the flask. When in use, supporting its burden, the sling chain hung from the hook of the crane, in the shape of an inverted letter V.

At the time of the occurrence in question, the workmen had brought the swinging boom of the crane to a position above the loaded car, had attached one of the flasks to the crane by the use of the sling chain in the manner just indicated, and had placed several flasks upon the one thus attached, thereby making up a load of about 7,200 pounds. The load was lifted by the crane so as to be clear of the car, and the men were swinging the flasks around towards the point where they were to be deposited. At this juncture one of the branches of the sling chain broke by the parting of a link about 18 inches from the heavy ring. The load of flasks fell upon the plaintiff, seriously injuring him. This action was brought to recover compensation from his employer for the injuries thus sustained, and resulted in a judgment in his favor in the court below. Reversal is asked for alleged trial errors.

There was a motion to nonsuit, based upon three grounds, viz.: (1) For want of evidence of negligence on the part of the defendant; (2) because of contributory negligence on the part of the plaintiff; and (3) because the negligence, if any, that resulted in the plaintiff's injury, was that of a fellow servant. With respect to the first ground, the evidence showed that the sling chain, as well as all the other appliances in question, was supplied by the employer for the use of the plaintiff and those who were working with him. The law therefore imposed upon the employer the duty of using reasonable care to furnish a chain that was reasonably safe for such use, and of using reasonable care to keep it in a reasonably safe condition. And if (as admittedly was the case) the continued use of the chain tended to wear out the metal of the links where they bore upon each other, and thereby seriously

impair the strength of the chain, the employer was under a duty to exercise reasonable care about having the chain inspected at reasonable intervals, so that it might be kept in reasonably good repair. There was no evidence tending to show that, when the sling chain was originally supplied, it was not entirely sound and sufficiently strong for the purposes for which it was intended.

But as to its state of repair at the time of the accident, the case stood otherwise. The links were each about two inches in diameter, and the thickness of the metal of each link, where not worn, was about one quarter or three-eighths of an inch. From the evidence introduced in behalf of the plaintiff, it did not distinctly appear how long the chain had been in use. One of his witnesses, who examined it immediately after the accident, testified that its links were very badly worn where they came together; that he observed this to be true of six or eight links near the point where the break occurred. He also testified that the chain was an old one. He does not appear to have seen the link that was broken. Two witnesses who did see it testified that it was broken clean through, at the end of the link, where the links were coupled together; one of them says that it was worn "one-fourth part off." These witnesses also testified in substance that several links in that part of the chain nearest to the point of fracture were seriously worn with use. One witness, on being pressed to say how much the links were worn, "couldn't say exactly how much; it was pretty nearly half worn." There was evidence tending to show that the broken chain was taken at once to the blacksmith shop. The blacksmith's helper then testified that he examined it; that it was an old chain; that the links throughout nearly the whole length of the chain were worn with use where they bore upon each other; that the effect of this wear was to weaken the chain; and that there was no difficulty in discovering the condition of the links by an examination of the chain. At the close of the plaintiff's case, there was nothing to show that the chain had, at any time previous to the accident, been examined, inspected, or repaired. One witness had testified that the chains were "supposed to be" inspected every Sunday; but under pressure of cross-examination he admitted that he knew nothing about it. There was evidence tending to show that the weight carried by the chain when it broke was much less than what it was intended to bear. In the cross-examination of the plaintiff's witnesses, an attempt was made to show that, as the load of flasks was swung around from the car by the workmen, it was permitted to strike the top of a heap of sand, and that this caused a jar that produced a sudden increase of strain upon the chain. This attempt was not successful; the witnesses asserting, in substance, that the break

occurred before the flasks touched the sand heap.

In this state of the proofs, viewing the circumstances of the occurrence in connection with the evidence tending to show that the chain was an old one, worn to such extent as to weaken it, and so much worn that an examination would have disclosed its condition, coupled with the absence of evidence thus far to show that any care had been taken by the employer with respect to its inspection or repair, we think there was enough evidence to go to the jury upon the question whether there had been a neglect of duty on the part of the employer. *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619; *The cases of Fenderson v. Atlantic R. R. Co.*, 56 N. J. Law, 708, 31 Atl. 767, and *Baldwin v. Atlantic City R. R. Co.*, 64 N. J. Law, 232, 45 Atl. 810, are not at all parallel. Nor should the plaintiff have been nonsuited for contributory negligence. The insistence that there was such negligence on his part is based upon the theory that the disaster was caused by a collision with the heap of sand. But there was at least a serious doubt upon the evidence whether it was so caused. The contention that the occurrence was due to the negligence of a fellow servant has no more substantial basis. Those who were working with the plaintiff at the time are not shown to have been negligent. As to those who were charged with the duty of inspecting and repairing the chain, there being nothing to show that either of these duties had been imposed upon or assumed by the plaintiff and other workmen who were using the chain, and nothing to show that such inspection or repair was incidental to its use, it followed that those who were charged with inspection and repair were not fellow servants engaged in a common employment with the plaintiff. *Smith v. Erie R. R. Co.*, 67 N. J. Law, 636, 52 Atl. 634, and cases therein cited.

The defendant introduced evidence tending to show affirmatively that the chain was perfectly sound when first put into use; that it had been used but a short time; that the duty of inspection and repair had been fully performed, and the like. At the close of the case a motion was made to direct a verdict in favor of the defendant, and to the refusal of the trial judge to comply with this motion an exception was sealed. The bill of exceptions, however, does not show that any ground was assigned for the granting of the motion, and we have therefore not considered this exception. *Trade Insurance Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Garretson v. Appleton*, 58 N. J. Law, 386, 37 Atl. 150; *Ottawa Tribe v. Munter*, 60 N. J. Law, 459, 38 Atl. 696.

Exception was taken to the refusal of the trial judge to permit the following question to be answered by an expert witness, produced by the defendant, viz.: "Can you say, from your experience as an expert, whether

a concern using a half inch chain, subjected to a weight of 7,500 pounds, would be justified in using such a chain when it had been worn away to the extent of $\frac{1}{16}$ of an inch?" This question encroached upon the province of both the court and the jury, and was properly excluded.

Error is assigned on the ground that the trial judge charged the jury that the defendants were bound to make tests of the chain at reasonable intervals. But no exception was taken to that portion of the charge that is here referred to, and therefore we are not called upon to express an opinion upon the question whether, as matter of law, a duty to make tests rested upon the employer. Certain exceptions that were taken to the charge disclose only proper comment on the testimony of certain witnesses; the court leaving it to the jury to say whether the inspection that one of defendant's witnesses testified had in fact been made was sufficient if made. There was here no error.

We have now dealt with all the exceptions that were discussed upon the argument. Other exceptions we are not required to consider. *Roofing Co. v. Leather Co.*, 67 N. J. Law, 566, 52 Atl. 389. We have, however, examined the remaining exceptions, and find them unsubstantial. No error appearing upon the record, the judgment will be affirmed.

VAN PELT v. SCHAUBLE et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

WAGERING CONTRACTS—RECOVERY OF DEPOSIT—MONEY HAD AND RECEIVED—ASSIGNMENT.

1. Money deposited in pursuance of a wagering agreement upon a rise or fall in the price of stocks may be recovered by the depositor from the depository, whether the agreement has been fully executed or not.

2. Such a recovery may be had upon the common count for money had and received.

3. The depositor's right to such money is a chose in action arising on an implied contract, and therefore is assignable at law, so that the assignee may sue for it in his own name, by force of the practice act (Gen. St. p. 2591, § 340).

(Syllabus by the Court.)

Error to Supreme Court.

Action by Henry Van Pelt against Philip Schauble and others. Judgment for plaintiff. Defendants bring error. Affirmed.

P. H. Gilhooly, for plaintiffs in error. W. A. Cotter, for defendant in error.

DIXON, J. The plaintiff and five other persons, acting separately, deposited with a firm in Newark, of which the defendants were members, various sums of money, for the purpose of winning or losing as the price of certain stocks should rise or fall. Afterwards the other persons assigned to the plaintiff their right to the moneys so de-

posited, and he brought this suit to recover the same. His declaration set forth only the common money counts. At the trial it appeared that the defendants had paid the money to other parties, presumably on a fall in the price of the stocks, whereupon the defendants moved for a nonsuit, because the transactions were unlawful under our statute; but that motion was overruled, and a verdict for the plaintiff was, in effect, ordered. These rulings present the substantial matters for review.

The transactions were doubtless illegal, for our statute against gaming (Gen. St. p. 1606, § 1) enacts that "all bets, wagers or stakes, made to depend upon any * * * unknown or contingent event, shall be unlawful." But it is because of the illegality that the money deposited remained the property of the depositor. The Legislature has the power of regulating the mode in which the title to property can be transferred, and the effect of this statute is to prevent the transfer of title by the mere delivery of money upon a wager. Consequently, when the depositary receives money upon such an unlawful agreement, he holds it without any other right or duty respecting it than the duty of returning it on demand to its lawful owner, the depositor. That duty may be enforced by action of *indebitatus assumpsit* for money had and received. *Huncke v. Francis*, 27 N. J. Law, 55, 58. If, however, there were no further legislation, this doctrine would not sustain the judgment in the present case, because of the evidence tending to show that the defendants had paid out the money in pursuance of the agreement before the plaintiff demanded its return; the general rule being that, when the agreement has been executed, the depositor cannot recover the money deposited upon a wager. But this denial does not rest upon any notion that the depositary has been able to transfer to his payee the legal title of the depositor. Evidently the act of the depositary in furtherance of the unlawful agreement can have no more effect upon the title than did the original act of the depositor. The denial rests solely on a rule of judicial procedure, "*In pari delicto potior est defendantis conditio*," which the courts will apply to a culpable plaintiff who has permitted the whole agreement to be executed, although they do not apply it to a plaintiff who repents and repudiates the transaction before it is consummated. But with regard to dealings such as that before us the Legislature has put aside this judicial rule, by enacting the second section of the gaming statute, which declares that "any person * * * shall pay, deliver or deposit any money * * * upon the event of any wager or bet, may sue for and recover the same of the * * * person to whom the same shall be paid or delivered, or of the stakeholder, * * * whether the same shall have been delivered or paid over by such depositary or

stakeholder or not, and whether any such wager be lost or not." This provision does not create the right or chose in action on which the permitted suit is founded. Its legal effect is merely to remove the disability under which the judicial rule placed the plaintiff, so that the court would hear him as if he were free from blame. Thus exculpated, and his title to the money received by the defendants remaining unaffected by their act in paying it away, the plaintiff can enforce his claim on the same principle and in the same manner as if the unlawful agreement were still unexecuted. *Meech v. Stoner*, 19 N. Y. 26.

This view of the matter meets another objection interposed by the defendants—that the plaintiff cannot recover upon the claims assigned to him. The objection is based on the idea that the statute above mentioned creates the right or chose in action, rights so created not being assignable in law. But since we are of opinion that the right or chose in action is not created by the statute, but arises out of the implied contract of the defendants to repay the money belonging to the depositor, the objection fails, because of the statute which renders all choses in action arising on contract assignable in law. Practice Act (Gen. St. p. 2591) § 340.

At the trial the defendants offered to prove a set-off against one of the plaintiff's assignors for a loss sustained through the wagers. This offer was properly overruled on the ground that such an indebtedness could exist only by affirming the validity of the wagering agreement, which, of course, was inadmissible.

We find no error, and the judgment is affirmed.

RICHARDSON v. GERLI et al.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—RECEIVER OF INSOLVENT CORPORATION—JUDGMENT CREDITORS OF FRAUDULENT GRANTEE—CONVEYANCE IN CONTEMPT OF INSOLVENCY.

1. An insolvent corporation, by its treasurer, executed a bill of sale of all its property to an insolvent firm of which he was a member, without consideration. *Held*, that the conveyance was fraudulent as to the corporation's creditors and as to its receiver, representing them, under the statute of frauds, and was also in violation of the provisions of Corporation Act, § 64 (Gen. St. p. 919), forbidding transfers in contemplation of insolvency.

2. A judgment creditor of a fraudulent grantee, who has levied on the goods fraudulently conveyed prior to the appointment of a receiver of the grantor, is not a bona fide purchaser for a good consideration within Gen. St. p. 1605, § 15, excepting bona fide purchasers from the operation of the statute of frauds, and acquires no title or lien prior to that of the judgment creditors of the grantor, whose debts existed at the time of the fraudulent conveyance.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 615.

Suit by Britton Richardson, assignee, etc., against Charles Gerli and others. Heard on bill, cross-bill, answer, replication, and proofs. Decree for complainant.

Corbin & Corbin, for receiver. Mr. Car-
rick, for judgment creditors.

EMERY, V. C. The question now to be decided arises on a cross-bill filed by defendant Kellogg, as receiver of an insolvent corporation, the National Silk Label Company. This company, on April 25, 1896, conveyed all its property to the firm of William MacFarlane & Co. On April 27, 1896, this firm made an assignment for the benefit of its creditors, and the assignee took possession of the property, which comprised also other property than the property conveyed by the silk company. Subsequently defendant Gerli, a creditor of the firm of MacFarlane & Co., obtained a judgment against the firm, and levied on the property in the possession of their assignee, including the property conveyed by the silk company. As to the property levied on as the firm property, the execution has been held valid as against the assignment. The property conveyed by the silk company has been separately sold by the receiver appointed for all the property of MacFarlane & Co., and after the payment of a mortgage given by the silk company prior to the conveyance, which was prior to the unsecured creditors of the silk company, and also to the Gerli judgment, a surplus of about \$3,000 remains in court. Claims against the silk company, more than sufficient to exhaust the sum, and which existed at the time of the bill of sale, have been proved against the receiver, and the receiver files this cross-bill to have the transfer by the silk company to MacFarlane declared fraudulent and void, and to have the surplus paid over to him for the creditors of the silk company.

The receiver, in a bill of this character, represents, as is well settled, the creditors of the silk company, and is entitled to set aside conveyances in fraud of the company's creditors. On the evidence there can be no question, I think, that the conveyance was in fact fraudulent against the company's creditors. The grantees paid nothing for the conveyance. They were themselves insolvent, and at the time they contemplated an immediate assignment for the benefit of their creditors. This assignment was made, and the real object of the conveyance in question seems to have been, to save the expense of a double assignment, and to settle the affairs of both the company and firm in a single insolvency proceeding. One of the two members of the firm of MacFarlane & Co. was treasurer of the silk company, and executed the bill of sale on its behalf. The conveyance was clearly made in contemplation of insolvency, and, as both grantor and grantee participated in the fraud, the conveyance was fraudulent against the creditors of the

silk company under the statute of frauds. It was also a violation of the provisions of the Corporation Act, § 64 (Gen. St. p. 919), forbidding transfers in contemplation of insolvency.

The only question is whether a judgment creditor of a fraudulent grantee, who has levied upon the goods fraudulently conveyed prior to the appointment of a receiver, has a title or lien prior to that of the judgment creditors of the fraudulent grantor, whose debts existed at the time of the fraudulent transfer, or the receiver, who stands in their rights. I considered this question in *Couse v. Columbia, etc., Co.* (N. J. Ch. 1895) 33 Atl. 297, 299, reaching the conclusion, upon the authorities there cited, that the judgment creditor of the fraudulent grantee was not a bona fide purchaser for a good consideration within the saving provision of the fifteenth section of the statute. Gen. St. p. 1605. The following additional authorities also support this view denying the right of the judgment creditor of the fraudulent grantee to be considered a bona fide purchaser for good consideration under the statute: *Mingus v. Condit* (Zabriskie, Ch., 1873) 23 N. J. Eq. 313, 315, approved in *Knowles Loom Works v. Vacher* (Sup. Ct. 1895) 57 N. J. Law, 490, 496, 31 Atl. 306, 33 L. R. A. 305, affirmed on error, 59 N. J. Law, 586, 39 Atl. 1114; 14 A. & E. Ency. Law (2d Ed.) 287, note 1.

The judgment creditor, not being a bona fide purchaser for good consideration, is therefore not protected by the statute of frauds. The same consequences follow if the bill of sale is void as a conveyance in contemplation of insolvency, and, in either aspect of the transfer, it is void as against the existing creditors of the silk company and its receiver as representing them.

I will advise a decree that the money in court be paid to the receiver.

BOROUGH OF MADISON v. MORRISTOWN GASLIGHT CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

GASLIGHT COMPANY—CHARTER—POWERS.

1. The authority conferred upon the Morristown Gaslight Company by section 1 of its charter (P. L. 1855, p. 74)—to sell gas for the purpose of lighting the streets, buildings, manufactories, and other places situated in Morristown and its vicinity—does not authorize that company to enter into the independent municipality of Madison, four miles distant from Morristown, and lay pipes in the streets thereof.

2. The authority conferred by section 2 of the defendant company's charter—to lay down its gas pipes in the streets, alleys, lanes, avenues, and public grounds of Morristown and its vicinity—does not authorize it to lay its gas pipes in the streets of other places, constituting independent municipal governments, beyond and outside of the municipal corporation of which the unincorporated village of Morristown was a part in 1855.

Garretson, J., dissenting.
(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the borough of Madison against the Morristown Gaslight Company. Decree for defendant, and complainant appeals. Reversed.

Charles A. Rathbun, for appellant. Joseph Cross and Willard W. Outler, for defendant.

FORT, J. The bill in this case is filed by the borough of Madison to enjoin the defendant company and its agents from digging trenches and the like in Madison avenue, in said borough.

The Morristown Gaslight Company was incorporated by special act of the Legislature, approved February 19, 1855 (P. L. 1855, p. 74). By the first section of the act it is provided that the company "shall have power and authority to manufacture, make and sell gas, * * * for the purpose of lighting the streets, buildings, manufactories, and other places, situated in Morristown and its vicinity, and to enter into and execute contracts, agreements or covenants in relation to the objects of the corporation." The second section enacts that the corporation shall be "empowered to lay down their gas pipes, and to erect gas posts, burners, and reflectors in the streets, alleys, lanes, avenues and public grounds of Morristown and its vicinity, and the dwellings, stores, and other places situated therein."

The borough of Madison was incorporated in 1889 under the borough act of 1878 (P. L. 1878, p. 403), and is now governed by the general borough act, approved April 24, 1897 (P. L. 1897, pp. 285, 329, § 96). By section 28 of the borough act of 1897 boroughs are given power "to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of any street, road or highway or in digging up the same for any purpose whatever," and, further, "to provide for the sewerage or drainage of the borough and for the laying of pipe for the conveyance of water and gas for private or public use in the streets, highways or alleys or beneath the sidewalks of said borough and to regulate the same." The defendant company in this case is admittedly in the act of opening Morris avenue without the consent of the borough; the defendant claiming that by its charter it is empowered to lay down gas pipes "in the streets, alleys, lanes, avenues, and public grounds of Morristown and its vicinity," without interference by any municipal or other authority, so long as it does not affect or impede public travel, "and it shall restore the highways opened by it and leave the same in as good condition as before." P. L. 1855, p. 74, § 2.

At the time the charter was granted to the defendant company, Morristown was quite compactly settled, and was a part of Morris township, in the county of Morris, but was not incorporated. Madison was likewise an

unincorporated village, situated within the township of Chatham, in Morris county. Madison is about four miles from Morristown. Morris township and Chatham township adjoined in 1855, and that part of Chatham township out of which the borough of Madison was carved in 1889 lies adjoining the Morris township line.

The question here is a very narrow one: Does the right to lay gas pipes in the streets, lanes, avenues, alleys, and public grounds of Morristown and its vicinity authorize the defendant company to enter and lay gas pipes in the streets of an adjoining independent municipality? It seems to me that such a construction is doing violence to language. It cannot be that the legislative purpose was to confer upon the defendant company, under its right to lay gas pipes in streets and to supply gas to buildings in the vicinity of Morristown, the power to enter adjoining municipalities which had independent governments, and of which Morristown was not then a part. "Vicinity," as used in the statute, applies only to the streets, avenues, lanes, alleys, and public places adjoining the village of Morristown. It does not embrace other places and territory, constituting an independent municipal government, beyond and outside of the municipal corporation of which the unincorporated village of Morristown was a part in 1855. English's Law Dictionary defines "vicinity" as "adjacent; that which is near." Webster defines "vicinity" as (1) the quality or state of being near or not remote; nearness; proximity; (2) that which is adjacent to anything; neighborhood. "Neighborhood" is defined as "dwelling near; a place near; adjoining district; the inhabitants who live in the vicinity of each other; as, the fire alarmed all the neighborhood." Bronson, C. J., in *Esterly v. Cole*, 3 N. Y. 502, 505, says, "I understand 'neighborhood' to mean the same town or place where the plaintiff carried on business, and not a different town or place." In *Coyle v. Chicago R. Co.*, 27 Mo. App. 584, the court adopt Webster's definition.

The act of incorporation of the defendant company is not difficult of construction. Its language construes itself. The company is incorporated to supply gas "for the purpose of lighting the streets, buildings, manufactories, and other places situated in Morristown and its vicinity." Every building or other place in Morristown may be lighted. Buildings in the vicinity of Morristown may also be lighted. The intent was to give the defendant the right to lay gas pipes and light Morristown and the buildings or factories lying in its vicinity—that is, adjoining Morristown. If this construction is not put upon the act, where will you say vicinity extends? If it takes in the independent municipality of Madison, why not Chatham and Summit? Is it not clear that the Legislature meant to confine the franchise of this company to the place named in the act, and its vicinity, as

contradistinguished from other towns and places? It seems to me, this is clear.

The decree below is reversed.

GARRETSON, J., dissenting.

SCOTT v. MAYOR, ETC., OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

MUNICIPAL CORPORATIONS—FIREMAN—RIGHT TO PENSION—DEATH IN PERFORMANCE OF DUTY.

1. By the second section of an act entitled "An act for the pensioning of firemen in certain cities of this state" (P. L. 1897, p. 263), it is enacted that "if any officer or man permanently employed in any fire department in any such city shall be fatally injured while in the performance of or attempting to discharge his duties, such municipal board shall allow the widow, if there be any, * * * an annual pension equal to one half the salary received by such officer or man at the time of his death to be paid to such widow during her widowhood. * * * A member of a paid fire department in one of such cities, whose entire time was devoted to the duties of his office, which consisted of work in the firehouse, opening the hose and apparatus, and in fighting fires, was killed by falling from a trolley car while on his way from the firehouse to his home in the city during one of the hours set apart by the commanding officer for the taking of meals. His widow brought suit against the city under the above section to recover a year's pension. At the close of the trial the court directed a verdict for defendant, one of the grounds being that the deceased was not engaged in the performance of his duty within the meaning of the act. Upon reference to the first section of the act, it appeared that a like pension was awarded to a fireman whose duty required active service in the extinguishment of fires and who should become incapacitated for further duty as a result of injury received in the discharge of or attempt to discharge such duty. It was held on review that the two sections should be read together in construing the second section, and that it clearly appeared that deceased was not at the time of his death engaged in the performance of his duties within the meaning of the act, and that there was no error in the direction of the verdict.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Barbara Scott against the mayor and aldermen of Jersey City. Judgment for defendant. Plaintiff brings error. Affirmed.

Riker & Riker, for plaintiff in error. John W. Queen, for defendant in error.

HENDRICKSON, J. The plaintiff in error brought suit against the defendant city to recover the amount of an annual pension, which she claimed to be due her upon the death of her husband while serving as a hoseman of Engine Company No. 1 in the fire department of Jersey City. The action was based upon the second section of an act entitled "An act providing for the pensioning of firemen in certain cities of this state" (P. L. 1897, p. 263), which reads as follows: "If any officer or man permanently employed in

any fire department in any such city shall be fatally injured while in the performance of, or attempting to discharge his duties, such municipal board shall allow the widow, if there be any, * * * an annual pension equal to one half the salary received by such officer or man at the time of his death, to be paid to such widow during her widowhood. * * * The plaintiff's husband became a member of the fire department, which was a paid one, on January 26, 1899. He was permanently employed in the fire department from that time until March 14, 1899, when he fell from a trolley car in that city while on his way home from the firehouse of the company to take supper with his family, receiving injuries from the effect of which he died the next day. At the close of the plaintiff's case, motion was made to direct a verdict for the defendant, on the following grounds: (1) Because the deceased was not at the time of his fatal injury in the performance or attempt to discharge his duty as a fireman as contemplated by the act in question; (2) because the act was unconstitutional, in that it was special, and also its object was not expressed in its title; (3) because the act was not mandatory, and the city had not by ordinance provided for such a pension under the act. The learned trial judge granted the motion, and directed a verdict for the defendant. To this ruling exception was allowed and sealed, and error has been assigned thereon.

Our first inquiry will be whether the first ground of the motion should be sustained. The defendant's contention is that in order to recover under this act it must appear that the death occurred while the fireman was actively engaged in the performance of, or attempt to discharge, the duty of extinguishing fires. The contention in behalf of the plaintiff is that the act has a broader meaning, and extends to a death which occurs while the member is performing any of his duties required by the act or by the regulations of the department.

The plaintiff produced in evidence the rules and regulations of the department, from which it appeared that its officers and employes were required to devote their entire time to the interests of the department; that, for the purpose of getting meals, no more than three separate hours daily may be allowed to each officer and member, except that by special permission of the proper officer two leaves of 1½ hours each may be allowed in lieu thereof; and that the commanding officer must see that members obtain their meals as regularly as circumstances will permit. There was other evidence submitted tending to prove that the duties of the deceased member were to do his share of the work around the house, such as cleaning up the hose and apparatus and work at fires; that he was always on duty; that his hour for supper set apart on that day was between 7 and 8 o'clock; that the meal hours

were so arranged that four men could be kept on duty at all times; that during absence for meals the members must carry a key to the nearest alarm box, and send in an alarm in case of a fire, and to go to the fires if any should break out; that, on the day of the accident, the deceased was dressed in the uniform of the department.

Upon this evidence it was contended that the deceased member was engaged in the performance of his duty at the time of his fatal injury, within the meaning of the act, and that the plaintiff had established her case. Assuming, as we may, that the regulations of the department were duly authorized by the city charter, and looking at the second section alone, there might be some doubt as to the true solution of the question thus raised. But, according to a well-established canon of construction, when one part of a statute is obscure, we are permitted to look at the other parts of the same statute and compare them with the former in reaching a conclusion as to its true meaning. *Attorney General v. Sillem*, 2 H. & C. 515; 1 Bl. Com. 60; *Bacon's Abr. tit. "Statutes"* (1) 2; *Mason v. Paterson*, 35 N. J. Law, 190; 23 Am. & Eng. Encyc. 306.

Referring to section 1 of the act under consideration, we find that the municipal board having charge of said fire department are authorized to "retire from service any officer or man permanently employed in such department whose duty requires active service in the extinguishment of fires, who shall have become, or shall hereafter become incapacitated, either mentally or physically, for the performance of such duty, whenever such incapacity is or shall be the result of injury received or sickness contracted in the discharge or attempt to discharge such duty." And the person so retired is awarded the same pension as that awarded under the second section. And, reading these two sections in conjunction, it seems quite clear that what the Legislature intended was that the principle upon which the municipal body was to dispense its bounty should be the same under both sections, and that was the recognition of the extra hazard that came to its members while discharging or attempting to discharge the duties required in the active service of extinguishing fires. This construction is in harmony also with the reason and spirit of the law, which manifestly was to reward fidelity and encourage the firemen to heroic efforts in protecting the cities from the destructive element of fire.

A number of cases have been called to our attention in the argument, which have arisen in the administration of the pension laws, which award pensions to soldiers or their representatives where they have been injured or killed while "in the line of duty." And in one of these cases the soldier, who had been thus injured while going or coming between the captain's headquarters in a village and their homes, under orders of the captain,

was held to have been "in the line of his duty," within the meaning of the act. *Case of Heacock*, 4 Dec. Dep. Int. Pensions, 160. But these cases have very slight bearing here, where, as we have seen, properly interpreted, the duty is defined as one performed in the active service of extinguishing fires. And we must also have regard to the fact that these decisions are made by the Pension Bureau, which is not a court, and whose officers are not invested with judicial functions. In *re McLean* (D. C.) 37 Fed. 648.

The conclusion reached is that the plaintiff's husband was not engaged in the performance or attempt to discharge his duty as such fireman at the time of his fatal injury, and that for this reason the trial judge committed no error in directing a verdict. It is therefore unnecessary to examine the other grounds for the motion.

The result is that the judgment below is affirmed.

OTIS v. LANE.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

QUO WARRANTO—TITLE TO OFFICE—CHOSEN FREEHOLDERS—CONSTITUTIONAL LAW—SPECIAL ACT—VOTERS—DISFRANCHISEMENT.

1. The title of the relator as well as the respondent may be inquired into under the act entitled "An act in relation to the writ of quo warranto," approved February 18, 1896 (P. L. 1895, p. 82).

2. The act entitled "A supplement to an act to incorporate the chosen freeholders in the respective counties of this state," approved March 24, 1899 (P. L. 1899, p. 427), in so far as it requires a majority vote to elect such freeholders in all townships, except in townships in counties of the first class, is unconstitutional, because in this respect special.

3. The provision of our election law which declares that "every person shall be entitled to vote in the election district in which he actually resides and not elsewhere" will not be held to disfranchise voters who vote at a polling place selected and advertised by the proper officers as the polling place of the district in which such voters reside, notwithstanding the place so selected, but at which the election is otherwise lawfully held, is outside the territorial limits of the election district for which it is provided; no fraud or other harm being shown or charged.

(Syllabus by the Court.)

Bogart, J., dissenting.

Error to Supreme Court.

Quo warranto by the state, on the relation of Lewis Lane, against James E. Otis. From the judgment, both parties bring error. Reversed.

I. W. Carmichael, for plaintiff in error. George Reynolds and John G. Horner, for defendant in error.

FORT, J. The relator claims to have been legally elected to the office of chosen freeholder of Ocean county from the township of Little Egg Harbor, at an election held in March, 1901. The board of freeholders of

said county refused to recognize the relator, notwithstanding he took the oath of office and tendered himself ready to enter upon its duties, but, instead, they recognized the incumbent as elected, at said election, to said office. This proceeding is to oust the incumbent and seat the relator.

With so much of the opinion of the Supreme Court as holds that in a quo warranto proceeding between an incumbent and a claimant for the office, who is also the relator, the title of both the incumbent and relator may be inquired into, we agree. This is undoubtedly the rule since the act approved February 18, 1895 (P. L. 1895, p. 82).

We also agree with the Supreme Court that the act entitled "A supplement to an act to incorporate the chosen freeholders in the respective counties of this state," approved March 24, 1899, is unconstitutional, in so far as it provides that in all townships, other than townships in counties of the first class, it shall require a majority of all the votes cast to elect a chosen freeholder. This act clearly relates to the internal affairs of townships, and, in this respect, is special, in that it does not apply to all the townships of the state required to elect chosen freeholders. P. L. 1899, p. 427.

With the conclusion of the Supreme Court that the relator is entitled to the office, and that the incumbent shall be ousted, we do not agree. The township of Little Egg Harbor is entitled to be represented in the board of chosen freeholders of Ocean county by one freeholder. In February, 1901, there was set off from Little Egg Harbor township a part of the township, to create the borough of Tuckerton. P. L. 1901, p. 27. A borough which has a population of not less than 3,000 inhabitants is entitled to be represented by a chosen freeholder. P. L. 1897, p. 285, § 2. Where there are less than 3,000 inhabitants in a borough, the statute provides that "the votes polled in such borough for freeholder shall be added to the votes polled in the township and be canvassed in the same manner as the votes of the several election districts in the township are directed by law to be canvassed." Borough Act (P. L. 1897, p. 287, § 6).

At the election at which the relator claims to have been elected, the voters of the borough and the township both voted at the polling places advertised for them, respectively, to vote at. There is no claim that the voters legally entitled to vote because residents of the borough, voted at the polling place advertised as the polling place for the residents of the township outside the borough. Nor did any of the residents of the township vote in the borough polling place. There is no question as to the legality of the voters voting in each polling place.

The only ground of claim by the relator is that the votes cast by residents of the township outside of the borough should not be

counted because the polling place selected by the clerk, and advertised as the place for said voters to vote, was not, in fact, located within the territory outside the borough, and within the township voting district, but was, in fact, in a building situated within the territorial boundaries of the borough of Tuckerton.

There is no allegation of fraud on the part of any one. Does the mere fact that a voting precinct or polling place has been selected outside the district defeat the whole vote cast at such polling place? That does not raise the question of one voter lawfully entitled to vote in one district voting in the ballot box of another district, but is the case of a voter voting, at the polling place provided for him to vote at, for the district in which he resides. Every person who voted at the polling place set up for the residents of the township of Little Egg Harbor to vote at was legally entitled to vote at the lawful polling place provided for the residents of said election district to vote.

Sections 7, 8, 12, 64, and 69 of the general election law are the important sections in determining the rights of the relator and of the residents of the township whose votes it is alleged should not be counted. P. L. 1898, pp. 237, 239, 240, 270, 272.

Section 7 requires the clerk of every township "at least eight days prior to * * * the day of election to put up an advertisement in at least five of the most public places within the township, of the time, place and purpose of the election and the offices to be filled thereat."

Section 64 requires that the board of registry and election shall, in their respective districts, hold and conduct all elections held throughout the state.

Section 69 reads: "Every person possessing the qualifications required by the Constitution and being duly registered as required by this act, shall be entitled to vote in the election district in which he actually resides, and not elsewhere."

Section 12 of the election law defines what an election district is, as follows: "For the purpose of this act the term 'election district' denotes the territory within which there is a single polling place for all the voters therein."

Section 8 of the same act devolves upon the clerk of every township, prior to the first meeting of the board of registry and election, to "procure for each election district in his township, a suitable room in which said board shall meet to make and revise the register of voters and also to hold the election."

The voter must vote, or be disfranchised, at the place selected by the clerk and advertised as the polling place for the "election district" in which he resides. These sections of the election law only fix the method of selecting the place and giving notice to the voter where he may lawfully vote as a resi-

dent of a particular election district. An error of the clerk in the selection of the place should not disfranchise the voter. No matter where the place is, if it is the place selected and advertised, and where the proper election officers conduct the election, and is the only place lawfully provided for the voters of that particular election district to vote at, the ballots thus cast are cast by legal voters, and cast in the place provided for that purpose by the officer charged with that duty by law. If a clerk, by selecting a place just over an election district line, could defeat the whole vote of the district, it would be putting a premium on fraud. The right of suffrage is too sacred to be defeated by an act for which the voter is in no way responsible, unless by the direct mandate of a valid statute no other construction can be given. There is nothing in our election law which requires the rejection of votes honestly cast and counted in a case like the one before us.

Where the election inspector changed the place of election on election day, the Supreme Court of Michigan said: "Here was an election held under the forms of law in good faith. No fraud is imputed. No person cast a vote who was not entitled. The relator has failed to show himself injured by the action of inspector of election." *Farrington v. Turner*, 53 Mich. 72, 18 N. W. 544, 51 Am. Rep. 88; *Preston v. Culbertson*, 58 Cal. 198.

In Nebraska, it is held that the casting of votes by electors outside of their district, at a voting place established for them, is a mere irregularity not affecting the merits of the election, and the vote should be counted. *Peard v. State*, 34 Neb. 372, 51 N. W. 828.

In Texas, where the Constitution of the state requires electors to vote in the precinct of their residence, it was held that an election advertised to be held at the courthouse, which was outside the precinct, was valid, notwithstanding the constitutional requirement that electors must vote in the precinct of their residence. *Ex parte White*, 33 Tex. Cr. R. 594, 28 S. W. 542.

To the same effect is the decision of the Court of Appeals in New York in *People v. Carson*, 155 N. Y. 491, 50 N. E. 292.

We think the provisions of our election law, here alleged to defeat the right of the incumbent, are directory merely, and that, where no fraud or other harm is shown or charged, the failure to observe their requirements should not disfranchise the voter. *Smith v. Howell*, 60 N. J. Law, 384, 389, 38 Atl. 180.

The incumbent, having received a plurality of the votes cast at the polling places in the borough of Tuckerton and the township of Little Egg Harbor, was duly elected to the office which the relator seeks.

The Supreme Court is reversed.

BOGART, J. *dissent*.

CHARLTON v. COLUMBIA REAL ESTATE CO.

(Court of Chancery of New Jersey. Feb. 21, 1903.)

SPECIFIC PERFORMANCE — LANDLORD AND TENANT — CONTRACT — EVIDENCE — STATUTE OF FRAUDS — EQUITY.

1. The owner of a building executed an "agreement" to lease certain land for a term of years at a certain rental, and subsequently executed a receipt for \$100 "on account of agreement for lease, for which details are to be settled on." Thereafter a draft of a lease was made, and sent by the owner to the proposed lessee, which contained terms not previously expressed, but was not signed by the owner. *Held*, that there was no contract.

2. In a suit for specific performance of a contract whereby defendant was to lease certain premises to plaintiff, a draft of a lease sent by defendant to plaintiff, but not signed by defendant, was obnoxious to the statute of frauds, providing that all leases not signed by the parties shall have only the force of leases at will.

3. In a suit for specific performance of a contract to lease by defendant to plaintiff, there was no proof showing that plaintiff had done anything in part performance of the lease, except to pay \$100, which had been returned to her; that she had never entered into possession of the premises or made any improvements, though she had expended some money to get plans for improvements from an architect. *Held*, that there was no such performance as to entitle plaintiff to specific performance inasmuch as she had an adequate remedy at law for any damages.

4. A lessee in a contract to lease may not have specific performance as against a bona fide holder of the premises without notice.

Suit by Salina A. Charlton against the Columbia Real Estate Company for specific performance of a contract to lease. Bill dismissed.

The bill in this case is filed to compel the specific performance of an agreement alleged by the complainant to have been made by the defendant company for the lease, under special terms, of a lot of land situate in Atlantic City. The complainant alleges that, by a contract made between herself and the defendant company, the latter agreed to lease to the complainant the lot of land in question, with the privilege of a 15-foot entrance way to the demised premises, and the use of the doors across the entrance way, for the period of 10 years from June 15, 1901, at the annual rental of \$1,200; that it was expressly agreed that at the expiration of the lease the defendant company should purchase all improvements erected on the premises by the complainant, at a price to be fixed by three arbitrators, and that in the meantime said buildings and improvements should stand as security for the rent to become due during the term; that she paid \$100 to the defendant company on account of the rent, for which the defendant gave her a receipt; that she had the privilege of paying the rent in cash, or of furnishing security for the same, at her pleasure; that, in conformity with the agreement, she delivered to the attorney of the defendant company two promissory notes

—one for \$500, payable in two months from date, and one for \$8,000, payable in three months from date—both indorsed by a citizen of Atlantic City of large wealth and good financial standing; and that at the same time she delivered to him an agreement and lease which had been prepared under the directions of the defendant company, which agreement was executed by her. The promissory notes and the agreement executed by her were, she alleges, retained from the 21st of May, 1901, until the 1st of June, when they were returned to her; the company having refused to accept the suretyship of the indorser. The refusal of this security, and to deliver possession, the complainant alleges, was due to the fact that the defendant company had found another applicant for the premises, at a higher rental. The complainant further avers that she subsequently tendered to the attorney of the defendant company \$1,100, the balance of the rent for the first year, and demanded possession of the property, and that the attorney declined to receive the money, telling her he had no authority, and sent her to the agent of the defendant company; that on the 3d day of July, 1901, she tendered the \$1,100 to the agent of the defendant company, and demanded possession of the property, which he refused. She alleges that she then caused a notice to be served on the defendant company on July 10, 1901, demanding possession; stating that she would sue for specific performance if it was refused to her, and notifying the defendant company that the \$1,100 rent would be paid whenever they were willing to accept it, which offer was again refused. The complainant tenders herself ready to pay the rent reserved by the agreement, and prays that the defendant may be decreed to specifically perform the agreement set forth in the bill, and execute the lease which the defendant company had prepared, and which is already signed by the complainant, and to deliver possession of the property to the complainant, and for further relief.

The Columbia Real Estate Company is the sole defendant. It files its answer, denying all the allegations in the bill, except those specifically in the answer admitted. The defendant company admits that negotiations were opened between the parties, looking towards the leasing of the property in question, and that a duplicate copy of a proposed lease was prepared, but avers that it was never executed by the defendant company, nor delivered. The defendant admits that when the negotiations for a lease were begun the complainant paid \$100, which the defendant says it tendered back to the complainant on the 2d day of July, 1901, when it appeared she was unable to carry into effect the agreement for leasing, and that all negotiations between the parties were then and there declared to be off. The defendant avers that at the time of the first negotiations the rental money was agreed to be paid in cash; that

complainant asked the defendant to accept notes, which the defendant consented to do if secured by a satisfactory indorser, which the defendant insists was not furnished. The defendant denies the tender of \$1,100 on July 1, 1901, and avers that the complainant neglected and refused to pay the balance of the rental money, and further avers that the defendant company, before the alleged tender, handed back to the complainant the \$100 which had been paid, and notified complainant of defendant's intention to proceed no further in the matter of leasing. The defendant further says that it has leased the premises to other parties, who are now tenants of defendant, actually in the possession of the premises.

Issue was joined on these pleadings, and the cause came to final hearing.

A. B. Endicott, for complainant. G. A. Bourgeois, for defendant.

GREY, V. C. (after stating the facts). The bill seeks the specific performance of an alleged agreement for the leasing for ten years of a lot of land situate in Atlantic City, admittedly owned by the defendant, the Columbia Real Estate Company. The agreement is not alleged in the bill to have been in writing. The defense is: First, That no agreement between the parties touching the alleged leasing was ever finally concluded. It is admitted that negotiations were opened, and that they had made some progress towards an agreement, but it is denied that any concluded contract was made between the parties. Secondly, The defendant insists, as the claimed agreement is for a lease for a 10-year term, that it must have been evidenced by a writing signed by the lessor, or by his lawfully authorized agent, and that no such writing has been shown, etc., nor any equitable excuse for its nonproduction.

The statute of frauds, in its first section, prescribes the effect which shall be given to leases of land for a longer period than three years, when they are not put in writing, signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing. The phrasing of this clause of the statute is in the words following: "That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to or out of any messuages, lands, tenements, or hereditaments, made or created, or hereafter to be made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding, except nevertheless all leases not exceeding the term of three

years from the making thereof." Gen. St. p. 1602, § 1.

The bill of complaint does not allege that the contract whereby the defendant company "agreed to lease" was in writing. The frame of the bill shows that the agreement that a lease should be given, and the lease itself, were, in the contemplation of the parties, several and distinct transactions. The proofs also show that there were negotiations between the parties preliminary to an intended leasing. These preliminaries are, to an imperfect extent, evidenced by writings. The following are copies of these preliminary writings.

Exhibit C2: "Agreement made this seventh day of May between Columbia Real Estate Co. of the first part & Mrs. Charlton of Atlantic City of the second part, witnesseth, that the party of the first part will make a lease for ten years of a certain building on their ground in rear of stores to contain about eighty feet in width by about one hundred feet in depth with a fourteen foot entrance from boardwalk, to consideration to be a rental of twelve hundred dol. per annum payable yearly in advance, lease to date from June 15th, 1901. The party of the first part to be put to no expense whatever in this matter, and security to be given for the rent. Columbia Real Estate Co., by H. G. Bergman, Agt. S. A. Charlton. Witnesseth by Ida J. Atkinson."

Exhibit C3: "Received Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton, one hundred dol. on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled on. Columbia Real Estate Co., by H. G. Bergman, Agt."

These papers were signed and passed at the same time from the defendant company's agent to the complainant. As they relate to the same transaction, they must be deemed to be parts of one instrument. Exhibit C2 is a memorandum of an agreement for a lease. Exhibit C3 is a receipt for \$100 on account of that agreement. The effect of these two writings shows on the face of them that the parties in their negotiations had not by these writings yet arrived at any contract, the terms of which had been definitely agreed upon between them. The receipt, in express words, recognizes this. In the phrase referring to the lease, "for which details are to be settled on." The proof shows that when these memoranda of May 7th were signed the details of the lease had not yet been finally "settled on," and were not expressed in those agreements. Plans for buildings to be erected by the lessee had been submitted and approved, but certain dimensions and angles of the premises, which might call for a survey, had not yet been ascertained, and a method of compensating the proposed lessee for her expenditures in improvements, by paying her a price to be fixed by an arbitrator, was yet under discussion, as details of the proposed lease which were

yet to be settled. None of these incidents of the proposed lease were set out in the written memoranda of May 7th. The two memoranda of May 7th are the only writings signed by or for the defendant company. These instruments themselves, as well as the evidence of the negotiations of the parties as to details to be settled, show that when they were created no concluded contract had yet been made. No other written paper of any kind was ever "signed by the parties making or creating the same, or by their agents thereunto lawfully authorized in writing," etc.

A comparison of the contract of lease which the bill seeks to have decreed to be made, with these two writings, also shows that the complainant is not asking for the making of a lease, the terms of which are set forth in these two writings, but for quite a different instrument. The bill of complaint prays that the defendant company may be decreed specifically to perform the agreement therein set forth. The agreement for a lease set forth in the bill contains a number of terms, dealing with matters of substance, which are not in any way referred to in the previous written memoranda. The bill of complaint demands a lease which shall convey "the use of the doors across the entrance way," and which shall oblige the defendant company to "purchase all improvements erected on the premises by the complainant, at a price to be fixed by three arbitrators, and that in the meantime the said buildings and improvements should stand as security for the rent to become due during the term"; that the complainant should have "the privilege of paying the rent in cash, or of furnishing security for the same, at her pleasure." None of these incidents, imposing obligations upon the defendant company of great importance, some of which are essentially part of the lease, are included within the two writings signed by the defendant company's agent, and above recited. Nowhere, either in pleadings, evidence, or argument, is it intimated that the complainant would in this cause accept a decree for the making of a lease which did not contain these incidents. On the contrary, it is insisted that the decree shall be for a lease on these terms. We must therefore look elsewhere than to the writings signed by the defendant company to find the terms of the lease which the complainant insists the defendant is bound to make. These terms are expressed in a prepared draft of a lease, which was never executed by the defendant company, but a copy of which, having been drawn in counterpart, was sent unsigned to the complainant; the duplicate being retained by the defendant company. At this stage of the negotiations, differences arose between the parties as to security offered for the rent by the complainant. The prepared draft was never signed and delivered by the lessor. The complainant was told that the "negotiations were all off," and that the defend-

ant agent could not sign the lease. The \$100 which the complainant had paid was sent back to her.

The complainant offered in evidence the copy of this unsigned draft of a lease which was sent to her, and it has been marked "Exhibit C1." The complainant (proposed lessee) has signed it, but the defendant (proposed lessor) has not. A cursory examination of this draft of lease affords additional proof that the previous written memoranda of May 7, 1901, signed by the defendant company, did not express a concluded contract between the parties, and that after they had been made there were further negotiations, or, if no further negotiations, yet there were terms of the letting already agreed upon, which were not included in the written memorandum, though both parties recognized their essentiality as component parts of the lease. These were the "details to be settled on" which were referred to in the memorandum receipt. It is this proposed but unexecuted lease which the complainant insists, by her bill of complaint, was agreed to be given as a lease of the premises in question. This unexecuted paper contains all the above-recited terms as to the use of doors, and obliging the defendant lessor to purchase improvements at an arbitrated price, and making them meanwhile stand as security for the rent, and giving the lessee the privilege of paying the rent in cash, or of furnishing security therefor, at her pleasure. This unexecuted draft of lease has of itself no efficacy as the concluded agreement of the parties, because it was never executed by the lessor. The parties got into a dispute before that was done about the character of the security for the rent, and the proposed lease was declared off, as above stated. Nothing in all the proofs shows that there ever was a time when, as to each incident of the proposed contract, the parties came to be of the same mind, and finally contracted each with the other that such a lease should be made. The court of appeals declared in the case of *Brown v. Brown*, 33 N. J. Eq. 650, that, when specific performance is sought, the terms of the contract must have been completely determined and definitely ascertained between the parties. If it be doubtful whether the contract was finally closed, equity will not interfere.

The utmost effect that can be ascribed to the two memoranda of May 7th is that they amounted to an agreement to enter upon an agreement, upon terms to be afterwards settled between the parties. On the face of the receipt of that date is an express declaration that details of the lease were yet to be settled. Lord Wensleydale, in *Ridgway v. Wharton*, 6 H. L. C. 305, declares such an agreement to be a contradiction in terms, and that it is absurd to say that one enters into an agreement until the terms of that agreement are settled. Leaving the effect of the written memoranda of May 7th which

were signed by the defendant company only, all the proofs show that it was always in the contemplation and intent of both parties that a written lease of some sort should be executed by the complainant, as well as the defendant, which should contain clauses severally binding upon each of them. It was the execution of this instrument by the signature of both parties, and its delivery, which it was intended should conclude the bargaining. This appears by the fact that the draft of the proposed lease contained various terms not included in the previous written memoranda, but imposing serious obligations upon the parties. These were the details which, when the memoranda of May 7th were made, were yet to be settled on. This draft of lease never was executed and delivered by the lessor. There never was any complete determination and definite ascertainment of the terms of the contract.

A further objection by defendant is that the unexecuted draft of lease is obnoxious to the statute of frauds, as a basis for a decree for specific performance, such as is here prayed. This draft of lease purports to convey a 10-year term in lands. It is not in writing signed by or for the party making it (the lessor). The statute prescribes that such an agreement, even if finally concluded between the parties, but not expressed in a signed writing, shall have only the force and effect of a lease at will. This the complainant is not willing to accept. She asks that she be decreed to have a lease for a 10-year term, with all the attending advantages of privilege to erect improvements which the defendant company shall be obliged to pay for at an arbitrated price. The statute is a bar to any such decree.

The written memoranda being ambiguous in their phrasing, considerable latitude has been allowed, introducing parol proof as to the attending negotiations of the parties, in order to ascertain what was meant by "details to be settled on." Little or no proof has been offered showing that the complainant has done anything in part performance of what she claims was a concluded contract, partly in parol. She paid \$100, which has been returned to her. She has since tendered or offered the first year's rental, but this tender was based on the assumption that she had a concluded and binding contract with the defendant. In this she was mistaken, as is above shown. She never entered into possession of the premises, nor made any of the contemplated improvements. She did expend some money to get plans from an architect. None of these incidents constitute such a part performance of a contract as entitled the complainant to the favorable consideration of this court by a decree for specific performance. For all loss or inconvenience she may have suffered she may, if she has any right, be fully and adequately compensated by an action at law for damages.

There is an additional objection which this court ought to consider on this application for relief by specific performance. It appears in a letter of the complainant's solicitor, offered in evidence for complainant, that before this suit was brought he was notified that the defendant company had rented the premises in dispute to other parties. There is other proof containing like suggestion. No such other persons have been brought in as defendants in this cause. It may be that such persons are bona fide holders, without notice of the alleged equity of the complainant, so that a decree in this suit against the defendant company for specific performance may be of no avail against such other parties. If this condition should appear, this court would refuse specific performance, even if, as against the defendant company, the complainant was shown to be entitled to it. *Johnson v. Hubbell*, 10 N. J. Eq. 332, 64 Am. Dec. 773.

Upon the whole case, the complainant's bill should be dismissed, with costs.

OCEAN GROVE CAMP MEETING ASS'N OF M. E. CHURCH v. SANDERS,

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

LANDLORD AND TENANT—RE-ENTRY—BREACH OF COVENANT—EJECTMENT.

1. The mere breach of covenant by the tenant can give the landlord no right of re-entry unless there be a stipulation in the lease that such breach of covenant shall work a forfeiture or determination of the tenant's interest, in which case ejectment will lie. No ejectment can be maintained by the landlord for mere breach of covenant not coupled with a proviso that the term shall end. His only remedy would be an action for breach of covenant.

2. When there is a provision in the lease that on nonperformance of a covenant by the lessee the term shall be at an end, it is not within the operation of the seventh section of the landlord and tenant act (Gen. St. p. 1916). In such case ejectment by the lessor will lie without proving that there was no sufficient distress upon the premises.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Ocean Grove Camp Meeting Association of the Methodist Episcopal Church against Henry M. Sanders. Judgment for plaintiff, and defendant brings error. Affirmed.

John S. Applegate & Son, for plaintiff in error. Samuel A. Patterson, Esq., for defendant in error.

VAN SYCKEL, J. This is an action of ejectment instituted in the Monmouth circuit court, based upon alleged breaches of a deed executed by the plaintiff to the defendant, of which the following is a copy:

"This indenture made the 11th day of June in the year of our Lord 1877, between the

Ocean Grove Camp Meeting Association of the Methodist Episcopal Church of the first part and Henry M. Sanders of the city of Yonkers, in the county of Westchester and state of New York of the second part, witnesseth, that the said party of the first part for and in consideration of the sum of \$2,250 lawful money of the United States of America to them in hand well and truly paid by the party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the yearly assessment of rent and covenants hereinafter mentioned and reserved, to be kept and paid and performed, have demised, leased and let and hereby do demise, lease and let unto the said Henry M. Sanders, his heirs, executors, administrators and assigns all that certain plot, piece, or parcel of ground known and designated as lots Nos. 1,324, 1,325, 1,326, 1,327, on the map of lots on Camp ground of the said the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, being a part of the same premises situated in Ocean township, in the county of Monmouth and state of New Jersey, acquired by them, the said party of the first part, by virtue of the authority given by their charter for the purposes of said corporation by conveyance to them made by William D. Osborn and wife and David H. Brown and wife, by deed dated August 4, 1870, and recorded in Book 227 of Deeds of said Monmouth County, pages 57 and 60; to have and to hold the said lot or parcel of ground and all and singular the premises hereby described with the appurtenances unto the said Henry M. Sanders, his heirs, executors, administrators and assigns, to his and their only proper use, benefit, and behoof, but for the purposes hereinafter designated, and under and subject to the rules and regulations which may from time to time be adopted as to manner of building upon and care of the lots, and the buildings and improvements which may be erected thereon for and during the full term of ninety-nine years from this day fully to be completed and ended, renewable to the said Henry M. Sanders his heirs and assigns, for a like term of years forever, paying therefor to the said party of the first part their successors or assigns, and for a yearly rent for demised premises not to exceed seven per centum of the sum of six hundred dollars at such time or times in each year of said term as the same may be required by the said party of the first part or their successors or assigns. Subject however, nevertheless, and this lease is granted and accepted accordingly, to the regulations which may from time to time be adopted and promulgated for the government of the said camp grounds, and which are hereby made part of this instrument as fully to all intents and purposes as if they were incorporated herein, and the said party of the second part for himself, his heirs, executors and administrators, doth cov-

¶ 1. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 1167.

enant, promise and agree with the said party of the first part, their successors and assigns well and truly to pay to them the said assessment as hereinaforesaid within thirty days after the notice of the same and in case the said party of the second part shall persistently neglect or refuse to pay the same or to observe the hereinafter contained covenants or said regulations or any or either of them or any or either herein contained, it shall be lawful for the said party of the first part their successors or assigns to enter into and upon said demised premises and hold the same as of their former estate or estates, and this lease shall thereupon and from thenceforth be wholly at an end, and the estate hereby granted shall cease and determine; and also that the said party of the second part shall not and will not at any time hereafter without the written consent of the party of the first part, their successors or assigns, use or occupy said demised premises or any part thereof, or any building or other structure thereon, or suffer or permit the same or any part thereof to be used or occupied as a boarding house or any mercantile or mechanical trade or purposes whatsoever or in any other way or for any purpose except as a temporary residence and seaside resort for and during the term commencing the 15th day of May and ending the 30th day of October of each year; and also that the said party of the second part shall not nor will at any time during the said term give, demise, let, assign, set over or in any manner dispose of the hereby demised premises or any part thereof for all or any part of the term hereby granted to any person or persons whatever without the consent and approbation in writing of the said party of the first part, their successors or assigns, first had and obtained for that purpose."

The execution and delivery of this deed was duly proven, and offered in evidence by the plaintiff. On the trial of the cause the jury was instructed to find a special verdict in answer to each of the following questions submitted to it: (1) Whether the assessments to be paid were made for the years 1887, 1888, 1889, 1891, 1893, 1894, 1895, and 1896, under the terms and provisions of the said deed, against the premises thereby demised to the defendant. (2) Was the amount so assessed in each of said years on the premises demised to the defendant less than 7 per centum on \$600? (3) Did the defendant receive notice of said assessments from the plaintiff association for each of said years after they were so levied on the premises demised to and owned by him? (4) Did the defendant persistently neglect or refuse to pay such assessments within 30 days after such assessment notices were respectively received, and at any time after such 30 days to the time of the commencement of this suit? To each of these questions the jury, by its verdict, answer in the affirmative. Thereupon the trial court certified to the Supreme

Court for its advisory opinion the three following questions: (1) Whether the money consideration reserved in the said deed to be paid by the defendant is rent within the meaning of the seventh section of our landlord and tenant act. (2) Whether the notice given was in compliance with the terms of the deed. (3) Whether the assessments were legally levied under the terms of the deed.

It is immaterial whether, as defendant contends, the Supreme Court erroneously supposed that Exhibit No. 7 was the notice referred to in the second question certified, as there was sufficient evidence to justify the verdict of the jury upon the question of annual notice of the assessments made. To all these questions the Supreme Court certified an affirmative answer, whereupon the trial court found the defendant guilty, and rendered judgment of ouster against him. The writ of error in this case is prosecuted to review that judgment.

We concur in the opinion of the Supreme Court reported in 67 N. J. Law, 1, 50 Atl. 449, in respect to the last two questions certified, and also in respect to the first question in so far as it holds that the money consideration reserved in the said deed to be paid by the defendant must be regarded as rent. At common law, upon a breach of the condition for the payment of rent, the estate was not determined until the lessor actually entered. The reason was that when an estate commenced by livery of seisin it could not be determined before entry. *Dumport's Case*, 4 Coke, 120; *Fenn v. Smart*, 12 East, 444; *Taylor, L. & T.* § 295, and notes. The seventh section of our landlord and tenant act (Gen. St. p. 1916) is copied from section 2 of the English statute, 4 Geo. 2, c. 28, and its purpose was to make unnecessary the actual re-entry required by the common law. Where there is a mere right of re-entry for nonpayment of rent, the seventh section of the statute applies, and, to sustain ejectment, there must be proof by the landlord that no sufficient distress could be found upon the demised premises. The seventh section has no application to the case under consideration.

The plaintiff's right of action rests not upon the statute, but upon the express provisions of the contract with the defendant. The deed hereinbefore recited "demises the locus in quo to the defendant for ninety-nine years for a yearly rent not exceeding forty-two dollars, payable at such time as required by the lessor," with a provision that, "if the lessee shall persistently neglect or refuse to pay it, it shall be lawful for the lessor to enter and hold possession and this lease shall thereupon be wholly at an end and the estate hereby granted shall cease and determine." In this state it is well settled that upon breach of such a covenant the lessor, and not the lessee, has the option to declare that the term is ended. *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. 39; *Crevel-*

ing v. West End Iron Co., 51 N. J. Law, 34, 16 Atl. 184. These parties in express terms agreed that upon persistent failure to pay the rent as required by said deed the term thereby granted should be at an end, and the defendant's estate should cease and determine. The plaintiff cannot be deprived of the benefits of the contract, nor can a term be added to it making it ineffective, unless he proves that there is no sufficient distress. His action is based upon the deed independent of the statute. It is familiar law that, whenever a tenant unlawfully holds over after his term is ended, ejectment will lie. His term may end by mere lapse of the time stated in the lease, or it may, by express agreement, terminate sooner upon failure to do or not to do certain acts. In *Jones v. Carter*, 15 M. & W. p. 718, Baron Parke said that, where the lease contained a stipulation that for any breach of covenant, it should "determine and be utterly void," it was perfectly well settled that it shall be void at the option of the lessor, and that the bringing of an action of ejectment was an election to end the term. In *Den. v. McShane*, 13 N. J. Law, 35, which is an action of ejectment, the Supreme Court, in the opinion delivered by Chief Justice Ewing, held that, where a party is in possession of premises, under an agreement, which contains this clause, "in case a failure is made in any of the payments, previous to the deed being executed, the said Bray shall be privileged to take possession of the premises," he is not entitled to notice to quit or demand of possession; the lessor of the plaintiff is authorized by the letter of the agreement to take possession, and having the right to entry, can maintain an action of ejectment, and no notice to quit or demand of possession is necessary. The failure of payment, like the efflux of the fixed time of a lease, is sufficient notice. In *Den v. Post*, 25 N. J. Law, 286, Chief Justice Green stated the rule as follows: "But if the assignment be a violation of the covenant of the tenant, the mere breach can give the landlord no right of re-entry, unless there be a stipulation in the lease that such breach of covenant shall work a forfeiture or determination of the tenant's interest. No ejectment can be maintained by the landlord for a mere breach of covenant not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. Neither the lease nor the assignment is avoided by reason of the breach of covenant." So well was this distinction observed at common law that prior to the statute 32 Henry 8, c. 34, an assignee or grantee of a reversion, although he might have an action for rent reserved, could not enter for a condition broken, for to prevent maintenance an assignment of a mere right of entry was not allowed. If, however, the estate ceased by breach of condition without entry—as where in a lease for years it was

expressly declared that the lease was to become void by breach of the condition—the assignee might take advantage of it. *Taylor, L. & Tenant*, § 295, and cases cited.

The deed in the case sub judice having expressly declared that, if the lessee should persistently neglect or refuse to pay, it should be lawful for the lessor to enter and hold possession, and that the lease should thereupon be void, and the estate of the tenant cease and determine, and the jury having, by its verdict, found such persistent neglect and refusal to pay in accordance with the stipulation in the said deed, the plaintiff was entitled to recover possession in the action of ejectment.

The judgment below should therefore be affirmed.

CUMBERLAND LUMBER CO. v. CLINTON HILL LUMBER & MFG. CO.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

RECEIVERSHIP—ASSESSMENT ON STOCKHOLDERS—DEFENSE—DETERMINATION OF DEBTS.

1. As a defense to an application by a receiver for an order authorizing an assessment on stockholders for unpaid subscriptions, the stockholders cannot set up the fact that the company never became a corporation de jure.

2. Neither can they set up the fact that the company never became a corporation de facto.

3. Neither can they interpose the plea that the agreement to incorporate was abandoned and the subscriptions were canceled by the subscribers.

4. Neither can they plead the statute of limitations.

5. Neither can they set up that the claim against the estate of one of the subscribers is barred by a decree of the orphans' court.

6. Where insolvency proceedings have been instituted against a company, and a receiver appointed, the final ascertainment in such proceedings of the amount of debts owing by the company must be taken as final, and cannot be questioned in proceedings by the receiver for an order to authorize an assessment on stockholders, or persons claimed to be such.

7. When a receiver of an insolvent company shows, in proceedings for an order authorizing an assessment against delinquent subscribers to stock, a case which entitles him to test by suit the status of persons supposed to be stockholders, but who allege that they are not, the court should direct the assessment, and leave the liability of the individual subscribers to be tested by suit, if necessary.

8. Where the receiver of an insolvent company has no assets for the prosecution of a disputed claim, and the stockholders of the company have not asserted the validity of the claim and indemnified him against the expenses of a suit, he cannot be required to bring suit thereon before the court will be authorized to order an assessment on the stockholders.

Action by the Cumberland Lumber Company against the Clinton Hill Lumber & Manufacturing Company. Application by the receiver of the latter for an order authorizing an assessment on the stockholders for subscriptions. Order advised.

J. E. Howell, for receiver. Frank E. Bradner, contra.

EMERY, V. C. In this case I will advise an order authorizing the receiver to call upon the respondents, as stockholders, for such an amount of their subscriptions, not exceeding 60 per cent. of the subscriptions made by the individual respondents and William S. Ketcham, Sr., as may be necessary to pay the debts against the company allowed by the receiver, including the costs and expenses of administration. If these amounts are not agreed upon, I will settle them. The receiver will also be authorized to enforce payment of the unpaid subscriptions to this amount by suit, if necessary, against each of the respondents claimed to be stockholders. The order will be made without prejudice to the rights of any of the respondents to any defense they may have to any action, legal or equitable, which might be brought against them for such alleged stock subscription.

The principal defenses set up to the application are: First, that the company never became a corporation de jure, and the incorporators never became liable on their subscriptions; second, that it never became a corporation de facto; third, that the agreement to incorporate was abandoned and the subscriptions were canceled by the subscribers; fourth, the statute of limitations; fifth, that the claim against the estate of William S. Ketcham is barred by a decree of the orphans' court. All of these defenses are, in my judgment, defenses which must be set up and considered in an action to recover the subscription, and not on this application. In *Dorris Receiver v. Sweeney* (1875) 60 N. Y. 463, cited by respondents' counsel, the defense of no corporation was sustained in an action by the receiver to recover the subscription.

The whole of this court's authority on an application of this character, as I understand it, extends, first, to the ascertainment of the amount of the debts which are valid as against the company itself; second, the ascertainment of the stockholders of the company who have not fully paid their subscriptions or for their stock; and, third, the amount of the call for unpaid subscriptions or stock necessary to pay the debts, taking into account the assets of the company in the receiver's hands and the solvency or insolvency of the stockholders liable or claimed to be liable. As to the first, the final ascertainment of the amount of debts in the insolvency proceeding itself must be taken as final against the company, and, for the purpose of this proceeding, as against the stockholders or persons claimed to be such. As to the second point, if the status of the respondents as stockholders is disputed, and the receiver shows on his part a case which entitles him to test this question by suit, the court should direct the assessment, leaving the defenses of any stockholder or alleged stockholder to be settled by suit, if necessary. The receiver does show such a case

here, and therefore should be allowed to test the liability of the respondents as stockholders by regular proceedings. The present proceeding is, in my judgment, neither intended for nor adapted to the settlement of the above defenses of the different stockholders or persons claimed to be stockholders, set up in this proceeding against a recovery for unpaid subscriptions for stock. This is purely a judicial proceeding of an administrative character, intended to give to the receiver the same status which the company itself had, or might reasonably be claimed to have, to make a call for the payment of its debts against its stockholders or persons claimed to be such. In relation to the calls upon stockholders for the payment of debts, the receiver succeeds to the rights of the company. *Falk v. Whitman Cigar Co.* (N. J. Ch.; *Stevens, V. C.*, 1897) 36 Atl. 1094. It is objected that by the provisions of the twenty-seventh section of the corporation act the assessment by directors could only be made by the consent of two-thirds of the stockholders, but this express provision authorizing the directors, at their discretion, to make the call for any purpose, does not touch the power or the duty of the directors to make a call, when necessary for the payment of the debts; and in case of insolvency the court of equity will execute this trust upon which the capital stock is held by directing the assessment. 3 *Thomp. Corp. pars.* 3386, 3537.

In reference to the third question to be settled on this proceeding, viz., the amount of the assessment, it is insisted that the receiver has a right of action or claim against the estate of William S. Ketcham for the subsequent conversion to his own use of the goods and chattels which, as the receiver claims, were conveyed to the company in payment of 40 per cent. or the subscriptions of Ketcham and his two sons to the capital stock, and that he should exhaust this right of action before an assessment is made. There is, in my judgment, no substantial basis for this contention. The claim is disputed. The receiver has no assets for its prosecution, and could not be required to prosecute, in aid of the stockholders, except upon their indemnification against the expenses. *Kalmus v. Ballin*, 52 N. J. Eq. 290, 295, 28 Atl. 791, 46 Am. St. Rep. 520. In the absence of such indemnification and of the stockholders' assertion of the validity of the claim, the receiver, for the purpose of the speedy settlement of the estate, as required by the general policy of the insolvent corporation law, should be authorized to call for the unpaid subscription, leaving to the stockholders the right, if they desire, to prosecute for their own indemnification hereafter in the receiver's name, if necessary, any claim the company may have against the estate of Ketcham for this conversion of the goods.

The receiver will therefore be directed to

make an assessment, and the form of the order will follow the order in *Falk v. Whitman Cigar Co.*, supra.

CUMBERLAND LUMBER CO. v. CLINTON HILL LUMBER CO. et al.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

CORPORATIONS — INSOLVENCY — INDIVIDUAL STOCKHOLDERS—DEFENSES—EXTENT OF STOCKHOLDER'S LIABILITY.

1. The stockholders of a corporation cannot intervene, in an insolvency suit against it, to interpose defenses that the corporation itself cannot set up.

2. While the stockholders of a corporation cannot interpose any defenses to an insolvency suit against it that the corporation itself cannot set up, they can have the validity of matters alleged as a defense to their liability as stockholders adjudicated in suits brought by the receiver to collect assessments levied against them.

3. When a corporation has been decreed insolvent, and a receiver appointed, interest on the corporation's debt should be included in an assessment against the stockholders.

4. A receiver of an insolvent corporation is entitled to have expenses incurred in suits brought pursuant to the court's order included in an assessment against the stockholders, even though the costs paid in such suits went to persons to be assessed as stockholders.

5. The receiver of an insolvent corporation is entitled to have an allowance for his fees and those of his counsel included in an assessment against the stockholders.

Bill by the Cumberland Lumber Company and others against the Clinton Hill Lumber Company. Application by the stockholders of the defendant to open the decree in the insolvency proceedings. Application denied.

Frank E. Bradner, for stockholders. J. E. Howell, for receiver.

EMERY, V. C. The application to open the decree in the insolvency proceedings for the purpose of allowing the respondents claimed to be stockholders the opportunity to litigate in that case the questions presented by the petition must be denied. That decree was made on a bill filed by the Cumberland Lumber Company and Strieby, Sprague & Co., creditors of the Clinton Hill Lumber & Manufacturing Company, as an insolvent corporation; and the claims of complainants were based upon decrees of this court previously made in causes in which they were complainants, and the Clinton Hill Company was one of the defendants. The Clinton Hill Company appeared in these suits and contested them, and upon its appeal the decrees were sustained. The company appeared by solicitor in the suits and on the appeal. Subsequently a receiver was appointed in insolvency proceedings against the company, on a bill filed April 9, 1895, after service upon one William S. Ketcham as the president of the company. He had in the previous suits against the company acted or assumed to act as such officer. Upon the application of the receiver to assess stockholders for the

payment of debts, the present petitioners, who are stockholders or alleged stockholders of the company, apply to open the decree in the insolvency proceedings for the purpose of allowing them, as individuals, to set up defenses which may be divided into the following classes: First, that the Clinton Hill Company was never a corporation de jure or de facto; second, that no certificates of stock were ever issued; third, that William S. Ketcham, Jr., appeared in the suits as an officer of the company without authority; fourth, that the decree in insolvency was entered without notice to the alleged corporation, or any of the present alleged stockholders, except William S. Ketcham, Jr., and was made without authority; and that one of the complainants (Strieby, Sprague & Co.) had knowledge before instituting proceedings against the corporation that it had no existence in law or in fact. Nothing is alleged against the other complainant, but its claim has been purchased since these proceedings for assessments were instituted by one of the respondents.

In my judgment, none of these questions would have been triable in the insolvency proceedings, had the present application been then made. So far as relates to the existence de facto of the alleged corporation, the decrees in chancery in the suits brought by the complainants were necessarily conclusive upon the point, so far as the corporation is concerned, and are still conclusive. If there was a corporation de facto, the court of equity would seem to have no jurisdiction to try the question whether there was a corporation de jure. *Atty. Gen. v. Am. Tobacco Co.*, 55 N. J. Eq. 352, 368, 369, 36 Atl. 361, 979, 980, and cases cited, affirmed on appeal 56 N. J. Eq. 847, 42 Atl. 1117. The corporation was the only defendant in the insolvency suit, and the stockholders, if they could be permitted to intervene for any purpose, would not be permitted to intervene in that suit, as parties or otherwise, to set up defenses which the corporation itself could not have made. Unless there is a defense on the merits, the corporation itself would not be entitled to open the decree. The effect and finality, as against petitioners, of the decrees either in the original suits or in the insolvency proceedings, is another matter, and as against them the validity of the present defenses are matters for adjudication in the suits to be brought by the receiver to recover the assessments. This was the view which I took as to some of these defenses when they were presented as defenses to the order for assessment, and a fortiori the decree in insolvency should not be opened for the purpose of trying them in that suit at this late day, after the time for appeal has passed, and when the decree has been enrolled.

2. The claims of creditors, with interest on them, are to be included in the amount to be assessed. As against a stockholder, interest is to be allowed to the same extent as

if the action were against the corporation itself; not exceeding, however, the maximum liability of the stockholder for unpaid stock. *Richmond v. Irons* (1886) 121 U. S. 27, 64, 7 Sup. Ct. 788, 80 L. Ed. 864; 6 *Thomp. Corp.* § 7314.

3. The costs paid by the receiver in the suits at law authorized to be brought by the order of the court are to be included in the assessment. These will include his own taxed costs. The general rule seems to be settled that the receiver is to be allowed for expenses in suits which have been incurred by the express direction or approval of the court appointing him. 2 *Dan. Ch. Pr.* (6th Am. Ed.) *1747. The costs on appeal should also be allowed. These were expenses necessarily incurred in the performance of the receiver's duties. The contention in this case is that the general rule as to the reimbursement of the receiver's expenses should not apply, because the costs paid were paid to the persons now assessed as stockholders or alleged stockholders, and that therefore the order for assessment is, in effect, an order that they should repay the costs which have been made to them. But upon the question of the right of the receiver to reimbursement of expenses properly and necessarily incurred in executing his trust, the coincidence that the stockholders assessed for repayment, or some of them, are the persons to whom the payments were made, cannot, as it seems to me, vary the general rule. The right of the receiver to reimbursement from the trust fund depends on the necessity or propriety of the payments and expenses he has made or incurred in carrying out his trust, and to this extent he is entitled to protection and reimbursement. As to the bulk of the costs, viz., those incurred in the suits at law, these would, as it now turns out, have been unnecessary, had the respondents appealed promptly from the original order of assessment, instead of delaying until after the suits had been brought, and the statutory period for appeal had nearly expired. As to the costs on appeal, the receiver, having the order below in his favor, was entitled, and, I think bound, to assert it in the court of appeal, and is entitled, as any other trustee would be, to the necessary and proper expenses of appeal.

4. In addition to the costs, a proper allowance for counsel and receiver's fees should be allowed, including an allowance for the probable litigation in prosecuting the assessments. The allowance for counsel fee will be \$1,000, and for the receiver's fee \$150.

THOMPSON et al. v. WILLIAMSON et al.
(Court of Chancery of New Jersey. Feb. 18, 1903.)

PLEADING—IRRELEVANT AND IMPERTINENT
MATTER—MOTION TO STRIKE OUT.

1. The time of the incurring of complainants' debts being a material point, they asking to

have a conveyance set aside as fraudulent, and discovery on oath on this point from defendant, his answer on the point cannot be stricken out as irrelevant and impertinent.

2. A motion to strike a paragraph for impertinence or irrelevancy will fail if any portion of the paragraph is relevant or responsive.

3. Allegation of the answer, in a suit to subject property as fraudulently conveyed, that defendant allowed judgment to be taken against him by default because informed by his counsel that there was no valid defense, will be stricken out as irrelevant and impertinent.

Suit by W. Ledyard Thompson and others against Frederick B. Williamson and others. Complainants move to strike out portions of the answer of defendant Williamson for irrelevancy and impertinence. Granted in part.

Percy R. Crane, for complainants. T. C. English, for defendants.

EMERY, V. C. The first two motions to strike out were withdrawn at the argument, and my conclusions on the third motion are as follows:

1. Complainants' bill makes allegations that their debt of \$8,780.68, upon which suit in New York was brought in November, 1899, "had become due from Frederick B. Williamson in the month of May, 1899." The conveyance alleged to be fraudulent was dated October 25, 1899. The time of incurring the debt was, therefore, material, and complainants have asked discovery on oath, as to all the allegations of the bill, from this defendant, the debtor.

The paragraph of Frederick B. Williamson's answer to which the first part of complainants' third motion to strike out applies includes a statement as to the agreement on which the account with complainants was opened, and as to the time of opening the account, and afterwards says, "Such agreement and opening of account having been made late in the year A. D. eighteen hundred and ninety-seven." On this matter of time a subsequent portion of the paragraph says "that in the course of such dealings no statement of account was made or rendered other than a memorandum slip of the sales or purchases of single days, nor did he actually know at the time alleged in the bill of complaint, as the day whereupon he was indebted to the complainant in the sum of money therein mentioned." The time of the incurring of complainants' debts is a material point of the case, and the time was distinctly alleged in the bill. As complainants ask discovery on oath upon this point, and upon all other allegations of the bill from this defendant, he was entitled to answer it, and complainants cannot strike out the answer on this point for which they have called. On exception or motion to strike out an entire paragraph for impertinence or irrelevancy, the exception or motion must fail if any portion of the paragraph excepted to is either relevant or responsive. 1 *Dan. Ch. Pr.* (6th Am. Ed.) 352; *Wagstaff v. Bryan*, 1 *Russ. & Myl.* 30; *McGuckin v. Kline*, 31

N. J. Eq. 454, 457 (Runyon, Ch. 1879). A different rule obtains on exceptions for insufficiency, in which case the exceptions may be sustained in part. *Bennett v. Hamlin*, 47 N. J. Eq. 326, 21 Atl. 953 (Err. & App. 1890). The effect of the answer on this point, either as to this defendant or to the other defendants, is a matter to be decided on final hearing.

2. The second paragraph referred to in the third motion to strike out must be stricken out. This sets up that defendant was informed by his counsel that no valid defense could be made to the action on the judgment brought in this state, and he therefore submitted to the judgment by default, and that defendant then believed, and now believes and insists, that he is not indebted to complainants in the amount of the judgment. This is not responsive, and is immaterial and irrelevant. Whether the defense to the judgment obtained in this state and set up in the previous part of this defendant's answer can avail him in this suit will be a question for determination at the hearing. My present view is that the decision in *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, relied on by defendant's counsel, does not protect a defendant who has had his day in court at law, and could have set up before that court the defense urged here. But decision as to the scope of this case on this point is not now involved.

Both parties succeeding in part, neither is entitled to costs.

APPLETON et al. v. AMERICAN MALT- ING CO. et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

CORPORATIONS—DIRECTORS—HOLDING OVER— PRESUMPTION—REQUEST TO BRING SUIT— SUIT BY STOCKHOLDERS—DIVIDEND FROM CAPITAL—LIABILITY.

1. Under P. L. 1896, c. 185, § 43, requiring every corporation to file annually with the Secretary of State, within 30 days after election of directors, a report giving the names of the directors; and section 12, providing that directors shall hold office for one year, and till others are chosen and qualify—failure of a corporation to file such a report since 1899 justifies the conclusion that since then no election has been held, and that the directors then chosen are holding over.

2. The directors of a corporation need not be asked to bring suit in its name, a majority of them being among the persons against whom relief is sought by the suit.

3. Stockholders are not disqualified to maintain a suit for the benefit of the corporation against its directors to reimburse it because of the directors declaring and paying a dividend out of capital, though such stockholders, or the persons from whom they purchased their stock, participated in the dividends, and did not return them.

4. Under P. L. 1896, c. 185, § 30, providing that no corporation shall make dividends out of capital, and, in case of violation thereof, the

directors under whose administration it happened shall be liable, "at any time within six years after paying such dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency," to the full amount of the dividend, recovery may be had of them, though there is no dissolution or insolvency of the corporation.

Appeal from Court of Chancery.

Suit by Aaron Appleton and another against the American Malting Company and others. From a decree sustaining demurrers to and dismissing the bill, complainants appeal. Reversed.

James E. Howell and John A. Garver, for appellants. Corbin & Corbin and A. B. Thacher, for respondents.

GUMMERE, C. J. The appellants, who are stockholders of the defendant company, filed their bill to compel the directors of the company, who held office as such from the time of the organization of the company in September, 1897, up to and including the year 1899, to pay back into the treasury of the company certain dividends paid out by them during the period named from the capital stock of the company, in violation of the provisions of section 30 of the corporation act. The bill was filed by the complainants, not in the assertion of any individual right, but on behalf of the company. Each of the defendants filed a demurrer to the bill, and upon a hearing in the court below a decree was entered sustaining the demurrers and dismissing the bill. From that decree this appeal was taken.

Two questions are raised by the demurrers: First. Do the facts exhibited in the bill justify the complainants in instituting this suit without first making demand upon the directors to do so? Second. Does the thirtieth section of the corporation act impose any liability upon directors who have paid dividends out of capital, except in the event of the dissolution or the insolvency of the company?

In determining the first question the following facts are material: The bill was filed in March, 1901. The illegal declaration and payment of unearned dividends is alleged to have occurred prior to the 1st day of January, 1900. As an excuse for not, in the first instance, applying to the present board of directors to prosecute, it is stated in the bill that, according to the last report made by the corporation to the Secretary of State in compliance with section 43 of the corporation act (and filed in his office in the year 1899), a majority of the board as then constituted were and are among the individual defendants against whom relief is sought by the bill. By section 12 of the corporation act directors are required to be chosen annually, and are authorized to hold office for one year, and until others are chosen and qualified in their stead. The forty-third section of the act requires every corporation to file

in the office of the Secretary of State, annually, within 30 days after the election of directors, a statement containing the names and addresses of each of such directors, with the date of their election and of their term of office. P. L. 1896, pp. 281, 291, c. 185. The fact that the defendant corporation has not filed in the office of the Secretary of State any report of election of directors since the year 1899 justifies the conclusion that since then no election has been held by its stockholders, and that those directors who were then chosen held over, under the provision of section 12 of the statute, and were in office at the time of the institution of the suit.

The statement that a majority of the present board of directors were and are among the persons against whom relief is sought by the bill, discloses a situation which relieved the complainants from the duty of applying to them to bring suit in the name of the corporation. It is settled in this state that such application need not be made when the interest or bias of the directors makes it certain that, if it was made, it would be denied; or, if granted, that the litigation following would necessarily be under the direction of persons opposed to its success. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 84, 23 Atl. 118; on appeal, *Bohmrich v. Knoop*, 50 N. J. Eq. 485, 27 Atl. 636.

Another ground upon which the right of the complainant to maintain this action is attacked is that either they or those from whom they purchased their stock participated in the distribution of the illegal dividends, and are for that reason (as it is contended) disqualified from maintaining this suit, unless and until they return into the treasury of the company so much of the illegal dividends as was paid upon the stock which they hold. But this contention is based upon a misconception of the real situation. The complainants do not bring the suit to establish any right of their own, or because they are personally entitled to the relief sought. They are permitted to sue *ex necessitate rei*, because the interests of those in control of the corporation are hostile to the interests of the corporation itself. Although, on the record, the corporation is a party defendant, yet in reality the complainants represent it. Except in name, the suit is an action brought by the corporation. It is maintained solely for its benefit, and the final relief, when obtained, belongs to it, and not to the complainants. *Willoughby v. Chicago Junction Ry. Co.*, 50 N. J. Eq. 656, 666, 25 Atl. 277. The fact that the complainants, or those from whom they purchased their stock, participated in the distribution of the illegal dividends, is no bar to the right of the corporation to obtain the relief sought.

Concluding that the facts stated in the bill sufficiently show the right of the complainants to maintain this suit upon behalf of the corporation, we reach the meritorious ques-

tion raised by the demurrer, and that is whether, by virtue of the provisions of the thirtieth section of the corporation act, the directors who have participated in the declaration and payment of a dividend out of capital are liable to the corporation for so doing, except in case of the dissolution or insolvency of the company. The language of the statute is as follows: "No corporation shall make dividends, except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this act, and in case of any violation of the provisions of this section, the directors under whose administration the same may happen shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with interest on the same from the time such liability accrued: provided, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors, at the time the same was done, or forthwith after he shall have notice of the same, and by causing a true copy of said dissent to be published, within two weeks after the same shall have been so entered, in a newspaper published in the county where the corporation has its principal office." The contention of the demurrants, which was sustained by the Court of Chancery, is that the remedy provided by the statute is solely for the benefit of creditors; and that it can only be availed of in case of the insolvency of the corporation. The argument is that the punctuation (the insertion of a comma, after the word "creditors") shows clearly that this was intended by the Legislature to be a winding-up provision, creating a fund for the payment of debts; and that, even if the location of the comma is not to be accepted as controlling, nevertheless a construction which would enable the corporation to compel the directors, for the benefit of its stockholders, to make good a deficit in the capital stock, when the stockholders themselves already had in their pockets the whole amount of that deficit, is so unreasonable and inequitable as to require its rejection. Punctuation, although usually considered in discovering the purpose of a statute, is never decisive in determining it; on the contrary, it will be entirely disregarded if it be necessary to do so in order to arrive at the real meaning and intent of the lawmakers. *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *Kinkele v. Wilson*, 151 N. Y. 277, 45 N. E. 869; *Cushing v. Worrick*, 9

Gray, 382. If controlling force be given to the punctuation, and the location of the comma be considered decisive of the legislative intent that the liability should arise only in the event of dissolution or insolvency, still it is not perceived how the statute is to be limited in its scope so as to impose that liability only so far as it is necessary to provide a fund for the payment of debts. The liability is created for the benefit of the corporation as well as its creditors. It arises in case of dissolution or insolvency; i. e., where there is a voluntary winding up of a solvent corporation, as well as when the corporation is wound up in invitum on account of insolvency. If punctuation is to govern in the construction of this statutory provision, therefore, the situation is this: although the directors are answerable to the corporation for the injury inflicted upon it by the impairment of its capital, yet the corporation cannot compel them to make good the loss which it has sustained by their illegal act, unless it elects to abandon its business, and go into liquidation. A construction which imputes to the Legislature the intent to force a solvent corporation into liquidation as a condition of enabling it to recover from its directors the money necessary to make good the impairment of its capital by them, should not be adopted unless such intent is manifest. If the words of the act, rather than the punctuation, are looked to, the intention of the Legislature would seem to be the reverse of that contended for by the demurrants. Reading the statute without regard to punctuation, the Legislature has declared that for the impairment of the capital of the company "the directors shall be jointly and severally liable at any time within six years to the corporation and to its creditors in the event of its dissolution or insolvency to the full amount of the capital stock so divided withdrawn paid out or reduced." The apparent object of the provision is to afford protection equally to the corporation and to its creditors against loss by reason of the illegal act. But the creditors can suffer no injury from it unless the capital is so impaired as to render the company insolvent. Not so with the corporation. Any impairment of its capital is harmful to it in some degree; the seriousness of the injury depending upon the extent of the impairment. For the full protection of the company the liability of the directors must be absolute. No liability on the part of the directors is required for the full protection of creditors, except in case of the insolvency of the corporation, or possibly in the event of its voluntary liquidation. The words of the statute give this full measure of protection. For disobedience of its mandate "the directors shall be jointly and severally liable to the corporation, and to its creditors in the event of its dissolution or insolvency"; to the corporation in any event, to the creditors in the event expressed in the statute. In our judgment, the Legislature intended by this provision to afford the full

measure of protection which the words provide.

It is argued by the demurrants, as has been already stated, that the statute, so construed, is grossly unjust and inequitable, in that it requires the directors to pay into the treasury of the corporation, for the benefit of the stockholders, the amount of the deficit, although the stockholders, not the directors, have in their pockets the portion of the capital which has been withdrawn. The argument assumes that there will be no transfer of the stock of the company during the period of the liability of the directors. The assumption is unwarranted. The very declaration of the dividend, evidencing as it does the apparent prosperity of the company, creates a desire on the part of outsiders to become holders of the stock. It at the same time decreases the actual, while increasing the apparent, value of the stock. The result is to afford unscrupulous directors, and stockholders who are cognizant of the illegal action of the board, an opportunity to unload their holdings upon innocent purchasers at fraudulently inflated prices. It is eminently just that the persons whose wrongful act has caused loss to those who have been induced by it to become stockholders should make good that loss. Nor is it inequitable that stockholders who have innocently participated in the distribution of the illegal dividends should have their stock restored to its normal value by contribution from the directors who have impaired the capital without being first required to pay back the dividend so paid to them. The ordinary purchaser of corporate stock holds it as an investment. He rightly considers and treats the dividends paid upon it as income. In many instances the income is required to meet the expenses of living, and is entirely expended for that purpose. To say that a person who has been unwittingly induced to exhaust his principal by the mistaken or fraudulent representation of those to whom he has intrusted it that what has been paid to him is income suffers no injury is absurd. To refuse him redress except upon condition that he return the moneys which he has expended in the belief that his capital was intact, notwithstanding that by such expenditure he is rendered penniless, is to put a premium upon fraud in corporate management.

The learned vice chancellor, who heard the case in the court below, considered that, if the statute fixed liability upon the directors without regard to the financial condition or needs of the corporation, then it was highly penal in its character, and that for this reason a court of equity should refuse to entertain a suit for its enforcement. In our opinion, the liability imposed by the statute is not penal in its character. Its sole purpose is, not to punish, but to provide for the making of compensation by wrongdoers for the injury sustained by their wrongful act.

The decree appealed from should be reversed.

UNITED STATES FIDELITY & GUARANTY CO. v. DONNELLY.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

NONSUIT—WHEN GRANTED.

1. A plaintiff is properly nonsuited if his proofs fail to establish an essential part of the agreement upon which he has declared.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the United States Fidelity & Guaranty Company against Louis H. Donnelly. Judgment for defendant, and plaintiff brings error. Affirmed.

William I. Garrison and U. G. Styron, for plaintiff in error. Clarence L. Cole, for defendant in error.

GARRISON, J. The plaintiff declared upon an agreement under seal by which the defendant agreed to indemnify the plaintiff against the damage it should sustain by reason of its having executed two "undertakings" incident to the removal of two certain actions into the city court of the city of New York, averring damage by reason of a judgment rendered by said court in the actions so removed into it. The defendant pleaded that he had not made such an agreement—in effect, a plea of non est factum.

To prove the affirmative of the issue thus presented, the plaintiff offered a sealed instrument executed by the defendant, which recited that the plaintiff had become surety upon two undertakings of removal, and that copies of such undertakings were annexed to and formed a part of the agreement between the parties, but in point of fact the instrument offered by the plaintiff was not accompanied by copies of any undertakings, and no offer was made in the first instance to supply proof respecting this part of the defendant's alleged agreement. The objection of the defendant to the admission of the instrument offered by the plaintiff having been sustained by the trial court, the plaintiff was permitted to introduce an exemplified copy of a record of the city court of the city of New York, which recited an undertaking by the plaintiff with respect to an action pending in the said court, and certified the recovery of a judgment upon such undertaking. The plaintiff then renewed its offer of the sealed instrument executed by the defendant, claiming that the recital in the record of the New York judgment supplied adequate proof as to the undertakings that were part of the agreement declared upon, and that the judgment itself established both the fact and the quantum of the plaintiff's damage. This was the plaintiff's case, upon which a nonsuit was directed, to which direction an exception was allowed.

It is evident that the plaintiff's entire case was presented upon its renewed offer of the defendant's agreement, as supplemented by the New York record, and that the propriety

of the earlier ruling upon a part only of such agreement has no practical bearing upon the merits of the controversy.

The rulings of the trial court upon the plaintiff's case as finally made up were obviously correct. The written instrument that was offered showed upon its face, and expressly stated, that it was but part of the agreement between the parties. The New York record in no wise identified the undertaking that it recited with the undertakings that formed an essential part of the alleged agreement of the defendant. The plaintiff, therefore, had not proved an essential part of the agreement upon which it had declared, and which the defendant by his plea denied that he had made.

The judgment of nonsuit is affirmed.

BROWN et al. v. TALLMAN.

(Court of Chancery of New Jersey. Feb. 24,
1903.)

EQUITY—BILL—ALLEGATIONS—DEMURRER—COST.

1. A bill seeking relief on the ground that complainants have title in certain lands devised by a will, alleging that complainants "are devisees and legatees under the last will of T., deceased," is an insufficient allegation of title.

2. Where, in equity, a demurrer on the ground of multifariousness is joint, and the bill is not multifarious as against one of the demurrants, the demurrer must fail as to both of them.

3. Under the express provisions of Chancery Act, § 24, Revision 1902 (P. L. 519), on the sustaining of a demurrer to a bill in equity, the costs must be paid by the complainant.

Suit by Mana L. Brown and others against Cornelius H. Tallman, as executor of the will of Jacob B. Tallman, deceased. On demurrer to the bill. Demurrer sustained.

Mr. Price, for complainant. John T. Rosell and Frank P. McDermott, for respondents.

EMERY, V. C. The demurrer must be allowed because of the failure of complainant to allege or show title to the lands in question. The allegation that they "are devisees and legatees under the last will and testament of Jacob B. Tallman, deceased," is not sufficient. The bill should at least allege that they are devisees of the lands in question, or have some interest in these lands as devisees or legatees, and it may be necessary to set out such portions of the will as show their title or interest.

As to multifariousness, my view is that the bill is not multifarious as against Cornelius Tallman, one of the demurrants; that the other demurrant stands in the same position with him, because the demurrer is joint, not "joint and several," and must therefore fail unless good as to both. 1 Dan. Ch. Pr. (6th Am. Ed.) *584, and cases cited in note 7.

Costs must be paid by complainant. The

statute (Chancery Act, § 24, Revision 1902; P. L. 519) makes this compulsory.

Complainant may amend his bill.

**BOARD OF CHOSEN FREEHOLDERS OF
ATLANTIC COUNTY v. INHABITANTS
OF WEYMOUTH TP.**

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

TAXES—COLLECTION—TOWNSHIP COLLECTOR.

1. Taxes are purely of legislative creation, hence a special method prescribed by statute for their collection or devolution must be pursued to the exclusion of others based upon general principles of law.

2. Section 24 of the general tax act (Gen. St. p. 3285) makes it the duty of the township collector to pay the moneys collected in his township for county purposes to the county collector. *Held*, that (nothing more appearing) an action by the county against the township for such moneys will not lie.

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by the board of chosen freeholders of the county of Atlantic against the inhabitants of the township of Weymouth. Judgment for plaintiff. Defendant brings error. Reversed.

E. A. Higbee and D. J. Pancoast, for plaintiff in error. Thompson & Cole, for defendant in error.

GARRISON, J. The main question presented by this writ of error is whether a township is liable to the board of chosen freeholders of the county of which it forms a part for the amount of the taxes collected in such township for such county. The answer to this question is to be found in two established principles of law respecting taxation, viz.: (1) Taxes are in legal contemplation neither debts nor contractual obligations, but are in the strictest sense of the word exactions. (2) Where the Legislature has prescribed a special method respecting such divestments and their devolution, such method must be pursued to the exclusion of others based upon general legal rules.

The legislative provisions by which taxes collected from townships shall reach their respective county treasuries is as follows: "It shall be the duty of the township collector to pay the moneys which he shall have reached by virtue of any such assessment to the county collector." Section 24, Gen. St. p. 3285. This is explicit. The further provisions of the tax act (section 30, Gen. St. p. 3286), and of the act relating to chosen freeholders (section 24, Gen. St. p. 413), making the township directly liable to the county under certain specified conditions, emphasize the absence of such liability when such special conditions do not exist. Doubtless, conditions other than those thus enumerated may so disturb the normal relations of the respective collectors with their municipalities that recourse to general legal rules must be had. To speculate, however, as to what these con-

ditions might be, or to cite cases in which they have actually arisen, would be to ventilate views not conducive to the determination of the case in hand, which will be fully disposed of when the conclusion has been reached that it presents no special features that take it out of the legislative rule respecting the channel by which taxes collected in townships shall be passed on to the counties to which they belong. Having reached such a conclusion, the judgment contained in this record by which efficiency is given to a different course must be reversed.

J. C. SMITH & WALLACE CO. v. PRUSSIAN NAT. INS. CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

INSURANCE—BINDING SLIP—ACCEPTANCE—IMPERFECT—RATE—AGENCY.

An insurance company, by its agent, issued and delivered to the insured a binder, or binding slip, whereby it assumed and bound \$2,000 of insurance upon certain property of the insured; the binding slip to be void on delivery of the policy. When the binder was delivered it was assumed by the insured that the insurer proposed to charge a rate higher than it had charged for the same insurance for the previous year, although no rate was mentioned in the binder, whereupon he requested the agent of the insurer to ascertain if he could not obtain from his principal some concession in the rate. This the agent consented to attempt, but before any attempt was made by the agent the building burned. *Held*.

1. That a complete temporary contract of insurance existed between the insurer and the insured from the time of the delivery of the binder.

2. That the insured having accepted the binder, the promise to pay the premium to be mentioned in the policy was a sufficient consideration for the contract.

3. That the agent of the insurer having failed to fix the rate before the policy was delivered and before the loss occurred, the insured was bound to pay a reasonable rate for the protection which he had received by the temporary contract.

4. Whether one acts as agent for the insurer or the insured is to be determined by the circumstances of the particular case; one cannot be the agent for both parties.

(Syllabus by the Court.)

Error to Supreme Court.

Action by J. C. Smith & Wallace Company against the Prussian National Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

James Buchanan and W. Benton Crisp, for plaintiff in error. Robert H. McCarter, for defendant in error.

GARRETSON, J. The judgment in this case was entered upon a verdict directed by the trial justice at the circuit, and this writ of error brings up the judgment, and the propriety of this direction is the question in controversy.

The plaintiff had been insured by a policy of the defendant, which was about expiring.

and the plaintiff's treasurer had called the attention of the defendant's agent to this fact. On the 17th day of May, the treasurer of the plaintiff received at the hands of William Vanderveer the following paper, called a "binder":

"William Vanderveer, Fire, Marine and Inland Insurance, 43 Cedar Street.

"New York, May 16, 1901.

"Insurance in the amount of \$2,000 is wanted for J. C. Smith & Wallace Co., on building Nos. 420-422 Ogden Street, Newark, N. J. The undersigned companies assume and bind from the 16th day of May, 1901, the insurance applied for above for amounts opposite their respective names. This binding slip is void on delivery of the policy. Company, Prussian Nat'l. Amount, \$2,000. Accepted. W. Vanderveer, Agt."

With the binder was delivered by Vanderveer this letter:

"William Vanderveer, Successor to Hansell & Vanderveer, Fire and Marine Insurance, 43 Cedar Street.

"New York, May 17, 1901.

"J. C. Smith & Wallace Co., Newark, N. J.—Gentlemen: We enclose policy No. 31,705, Pennsylvania, for \$4,000, and binder of Prussian National for \$2,000 on building Nos. 420-422 Ogden street, in renewal of expirations on 8th and 16th Insts. Yours very truly, William Vanderveer, H."

When the treasurer examined the Pennsylvania policy he noticed that the rate mentioned therein was 70 cents instead of 50 cents, the rate in both the previous Pennsylvania and Prussian policies. He then told Vanderveer that this rate was unsatisfactory, and, if it had to be 70 cents, that he wanted Vanderveer to ascertain if he could not get it written for three years or five years, thereby writing it at a reduction of one-half of one year's rate, or two and a half years' rate for three years. Vanderveer said he would try to do so, and left the Pennsylvania policy and the binder with the treasurer. The rate was left in this situation. No policy was issued in place of the binder. The fire occurred about June 22, 1901.

A contract of insurance may be by parol. *Audobon v. Insurance Co.*, 27 N. Y. 216. And a preliminary contract is frequently effected by what are known as "binders" or "binding slips," such as was used in this case. *Lipman v. Niagara Fire Insurance Co.*, 121 N. Y. 451, 24 N. E. 699; *Karelson v. The Sun Fire Insurance Co.*, 122 N. Y. 545, 25 N. E. 921; *Van Tassell v. Greenwich Insurance Co.* (N. Y.) 45 N. E. 365; *Underwood v. Greenwich Insurance Co.*, 161 N. Y. 413, 57 N. E. 1127.

To constitute a valid contract there should be parties thereto, a premium, a subject-matter, an insurable interest, certain risks or perils, duration of the risk, and the

amount insured, but in the temporary oral contracts, or in those evidenced by binders, some of these terms are often omitted, and need not be expressly negotiated upon, since they may be understood, as where the terms of the usual policy are presumed to be intended, or where the usual rate of premium is presumed to be meant, or in case of duration of the risk is understood to be the same as in a former policy, or where by custom or usage a certain course of dealing has been established. 1 *Joyce on Insurance*, § 46.

When the binder was delivered, the plaintiff, assuming that the rate to be expressed in the policy of the defendant would be 70 cents for one year, because that was the rate in the policy of another company delivered at the same time, objected to that rate, and after some conversation the defendant's agent undertook to see if he could not get a modification of the rate, and he at the same time delivered to the plaintiff the binder, and the plaintiff accepted it, and by it the defendant insured the property of the plaintiff upon the terms to be expressed in the policy which was to be delivered, and upon the delivery of which the binding slip was to be void. The defendant said, in effect, to the plaintiff: "Upon your application we secure your insurance; we make a temporary contract of insurance by which we protect your property until we can agree upon the terms of the policy, which shall be a permanent contract expressing all the terms necessary to a complete contract." The plaintiff by accepting the binder agreed to be bound by all the terms of the policy, including the rate of premium to be paid, and the defendant ought not now be allowed to say, "We are not bound to keep that contract, because no specific premium was mentioned;" the uncertainty as to the rate having remained in abeyance by the action of the defendant.

When the company made this temporary contract, to be terminated when the policy was delivered, the promise to pay the premium upon delivery of the policy was sufficient consideration for the temporary insurance. If, therefore, as in this case, no policy was delivered defining the rate of insurance, the question remains, what was the rate? The consideration is in the alternative. If the policy is executed, delivered, and accepted, the payment of the premium mentioned in it is the consideration; and, if it is not, the defendant having insured the plaintiff by the temporary contract, then the law raises a presumption on the part of the insured to pay the company what the protection which he has had under this temporary contract is reasonably worth, and the insurer, by the very terms of the binder, gives credit to the insured until the temporary contract is ended, either by the issuance of a policy or otherwise.

It is admitted that Vanderveer was the

agent of the company, appointed by a regular commission and authority from them, signed by the manager. As such agent, he signed the binding slip in question, and did so within the limits of his authority as an agent to countersign and issue policies. His authority to enter into the contract in question for the insurance company will be inferred from his general agency. *Fire Insurance Co. v. Building Association*, 43 N. J. Law, 652; *Carson v. Jersey City Insurance Co.*, Id. 300, 39 Am. Rep. 584; 16 A. & E. Enc. of L. (2d Ed.) 853.

It is claimed in this case that Vanderveer, in making this contract of insurance, was acting as agent of both the insurer and the insured, and that, therefore, the contract is void; but there is no evidence to sustain such a contention. The treasurer of the company, before the contract in question was made, wrote to Vanderveer calling his attention to the fact that the policy of his company, the defendant, was about to expire. Vanderveer brought to Wallace the binding slip offered in evidence, signed by Vanderveer as agent of the Prussian National, the defendant. Wallace questioned the rate which he assumed, and which Vanderveer admitted would be charged, and endeavored to get a reduction of it from Vanderveer, and, failing in that, desired him to get it from his company. There is nothing in this evidence to show Wallace was dealing with Vanderveer in any other capacity than as agent of the insurance company, and there is nothing in Vanderveer's actions inconsistent with his duties as such agent.

While it has been held that one who acts as a general agent to procure insurance cannot also act as agent for the insurer and bind the insurer by his acts, yet it is competent to inquire into the particulars of the making of each contract of insurance, and, if it appears that in the contract in question the agent was not acting for the insured, but only for the insurer, the contract will be sustained, and, where it appears that the agent is the duly appointed and authorized agent of the insurer, and acts as such in making the contract of insurance, he will be regarded as the agent of the insurer only, although, as to other contracts by other companies of which he was not such authorized agent, he may be regarded as the agent of the insured.

The judgment below will be affirmed.

OLIVER v. RAHWAY ICE CO. et al.
(Court of Chancery of New Jersey. Feb. 26, 1903.)

CORPORATIONS—ULTRA VIRES—PURCHASE OF STOCK—SALE BY DIRECTORS—RATIFICATION—RECOVERY OF VALUE.

1. A purchase by a corporation of shares of its stock, not disabling it from paying its debts in full, is not ultra vires.

2. A contract of sale to a corporation of shares of its stock by directors, who were present at the meeting of the board at which the sale was sanctioned, is not binding as to the price, though it may be enforced on the basis of what the stock was worth.

3. A payment by a corporation on account of a sale to it by directors, who were present at the meeting of the board at which the sale was sanctioned, is of the contract as made, as it may as well be referred to an implied indebtedness on the quantum valebant as to an express indebtedness on the contract.

4. Reference in a mortgage of a corporation to its prior mortgages due is the statement of a seeming fact, rather than the conscious validation of an illegal agreement.

5. A board of directors, the majority of which were the members of the board, which authorized an illegal contract, cannot ratify it.

6. Silence of the stockholders of a corporation for two years, with knowledge of an illegal contract by the directors, is not a ratification thereof.

7. Though a contract of sale to a corporation of shares of its stock by directors, who were present at the meeting of the board which sanctioned the sale, is not binding on it as to the price named, the corporation cannot tender back the stock after putting a mortgage on its property, but must pay what it was worth at the time of the sale.

Bill by Charles R. Oliver against the Rahway Ice Company and others to foreclose a mortgage. Reference ordered.

N. C. J. English, for complainant. Frank Bergen, for defendants.

STEVENS, V. C. The bill is filed to foreclose a mortgage made on August 31, A. D. 1899, by the Rahway Ice Company to complainant, to secure the sum of \$12,000. One year thereafter the mortgagor paid the principal sum of \$3,000, with a year's interest. The complainant, Oliver, and his brother had been stockholders of the company; together holding 300 shares, of the par value of \$100 each. On these shares \$15,000 had been paid into the treasury of the company, and, on the day above named, the company had agreed to take them for what had been thus paid. Of this price, \$3,000 was paid in cash, and the balance was secured by the above-mentioned mortgage. The main defense was that the transaction was ultra vires and void. Since the decision by the Supreme Court in *Chapman v. Ironclad Rheostat Co.*, 62 N. J. Law, 497, 41 Atl. 690, approved by the Court of Errors and Appeals in *Berger v. United Steel Corporation*, 53 Atl. 68, it is the settled law of this state that corporations may purchase shares of their own capital stock whenever such purchase is required for legitimate corporate purposes. I do not suppose that this decision goes the length of authorizing a corporation to purchase and pay for its own stock if such purchase and payment will disable it from paying its debts in full, or of authorizing a corporation to contract with one or more of its shareholders to buy shares and so convert them into creditors entitled to come in on an equality with other creditors, if the assets be at the time insufficient to pay all the cred-

§ 1. See *Corporations*, vol. 12, Cent. Dig. § 1530.

itors in full. But the evidence does not bring the case in hand under either of these categories, and so nothing is decided in reference to them. Under the proofs the transaction is not, therefore, ultra vires. It seems to me, however, to be objectionable on another ground. It comes within the principle of *Gardner v. Butler*, 30 N. J. Eq. 702. Oliver and his brother were directors, present at the meeting of the board at which the sale of the stock was sanctioned. Speaking of a case thus circumstanced, Mr. Justice Van Syckle, in the case cited, says: "The rule is that the trustee cannot fortify himself by a contract which he makes with himself or for his own benefit, and set it up, either at law or in equity, as a valid obligation. It is of no binding force as a contract, and the cestui que trust may repudiate it at will. But while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents, or employes, and for such services the law will enable them to recover a just and reasonable compensation. * * * No claim which they may make against their company can acquire any support from the fact that they have expressly sanctioned it. It must rest exclusively upon its fairness and justice, and be enforced upon the quantum meruit." Referring to the case of *The Aberdeen Ry. Co. v. Blakie*, 1 Macq. H. L. Cas. 461, he says further on: "If the action [in that case] had been brought to recover for the chairs which had been delivered and accepted, I apprehend it would not have been held in any court that the company could have retained the property and refused to pay for it—not the contract price, but what it was reasonably worth. * * * The same principle must apply whether it is property conveyed or services rendered to the company. The cupidity and avarice of the trustee is guarded against by giving the cestui que trust the right to repudiate the contract at all times where it is executory, and to allow simply a just remuneration, without reference to the contract price, where it is executed." In the *Berger Case*, stock is said to have been put by our statute upon the footing of other property, and so the rule laid down in the case of *Gardner v. Butler* is directly applicable. The company must pay for it, not the contract price, but what at the time of the sale it was reasonably worth.

It was argued for complainant that there was ratification of the contract as made, first, by payment on account; and, secondly, by an express reference to the mortgage as due in a subsequent mortgage made by the company to a trustee to secure certain bonds. The payment on account may as well be referred to an implied indebtedness on the quantum valebant as to an express indebtedness on the contract. As to the clause in the second mortgage, the evidence does not show by whose direction it was inserted, and it appears to be rather the statement of a

seeming fact, than the conscious validation of an illegal agreement. If it was inserted by direction of the board of directors, then, so far as appears, a majority of the board which directed it may have consisted of the same persons who authorized the purchase. That majority could not, consciously or unconsciously, ratify its own illegal act. The ratification must necessarily come from the principal, and not from the unauthorized agent. Here the principal is the corporation itself—the whole body of the stockholders. It is not pretended that this body, as such, or duly authorized representatives of this body, ratified the transaction, otherwise than by silence; and this silence has not been sufficiently long continued to be evidence of acquiescence, and hence of ratification—assuming, notwithstanding the language of the court in the *Gardner-Butler Case*, that the ordinary rule relating to ratification by acquiescence is applicable to cases like the present. Only two years and a little over a month intervened between the making of the mortgage and the bringing of this suit. In the *Gardner-Butler Case* the stockholders, with full knowledge of the facts (see Chancellor's opinion on page 710, 30 N. J. Eq.), remained silent from January, 1868, to May, 1871; and although the chancellor called attention to the delay, and laid stress upon it, it was not considered by the Court of Errors to be material.

There must be a reference to ascertain the value of the stock at the time it was purchased. I do not think the company could with any more reason tender it back now, with another mortgage put upon the property, than the *Aberdeen Company* in the case mentioned by Mr. Justice Van Syckle could have tendered back the chairs after using them

HUCKESTEIN v. NEW YORK LIFE INS. CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.

1. In an action for malicious prosecution the want of probable cause is one of law, for the court, where the facts are undisputed.

2. A life insurance company caused the arrest of plaintiff for obtaining money under false pretenses. The evidence showed that, if there was a false pretense, it was not made to the insurance company, but to a broker who bought a policy of plaintiff, who afterwards sold it to the company. *Held*, that the prosecution was without probable cause.

Appeal from Court of Common Pleas, Allegheny County; McClung, Judge.

Action by John Huckestein against New York Life Insurance Company and Walter S. Huntley. Judgment for plaintiff, and defendants appeal. Affirmed.

¶ 1. See *Malicious Prosecution*, vol. 33, Cent. Dig. § 181.

At the trial it appeared that the plaintiff, who owned a policy in the New York Life Insurance Company, sold the policy to Richard Herzfeld for \$2,000, and that Herzfeld surrendered the policy to the company, and received for it \$2,600. There was testimony that plaintiff had submitted to Herzfeld a paper in which he falsely stated that he had four sons, and that these were all his children, when, in fact, two daughters were then living. The policy was made payable to plaintiff's wife and children. It did not appear that plaintiff had any transaction with the insurance company in relation to the sale of the policy, but that he dealt wholly with Herzfeld.

The court charged, in part, as follows:

"Now, to apply this matter to the case before us: The prosecution was instituted by an information made before Alderman Groetzinger on November 15, 1898. As I have said, the information was made by Mr. Huntley, and it was made, admittedly, at the direction of the other defendant, the company. The information was made against John Huckestein, charging him with obtaining money from the New York Life Insurance Company by a false pretense; that is, by a false pretending, by a signed paper, that the four sons who joined in the transfer of the policy were all his children by a wife who was then dead. When the testimony developed, it appears by the uncontradicted testimony that Huckestein did not obtain any money at all from the New York Life Insurance Company in this transaction, and consequently he could not have obtained it by any false pretense. He sold the life insurance policy to one Herzfeld, through brokers, and did not deal with the insurance company at all. He sold it, it seems, through these brokers, for \$2,000, and it appears that afterwards Herzfeld sold it to the company for some \$2,600—a different transaction altogether. I presume they call that transaction a 'surrender.' But at any rate, Huckestein hadn't anything to do with that transaction, and there is nothing to indicate here that whatever paper he signed was intended to influence any one excepting Herzfeld—at any rate, that it was not a pretense by Huckestein to any one excepting Herzfeld. So that it is perfectly manifest that, in any aspect of the case, there was no false pretense—no cheating by false pretense—as between Huckestein and the New York Life Insurance Company. He did not get a dollar of money from the life insurance company, and consequently there was no reasonable or probable cause for the prosecution that was instituted, to wit, the prosecution for obtaining money by false pretense from the New York Life Insurance Company by Huckestein. So that that element is taken out of the case. I instruct you that, under the testimony all around—the admitted facts in the case—that there was no probable cause for that prosecution.

"That leaves the matter wholly upon the question as to whether the prosecution was maliciously instituted or not; that is, with the exception of another matter, with respect to the advice of counsel, which I will explain to you. You will assume that there was no reasonable or probable cause for this particular prosecution. Even if Huckestein did sign that affidavit—the disputed affidavit—then the pretense was made, not to the New York Life Insurance Company, but to Herzfeld.

"The fact, however, that there was no reasonable or probable cause, does not determine this case in favor of the plaintiff, because you have yet to go on to the consideration of the question as to whether or not the defendants are liable for the consequences of this prosecution; and they are not if they acted without malice, if they acted from a proper motive, if they acted in good faith. That is, if the prosecution, although wrongful and although unsustained by the facts, was the result of an honest mistake, then they would not be liable. And there is another principle—that, if it was based upon the advice of counsel, that then the party who made it would not be responsible. If you proposed to make an information against some one with whom you have dealt, for a criminal act, and you go to your counsel and lay before him fully and freely all the information you have, or give him all the means of information that are accessible, and he advises you that you have a case, and you act upon that, then the law protects you. But it must be substantially such case as that. You must lay the matter fully before him, and take his opinion upon the question thus presented. It is not necessary that you should exclude him from getting any information himself, but you must directly or indirectly lay the case before him.

"The plaintiff here claims that this is not a case where the facts were laid before the counsel for the company, Mr. Wakefield, and his opinion taken, but that the matter was put into his hands as not simply the attorney, not simply the counsel, for the company, but the agent of the company to look the matter up, and to determine not only upon the facts, but, in the exercise of his discretion, as to whether or not an action should be brought. And the plaintiff alleges that it was not a case where he gave his advice upon the facts submitted to him or learned by him, but a case where he, with the authority of the company, took charge of the whole, matter, and, because of prejudice against the plaintiff here (the defendant in that case), and because he was actuated by malice, determined to bring this suit, although it did not have legal ground to rest upon. My recollection of the testimony of the defendants' chief witness, Mr. Wakefield, is that it sustains, to some extent, at least, the allegation that he acted as the agent of this company, and that he had power to de-

termine whether the suit should be brought or not. My recollection is that he says that, if he had gotten what the company wished from Mr. Huckestein, that suit would not have been brought, and that he expressly or impliedly asserts that he had the right to determine whether the suit would be brought or not. That is the question for you. If you believe that there was a submission of the case, and a legal opinion taken, and that was acted upon in good faith, then the company would be protected, and Huntley would be protected. But if you believe that Wakefield was constituted the agent of the company, that the whole matter was put in his hands, and that he was either given full power to act, or that he was directed to act in such a way as to compel the performance of this duty, or of his claim, to wit, the obtaining of the release of Huckestein's daughters, or, upon failure of that, then to bring suit, and he had this prosecution instituted for the company maliciously, and for the purpose of gratifying spite, and not in good faith, then the company would be liable and Huntley would be liable."

Defendant presented this point: "The court is respectfully asked to charge the jury that, under all the evidence, the verdict should be for the defendant. Answer. Refused."

Verdict and judgment for plaintiff for \$1,900.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

D. F. Patterson, for appellants. S. S. Robertson, for appellee.

FELL, J. This action was for a malicious prosecution. The plaintiff was arrested and tried for obtaining money from one of the defendants—the New York Life Insurance Company—by a false pretense. The company authorized its agent, the other defendant, to cause his arrest. If there was a false pretense, it was not made to the insurance company, with whom the plaintiff had no dealings whatever, but to a broker who bought the policy of the plaintiff, and who afterwards sold or surrendered it to the company. As to this there was no dispute. The instruction, therefore, that the prosecution was without probable cause, was clearly right, and it was the duty of the court to give it. The question of probable cause is one of law, for the court, where the facts relied on to constitute it are admitted or established beyond controversy.

The attempt by the defendants to show that the prosecution was commenced by the advice of counsel gave rise, under the testimony, to the inquiries whether there had been a submission of the facts and circumstances to counsel, and a legal opinion sought and acted on in good faith, or whether the counsel who advised the prosecution was in fact the agent of the insurance company, with power to act in procuring a release to

save it from loss, and that the prosecution was instituted to accomplish this purpose. These questions were submitted to the jury with full and accurate instructions.

The judgment is affirmed.

CITY OF PITTSBURG v. STERRETT SUBDISTRICT SCHOOL

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

TAXATION—PROPERTY SUBJECT—SCHOOL DISTRICT—REAL ESTATE.

1. Act May 16, 1891 (P. L. 69), provides that, whenever there shall be a final assessment on any property for the costs of any municipal improvements, the property assessed shall be subject to a lien for the amount of the assessment, and provides for the enforcement of the lien. The directors of a sub school district created under the act of February 12, 1869 (P. L. 150), purchased certain real estate, on which the city, under the act of 1891, levied an assessment for the improvement of a street on which it abutted. *Held*, that the property was not subject to the assessment; it being public property, and there being no provision in the act of 1891 by which such an assessment could be enforced.

Appeal from Court of Common Pleas, Allegheny County; Evans, Judge.

Action by the city of Pittsburgh against the Sterrett Subdistrict School. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Affirmed.

At the trial the jury returned the following verdict: "And now, to wit, March 17, 1902, we, the jurors impaneled in the above-entitled case, find for plaintiff for \$2,048.41, subject to question of law reserved, to wit, whether real estate, the property of the subdistrict schools in the city of Pittsburgh, is liable to assessment for municipal improvements." Judgment was subsequently entered for the defendant non obstante verdicto.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William W. Smith, City Sol., and T. D. Carnahan, Asst. City Sol., for appellant. Jesse T. Lazear, Thomas C. Lazear, and Charles P. Orr, for appellee.

MESTREZAT, J. There is but a single question in this case, and that is whether real estate purchased and held by the board of directors of sub school districts in the city of Pittsburgh is liable to assessment for grading, paving, and curbing a street on which said real estate abuts. The learned trial judge answered the question in the negative, and denied the right of the city to recover from a subdistrict the cost of the improvement.

By the act of February 12, 1869 (P. L. 150) the city of Pittsburgh was created an independent school district. A central board of education was established, having corporate

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1036.

capacity, with certain powers over, and duties relative to, the schools and subdistrict schools of the city. The board is composed of one member elected by the board of directors of each of the subdistricts. It is required, among other things, to maintain one high school and one or more separate schools for children of color, and authorized to take and hold real estate for these purposes; to assess, and, through the city treasurer, collect, sufficient taxes to establish and maintain the high school and schools for children of color, and for the payment of the teachers of the several subdistrict schools. Each ward is made a subdistrict, and two school directors are to be elected annually therein for a term of three years. The board of directors of a subdistrict is authorized, *inter alia*, to purchase and hold such real estate and personal property as may be necessary for the establishment and support of the schools within their respective districts, and to dispose of the same; to cause suitable lots of ground to be purchased or rented, and suitable buildings to be erected or rented for schoolhouses, and to supply the same with the proper conveniences and fuel, and are given general supervision over the schools; to levy a special tax, to be applied solely to the purchasing or paying for the ground, the building or erection of schoolhouses thereon, the repairing of said houses, and furniture, apparatus, and all necessary books and stationery, and fuel therefor, and janitor service; to appoint the teachers of the subdistrict schools, and to dismiss them at any time for cause; and to suspend or expel from the schools all persons found guilty of incorrigible conduct. The board is required to admit to the school of the subdistrict all persons between the ages of 6 and 21 years, residents of the subdistrict, except persons of color.

In 1891 the Sterrett Subdistrict, the appellee, purchased a lot of ground within the subdistrict, and erected a school building thereon, which, since its erection, has been used exclusively for school purposes. This property abuts on Linden avenue, a public street of the city, which in 1893 was graded, paved, and curbed by the city. Viewers were appointed by the court of common pleas, who assessed the property of the subdistrict with \$1,336.65, as special benefits, which assessment was reported to, and duly confirmed by, the court. A municipal lien was filed by the city against the property under the act of May 16, 1891 (P. L. 69), and a *scire facias* thereon was issued to enforce payment of the claim against the premises. An affidavit of defense and plea were filed, and no further proceedings were taken on the *scire facias*. About five years thereafter the city issued a *scire facias* to revive and continue the lien, and on the trial thereof the court directed a verdict for the plaintiff, subject to the question "whether real estate, the property of the subdistrict schools in the city

of Pittsburg, is liable to assessment for municipal improvements." Subsequently, on motion of appellee's counsel, the court entered judgment for the defendant non obstante verdicto, on the ground that the real estate of the subdistrict was not liable for a municipal claim for a street improvement, because the property was used exclusively for school purposes, and held further that this proceeding is an action in rem, and, as "it is not pretended that this land could be sold to satisfy this lien," judgment should not be entered on the verdict in favor of the plaintiff.

The provisions of the act of 1869, as referred to and quoted above, indicate sufficiently for the purposes of this case the powers and duties of the central board of education, and of the board of directors of the respective subdistricts. The system of education created by the act requires the united action of the central and subdistrict boards of directors to render it complete and effective. When organized and in operation, it is an efficient means of enforcing article 10, § 1, of the Constitution, which provides that "the general assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth, above the age of six years, may be educated." While the city is the school district, yet the title to the real estate necessary for subdistrict school purposes is taken and held by the directors of the subdistricts. It is also true that the real estate in each subdistrict is purchased and paid for by the money of the subdistrict in which it is located. These facts, however, do not deprive it of the character of public property used for school purposes. It is one of the necessary and indispensable means which the state, through the city, uses in carrying out the system of public education commanded by the constitution of the commonwealth. Each of the subdistricts is charged with the same duty in this respect, and that the act of 1869 did not impose upon the city the power and the duty of purchasing and holding the title to the real estate cannot affect its character as public property, nor deny to the subdistricts their right to exemption from taxation or municipal assessments to which the city, as a school district, would be entitled if the title was vested in it. In either case, regardless of where the title is lodged, the property is taken, held, and used "for the maintenance and support of a thorough and efficient system of public schools." The burden imposed on subdistricts by the purchase of real estate for school purposes is equalized among the subdistricts by similar service to be performed by each subdistrict. Substituting "subdistrict" for "municipality," and "district" for "state," the following language of Agnew, J., in Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255, is applicable here: "Nor is this mode of taxation inconsistent with our

notions of the right of private property and of the equality of burdens, for each municipality, in its turn (sooner or later), by a tax on all of its inhabitants, pays only for what it makes and enjoys within its own limits; and thus in the course of time the burden is equalized upon all, as every portion of the state makes its own improvements and enjoys their peculiar benefits."

Regarding the real estate in question as the property of a school district—"a quasi corporation for the sole purpose of administering the commonwealth's system of public education"—is it subject to an assessment for benefits received by reason of the improvement of the street on which it abuts? The act of May 16, 1891, under which this lien was filed, provides that whenever there shall be any final assessment made on "any property or properties" to pay for the cost, expenses, and damages of any municipal improvements, the property so assessed shall be subject to a lien for the amount of such assessment. The act provides for the enforcement of the lien and the collection of the claim by sale of the real estate on a *levari facias* issued on the judgment obtained on a *scire facias*. It will be observed that the terms of the act do not limit its application to private, as distinguished from public, property. The words employed in the statute are "any property or properties," and they are sufficiently comprehensive, if so intended by the Legislature, to include all property, whether held for public use or owned by a private individual. But in construing this Legislation, and in determining the intention of the Legislature in its enactment, we must be guided by the well-established rule that "it is always to be assumed that the general language of statutes is made use of with reference to taxable subjects, and the property of municipalities is not in any proper sense taxable. It is therefore, by clear implication, excluded." Cooley on Taxation, 131: *County of Erie v. City of Erie*, 118 Pa. 360, 6 Atl. 136. In speaking of the presumption that public property is exempt from taxation, Judge Cooley (Cooley on Taxation, 130) says: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demands of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore

a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact." In *Jones v. Tatham*, 20 Pa. 398, Lewis, J., delivering the opinion of the court, says: "Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied." In *Directors of Poor v. School Directors*, 42 Pa. 21, Chief Justice Lowrie says: "The public is never subject to tax laws, and no portion of it can be without express statute. No exemption law is needed for any public property, held as such." The late Chief Justice Green repeated this language with approval in his opinion in *County of Erie v. City of Erie*, supra. In *Endlich on the Interpretation of Statutes*, § 161, the author, citing authorities to support the text, says: "The crown is not reached, except by express words or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the crown of any prerogative, right, or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and, in its wide and natural sense, would divest or take away any prerogative or right, title, or interest from the crown, it is construed so as to exclude that effect."

It is contended, however, that an assessment for a local improvement is not taxation in its general form, and hence is not subject to the rule that statutes imposing taxation do not apply to, or impose a tax upon, property held by the state or one of its municipalities, unless it is expressly so provided. In support of this position, the learned counsel for the appellant rely upon *Sewickley M. El. Church's Appeal*, 165 Pa. 475, 30 Atl. 1007, and two kindred cases decided by this court. The question in those cases, however, was, as the appellant's counsel concede, whether the constitutional exemption from taxation applies to municipal assessments. It was held that it did not apply to such assessments, and only relieves from the obligation to pay the ordinary taxes levied for general purposes. There can be but little doubt that such is now the settled rule in this state. It was admitted, however, by Chief Justice Sterrett, in *Church's Appeal*, that these assessments, resting for their final reason upon special local benefits, are referable to the taxing power, and are therefore not improv-

ery recognized as a species of taxation. Such assessments have been recognized as an exercise of the taxing power in numerous other decisions of this court, and in the decisions of the courts of other states. *Hammett v. Philadelphia*, 65 Pa. 146, 8 Am. Rep. 615; *Washington Ave.*, supra; *Olive Cemetery Company v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732; *Erie v. First Universalist Church*, 105 Pa. 278; *McKeesport Boro. v. Fidler*, 147 Pa. 532, 23 Atl. 799; *Board of Improvement v. School District (Ark.)* 19 S. W. 969, 16 L. R. A. 418, 35 Am. St. Rep. 108; *Worcester County v. Worcester*, 17 Am. Rep. 159. In *Olive Cemetery Company v. Philadelphia*, supra, *Sterrett, J.*, delivering the opinion, says: "It is conceded, however, that the authority to make and collect such assessments is delegated by the commonwealth. If it does not emanate from the inherent powers of a government to levy and collect taxes, it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former, and hence it must be in the latter." In *Erie v. Church*, supra, *Gordon, J.*, approvingly repeats this language, and adds: "Scarcely less emphatic is the declaration of Mr. Justice Sharswood, in *Hammett v. Philadelphia*, 65 Pa. 146, that this mode of municipal assessment for the cost of local improvements upon the properties benefited is a species of taxation." Judge Gordon also says that *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255, *Craig v. Phila.*, 89 Pa. 265, and *Phila. v. Rule*, 93 Pa. 15, are ruled upon the assumption that such assessments are taxes. The same view is entertained in many other states, and it is there held that the general language of a statute authorizing assessments for local improvements does not apply to property held by the state, or a political subdivision thereof, and devoted strictly to public use. *City of Clinton v. Henry County (Mo.)* 22 S. W. 494, 37 Am. St. Rep. 415; *Board of Improvement v. School District*, supra. In the latter case, *Hemingway, J.*, speaking for the Supreme Court of Arkansas, says: "If it be argued that the reasoning upon which the rule [under which public property is presumed to be exempt] is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the taxes, while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the statehouse and other state institutions relieves every taxable subject in the state from the burden of taxation, but it deprives the particular county or school district in which they are situated of the entire county or school tax; and so the exemption of county property from state taxes benefits the county only, and de-

prives the entire state of revenue; still, in all such cases, it is held that exemption is applied wherever liability is not expressed or necessarily implied. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to special assessments."

These authorities conclusively show that statutes imposing assessments for local improvements are enacted in the exercise of the taxing power of the Legislature. They, therefore, notwithstanding the generality of the enumeration of the property affected, do not apply or relate to property held or used for public purposes by the state or any of its political subdivisions. The reasons for this rule given in the authorities cited above are convincing, and amply sufficient to sustain it. The imposition of a tax or assessment by the authority of the state, represented by itself or any subordinate political division thereof, upon property held by another subordinate division, and used for public purposes, would, in effect, be a party demanding money and receiving payment from himself. An assessment pays for a public, though a local, improvement. It therefore relieves the public from the necessity of contributing to the cost or expense of the improvement. If public property purchased by funds raised by taxation is subjected to assessment for a local public improvement, it is the public paying the public, which clearly discloses the absurdity of the proposition. The fact that the benefit of the exemption would inure to the people of only a portion of the territory which produces the revenue from which the property is purchased cannot affect the right to exemption. As is shown in the authorities cited above, the same objection would be equally effective in preventing public property from being relieved from general taxation. It may also be observed that the other parts of the territory not benefited by the local improvement would in time derive like benefit from similar improvements, without the liability for assessment of their property.

The mode provided in the act of 1891 for enforcing the assessment also leads to the conclusion that the Legislature did not intend that it should apply to the property of school districts. The statute provides that the collection of the claim shall be by "writ of *scire facias*, in accordance with the course of the common law," on which a judgment shall be entered for the debt, interest, and cost of the lien. A writ of *levari facias* shall issue on the judgment, and by virtue thereof the sheriff shall sell the property. As the proceeding is statutory, it is exclusive, and must be pursued in the enforcement of the claim. There is no personal liability against the owner which can be enforced by an ordinary action at law. Here the claim cannot be paid by the school board of the subdistrict, as it has no funds with which to make payment. As we have seen by reference to

the act of 1869, the subdistrict school boards are authorized to levy a tax solely for the purpose of purchasing school sites, for the erection and repair of school buildings, for the purchase of school apparatus, and to pay for fuel and for janitor service. For no other purpose and to meet no other indebtedness can the board of a subdistrict levy or collect a tax. If, therefore, the claim of the plaintiff in this case is collected, it must be done by a sale of the school property on a *levari facias* by the sheriff. As said by Williams, J., in *O'Donnell v. Cass Tp. School District*, 133 Pa. 162, 19 Atl. 358, this would take from it (subdistrict) the schoolhouse, and defeat the very purposes for which the district was organized. For such reason it was held in that case that an execution could not issue on a judgment against a school district created by authority of the act of 1854 (P. L. 617). In *Patterson & Co. v. Pennsylvania Reform School*, 92 Pa. 229, it was held that the defendant was "a public corporate body, and cannot be proceeded against by *levari facias*." And in *Monaghan v. Philadelphia*, 28 Pa. 207, it is said: "It is very clear that none of the property of a municipal corporation, whether real or personal, necessary to the corporation for governmental purposes, could be seized and sold, even if the usual process for collecting a judgment could issue against such corporation." In *Schaffer v. Cadwallader*, 36 Pa. 126, Chief Justice Lowrie says: "It is essential to the existence of a lien (as of all other legal rights) that it be recognized by law, by being enforced or protected as such. This is a very plain principle, and it refuses to a judgment against a municipal corporation the character of a lien on its land, because such a judgment cannot be executed against the land."

In contemplation of the constitutional provision relative to our public schools, and statutory enactments to enforce it, the school districts or subdistricts of the state are the agents of the commonwealth in the administration of its system of public education. They are made quasi corporations for that purpose. *Ford v. Kendall Boro. School District*, 121 Pa. 543, 15 Atl. 812, 1 L. R. A. 607. They therefore hold the property as the agent of the state, and for the purpose of making its public school system effective. Taxation of any kind whatever imposed upon the property would interfere with and defeat the commonwealth in maintaining the system of education required by the Constitution. Such an intention should not be attributed to the Legislature in the enactment of either special or general tax laws unless it is manifested by clear and explicit language.

We think it clear, therefore, on reason and authority, that the language used in the act of 1891 does not apply to property held by the state or any of its political subdivisions for public use. The statute, in imposing the burden, does not discriminate between pri-

vate and public property, and does not expressly place it upon public property. The appellee's property is therefore presumptively exempted from the operation of the act, and the lien sought to be enforced here has no statutory authority, which is necessary to its validity, to support it.

The question raised here has been directly adjudicated in some of the states. In *Board of Improvement v. School District*, supra, the Supreme Court of Arkansas held that an assessment of public school property for local improvements is not authorized by a statute which in general terms requires the assessment to be upon all real property situate in the district. *Hemlingway, J.*, delivering the opinion, holds that public property is exempt from special taxation, and, after citing numerous authorities to support his position, says: "It is argued that, even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The Constitution provides that the state shall ever maintain free public schools, and in performing this duty it exercises a function strictly public and governmental. It created school districts, and imposed upon them, in part, this duty, and in order to discharge it they own schoolhouses. They have no other duty than to perform for the state this public function, and only that they may do it is the house held. The state may abolish them, take the property, and undertake, directly or through other agencies, this public function. The means of controlling the property would thereby be changed, but its use would be unchanged; and there is nothing in the policy of the law to exempt the property while held and controlled by the state which would deny the exemption while held by the state's agent, and used in the performance of its duties. *Green v. U. S.*, 9 Wall. 655, 19 L. Ed. 806."

In *City of Hartford v. West Middle District*, 29 Am. Rep. 687, the Supreme Court of Connecticut holds that land occupied by a schoolhouse and used solely for school purposes cannot be assessed for the laying out of an adjoining street. In support of his conclusion, *Granger, J.*, delivering the opinion, says: "How could the defendants, as a school district, be benefited by the laying out of the street? The assessment was undoubtedly made upon the idea that the intrinsic value of the property was increased, but, if that were so as a matter of fact, does it follow that it was increased in value as school district property, bought and used solely for school purposes, and did the district, or could it, from the nature of things, derive any immediate, direct, or special benefit from the laying out of the street? We are unable to see how the district, as a corporation, could be so benefited, or that their property was rendered any more valuable for the purpose

for which they used it, and for which they must continue to use it, if not for all time, at least for a very long period."

In the recent case of *Witter v. Mission School District*, 53 Pac. 905, 66 Am. St. Rep. 33, the Supreme Court of California held that a lot belonging to a school district is not liable for an assessment for street improvements if used for school purposes. The court, conceding that there might be exemption from "taxation" where there would not necessarily be exemption from "assessments," put its decision on the ground "that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

We are aware that in some jurisdictions it is held that public property is subject to general as well as special taxation, where it is not excepted in the statute imposing the tax. We think, however, the contrary is the better view, and that it is supported by reason and the great weight of authority.

In accordance with the views above expressed, we are of opinion that the real estate of the sub school districts of the city of Pittsburg is not subject to an assessment for the cost and expenses of local improvements.

The assignments of error are overruled, and the judgment is affirmed.

CITY OF PITTSBURG v. PITTSBURG, C. & W. R. CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RAILROADS—OCCUPATION OF STREETS.

1. Act April 4, 1868, § 12 (P. L. 62), preventing the occupation of a street by a railway without municipal consent, is not repealed by Const. 1874, art. 17, § 1, providing that any association organized for that purpose shall have the right to construct a railroad between any points within the state, and connect at the state line with railroads of other states.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the city of Pittsburg against the Pittsburg, Carnegie & Western Railroad Company and Arthur McMullen. From the decree, plaintiff appeals. Reversed.

The following is the agreed statement of facts: "The plaintiff in this case is the city of Pittsburg, and the defendants are the Pittsburg, Carnegie & Western Railroad Company and Arthur McMullen. McMullen is simply a contractor whom the railroad company defendant has employed to do the work which the plaintiff seeks to enjoin. His rights, then, are simply those of the other defendant, and therefore the case may be discussed as if the railroad company were the only defendant. The defendant railroad company was formed by the consolidation of the

Washington County Railroad Company and the Pittsburg & Mansfield Railroad Company July 17, 1901. The Pittsburg & Mansfield Railroad Company was originally incorporated in 1894, and reorganized, after judicial sale, August 24, 1893. The defendant railroad company is incorporated under the general railroad act of 1868 (P. L. 62), as were its constituent companies, the charters of which were all obtained in or since 1894. Said charters together authorized the defendant railroad company to construct a railroad from Pittsburg to the state line, where it is intersected by Cross creek. The defendant is authorized by act of Congress to bridge the Monongahela river at a point where the pier whose construction is sought to be enjoined by the bill is located, provided it completes said bridge by March 2, 1904; and the location of the pier, etc., has been approved by the Secretary of War. The defendant's contractor proposed to remove a pier that had been erected upon a wharf. This pier had been erected by the Pittsburg & Mansfield Railroad Company prior to the filing of the bill in this case, with the assent of the city of Pittsburg, by its ordinance, duly passed, which limited the time for the construction of the bridge, which time limit has expired long before the time of filing the bill in this case. The defendant railroad company proposes to construct from the pier located upon the wharf a span of its bridge or approach, to an abutment or anchor pier situate about 120 feet north of the north line of Water street, in the city of Pittsburg; and the span, when constructed, will be at least 346 feet in length, being at least twenty-five feet for the full width of the street. The defendant railroad company proposes to construct and operate its railroad on a viaduct reaching from the anchor pier on private property 120 feet north of the north line of Water street to its terminus at or near Ferry street and Liberty avenue, in the city of Pittsburg. Said viaduct will have a clearance of not less than twenty-five feet over First, Second, Third, and Fourth avenues, and all the pedestals and supports necessary to support said viaduct will be located upon real estate owned by the defendant railroad company. The defendant railroad company intends to connect its bridge across the Monongahela river, on the south side of the river, with an iron and steel trestle or viaduct, extending from said bridge across Carson street to the bluff of Mt. Washington, and thence proceed to a tunnel through Mt. Washington to the city line, crossing several streets and highways, but never at grade, either crossing them overhead or on under-grade crossings, leaving the roadway between building lines unimpaired, and where the crossing is overhead, in all cases, provided at least twenty-five feet headway or clearance. The railroad being constructed by the defendant company is an original construction, and not an elevation or reconstruction

of a railroad heretofore constructed and in operation. The defendant company has expended in the counties of Allegheny and Washington, in the state of Pennsylvania, the sum of \$3,036,298.75 for actual construction in its railroad, and the acquisition of property necessary thereto. The defendant railroad company, together with Cross Creek Railroad Company, a corporation incorporated under the laws of the state of West Virginia, the Pittsburgh, Toledo & Western Railroad Company, a corporation incorporated under the laws of the state of Ohio, will form, when the railroad of the defendant company is completed, a system of transportation between the city of Pittsburgh and the town of Jewett, in Ohio; and the defendant railroad company and the Wheeling & Lake Erie Railroad Company, a corporation of the state of Ohio, affording the defendant company trackage rights which will enable it to transport freight and passengers from Pittsburgh to Toledo, Chicago, and points west. The defendant company has contracted for and is now actually engaged in completing the construction of its road as authorized by its charter, and is actually crossing with said construction the streets and highways of the city of Pittsburgh alleged in the bill of complaint filed in this case."

The court found: "Our conclusion is that a railroad company incorporated under the act of 1868, since the constitution of 1874 went into effect, where one of its termini is a city, whilst it is liable for all injury to property, cannot be prevented by the city from crossing a street, where such crossing is necessary in order that it may reach that part of the city to which it must go to do its work effectively."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. A. Blakeley, Thomas D. Carnahan, and A. M. Thompson, for appellant. A. M. Neep-er and W. M. Lindsay, for appellees.

DEAN, J. There is compressed in the question involved, as stated by appellant's counsel, the entire history of this case: "Has a railroad company, incorporated under the general railroad laws of 1868 and its supplements, the power to enter upon, occupy, and cross the streets of a municipality without the consent of the municipality?" The company is organized under, and derives its being from, the general railroad act. Section 12 of the act of April 4, 1868 (P. L. 62) reads: "This act shall not be so construed as to authorize the formation of street passenger railway companies, to construct passenger railways under or by virtue of its provisions in any city, or borough of this commonwealth, nor to authorize any corporations, formed under this act, to enter upon and occupy any street, lane or alley, in any incorporated city in this commonwealth, without the consent of such city having been first obtained."

The defendant desires to cross the city without its consent. Just what street it will occupy, or to what extent, it is not material to inquire. If the answer to the question involved be determined solely by the powers of defendant under the statute authorizing its incorporation, we would not attempt to answer it by trying to prove that two and two make four, not five, but would at once say, clearly, it has no such power; but the court below and appellee's counsel say we must write into the act of 1868 this much of section 1, art. 17, of the constitution of 1874: "Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within the state, and to connect at the state line with railroads of other states."

The court was of opinion that, if the act of 1868 forbids mere crossing of the city without its consent, then, to that extent, it is in conflict with the constitution, and the statute must give way. It will be noticed the language is general. At the adoption of the constitution, no legislation conferred such powers on railroads as claimed here. The act of 1849 (P. L. 79) and its supplements and the act of 1868 express the scope and limits of their powers at the time of the adoption of the constitution. That instrument would not enlarge these limits unless the intention to do so was clearly expressed or plainly to be implied. In *Cronise v. Cronise*, 54 Pa. 255, we said: "The Constitution is to be interpreted with reference to previous legislation of the state, and powers always previously exercised by the Legislature remain to them, unless expressly or impliedly prohibited." And this is the doctrine of the text-writers. See *Coolley on Const. Limitations*, 57, and *Story on the Constitution*, c. 5. Where a power, therefore, has always been exercised by the Legislature, a constitutional withdrawal of it by the people must be plain. If doubtful, it will not be made clear by construction. The people, through the Legislature, have unlimited power, except where they impose upon themselves constitutional restraints. If the words of the instrument convey a definite meaning, involving no contradiction of other parts of it, they are to receive their obvious meaning. The learned judge of the court below is of opinion that the general purpose of this clause was to encourage competition between railroad companies, and the particular intent was to take away the power of the Legislature to smother it by discriminating between different companies. We are not inclined to question the general correctness of these observations, but we think his conclusion that this general purpose gives a specific meaning, such as he gives here to the words "between any points within the state," is not warranted by any authoritative rule of interpretation.

The cases cited do not meet the point raised here. The subject-matter in those cases was different, and the decisions must be un-

derstood with reference thereto. For example, *Commonwealth v. Erie, etc., Railroad Company*, 27 Pa. 339, 67 Am. Dec. 471. The railroad company was authorized by its charter to build a road from the borough line as fixed at the date of the charter. Afterwards the borough was enlarged. The company asserted a right to build the road from a point 60 rods south of the old borough line. It was held that the change in the limits did not authorize the company to change the terminal. In *Western Pa. Railroad Co.'s Appeal*, 99 Pa. 155, the question was, what were the rights of the railroad company to change its terminal after it had entered into the city by the latter's express authority? *Pa. Railroad Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, was a construction of section 8, art. 16, of the Constitution, on an entirely different subject from that in section 1, art. 17—the one under consideration. The question here is not what construction is to be placed upon the words of a statute or a charter passed after the adoption of the Constitution, but what construction is to be placed upon the Constitution in view of the legislation existing at the adoption of that instrument? The answer is that given in *Cronise v. Cronise*, supra: "The Constitution is to be interpreted with reference to previous legislation of the state and powers always previously exercised by the Legislature." The Constitution, we may assume, with the court below, sought to encourage railroad competition. The act of 1868 promoting that object was fully before the convention. It gave the absolute right to any railroad company to construct a railroad between any two points within the state—just what the Constitution aimed to accomplish. Under this act, all the large cities with traffic demands, the sea, and state boundaries of other states, could be reached without discrimination by the act of the Legislature. But this act could be amended, modified, or repealed by the same power which passed it. Therefore any change must be placed beyond the reach of the Legislature. This was plainly the object of section 1, art. 17, and the only object. The court below carries it further, and holds that "between any points within the state" means through, under, or over any city within the state, without its consent, notwithstanding the plain inhibition of the act of 1868. Whether the Legislature, in the exercise of its sovereignty, could, by express language, grant to railroad corporations the right to occupy the streets, lanes, and alleys of a municipal corporation without the consent of the latter, is not involved in the issue before us, and we intimate no opinion thereon. What we do decide is that the implication from the constitutional provision is too farfetched. It is more than doubtful. It reaches into the conjectural—goes entirely too far. If carried to its legitimate conclusion, then a railroad can be run through any burial ground, place of public worship, or

dwelling house, from which they were excluded by the general railroad act of 1849. The learned counsel for appellee does not shrink from the conclusion the reasoning of the court below fairly leads to, for he says in his printed argument, after giving the same constitutional interpretation: "We must conclude, therefore, that the defendant railroad company has the right to build its line between any two points in the state, without limitation by the courts or individuals, or restrictions in any degree whatever, except that residing in the discretion of its board of directors."

While one object of the Constitution, probably, was to encourage competition between carrying corporations, it just as plainly sought to promote another object; that is, by the prohibition of all local legislation, to encourage self-government by the people under general laws providing for local control of their local affairs. It would require a very plain mandate of the Constitution to move us to interpret the section in question as one practically handing over to railroad corporations the authority to control, occupy, and obstruct the streets and highways of a great city, in disregard of the convenience of citizens. While the interest of the carrying corporation and the municipal one are not in themselves antagonistic, they may easily become so by selfishness and indifference to each other's rights. It is to the interest of the citizen that his city should grow and expand. With its growth commercially and industrially the railroad thrives. This, however, is only sound theory. In practice, the railroad, without regard to the city, very often assumes that its only interest is to make money for its stockholders. It is therefore of the utmost importance to the well-being of the city that it should control its means of local business and social communication. In no reasonable interpretation of section 1, art. 17 of the constitution, having regard to the legislation then existing and other parts of the same instrument, can we see that it intended, with the act of 1868 plainly before the convention, to take away from the municipal government the control of its streets and highways, as argued by appellee and decided by the court below.

The decree is therefore reversed, the bill reinstated, and injunction directed to issue as prayed for.

WOODS v. GREENSBORO NATURAL GAS CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

NATURAL GAS COMPANY—RIGHT TO MAINTAIN TELEPHONE LINE.

1. The right of a natural gas company incorporated under Act May 29, 1885 (P. L. 29), to locate a right of way for a pipe line for the transportation of natural gas, does not give to such a company the right to construct and

maintain a telegraph or telephone line along its right of way as a necessity in carrying on the chief purpose of its incorporation.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Joseph B. Woods against the Greensboro Natural Gas Company to restrain the erection of telephone lines along the pipe line laid by defendant under its right of eminent domain. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Shafer, J., found the facts to be as follows:

"(1) The plaintiff is the owner and is in possession of a tract of land in the townships of Elizabeth and Forward, in the county of Allegheny, containing about 200 acres.

"(2) The defendant is a corporation organized under the laws of the state of Pennsylvania for the purpose of producing, transporting, and supplying natural gas.

"(3) The defendant company has located a pipe line for the conveyance of natural gas over and across a farm of the plaintiff, and has caused to be filed in the court of common pleas No. 1 of this county its bond, with sureties, to secure to the plaintiff the payment of damages for the location of a right of way upon his land, for laying pipe lines, and for constructing a telegraph or telephone line to be used only in the necessary operation of the said pipe line, and the bond has been approved by that court.

"(4) In addition to laying a pipe line or lines for the conveyance of natural gas over or under the land of the plaintiff, the defendant claims the right to construct, and proposes to construct, a line of poles with telegraph or telephone wires upon the same along the route of said pipe line, and across the plaintiff's land a distance of about 166 rods.

"(5) The defendant company has been producing gas for about six years, increasing its production and the number of places supplied by it from time to time. It now has about 40 miles of gas pipe, and supplies a number of towns and villages with gas, having wells a considerable distance from each other, all of which are connected by its pipe line. A telephone or telegraph line of its own, either along the lines of its pipes, or elsewhere, connecting its various stations, would be a very great convenience to the defendant company, and would save it a great deal of money. It has hitherto, in all its operations, had no such line, but has operated its lines without a telegraph or telephone line, except such use as it could make of the public lines. A considerable amount of testimony was taken as to the difficulty of managing and operating a gas line without such connections, and from this testimony we find that it is not impracticable to operate a pipe line without a telephone or telegraph line, but that it is

highly inconvenient and expensive to do so."

The court entered a decree for an injunction. Error assigned was the decree of the court.

Edwin S. Craig, for appellant. J. P. Patterson and Boyd Crumrine, for appellee.

POTTER, J. The question for consideration in this appeal is stated by the appellant as follows: Does the right of a natural gas company, incorporated and doing business under the act of May 29, 1885 (P. L. 29), to locate and appropriate a right of way for laying and maintaining a pipe line for the transportation and distribution of natural gas, include the incidental right to construct and maintain, on the same right of way, a telegraph or telephone line to be used only in the necessary operation of the pipe line?

The question is merely one of corporate power, and is to be determined by an inspection of the charter of the defendant company, and of the statute under which it is incorporated. The act of 1885, by section 10, gives to companies incorporated under its provisions "the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas." It is further provided in the same section that the grant "shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon and over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys, or other public highways, or other pipe lines, or to cross railroads or canals." This is the extent of the power granted.

The rule for construing statutes of this class is clearly laid down by Chief Justice Black in *Packer v. Sunbury*, etc., R. R. Co., 19 Pa. 211: "All acts of incorporation and acts extending the privileges of incorporated bodies are to be taken most strongly against the companies. Whatever is not expressly and unequivocally granted in such acts is taken to have been withheld." And in *Commonwealth v. Erie & R. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471, this court, speaking by the same Justice, says (page 351, 27 Pa., 67 Am. Dec. 471): "That which a company is authorized to do by its act of incorporation it may do. Beyond that, all its acts are illegal. And the power must be given in plain words or by necessary implication."

These principles have ever since been uniformly followed and applied in appropriate cases. The right which the appellant here seeks to establish is not merely in enlargement of its corporate powers, but it is further asserted that its exercise is an incident of the power of eminent domain, with which, for certain purposes, the company is clothed.

Another rule of construction therefore applies, which is thus stated by Justice Thompson, in *Lance's Appeal*, 55 Pa. 16, 26, 93 Am. Dec. 722: "The exercise of the right of eminent domain, whether directly by the

state or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is that the authority is to be strictly construed. *Dwarris on Stat.* 750; *Allegheny v. Penna. R. R. Co.*, 26 Pa. 355; *Com. v. Erie, etc., R. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471; *Packer v. Sunbury, etc., R. R. Co.*, 19 Pa. 211. What is not granted is not to be exercised."

The concurring result of many cases is thus stated in *Lewis on Eminent Domain*, § 254: "All grants of power by the government are to be strictly construed; and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. 'An act of this sort,' says *Bland, J.*, 'deserves no favor. To construe it liberally would be sinning against the rights of property.' *Binney's Case*, 2 *Bland*, 99."

We come then to the essential point here involved, which is whether the right of eminent domain bestowed upon the appellant extends to the construction and operation of a telephone or telegraph line. An inspection of the plain wording of the statute, as we have quoted it above, from section 10, shows that it does not. There is a general provision in the fifth clause of section 1 which authorizes the company to hold, purchase, etc., pipes, tubing, tanks, office and such other machinery, devices, or arrangements as the purposes of the corporation require. And these words are followed by language conferring the "right also to enter upon, take, and occupy such lands, easements, and other property as may be required," not for the general purposes of the company, but (notice the limitation) "for the purpose of laying its pipes for transporting and distributing gas." So that, following the well-settled principles of construction, and reading the statute in their light, nowhere do we find in it anything to warrant the exercise of the right of eminent domain upon the part of the company with reference to anything other than that which is involved in the laying of pipe lines for the transportation and distribution of natural gas. The manner in which this right is to be exercised, and the character and extent of the easement granted, are pointed out in *Clements v. Phila. Co.*, 184 Pa. 28, 38 Atl. 1090, 39 L. R. A. 532.

The substance of the argument on the part of appellant is that the construction and maintenance of a telegraph or telephone line along its right of way, is a necessity in the carrying on of the chief purpose of its incorporation. But this contention is not supported by the facts as found by the court below. From these findings it appears that the defendant company has been producing and transporting gas through its pipe lines for some six years past; that it has operated its pipe lines hitherto without a telegraph or telephone line, except such use as it could make of the public lines. And the court

finds from the testimony that "it is not impracticable to operate a pipe line without a telephone or telegraph line, but that it is highly inconvenient and expensive to do so."

Inconvenience is not enough to justify a claim to a grant by implied necessity. As was said in *Phillips v. Dunkirk, etc., R. R. Co.*, 78 Pa. 177, "the right of eminent domain is a very high and arbitrary one, and arises only ex necessitate rei, and will not be presumed to exist in a corporation, unless by express legislative grant." And in *Penna. R. R. Co.'s Appeal*, 93 Pa. 150, this court held that, in favor of the right of eminent domain, "there can be no implication, unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things."

An illustration of a necessary incident to the grant of authority is that of a bridge company requiring the power to take land for its abutments. Without it, a bridge could not be built. So, in the laying out of a road, unless land be taken upon which to construct the road, it cannot be laid out. But in the present case, the construction and operation of a pipe line does not, in the nature of things, involve the construction along with it, and upon the same right of way, of a telegraph or telephone line. Undoubtedly, as found by the court below, the use of a telephone line in managing the business is a very important aid. But it does not appear from the testimony in the case that it is of special importance that such a line should follow the precise course of the pipe line. Indeed, unless the easement acquired by the company be enlarged considerably beyond the limits indicated in the opinion in *Clements v. Phila. Co.*, supra, there would be no place upon the line of the right of way, for the setting of the poles and the stringing of wire required in a telephone line.

In much of the evidence taken it is apparent that the witnesses failed to distinguish between the necessity for the use of a telephone line in connection with the business, and the necessity for having that line constructed immediately along and upon the right of way of the pipe line. No necessity is shown by the evidence for placing a telephone line upon the precise route followed by the pipe line. And it would seem that every requisite would be subserved by a line approximately near. If the exigencies of the business require it, the appellant company can obtain authority to construct a telephone line by securing in its interest a charter for that purpose. But neither in its present charter nor in the statute under which it is incorporated can be found authority, express or implied, for constructing, under the right of eminent domain, a telegraph or telephone line along and upon its right of way.

The assignments of error are overruled, the decree of the court below is affirmed, and this appeal is dismissed at the cost of appellant.

FLEMING v. FLEMING.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILLS—DEATH OF PARTNER—NOTES OF CONTINUING FIRM—LIABILITY OF DECEDENT'S ESTATE.

1. Testator bequeathed his business, with the good will thereof, to his brother, the latter to pay legacies mentioned in the will, and, if the available assets were not sufficient so to do, he was to carry on the business for the benefit of testator's estate until the proceeds were sufficient to make up any deficiency in the moneys applicable to the legacies. The brother took possession, paid all the legacies, and associated his sons with him in business. The firm thereafter issued certain notes. The executors of testator had nothing to do with the business, nor was it carried on for the benefit of the estate. The firm notes were not paid. *Held*, that a suit thereon could not be maintained against testator's executors.

Appeal from Court of Common Pleas, Allegheny County.

Action by Laura W. Fleming, executrix of John Fleming, deceased, against Cochran Fleming. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. A. Woodward, R. T. McElroy, and L. B. Duff, for appellant. D. T. Watson and Johns McCleave, for appellee.

MESTREZAT, J. This is an action by Laura W. Fleming, executrix of the surviving member of L. H. Harris Drug Company, against Alexander M. Byers and Cochran Fleming, surviving executors of John Fleming, deceased, to recover the amount due on 41 promissory notes, aggregating over \$100,000, with interest. The notes were made by Fleming Bros., and are payable four months after date to the order of L. H. Harris Drug Company, the first and last note being dated, respectively, May 31, 1890, and September 24, 1890.

At the time of his death John Fleming was engaged, under the name of Fleming Bros., in the manufacture and sale of McLane's and other proprietary medicines in the city of Pittsburg. He died November 2, 1870, leaving a last will dated December 21, 1866, which was probated November 9, 1870. He left to survive him a widow and collateral heirs, and appointed as his executors his brother, Cochran Fleming, Frank E. Porter, and Alexander Byers. The testator made a number of pecuniary bequests, amounting to about \$100,000, in most of which there were two or three preceding successive life estates of the income thereof, during which the principal was directed to be invested by the executors. In addition to these bequests,

and after he bequeathed to his wife certain articles of a personal character, and devised to her a life interest in some real estate, he provided in his will, *inter alia*, as follows:

"To my brother Cochran, I give and bequeath the good will and proprietorship of McLane's and other medicines which I own and control, on the following conditions, to wit: That immediately on my death he take charge and carry on my said business; and if it is found on examination of my affairs, that my available assets (in which are not to be included the warehouse and articles of a personal character hereinbefore bequeathed to my wife) are not sufficient to provide means wherewith to pay the foregoing pecuniary legacies in the order in which they are enumerated in this my last will, then that he carry on said business for the benefit of my estate until enough of moneys are realized by my said business to make good any deficiency in the moneys applicable to the payment of said legacies. On the payment of said legacies, my other executors will execute and deliver unto my said brother Cochran all bills of sale or conveyance of my said business and property connected therewith, which may be desired by the said Cochran.

"All the rest and residue of my estate after the payment of the foregoing legacies, and excepting the foregoing specific devises and legacies, I give unto my said brother Cochran absolutely. * * * It is my will that my brother Cochran do not part with my business in the manufacture and sale of patent medicines, but keep the same up by a proper system of advertisement and transmit it to his children."

Immediately after his brother's death, Cochran Fleming took possession of the business as legatee under the will and as his own property, and carried it on for himself and for his own use and benefit in the name of Fleming Bros. The accounts were kept in a new set of books which were opened after John Fleming's death. In 1875 or 1876 he formed a copartnership with his two sons, J. Kidd Fleming and Cochran Fleming, Jr., public notice of which was given in two newspapers of the city of Pittsburg, and under the firm name of Fleming Bros. the business was conducted for the benefit of the partnership, the profits being divided among the three partners, until 1890, when the firm failed. The executors of John Fleming never had any connection with the patent medicine business of their testator. The notes in suit were given by the firm, the name being signed by J. Kidd Fleming, and were given in exchange for notes by the L. H. Harris Drug Company to the order of Fleming Bros., the proceeds of which were received by the latter firm.

It is not averred in the pleadings, nor was it proved on the trial, that the assets of John Fleming's estate were not sufficient to pay the legacies. The evidence was that the

estate was solvent, that the debts were paid, and that the assets were amply sufficient to satisfy the claims of the legatees. In 1871, Cochran Fleming paid the pecuniary legacies named in the will, and took receipts in the names of the executors from those who were first entitled to receive the income thereof for life. None of the legatees are complaining, nor contesting his right to take possession of the property and use it for his own benefit after the death of John Fleming.

The learned trial judge very properly granted a nonsuit and withdrew the case from the jury. The claim of the plaintiff, as set forth in her statement, is that Cochran Fleming, after the death of his brother, took charge of and carried on the business "under and pursuant to the terms of said will" of John Fleming, and that the notes in suit were given by Cochran Fleming while he was thus engaged in the business. To maintain the action, it was incumbent upon the plaintiff to establish the averments of her statement by the necessary proof. In this, as we have seen from the recital of the facts, she has failed. At the death of his brother, neither Cochran Fleming nor the executors of John Fleming, deceased, took possession of and carried on the business under the will. On the other hand, it distinctly and positively appears from the plaintiff's testimony that Cochran Fleming at once, after John Fleming's death, by advice of counsel, took charge of the business as legatee, and conducted it solely for himself and on his individual account for several years, and until his two sons were given interests therein by the formation of a copartnership. At no time during the continuance of the business, from the death of John Fleming in 1870 till it was closed by the firm's insolvency in 1890, did Cochran Fleming or his partners hold out to the public that it was conducted by the executors or by Cochran Fleming under the provisions of the will. Creditors and persons dealing with the parties in charge of the business were not misled or deceived as to the true status of affairs. It was carried on by Cochran Fleming for his own use, with the knowledge or consent of all the interested parties, and subsequently by the copartnership as the owner and sole beneficiary of the business.

The bequest of the good will and proprietorship of the patent medicines to Cochran Fleming was on the condition that he take charge of the business, and, if its available assets were not sufficient to pay the legacies, then he was to carry on the business for the benefit of the testator's estate until sufficient money was realized to make up any deficiency in the moneys applicable to the payment of the legacies. It will be observed that the executors were not given control or possession of the business, and were not authorized to interfere with it in any way. It was bequeathed specifically to Cochran Fleming, and he was to take charge of

it immediately on the death of the testator. The only condition imposed was that, if sufficient available assets were not found to pay the legacies, the legatee should carry on the business until the deficiency was made up. The title to the business was placed in the legatee, and upon him individually was imposed the responsibility of meeting any ascertained deficiency in the assets. The evidence discloses the fact that the condition upon which he took the business was performed, and that the pecuniary legacies were paid in full. This is not contested by the legatees or by any person representing, or entitled to, their interest in John Fleming's estate. The receipts in evidence show the payment of the legacies in 1871, and, whatever necessity there might have been for continuing the business prior to that date in order to make up the deficiency, there could be no reason for carrying it on thereafter.

There is another reason, in line with the one just stated, which we think must prevail against the right of the plaintiff to recover. It conclusively appears that the partnership formed by Cochran Fleming and his two sons in 1875 or 1876 took possession of the business, and, while carrying it on, gave the notes in suit. It cannot be pretended that at that time this firm was Cochran Fleming doing business as Fleming Bros., who conducted the business prior to the partnership, nor that the partnership was not running the business solely in its own interest and for its own benefit at the dates the notes were delivered to the payees. The notes in suit were signed by J. Kidd Fleming with the firm name of this partnership, and were exchanged for notes given to it. Neither the estate of John Fleming, nor his executors, nor Cochran Fleming as Fleming Bros., was in any way connected with the transaction, or involved in the obligation assumed in making the notes.

There was no necessity for the execution and delivery of bills of sale or conveyance to vest the business in Cochran Fleming. The matter was entirely optional with him. It will be seen by reference to the will that his coexecutors were to execute and deliver to him "all bills of sale or conveyance of my said business * * * which may be desired by the said Cochran." He desired no other assurance of title than the possession of the property, which he took and retained after his brother's death.

The plaintiff's action must fail for want of evidence to support it. The notes in suit were not given for any indebtedness of testator's estate, nor by any person in charge of or carrying on the business of the estate, or authorized to bind it by note or other obligation. The indebtedness was that of the partnership, and the creditor firm so understood it when it accepted the notes. The liability for payment rests upon the party creating it, and to whose use the proceeds of the notes were applied.

For the reasons given, we are of opinion that the plaintiff has failed to establish any liability on the part of the executors of John Fleming, deceased, for the payment of the notes in suit, and that, therefore, the nonsuit was properly granted.

The assignments of error are overruled, and the judgment is affirmed.

In re DAVIS' ESTATE.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MARRIAGE—EVIDENCE—BURDEN OF PROOF.

1. The burden of proof is on a woman claiming to be the widow of deceased to establish such fact.

2. A finding by the orphans' court that no marriage relation existed between the decedent and one claiming to be his widow held sustained by the evidence, though claimant and her mother testified as to the marriage ceremony.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Charles E. Davis, deceased. From a decree dismissing exceptions to adjudication, Catharine Anna Davis appeals. Affirmed.

The testimony showed that the exceptant and the decedent had had illicit relations for several years, during which he occasionally introduced her as his wife, and had finally gone to live in the same house with her mother. But on the other hand it was shown that among his friends and the employés at his theater she was not regarded or treated as his wife, that at the time of the alleged marriage ceremony he was not at the place alleged, and that before and after his death she had frequently admitted that they were not married. The court found that no marriage took place between the claimant and Davis, and that she had no status to file exceptions, nor interest in the distribution.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. A. Wakefield, for appellant. R. B. Petty and S. A. Johnston, for appellee.

PER CURIAM. The single question presented is one of fact—whether appellant was the widow of the decedent. She and her mother testified to the performance of a marriage ceremony at a time and place specified, but the inherent improbability of the story under the undisputed circumstances was so great, and the testimony against it so strong, that the learned judge below was constrained to disbelieve it. In this result we concur. The burden of proof was on appellant, and she not only failed to meet it, but the testimony affirmatively and convincingly disproved her claim.

Decree affirmed, at the costs of the appellant.

LEHMAN v. CARBON STEEL CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.

1. In an action for injuries to an employé operating a machine shearing steel plates, where the evidence showed that he was a skilled workman and had worked the machine for seven months, and it was observed the day before the accident that some of the plates were so hard that they could not be sheared successfully, and, if there was unusual danger, it was more manifest to the employé than to any other person, the evidence was sufficient to show knowledge of the danger in attempting to shear the plate, showing that the employé had assumed the risk.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Action by Peter Lehman against the Carbon Steel Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Homer L. Castle, William A. Stone, and Stephen Stone, for appellant. F. C. McGirr and John Marron, for appellee.

FELL, J. This judgment cannot be sustained on any ground that does not practically make an employer the insurer of the safety of his workmen. The plaintiff was employed to assist in operating a machine which sheared steel plates. He was a skilled workman, and had worked at this machine seven months. His business was to mark the plates, put them in position on the machine, and guide them so that the shears would cut to the line mark. On the day before the accident, it was observed that some of the plates were so hard that they could not be sheared successfully. Sparks flew from them, large pieces chipped out, and the edges of the shears were broken. A workman employed at the machine told the foreman of the department of this. The latter examined the plates, and, according to the plaintiff's testimony, told the men to go on with the work. According to his testimony, he told them to cut into scraps the plates that were too hard to be sheared. The shears were changed, and the work continued for the remainder of that day as usual, most of the plates being sheared without difficulty; but occasionally one was found from which sparks flew. The next morning, after working two hours, the plaintiff placed on the machine a plate of unusual hardness, which, when the shears came on it, shifted from its position so that he was not able to cut it to the line. Four times he placed it back in position, and while he was holding it there was a spark flew from the plate and injured his eye. The temper of the plates would not be disclosed by inspection, and would not be known until they were under the shears. It is conceded that the machine was in good condition, and of the kind in ordinary use.

The case was submitted on the single

¶ 1. See *Marriage*, vol. 34, Cent. Dig. § 62.

ground that the plaintiff was subjected, by the order of the foreman to go on with the work, to unnecessary and unusual danger, not manifest to him. This position is wholly untenable. The notice to the foreman was that the plates could not be sheared properly; that good work could not be done on them, because they chipped and broke. The danger of the work was not mentioned and apparently not contemplated by any one. If there was unusual danger, it was manifest to the plaintiff—more manifest to him than to any other person—and he had full knowledge that the last plate was unusually hard, and must be held to knowledge of the danger in attempting to shear it.

The judgment is reversed, and judgment is now entered for the defendant.

LAWSON v. AMERICAN STEEL & WIRE CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO EMPLOYE—NEGLIGENCE OF FOREMAN.

1. In an action by the engineer of a stationary engine for personal injuries it appeared that on the day of the accident it began to pound, showing that something was out of order, and the master mechanic and plaintiff, a practical machinist, familiar with the engine, were investigating it, when it exploded. The only negligence charged was that the master mechanic, thinking he had discovered the source of the trouble, told plaintiff to start the engine. Both were standing close to the engine when the accident occurred. *Held* insufficient to show any negligence on the part of the master mechanic.

Appeal from Court of Common Pleas, Allegheny County.

Action by Walter B. Lawson against the American Steel & Wire Company. From a judgment of nonsuit, plaintiff appeals. *Affirmed*.

At the trial plaintiff testified that he was a practical machinist and engineer, and had been in charge of the engine in question for about a year. His testimony disclosed the fact that up until within a few minutes before the accident occurred there had been no trouble whatsoever with the engine, and in fact only five or ten minutes before the trouble with the engine commenced the master mechanic employed by the defendant company remarked to the plaintiff on the satisfactory manner in which the engine was acting. Then, without apparent cause, the engine commenced to pound, and plaintiff stopped it, and signaled for the master mechanic. Instead came the superintendent, to whom the plaintiff said that there was "something serious the matter." The master mechanic came later, and he and the plaintiff examined the engine carefully, and found nothing wrong of any consequence. After this examination plaintiff was ordered to start the engine, but insisted there was something seriously wrong, without in any wise

designating what it was. He started it slowly, but says he tried to stand clear of any danger of injury, although the master mechanic was down with his ear to the cross-head, listening to the working of that part of the machine, and the superintendent was also close to the engine. Then, on a further order, he ran the engine at the customary speed necessary to operate the mill, and almost immediately the wrist pin broke, and plaintiff suffered injury. The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. G. Crawford, for appellant. George E. Shaw, J. H. Reed, Edwin E. Smith, and J. H. Beal, for appellee.

MITCHELL, J. We fail to discover any evidence of negligence on the part of the defendant. The engine had been working satisfactorily under the charge of the plaintiff himself for about a year. On the day of the accident it began to "pound" in a way indicating that something was out of order, and the master mechanic and plaintiff himself, a practical machinist, familiar with this engine, were engaged in making an investigation to find out what was the matter, when the explosion took place. The only negligence charged is that the master mechanic, apparently thinking he had discovered the source of the trouble, and that it was not serious, told plaintiff to start the engine, while plaintiff thought there should be a further examination. Both were close to the engine, looking and listening to discover the cause of the knocking, when the accident occurred. The superintendent of the mill was also present, aiding in the examination, but it does not appear that he gave any orders. Even if the master mechanic was anything more than a fellow workman—which was not shown—the happening of the accident was not evidence of negligence on his part, and there was no other.

Judgment affirmed.

SHOUP v. SHOUP.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

JUDGMENT—STRIKING OFF SATISFACTION—APPEAL.

1. An appeal from an order striking off the satisfaction of a judgment is in legal effect nothing more than a common-law writ of certiorari.

2. A motion to strike off an entry of satisfaction of a judgment is addressed to the discretion of the lower court, and will not be reviewed.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mrs. L. E. Shoup against L. E. Shoup. Judgment for plaintiff. From an or-

der striking off satisfaction of judgment, defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. S. Ferguson and J. D. Hern, for appellant. Morton Hunter, W. A. Hudson, and Joseph Howley, for appellee.

POTTER, J. The appeal in this case is from an order of court striking off the satisfaction of a judgment. In legal effect, therefore, it amounts to nothing more than a common-law writ of certiorari. *Rand v. King*, 184 Pa. 641, 19 Atl. 806. It is therefore to be disposed of as such.

The record shows the entry of a judgment d. a. b. for \$18,000, upon a single bill filed, dated November 13, 1899, payable one year after date. Upon February 11, 1901, the judgment was marked satisfied in full by the plaintiff. Upon July 19, 1902, the court granted a rule to show cause why the entry of satisfaction of the judgment should not be stricken off, and the lien of the judgment be restored. Upon September 2, 1902, after argument, this rule was made absolute. The judgment therefore stands now just as it did before the entry of satisfaction was made. Both plaintiff and defendant are in precisely the same position as then. If the judgment has been paid in whole or in part, or if the defendant has any other good defense, either in law or in equity, he is at liberty to apply to the court for an opportunity to present it. If the plaintiff was induced to enter satisfaction of the judgment upon the record by fraud or by mistake, the court undoubtedly had the right upon proof of the facts, on notice to the parties, to strike off such improper entry.

The motion to strike off the entry of satisfaction was addressed to the discretion of the court below, and the exercise of that discretion is not the subject of review. *Murphy v. Flood*, 2 Grant, Cas. 411; *McKinney v. Fritz*, 2 Wkly. Notes Cas. 173.

As the facts are not before us, and the record shows no apparent error, the proceedings of the court below are affirmed.

KING v. NEW YORK & C. GAS COAL CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

DEED—PAROL EVIDENCE.

1. Where the probate court ordered a private sale "of the coal and privileges" mentioned in the petition, and the executors made a deed reciting that the testator died seised of certain lands and coal thereunder in a certain township, and that they were authorized to sell the same, and conveyed to the purchaser "all the following described coal" within the boundaries given, parol evidence to show that the words applied only to a particular vein of coal, and not to all the coal underlying the premises within the designated boundaries, was inadmissible.

Appeal from Court of Common Pleas, Allegheny County.

Action by Thomas N. King and others against the New York & Cleveland Gas Coal Company. Judgment for plaintiffs, and defendant appeals. Reversed.

At the trial, when Henry M. Johnson was on the stand, he was asked this question: "Q. Mr. Johnson, did you at that time know of any other coal underlying that land except the Pittsburg vein? (Objected to as irrelevant and incompetent. Objection overruled, and bill sealed for defendant.) A. I did not know of any vein under that at that time." J. S. King was asked this question: "Q. Did you know of a coal vein in that farm? A. None but the Pittsburg vein, or what we call the upper vein— (Objected to. Objection overruled, and bill sealed for defendant.)" W. D. Alter was asked this question: "Mr. Alter, this affidavit sets forth that you are acquainted with the value of property in the vicinity of the property described in the within petition, and that you believed the price of \$75 per acre for coal of the estate of Thomas King, deceased, is a fair price, and as much as any coal in the immediate vicinity is sold for, and is as much and even more than could be obtained for the same at public sale. Now, I ask you what coal did you refer to in that affidavit? (Objected to because the coal referred to in that affidavit is described in the petition to which that affidavit refers, and it is immaterial so far as we are concerned, and besides the witness is asked to give an interpretation to his affidavit, which is perfectly clear of itself, and which may tend to change its tenor. Mr. Coleman being dead, and this being one of the parties who made this affidavit, it is incompetent to make any explanation of his affidavit, or to testify to any subject-matter of that transaction, because of the death of Mr. Coleman. Objection overruled. Exception and bill sealed for defendant.) A. We referred to the merchantable coal on the Briar farm at that time—the Pittsburg vein only." Defendant presented this point: "(15) That under all the evidence in this case the verdict of the jury should be for the defendant. Answer. Refused." Verdict and judgment for plaintiffs.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. Schoyer, Jr., H. K. Siebeneck, and John P. Hunter, for appellant. R. B. Petty and John M. Petty, for appellees.

MESTREZAT, J. The learned trial judge should have withdrawn this case from the jury, and directed a verdict for the defendant.

Thomas King died in 1866, testate, seised of two tracts of land, not contiguous, situate in Plum township, Allegheny county, the larger of which contained 153 acres and was known as the "King Farm," and the smaller

contained 98 acres and was known as the "Briar Farm." The personal estate of the decedent being insufficient for the payment of his debts, his surviving executors, in 1871, obtained an order from the orphans' court of Allegheny county to sell certain coal under said land of the testator at private sale for the payment of debts. The property was sold to William Coleman, the sale was confirmed by the court, and the executors executed and delivered a deed conveying it to the purchaser. In 1872 Coleman conveyed the coal to the New York & Cleveland Gas Coal Company, the defendant in this action.

This ejectment was brought in 1899 by the devisees under the will of Thomas King to recover a tract of land in Plum township, containing 64 acres and 55 perches, and "all coal and coal rights therein and thereunder." The plaintiffs claim title under the will of Thomas King. The defendant disclaims title to the real estate described in the praecipe, except "all the coal in and underlying the land described in the writ," with certain mining rights and privileges, the title to which coal and mining rights is claimed by the defendant by virtue of the sale for the payment of debts in pursuance of the order of the orphans' court, and the subsequent vesting of the title in the defendant by the deed of William Coleman. The plaintiffs deny that the proceedings in the orphans' court vested the title to any part of the real estate in Coleman, for the reason, as claimed by them, that the court had no authority to order a private sale for the payment of debts, and they also deny that, if the court had authority to make the decree, it authorized the sale of any coal except the "upper or Pittsburg vein" of coal under the land described in the praecipe and writ in this case. The learned trial judge held that the orphans' court sale divested the title to the property sold, but, against the objection of the defendant, submitted to the jury to determine "whether the Pittsburg vein alone answers the description of the 'body of coal' referred to in the executor's petition," on which the order of sale was made. On this issue the jury found a verdict in favor of the plaintiffs, and from the judgment thereon the defendant company has appealed.

The petition presented by the executors to the orphans' court averred, *inter alia*, that the testator died seised of certain real estate in Plum township, "under a portion of which lies a body of coal"; that it would be to the interest of all parties that "the coal underlying the said real estate" should be sold; that the deferred payments should be secured by a mortgage on the premises for "the whole of said coal underlying the surface of said testator's land, with all mining privileges," etc.; that "the coal has been surveyed, and is bounded and described as follows." A description is then given in the petition by courses and distances, and the acreage is stated to be 64 acres and 55

perches. The prayer is for the approval and decree of a private sale of "the coal above described with the privileges aforesaid." The court decreed a private sale of "the coal and privileges" mentioned in the petition. The executors made a deed to the purchaser, reciting that the testator died seised of "certain lands and coal thereunder" in Plum township; that they were authorized to sell "the coal underlying the testator's land hereinafter described"; and conveyed to the purchaser "all the following described coal" within the boundaries there given. After the delivery of the deed, the executors made a report to the court that in accordance with the decree of sale they had "executed and delivered to William Coleman a deed in fee simple for the coal described in the petition aforesaid, with the privileges, etc., therein enumerated."

It is contended by the plaintiffs, and it was held by the court below, that they had the right to introduce parol testimony to show that the words used in the orphans' court proceedings, descriptive of the subject-matter of these proceedings, applied to the Pittsburg vein of coal, and not to all the coal underlying the premises within the designated boundaries. The testimony was offered and admitted under the well-settled rule that extrinsic evidence is admissible to identify the subject-matter of a written instrument where the description is applicable to more than one thing or object. In such cases the purpose is to discover the intention of the party as shown by the words he has used, and for that purpose parol testimony is necessarily received. But it is equally clear under all the authorities that extrinsic evidence is not admissible where there is a subject-matter that satisfies the terms of the written instrument. *Starkie on Evidence*, *698; *Saunderson v. Piper*, 5 Bing. N. C. 425, per Tindal, C. J.; *Cook v. Babcock*, 61 Mass. 526; *Harvey v. Vandegrift*, 89 Pa. 346. Mr. Starkie says: "When a subject-matter exists which satisfies the terms of the conveyance, there is no latent ambiguity, and no evidence can be admitted for the purpose of explaining the terms of the deed of conveyance." And in *Cook v. Babcock* it is said by Shaw, C. J., speaking for the court, that when the description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction, or for the admission of parol evidence, to prove that the parties intended something different.

Applying these principles to the case in hand, we think that extrinsic evidence was not necessary, and hence not admissible, to discover or ascertain the subject-matter to which the language used in the orphans' court proceedings, descriptive of the property to be sold, applied. We have recited above the terms used throughout the proceedings. The "body of coal" referred to in the first part of the petition is clearly defined and explained in the subsequent parts

of the petition to be "the coal underlying the said real estate," and "the whole of said coal underlying the surface." It was to the interest of the parties concerned, as averred in the petition, not that the "body of coal," but that "the coal underlying the said real estate of said testator," should be sold. This is a distinct averment of the petition, and clearly referable thereto in the subsequent parts of the petition are the expressions "the whole of said coal underlying the surface of said testator's land," which was to be mortgaged, and "said coal" which was surveyed and described in the petition. It was this coal designated as "the coal above described" which the executors, in the petition, asked for an order to sell. There is therefore no uncertainty or ambiguity in the terms employed in the petition or the decree of the court to designate the property to be sold. It was the coal, and not a part of the coal, underlying the surface particularly described in the petition.

While the deed conveys only what the executors were authorized by the court to sell, yet they will not be presumed to have exceeded their authority, and to have granted to a purchaser property they could not convey. The deed of the executors to Coleman recites that King became in his lifetime seised "as of fee of certain lands and coal thereunder" in Plum township, and conveys "all the following described coal," giving a description of the land by courses and distances as set forth in the petition presented to the orphans' court. This deed, the act of the parties who represented the estate of decedent, confirms the interpretation we have put on the language used in the petition. The property thus conveyed was reported to the court by the executors as "the coal described in the petition," and the sale thereof was confirmed in accordance with the prayer of the executors. The action of the court and of the executors throughout leaves no doubt and creates no ambiguity as to the quantum of coal sold and conveyed.

Had the word "seam," "vein," or "strata" been used, the position of the plaintiffs would have had some ground to support it. Had the application been for an order to sell the seam, vein, or strata of coal underlying the surface, extrinsic evidence would have been necessary to determine which of the several seams or strata beneath the surface was embraced in the petition and decree of the court. Neither of these words, however, was used, but, instead, language was employed which clearly designates the subject-matter of the proceeding in the orphans' court, and leaves no doubt as to what property was sold and conveyed by its authority.

We are all of opinion that under the evidence presented to the court below the plaintiffs were not entitled to recover, and that a verdict should have been directed for the defendant company.

The fifteenth assignment of error is sustained, the judgment is reversed, and judgment is now directed to be entered for the defendant company for the coal underlying the surface described in the deed of Thomas King's executors to William Coleman, dated April 29, 1871, and recorded in the recorder's office of Allegheny county in Deed Book, vol. 274, p. 108.

McGINNIS et ux. v. KERR.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURIES TO EMPLOYEES—EVIDENCE.

1. Plaintiff's son was an employé of defendants, who were contractors for the remodeling of a building, in which there was an elevator, used by the various workmen in the building. Defendants did not own the building, nor did they have anything to do with the elevator. Three men working in the building, but not employes of defendants, found that the elevator stopped when they started it, and, looking up the shaft, saw deceased pinned under the balance weight. *Held*, that such evidence alone was insufficient to sustain the action.

Appeal from Court of Common Pleas, Allegheny County; Evans, Judge.

Action by J. M. McGinnis and Sarah L. McGinnis against William Kerr. From a judgment of nonsuit, plaintiffs appeal. *Affirmed*.

The court below stated the facts as follows: The plaintiffs were father and mother of Alfred McGinnis, a young man 22 years of age and unmarried, who was killed in the Verner building on Penn avenue, city of Pittsburg, on October 8, 1900, and, as the plaintiffs claim, through the negligence of the defendants. The defendants are contractors, and at the time of the accident had a contract for doing the carpenter work in remodeling the interior of the Verner building. Alfred McGinnis was in their employ. They had been working in the building but a short time—about ten days or two weeks. On the day of the accident, at 12 o'clock noon, three employes of another contractor in the same building went to a freight elevator in the building for the purpose of riding from the fifth to the eighth floor, which was the top floor of the building. This elevator was inclosed at the rear by the wall of the building. In front was a wire gate about four feet and a half high, which was raised and lowered. The sides of the elevator were open, except that across each side were either two or three iron bars (the witnesses differ as to the number), the top one about four feet from the floor. The elevator was operated by the person using it, by means of a rope which was located about eighteen inches back from the side of the elevator to the left of the person facing it. On the same side of the elevator as the rope, and about two inches from it, the balance weight of the elevator passed up and down between two upright posts about eighteen inches apart. The weight was supported by a rope which hung

about midway between the two uprights, so when nothing was seen between the two upright posts the weight was above, and when the rope was there the weight was below. One of three men above mentioned, when he went to the elevator, raised the gate in front, and looked down to see where the elevator was, and if any person was using it. The elevator was at the bottom, and he told one of his companions to start the elevator up, which was done. It went about one floor, when it stopped suddenly, and, looking up, the men operating it saw the head of a man on the seventh floor pinned down by the balance weight across his neck. He reversed the elevator, and, when released, the man above pitched forward into the shaft and was killed. The person killed was Alfred McGinnis. That is all there is known of the accident. How McGinnis came to have his head between the guides of the balance weight is not known, and can only be inferred from the surrounding circumstances. The defendants had nothing to do with the construction, maintenance, or operation of the elevator. The elevator was in the building when defendants commenced work, and in the same condition as when the accident occurred. There was a stairway near the elevator, leading from the first floor to the top. The plaintiff offered evidence that the workmen in the building, among them the employes of the defendants, used the elevator for the purpose of going from one floor to another, and that usually the elevator was operated from the side. There was evidence offered that the elevator, as constructed, was dangerous, in that the weight was too near the operating rope, and was liable to injure the hand or the arm of the person operating the elevator; but that was not the nature of the accident which injured this man, for there was no evidence to show that the operator needed to put his hand between the posts inclosing the weights in order to operate the elevator. Error assigned was refusal to take off nonsuit.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James S. Campbell, J. W. Lee, and Eugene Mackey, for appellants. William M. Hall, Jr., and W. B. Adair, for appellee.

MITCHELL, J. There was no evidence of negligence on the part of the defendants. They were not the owners of the building or the elevator, nor was the latter one of the tools for defendants' employes to use, or a place for them to work in. The latter used the stairs or the elevator in going from floor to floor at their own volition, apparently as defendants themselves and everybody else about the building did. If there was danger in the use of the elevator, it was as open to the notice of the deceased as to defendants, and he, being of full age, and a mechanic in a trade requiring intelligence, was in no need of instruction as to obvious risks.

But beyond this there was no evidence to show how or why the deceased got into the position of danger. Three men working on the building, but not employes of defendants, after starting the elevator found that it stopped, and, looking up the shaft, saw deceased's head pinned under the balance weight on an upper floor. That is all that is known of the accident. Why the deceased put his head in the place of danger can only be conjectured, and, so far as the accident itself speaks, it points to deceased's own negligence.

Judgment affirmed.

BRYAN v. FIRST NAT. BANK OF McKEES ROCKS.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

BANKS — CREDITING DEPOSITOR — CHECK OF ANOTHER DEPOSITOR — EVIDENCE — UNSTAMPED CHECK — GAMBLING DEBT.

1. Where a bank accepts a check of a depositor, and puts it to the credit of another depositor, it is equivalent to a payment to such second depositor of the amount of the check.

2. Where a bank accepts unstamped checks from a depositor and places them to the credit of the account of another depositor, but subsequently charges off the credit, it cannot, when sued, object to an offer of the checks in evidence because they were unstamped.

3. Where a bank receives from a depositor checks of another depositor, and gives credit for the same, it cannot, on failure of the drawer of the check to pay the same, charge off the credit, and on suit therefor allege as a defense that the checks had been given in a gambling transaction.

Appeal from Court of Common Pleas, Allegheny County.

Action by Miles Bryan against the First National Bank of McKees Rocks. Judgment for plaintiff, and defendant appeals. Affirmed.

Assumpsit against a bank for wrongfully charging off on its books a credit given to a depositor. At the trial the court refused defendant's offer to prove that the checks deposited by the plaintiff represented a gambling transaction. The court admitted in evidence the two checks, although it appeared that they were not stamped. The court charged in part as follows:

"In this case, as we understand the law, the plaintiff is entitled to the amount he claims, unless the defendant satisfies you that the plaintiff acquiesced in charging back this money represented by these checks. Now, that is the only question in the case. The bank, as between its depositors, in accepting a check and putting it to another depositor's account, as between depositors of the same bank, it is just precisely as if the money was paid to the party himself, and placed to his credit. That being the case, the plaintiff would be entitled to re-

¶ 1. See Banks and Banking, vol. 6, Cent. Dig. §§ 306, 307.

cover in this case, unless the defendant has satisfied you that the plaintiff acquiesced in charging it back. Upon that there is a great deal of disputed testimony. It is not all on one side by any means. The defendant called a number of witnesses to show that, after the bank discovered that the checks of Meyers & Co. did not go through the clearing house, and were not good for anything, and that McCann's account would not be sufficient to pay these checks deposited by the plaintiff, they told Mr. Bryan of the difficulty—the mistake or blunder, if you choose to call it that, that they had made—and that they proposed, as it was only a short time afterwards (on Monday) to rectify the mistake, and charge it back; and they allege that Mr. Bryan assented. Now, it is not necessary to say in words, 'I assent.' You can acquiesce by your actions. Some of the witnesses say that he said, 'All right.' Others state that he agreed that they should balance his book. They took his bankbook, and balanced it, and put these checks on there as having been charged to him, and they allege that he went away satisfied—made no objection then. That is their testimony. If he did that, he could not recover, because he could have stood upon the mistake of the bank. A bank is bound to know that a check is good when they tell you a check of one of their own depositors is good; but, if they make a blunder, the depositor may agree that they may rectify that blunder, and, if they balanced the book, and gave it to him, and told him that they charged back the checks, and he took his book, and made no objection, that estops him from recovering against the bank under the circumstances. That is the theory of the defendant, and they have testimony that tends to show that.

"On the other side, the plaintiff denies that entirely. He says he presented these checks as money; that they put them to his account as money, and he went away satisfied. He says that it was an ordinary and usual transaction with the bank, and that when he was told of the mistake he considered it their mistake. He had taken the checks, probably, for a valuable consideration. We do not know what for. It might have been for a debt. He says he only wanted to get the checks to show to his attorney, and that they balanced his book, and that he never saw that the checks were charged against him until he got down in town, and that he never acquiesced in it or agreed to it at any time.

"Now, you have both sides of the case, and it is not for the court to descant on the evidence, or say on which side of the case the weight of testimony is. That is for the jury. You twelve men will use your common sense in passing upon the testimony. Just ask yourselves, when you get to your room, the question, did the plaintiff acquiesce, silently or otherwise? It is not nec-

essary to say, 'I will agree to it,' if he acquiesced by his acts in having them rectify the mistake they made about their account with McCann. If he did acquiesce, and you are satisfied of that by the weight of the evidence, you will find for the defendant, because he is estopped in justice and law from trying to make the bank pay when they made a mistake and he was told of it and acquiesced in it. But if that is not made out by the weight of the evidence, if you believe he did not acquiesce, and did not agree to it, but demanded his rights all the way through, you should find for the plaintiff for the amount claimed as presented by counsel. That is all there is in this case, and all there could be if you tried it a month."

Verdict and judgment for plaintiff for \$2,301.01.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Joseph A. Langitt, H. W. McIntosh, William A. Stone, and Stephen Stone, for appellant. W. H. S. Thompson, Frank Thompson, and H. S. Lydick, for appellee.

BROWN, J. On November 9, 1900, John J. McCann drew to the order of Miles Bryan, and delivered to him, a check on the First National Bank of McKees Rocks, Pa., for \$956. The day following he gave Bryan another check on the same bank for \$1,164.75. On that day Bryan, who was also a depositor in the bank on which the checks had been drawn, went to it, and made a deposit of \$2,357, composed of these two checks and other small checks and some cash. At the time he made this deposit the books of the bank showed a credit in favor of McCann of \$3,276. The two checks which he had given to Bryan, amounting to \$2,120.75, after having been passed to the latter's credit as part of his deposit of \$2,357, were stamped "Paid" by the bank. Part of the amount standing to the credit of McCann on the books of the bank was made up by his deposit of two checks drawn to his order by E. A. Meyers & Co. The first dated November 9, 1900, for \$1,527.35, was deposited the same or the following day; and the second, given November 10, 1900, was for \$861.70. After Bryan had received credit for the two checks McCann had given him, and which had been stamped "Paid," the bank learned that the checks of E. A. Meyers & Co. to McCann, which had been deposited to his credit, were not paid by the Freehold Bank, on which they had been drawn, and they were subsequently returned, marked "No funds." Bryan made his deposit and received the credit in his pass-book on Saturday, and on the following Monday the bank charged the two McCann checks back to his account, returning them to him. Subsequently this suit was brought to recover from the bank the amount so withdrawn by it from appellee's account, on the ground that, having given him credit for the two checks drawn by McCann on itself,

with ample funds in its hands to meet them, according to its own books, when they were presented, it had made practically a cash payment to him, which it could not recall without his consent. The trial judge entertained this view, and in an adequate charge submitted to the jury, as the only question for their determination, whether the plaintiff had agreed that the money represented by the McCann checks should be charged back to his account. The jury found that he had not so agreed, and the verdict was in his favor for the amount claimed.

When the bank gave to Bryan, one of its depositors, credit on his passbook for the two checks drawn on it by another of its depositors having on its books ample funds to pay them, such credit was equivalent to a payment to Bryan in cash of the amount of the checks. This has never been questioned with us from the time it was first decided in *Levy v. Bank of the United States*, 4 Dall. 234, 1 L. Ed. 814, and 1 Bin. 27, and it cannot be pretended that, if an actual cash payment had been made to Bryan by the bank, there could be a recovery back from him, if unwilling to pay it.

The two legal positions taken by the defendant, which the court below refused to sustain, were: First, that the court ought not to have admitted in evidence the two checks drawn by McCann in favor of Bryan, because they had not been stamped as required by the act of Congress; and, secondly, that the defendant ought to have been allowed to prove that these checks "were given in a gambling transaction, commonly known as a 'bucket-shop' business, and conducted by E. A. Meyers & Co., with John J. McCann as an interested party therein, with full knowledge of the plaintiff in this case, who dealt with McCann, and through him with Meyers & Co., in carrying on that bucket-shop business contrary to public policy."

As to the first position, appellant seems to overlook the fact that this suit is not on the checks. The plaintiff could not sue on them. As a holder of checks on a bank, drawn by one having funds in it to meet them, he could not sue it. *Saylor v. Bushong*, 100 Pa. 23, 45 Am. Rep. 353; *First National Bank of Northumberland v. McMichael*, 106 Pa. 460, 51 Am. Rep. 529; *First National Bank v. Shoemaker*, 117 Pa. 94, 11 Atl. 304, 2 Am. St. Rep. 649; *Maginn v. Dollar Savings Bank*, 131 Pa. 362, 18 Atl. 901. The plaintiff sues to recover money which the bank had paid him by depositing it to his credit and then took from him without his consent. This is the substance of his averment in his statement. The checks were not offered in evidence as the basis of his claim, or as instruments upon which he had sued. His case was complete without them, for his passbook showed the credit given him by the bank. Knowing that the drawer of these unstamped checks had, according to its own books, money in its hands to pay them, it received

them as money from Bryan, and gave him credit for them. Instead of complaining of them now as not having been stamped, it ought to have refused to pay them when presented, for that was its duty under a penalty. But it paid them. The act of Congress was intended for no such case. It did not prohibit the offer in evidence of unstamped checks as such. These were offered not to establish and sustain the plaintiff's claim, for, as stated, it had been established by the bank's entry in his passbook of so much cash deposited by him and withdrawn by the bank without his consent. The prohibition of the act of Congress was upon the offer of checks as evidence when relied upon as valid instruments for the purpose for which they were drawn, and was not that it could not be shown what use had been made of them by parties against whom they could not be enforced by the holders. If, as in this case, the bank saw fit to pay unstamped checks, the act of Congress never intended that it could say the checks had not been paid, and that the money represented by them was still in its hands because the checks had not been stamped. In *Chartiers & Robinson Turnpike Company v. McNamara*, 72 Pa. 278, 13 Am. Rep. 673, the instrument rejected by the court because it had not been stamped in accordance with the act of Congress was one upon which the defendant relied as the real contract between him and the plaintiff; in other words, it was the instrument upon which its defense depended. Such is not the case here.

The checks given by McCann may have been drawn in settlement of marginal deals, but he did not say they should not be paid. He gave them intending that they should be paid, and the bank upon which they were drawn would now become the quickener of his unwilling conscience for the purpose of saving itself from the consequences of what may have been its own mistake in giving him credit for the checks of E. A. Meyers & Co. Even the ordinary gambler is not required to get the permission of the bank with which he keeps his account to withdraw his money to pay his gambling debts, regarded by him, as a rule, as obligations of honor. This is about the position of the appellant as we understand it, and as the court below must have understood it.

Judgment affirmed.

KELLY v. PITTSBURG & B. TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

APPEAL—REVIEW—CONFLICTING EVIDENCE— NEGLIGENCE—INFANT—QUESTION FOR JURY—ACTION BY MOTHER.

1. A verdict on conflicting evidence will not be set aside because the appellate court would, on the same evidence, have reached a different conclusion.

2. The question whether a boy of 12 years of age had sufficient capacity to be sensible of danger and to avoid it is not a question of law, but one of fact for the jury.

3. Act June 28, 1895 (P. L. 316), giving a wife, under certain circumstances, equal authority with the father, and equal right to the custody and services of a minor child, gives no right of action for an injury to such minor child caused by the negligence of another, and not resulting in death.

4. Where a father sues in his own right for an injury to his minor son, and as next friend, to recover for injuries not resulting in death, and pending suit the father dies, and the mother is substituted, a judgment for her in her own right cannot be sustained.

Appeal from Court of Common Pleas, Allegheny County.

Action by Charles H. Kelly, by his next friend, Mary Kelly, against the Pittsburg & Birmingham Traction Company. Judgment for Mary Kelly for \$2,000, and for Charles H. Kelly for \$2,700, and defendant appeals. Affirmed as to Charles H. Kelly, and reversed as to Mary Kelly.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Clarence Burleigh, for appellant. L. B. Cook, for appellee.

BROWN, J. After reviewing the testimony in this case, we are not surprised that the learned judge below, in his opinion refusing a new trial said, "The conclusion of the jury was not that which the court would have reached on the same evidence," adding at the same time, however, that it was not so manifestly against the weight of the evidence as to require him to set the verdict aside. The principal reason advanced for the new trial below, and the one most urgently pressed upon us here for reversing the judgments, is that the verdict was against the weight of the evidence. The testimony was conflicting, and though to the mind of the trial judge, as well as to our own, it ought fairly to have led the jury to a different conclusion on the questions of the defendant's negligence and the contributory negligence of the boy, these were questions of fact for the determination of the triers of facts, and not for the court. For this reason the court below properly refused to invade the province of the jury, and, in affirming the judgment in favor of Charles H. Kelly, we adopt as our own the following language from the opinion refusing a new trial: "The plaintiff's evidence was to the effect that the car was running at a high rate of speed, without any light, at a time of night when a light was necessary. We think this is evidence of negligence on the part of the company which must go to the jury. The only remaining question is as to the contributory negligence of the plaintiff. Being under the age of fourteen years, the general rule is that his contributory negligence is a matter to be passed upon by the jury. We see nothing

in this case which would authorize the court to take from the jury the question of the complainant's contributory negligence." At the time the boy was hurt, May 6, 1897, he was not quite 12 years old, and there was nothing developed on the trial that took the case out of the rule as laid down in *Strawbridge v. Bradford*, 128 Pa. 200, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 670, where the injured boy was 13 years and 4 months old: "It is claimed, however, that the plaintiff's own negligence contributed to his injury, and prevents a recovery, and that the court should have so instructed the jury. But it must be borne in mind that this plaintiff had not attained the age when sufficient capacity to be sensible of danger and to avoid it is presumed. *Nagle v. Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 413. A boy's capacity is the measure of his responsibility, and, if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to it. *Phila. Ry. Co. v. Hassard*, 75 Pa. 367; *Crissey v. Railway Co.*, 75 Pa. 86. When an infant who has not reached the age of discretion is charged with concurrent negligence, it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in, and this matter is ordinarily to be considered by the jury, in connection with the other circumstances of the case, and under proper instructions from the court."

Turning to the judgment in favor of Mrs. Kelly, the mother, we are at a loss to understand how she recovered, for she never had a cause of action against the defendant, and, even if she had, she is not on the record as suing for herself. It is urged that these objections were not made in the court below, and if this be true, as we assume it is, it was unfair to the learned trial judge not to have called his attention to what would have led him to direct a verdict against the mother. If we could avoid disturbing this judgment, we would do so, for the reason that the objections now made were not raised below; but we must consider them here because one of them, at least, is fundamental, and was always in the way of the mother's right to recover. When the boy was hurt, his father, Patrick Kelly, was living. The suit was originally brought by the father in his own right and as the next friend of his son. The cause of the father's action was the alleged negligence of the traction company, resulting in injuries to the minor son, in consequence of which his services would be lost to the father during his minority. The cause of action arose May 6, 1897. At that time there was nothing for which the mother could have sued, and the appellant was guilty of nothing subsequently which gave her a cause of action against it. The boy was not killed, but simply injured; and in such a case the cause of action is in the father

¶ 2. See *Negligence*, vol. 37, Cent. Dig. §§ 3473, 348.

alone, as we have held, for reasons which need not be repeated here, in *Fairmount & Arch Street Passenger Railway Co. v. Stutler*, 54 Pa. 375, 93 Am. Dec. 714, and in *Pennsylvania Railroad Co. v. Bantom*, 54 Pa. 495. This cause of action was not split by the death of the father, and until the Legislature gives the mother the right to sue in a case of injury to a minor child, caused by the negligence of another, and not resulting in death, we cannot give it to her. The act of June 26, 1895 (P. L. 316), gave Mrs. Kelly no right to sue. It simply gives a wife, under certain circumstances, equal power, control, and authority with the father over a minor child, and an equal right to its custody and services. It does not appear from the testimony that the family circumstances were such at the time of the injury as gave Mrs. Kelly, under the act of 1895, this equal right with her husband in the power, control, and authority over her child, and to his custody and services. Two years after the suit was brought, the father died, and about six months after his death the following substitution was made on the record: "And now, June 7, 1900, death of Patrick Kelly suggested, and, on motion of L. B. Cook, Mary Kelly, mother of Charles Kelly, is substituted instead Patrick Kelly, deceased, as next friend," etc. The substitution was only of a next friend for the minor boy, to enable him to prosecute his suit. It affected the case only as it would have been affected by the substitution of any one else as the next friend of the boy, and it could not have been for any other purpose. Mrs. Kelly, as the widow of Patrick Kelly, and in her individual capacity, could not have been substituted as the personal representative of the deceased, who had sued for himself; and, as stated, there was no place for her on the record to sue in her own right, because she had no cause of action against the appellant. But she did not even attempt to get on the record as the plaintiff in her own right, and yet there is a judgment for her in such right: It must be, and is now, reversed.

The judgment for the son, Charles H. Kelly, is affirmed.

IN RE AMBERSON'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILL—EXECUTION—EVIDENCE—BENEFICIARIES—IDENTITY.

1. The probate of a will is, *prima facie*, sufficient evidence of its due execution.

2. On distribution of an estate by an auditor, certain of the heirs objected on the ground that the charitable legatees thereunder had not shown that the will had been executed as provided by law. The record of probate proceedings showed the death of the testator three years after the making of the will, its execution in the presence of two witnesses, and that these witnesses signed their names to the will as such at his request. *Held*, that the objection was unfounded.

3. Where testator gave a legacy to the "Foreign Missionary Society," parol evidence is admissible to show that testator had contributed to the support of the foreign missionary work of the Methodist Episcopal Church, of which he was a member, and that the bequest was intended for the missionary society of such church.

Appeal from Orphans' Court, Butler County.

In the matter of the estate of John Amberson, deceased. Appeal by Martha Amberson from decree dismissing exceptions to the auditor's report. *Affirmed*.

Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John H. Wilson, S. F. Bowser, Lev. McQuiston, and J. C. Vanderlin, for appellant. A. G. Williams and Alexander Mitchell, for appellee.

POTTER, J. This is an appeal from the decree of the orphans' court of Butler county confirming the report of an auditor appointed to make distribution of the amount in the hands of the administrator *c. t. a.* of the estate of John Amberson, deceased.

It appears from the auditor's findings of fact that the testator was a single man, and died without issue upon December 10, 1899, leaving as his only heirs at law two surviving sisters; that letters of administration *c. t. a.* were issued to James Cooper, who has filed his partial account, showing a balance for distribution of \$5,397.13.

The will of the decedent bears date November 4, 1896, and was duly probated December 22, 1899, a copy being attached to the report of the auditor. It does not appear that the probate proceedings before the register were formally offered in evidence at the hearing before the auditor, but evidently these proceedings were considered as included in the general offer of all papers in the case as evidence, which was made without objection. It is not denied by any one that the will was, as a matter of fact, duly probated. The exceptants are objecting only to the bequests to charitable and religious uses. They contend that the burden of proof was upon the religious and charitable legatees to show that the will was executed in the presence of two credible, and at the time disinterested, witnesses, and that the execution was at least one calendar month before the decease of the testator. As an abstract proposition this may be readily admitted, but the probate of a will is, *prima facie*, sufficient evidence of its due execution. *Folmar's Appeal*, 68 Pa. 482.

In the present case more than three years elapsed between the date of the will, which was presumably the time of its execution, and the death of the testator. The will was executed in the presence of two witnesses, whose credibility was vouched for by this appellant when she called them to testify before the register at the time of the probate. It

appears from the certificate of the register that they testified before him that the execution of the instrument was perfected in the presence of both of them, and that they, at the request of testator and in his presence, and in the presence of each other, did sign their names thereto as witnesses. All the formalities for the execution of the will, prescribed by the act, were apparently observed. Had there been anything upon the face of it to suggest any want of conformity to the act of assembly, the case would be different. If there had been no witnesses, or if upon the face of the will it had been apparent that one or both of them were not disinterested, the fact that the will had been admitted to probate would not, of course, have benefited the claimants of the charitable bequests. But here the will, while informal, shows upon its face compliance with the law; it has been duly probated, and the certificate of the register shows affirmatively further corroboration of its legal execution; and there was no evidence offered by the exceptants before the auditor tending to show that any required formality had been omitted.

The auditor and the court below united in finding that the will was properly established, and we think they were right. In defining the object of his bounty, the testator used the term "Foreign Missionary Society." The auditor very properly called to his aid parol testimony to show the situation in which the testator stood when he made this bequest. From that testimony it appears that Mr. Amberson had been for many years an active member of the Petersville Methodist Episcopal Church, and that he had steadily contributed to the support of the foreign missionary work carried on by the denomination of which he was a member. It was clear that he intended his bequest should go to maintain that work, although he was mistaken as to the official name of the board which is in control of the foreign missionary efforts of the Methodist Episcopal Church. The evidence before the auditor led him to find as a fact that "the Missionary Society of the Methodist Episcopal Church is the corporate name of, and is the society that has control of, and expends all contributions made to, foreign missions of the Methodist Episcopal Church, as well as special gifts or legacies made to the same." And he found that the bequests of the testator to the "Foreign Missionary Society" were intended for and should go to "the Missionary Society of the Methodist Episcopal Church," as the proper official designation of the society in charge of the work to which the testator intended to consecrate his bounty. There is abundant authority, ranging from *Missionary Society's Appeal*, 80 Pa. 425, to *Croxall's Estate*, 102 Pa. 579, 29 Atl. 750, to justify the admission of such evidence as that upon which the auditor relied for aid in defining accurately the intended recipients of the testator's bounty. Nor do we see that there is any reason to

doubt the correctness of the conclusion reached by the auditor and confirmed by the court below.

The assignment of error is overruled, the decree of the court below is affirmed, and this appeal is dismissed at the cost of the appellant.

KEELING et al. v. PITTSBURG, V. & C. RY. CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MAYOR DE FACTO—ORDINANCE—INJUNCTION—LACHES.

1. Under Act March 7, 1901 (P. L. 20), abolishing the office of mayor of Pittsburgh, and substituting in its place the office of recorder, where the mayor holds over until the recorder takes his place he has the power as de facto mayor to sign ordinances.

2. An ordinance authorized the officers of a city to contract with a railroad company to elevate its tracks and build a retaining wall, and to construct its roadbed over part of a street, and to construct a bridge and a footway, and for the vacation of certain streets. The contract was entered into April 13, 1901. The abutting owners, on June 22, 1901, filed a bill to restrain the completion of the contract because of the serious damage to their property caused thereby, alleging that the ordinance was illegal, the petition therefor not being sufficient. The railroad company had expended large sums in construction of improvements, and purchased realty on the faith of the contract, before the bill was filed. *Held*, that the bill was properly dismissed for laches.

Appeal from Court of Common Pleas, Allegheny County; Stowe, Judge.

Bill by John Keeling and others against the Pittsburgh, Virginia & Charleston Railway Company and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. M. Shields and W. S. Thomas, for appellants. M. W. Acheson, Jr., Thomas Patterson, and James R. Sterrett, for appellees.

DEAN, J. Jane street, in the Twenty-Fourth Ward of the city of Pittsburgh, had been a public street, laid out and opened according to law for more than 21 years, on April 8, 1901. At that date the city council passed an ordinance authorizing and directing the proper officers, on behalf of the city, to enter into a contract with the Pittsburgh, Virginia & Charleston Railway Company and others to elevate their tracks and build a retaining wall over and along the line of Jane street from Thirtieth street to and across Thirty-Fourth street, and to construct its roadbed over so much of the street as lies north of the curb between the line of Thirtieth street and the east line of Thirty-Fourth street. Also to construct a bridge across the tracks at Ormsby Yard, and an underground footway to Jane street. And further, that

¶ 2. See *Injunction*, vol. 27, Cent. Dig. §§ 159, 200.

the city should vacate six certain streets leading from Jane street to Sarah street. Afterwards, on April 13, 1901, the contract was executed by the city, and approved by W. J. Diehl, acting as and claiming to be mayor, and by George W. Wilson, director of public works. It was properly attested and countersigned, and the seal of the city affixed.

Afterwards A. M. Brown was appointed recorder of the city. On June 17, 1901, he, acting for the city, also executed a contract to the same effect as the one executed by Mayor Diehl. While the work of improvement was being proceeded with, plaintiffs, on June 22d, filed this bill to restrain defendants by injunction. It will be noticed the ordinance authorizing the contract was passed April 8th. The bill averred that plaintiffs were abutting lot owners on the streets affected by the contract, and that their means of communication would be cut off, and their property seriously damaged, if the described improvements in the contract were carried to completion; and further averred that the ordinance passed was illegal, and had not been petitioned for by sufficient lot owners in number and interest, nor had it been approved by a mayor of the city, for at the time W. J. Diehl signed it, claiming to be mayor, there was no such office, it having been abolished by Act March 7, 1901 (P. L. 20), and the act clothing the recorder with this function of a chief executive was not passed until June 20, 1901. The learned judge of the court below says: "We assume, then, that the ordinance passed April 8, 1901, was valid and legal. The mayor had ceased to exist, and the recorder had no power to interfere, and his assent was not required; and while the approval of Diehl, assuming to act as mayor, did no good, it did no harm. And the ordinance was good without the approval of either."

While his conclusion is correct, we do not entirely concur in the reasons given by the learned judge, for when Mayor Diehl approved the ordinance he was, it seems to us, clearly a de facto officer. After the passage of the act of 1901, which substituted the office of recorder for that of mayor, he continued in office until the recorder actually took his place. And that is the substance of our decision in *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801. One of the manifest purposes of the act was to avoid an interregnum; so at the time Mayor Diehl signed the ordinance, if not the mayor by law, he was the mayor in fact, for he acted under color of title.

We pass no opinion on the other questions, because it is not necessary to a decision of the issue before us. The last point made fully vindicates the court's decree dismissing the bill. It will be noticed the ordinance authorizing the contract was passed April 8, 1901. It was not until June 22d, in the same year, that plaintiffs filed this bill. In

the interval, defendants had expended in construction of the improvements stipulated for in the contract \$267,862; purchased real estate to the value of \$288,145; had made contracts, yet uncompleted, for the price of about \$100,000; had done mason work along the line of Jane street to the value of \$20,000; and all this on the faith of the contract. In view of all this work and expenditure of money before the eyes of all the complaining lot holders, no steps were taken to assert their alleged rights. The conclusion of the court below is: "The delay of the interveners, the magnitude of the work done, and the great expense already involved, in the proposed avoiding of grade crossings by defendants' road, when contrasted with any injury which can possibly arise to plaintiffs, are considerations which will prevent a court of equity from granting an injunction, even if it was clear the plaintiffs have a strict legal right. * * * An injunction is of grace, and not of right, and a chancellor is not bound to make a decree which will do far more mischief and work far greater injury than the wrong he is asked to redress." *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645. And very slight delay on the part of the complainant in invoking equitable relief, when the work is of magnitude and public interests are prejudiced, will be sufficient to stay the hand of a chancellor. *Kerr on Injunctions*, p. 19.

The decree of the court below is affirmed.

NORTH BRADDOCK BOROUGH v. COREY.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EQUITY—REMEDY AT LAW—APPEAL—DISMISSAL OF BILL.

1. A bill to set aside an award of arbitrators alleged that complainant had no notice of the meeting or an opportunity to appear. *Held* properly dismissed, as complainant had a complete remedy at law in an action on the award.

2. Where complainant, in a bill to set aside an award alleged fraud, and until failure of proof as to the fraud it was not clear that the bill was without equity, it will be dismissed on appeal, though the question of jurisdiction was not raised at the original hearing nor by the pleadings.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Bill by North Braddock borough against J. B. Corey. From a decree dismissing the bill, plaintiff appeals. *Affirmed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. Rodgers McCreery and W. B. Rodgers, for appellants. J. H. Beal, J. H. Reed, Edwin W. Smith, and George E. Shaw, for appellee.

¶ 1. See *Arbitration and Award*, vol. 4, Cent. Dig. § 411.

FELL, J. The bill was to set aside an award on the grounds that the arbitrators had not given the borough notice of their meetings and an opportunity to defend; that they had made an award without hearing any testimony on the matter in controversy; and that the award was grossly unjust and excessive, being more than six times the amount of the damage actually sustained. The case went to trial on all of these allegations.

The court found that the award was not so excessive as to indicate misconduct on the part of the arbitrators in making it, and that the arbitrators, in proceeding without formal notice and without regular hearings, acted on what appeared to be an understanding between them and the members of council on the subject; but that the action of these members did not amount to a waiver by the borough of notice of the meetings, and did not estop it from asserting the invalidity of the award. The bill was dismissed for the reason that, as the borough could set up the want of notice in defense in an action on the award, it has a complete and adequate remedy at law.

The question of jurisdiction was not raised by the pleadings nor at the hearing, but was fully argued on exceptions to the findings of the court. While the bill did not in terms charge fraud, the misconduct alleged was so gross as to amount to fraud, and, until the testimony was closed and the question of fraud was eliminated, it was by no means clear that the plaintiff had not a case cognizable in equity. In doubtful cases, where the question of jurisdiction could have been raised at the beginning of the proceeding, and the defendant has voluntarily proceeded on the merits, we have refused to set aside decrees. But this case is not within these decisions, as it was not apparent that there was not ground for equitable jurisdiction until there was a failure of proof as to the fraud alleged.

The decree is affirmed, at the cost of the appellant.

REDEMPTORIST FATHERS v. LAWLER.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

JOINT TENANCY—SURVIVORSHIP—GRANT—VALIDITY.

1. Act March 31, 1812 (5 Smith's Laws, p. 395), abolishing the right of survivorship as an incident of joint tenancy, and providing that, whatever kind the estate or thing holden be, the parts of those who die first shall be considered as if such deceased joint tenants had been tenants in common, does not forbid nor make illegal in any way a grant or devise of an estate with the same attributes as to survivorship as joint tenancy at common law.

2. A grant to four persons to hold as joint tenants and not as tenants in common is valid, and creates an estate subject to the right of survivorship.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Redemptorist Fathers of the state of Pennsylvania against James B. Lawler on case stated. Judgment for plaintiff, and defendant appeals. Affirmed.

The case stated was as follows:

On November 19, 1862, Rev. Francis Joseph Muller et al. granted and conveyed to Rev. John De Dycker, Rev. George Ruland, Rev. Francis Xavier Seelos, and Rev. Joseph Helmprecht, "as joint tenants and not as tenants in common," inter alia, a tract of land in the city of Allegheny. That said Francis Xavier Seelos died on October 4, 1867; the said John De Dycker died on December 9, 1883; the said Joseph Helmprecht died on December 15, 1884; the said George Ruland died on November 25, 1885, in Howard county, in the state of Maryland, unmarried, leaving his last will and testament, in which he devised and bequeathed all his property, real and personal, to the Redemptorists, a body corporate under the laws of the state of Maryland, which said last will and testament was duly probated and registered in the county of Howard, in the state of Maryland. That the said the Redemptorists, so being such body corporate as aforesaid, on May 4, 1897, inter alia, granted and conveyed the said tract of land to the Redemptorist Fathers of the state of Pennsylvania, plaintiff above named. That the said defendant, by an agreement in writing dated June 2, 1902, agreed to purchase of the said plaintiff a certain lot of ground situate in the Thirteenth Ward of the city of Allegheny, part of the above-mentioned tract, but declines to comply with the conditions of the said agreement of sale, for the reason that he avers that the title of said plaintiff to said property is not a good marketable title in fee simple; that said Rev. John De Dycker, Rev. Francis Xavier Seelos, Rev. Joseph Helmprecht, and Rev. George Ruland were seised of the land above described as tenants in common, and the said Rev. George Ruland, the survivor of the said four last-mentioned persons, was not seised of the entirety by reason of his survivorship, and had no power to devise said land as above mentioned in his said last will and testament.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Robert T. McElroy, for appellant. W. A. Magee and Charles A. Fagan, for appellee.

MITCHELL, J. The act of March 31, 1812 (5 Smith's Laws, p. 395), expressly abolished the right of survivorship as an incident of joint tenancy, and provided that "whatever kind the estate or thing holden be, the parts of those who die first * * * shall be considered * * * in the same manner as if such deceased joint tenants had

¶ 1. See Joint Tenancy, vol. 29, Cent. Dig. §§ 2, 4.

been tenants in common." But it is not forbidden by this act, nor made illegal in any way, to create by grant or devise an estate with the same attribute of survivorship as joint tenancy at common law. Thus a grant to three for their joint lives, with remainders to the survivors and survivor, and to the heirs of the survivor in fee, would be unquestionably good, and yet it would be practically a grant to the three in joint tenancy, with survivorship as at common law. This was substantially the case of *Arnold v. Jack's Ex'rs*, 24 Pa. 57, and it was there held that, though survivorship as an incident of joint tenancy has been abolished, it may still be created or conferred by express words in a deed or will. See also *Kerr v. Verner*, 66 Pa. 326, and *Jones v. Cable*, 141 Pa. 586, 7 Atl. 791. Survivorship as an incident of an estate granted being still lawful, its creation becomes a question of intent. No particular form of words is required further than that they shall be sufficient to clearly express an intent in order to overcome the presumption arising from the statute.

In the present case the grant was to four, to hold "as joint tenants and not as tenants in common." The only practical difference between the two estates was the right of survivorship in joint tenancy. The statute had abolished this, and provided that the estate holden should be considered "in the same manner as if * * * they had been tenants in common." When, therefore, the grantor declared in his deed that his grantees should hold "as joint tenants and not as tenants in common," he made clear his intent not to follow the statute, but to convey an estate subject to the right of survivorship—the distinguishing incident of joint tenancy at common law.

Judgment affirmed.

FITZSIMMONS et al. v. LINDSAY et al.
(Supreme Court of Pennsylvania. Jan. 5, 1903.)

SPECIFIC PERFORMANCE—SALE OF PERSONALTY—ACTION AGAINST ADMINISTRATOR—PUBLIC POLICY—ORPHANS' COURT—JURISDICTION.

1. A demurrer to a bill against an administrator to enforce the sale of shares of stock, which decedent agreed should be sold to his fellow shareholders at his death for a value to be determined by arbitration, was improperly sustained on the ground that the arbitration had been revoked; such revocation not having been shown in the bill.

2. The stockholders of a private trading corporation agreed that, in the event of the death of any one or more of them, the remaining stockholders should have an option for the purchase of the stock of the decedent at its value. Held not invalid as against public policy, or as an improper restraint of the power of alienation.

3. The orphans' court, and not the court of common pleas, has exclusive jurisdiction to enforce an agreement by the decedent for the sale of his stock in a business corporation, on his death, to the other shareholders.

Appeal from Court of Common Pleas, Allegheny County.

Bill by J. O. Fitzsimmons and others against David G. Lindsay and others for specific performance. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The following is the opinion of the court below:

"This is a bill filed by J. O. Fitzsimmons, Thomas McMurray, A. J. Bihler, and George W. Diehl against David G. Lindsay, administrator of the estate of John S. Lindsay, deceased, and A. W. Lorentz, guardian of Mary A. Lindsay, a minor child and sole heir at law of said decedent. Thomas McMurray et al., executors and trustees under the will of James C. Lindsay, deceased, and James C. Lindsay Hardware Company, a corporation, are only nominal parties.

"It appears that the James C. Lindsay Hardware Company has a capital stock of \$150,000, and that on April 13, 1895, James C. Lindsay, John S. Lindsay, J. O. Fitzsimmons, Thomas McMurray, A. J. Bihler, and George W. Diehl were the owners of all its stock; and on that date these stockholders entered into an agreement for the evident purpose of continuing the concern as a close corporation, and provided therein that, in the event of the death of any one or more of the parties, the remaining stockholders should have the option to purchase and acquire the stock of the deceased party at its book value. This book value, it was further provided, should be ascertained by mutual agreement; but, in case no agreement could be arrived at, then each of the parties should have the right to appoint an arbitrator, who, with power to select an umpire, should fix a price for the stock, and the surviving parties should then have a right to take or refuse the stock at the price so determined.

"John S. Lindsay was the owner of 225 shares of the stock, and died on November 23, 1900; and David G. Lindsay was appointed administrator of his estate, and A. W. Lorentz was appointed guardian of the estate of his minor daughter, Mary A. Lindsay. The plaintiffs thereupon notified the administrator and guardian of their desire to purchase the stock, but were unable to secure an agreement as to price, whereupon the plaintiffs made demand upon the administrator and guardian for the appointment of arbitrators to fix a price on the stock. This the administrator and guardian refused to do, and the plaintiffs now seek to compel the administrator and guardian to select an arbitrator and go into an arbitration. To this bill David G. Lindsay, the administrator, files a demurrer.

"We are constrained to sustain the demurrer on the ground that the agreement to submit to arbitration is revocable, and it appears in the bill that the administrator has revoked it. As was said by Mr. Justice Clark in the case of *Commercial Union Assurance Company v. Hocking*, 115 Pa. 407, 8 Atl. 589, 2

Am. St. Rep. 562: 'But it is equally true, that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party, and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute.' Demurrer is sustained."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John D. Brown, for appellants. Thomas C. Lazear, Charles P. Orr, and Jesse T. Lazear, for appellees.

MITCHELL, J. The decree cannot be sustained on the ground upon which it was put by the court below. If the administrator has revoked the submission by the decedent in his agreement, that fact should be averred by answer. It does not appear on the face of the bill, and therefore cannot be set up by demurrer. And even if the administrator has revoked the submission, it does not follow that the court, under the prayer for general relief, may not go on to ascertain "the fair price or book value of the shares," so as to give effect to the option provided for in the agreement.

What the bill avers is that the administrator refuses to execute the agreement because he does not consider it legally binding. His objections are not tenable on demurrer. There is nothing illegal in the agreement on its face, as set out in the bill. Each subscribing stockholder acquired a preferred right, by way of option, to purchase the shares of the others if they died or withdrew from the business first. This was a mutual and sufficient consideration to make a binding contract. Whether equity will enforce it specifically will depend on the circumstances as they may be developed by the evidence. But the demurrer shows nothing in the bill inconsistent with the enforcement of the agreement upon the principles of *Goodwin Gas Stove & Meter Co.'s Appeal*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696, and *Northern Central Ry. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

Nor is the objection that the agreement is in restraint of alienation sufficient. Such agreements are quite common among partners as to their shares in the firm assets, and are enforced by courts without hesitation. No reason of overruling public policy is apparent why they should not also be sustained in relation to shares of stock in what is really only a private trading corporation.

But the objection to the jurisdiction of the court is well taken. The shares were the property of the decedent, and on his death passed, as part of his estate, to the administrator, who must account for them to the orphans' court. Even conceding his right to revoke the submission which the agreement of his decedent provided for, his action in do-

ing so must be justified before that court; and, on the other hand, the question of the complainant's equity to have specific performance of his agreement must go to the same tribunal. The dismissal of the bill was therefore proper, on the ground of the want of jurisdiction in the common pleas.

Decree affirmed.

ZEIGLER v. LICHTEN.

(Supreme Court of Pennsylvania. Feb. 9, 1903.)

LEASE—COVENANT NOT TO SUBLET—BREACH.

1. Plaintiff entered judgment by warrant of attorney in a lease on breach of covenant not to sublet, and the lessee, on a rule to open judgment, alleged a contemporaneous parol agreement that he might sublet. *Held*, that the burden of proof was on the lessee to establish the agreement.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary Helen Zeigler against Moses H. Lichten. Judgment for plaintiff. From an order discharging rule to open judgment, defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Julius C. Levi and David Mandel, Jr., for appellant. William Y. C. Anderson, William Jay Turner, and Richard C. Dale, for appellee.

PER CURIAM. Judgment was entered by warrant of attorney in a lease for breach of the covenant not to sublet. The breach was not denied, but appellant set up a contemporaneous parol agreement that he might sublet, and facts that carried notice to the lessor that a subletting was contemplated. The burden of proof was on appellant, and the court below found that there was no sufficient evidence to prove the alleged agreement, even if it could be shown without preliminary proof of fraud, accident or mistake. There is nothing in the case but a question of the sufficiency of evidence.

Judgment affirmed.

COMMONWEALTH v. PAYNE.

(Supreme Court of Pennsylvania. Feb. 9, 1903.)

CRIMINAL LAW—MURDER—TRIAL—EXCUSING JURORS—REPUTATION OF WITNESS.

1. That the court, on the trial of an indictment for murder, excused five of the jurors drawn, in advance of the call of the case, without the knowledge or the consent of the accused, is not error.

2. On a trial for murder, it is not error to call the jurors summoned as tales de circumstantibus one at a time.

3. On a trial for murder, defendant cannot show the general reputation of a witness for the commonwealth, though he also offers to show his bad reputation for truth and veracity.

Appeal from Court of Oyer and Terminer, Beaver County.

William M. Payne was convicted of murder, and appeals. *Affirmed.*

Prisoner's counsel excepted to the panel on the ground that five of the jurors drawn had been excused prior to the trial without the knowledge of the prisoner. The exception was noted on the record, and bill sealed.

The panel was exhausted after eight jurors had been obtained. The court thereupon directed the sheriff to call talesmen one at a time. The prisoner excepted, and a bill was sealed.

After Lulu Woods, a witness for the commonwealth, testified, a witness for the prisoner was asked as to her knowledge of the general reputation of Lulu Woods. The question was overruled, and bill sealed.

Counsel for the prisoner then made the following offer: "It is proposed first to ask the witness if she knows the general reputation of Lulu Woods, a witness who testified in this case, and this question, if answered in the affirmative, is to be followed by the question what it is; this to be followed by the next question, 'What is her reputation for truth and veracity?' this to be followed by another question, 'From your knowledge of her general reputation, would you believe her under oath?' The foregoing proposition is objected to as incompetent, irrelevant, and immaterial. That the defense have the right is granted, upon the part of the commonwealth, to ask the witness the general reputation of the witness Lulu Woods as to truth and veracity, if the witness knows. None other is competent. The Court: It would not be improper, while it would possibly be a vain thing and useless, to ask the witness if she knew Lulu Woods' general reputation, but it would be highly incompetent and improper to ask her, if she answered that in the affirmative, what it was, because that might relate to her chastity, to her reputation for truth and veracity, or to her honesty; and there is only one inquiry can be introduced in this case, and that is as to the truth and veracity of the witness Lulu Woods. For this reason the objection is sustained, and a bill of exceptions sealed to the prisoner."

Verdict of guilty of murder in the first degree, upon which judgment of sentence was passed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

J. F. Reed, for appellant. David K. Cooper, Dist. Atty., and John M. Buchanan, for the Commonwealth.

MITCHELL, J. The first assignment of error is to the action of the court below in excusing five of the panel of jurors drawn, and in doing so in advance of the call of the case for trial, without the knowledge or consent of the prisoner. The statute prescribes

a minimum panel of 48, and such a panel should be regularly drawn in accordance with law. But it is not required that the whole panel shall appear in court at the call of the case for trial. Such a requirement would frequently be impracticable. Some of the persons drawn may be dead or removed from the county, and their absence is not ground for challenge to the array. It is not a right of a prisoner to have 48 jurors in actual attendance. *Rolland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758; *Showers v. Com.*, 120 Pa. 573, 14 Atl. 401. So if the jurors drawn attend, but prove to be incompetent or incapable of service, from sickness or other cause, they may be excused; and the sufficiency of the cause is within the discretion of the judge, which is not reviewable. *Jewell v. Com.*, 22 Pa. 94; *Foust v. Com.*, 33 Pa. 338. Whether the juror be excused at the trial or beforehand is also within the sound discretion of the court, though in the latter case the action and the reasons for it should be stated in open court, so that the fact that the excuse was judicially passed upon and found to be sufficient should appear on the record. It would be an unreasonable hardship on a juror seriously ill to require him to be brought into court merely to be excused, and the reasons for disqualification or excuse are so numerous that they cannot be specified beforehand or reduced to any set rule, but must be left to the discretion of the judge to dispose of as they arise.

The next assignments of error are to the calling of the jurors summoned as tales de circumstantibus one at a time. This was within the discretion of the court. There is no right in a prisoner to have any particular man or men on the jury, or any particular set of men from whom to select. His right is only to have the proper number of jurors, "good men and true," as the common-law phrase was, to sit upon his case. The venire for talesmen always implies that less than a full panel are required (*Williams v. Com.*, 91 Pa. 498), and how many it will probably be necessary to summon in order to complete the jury depends so entirely on the circumstances of each case that the whole matter must be left to the determination of the judge at the time. It was said in the argument that the judge in this case departed from the usual practice in ordering or allowing the talesmen to be called singly. We do not know how this is. In general, it is desirable, especially in cases of serious crimes, to proceed in accordance with the settled course of precedents and practice. But the judge was within his legal right, and, even if he did not follow the usual course, it is to be conclusively presumed that he had good reasons for his action.

The remaining assignments are to the refusal to permit the prisoner's counsel to prove the general reputation of a witness for the commonwealth, even when coupled with an offer to follow it with proof as to the repu-

tation for truth and veracity. The offer was properly excluded. The only point relevant to the case was the truthfulness of the witness' testimony. This might be attacked by direct contradiction, or by showing a special animus or prejudice on the part of the witness against the prisoner, or by showing a bad reputation for truth and veracity in general. But this is the extent. A vicious practice had at one time a considerable hold in some states, and, to some extent, still has in modern England—under the pretense of "letting the jury know who the witness is," of allowing indiscriminate attacks upon the general character and private life of adverse witnesses. No doubt, there are cases where such knowledge might materially assist the jury in estimating the proper weight to be given to the testimony; but it was capable and usually productive of great abuse, by throwing into the jury box wholly irrelevant matter, merely intended to excite prejudice against the witness. In this case the true legal rule was properly enforced.

All the assignments of error are technical, and, having no legal merit, are overruled. Judgment affirmed, and record remitted to the court below for the purpose of execution.

In re MAGEE'S ESTATE.

Appeal of UNION TRUST CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILLS—CONSTRUCTION—PAYMENT OF TAXES.

1. Testator gave a certain sum to his executors, to be invested by them, and the income to be paid over to the legatees named, and directed that all taxes on bequests should be paid out of the estate, and not deducted from such bequests. *Held* to require present taxes, such as federal succession tax and state collateral inheritance tax, to be paid out of the estate, and not to require a sum over and above the amount of the legacy to be set apart to provide an income from which future state taxes should be paid.

Appeal from orphans' court, Allegheny county.

In the matter of the estate of Christopher L. Magee, deceased. From an order dismissing exceptions to adjudication, the Union Trust Company and William Addison Magee appeal. *Affirmed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. A. Magee and Charles A. Fagan, for appellants. William D. Evans and George C. Wilson, for appellee.

MITCHELL, J. The testator left various sums in trust for life, etc., as legacies, and further directed that "all taxes, federal and state, upon the bequests made and legacies created in my will, and the codicils thereto, shall be paid out of my estate, and not deducted from such bequests or legacies." The executors paid the federal succession tax

and the collateral inheritance tax upon the legacies involved in these appeals out of the corpus of the estate, and paid the amount of the legacies in full to the trustees for the proper parties; but the legatees demand that an additional sum be paid over or set apart to the trustees, sufficient to pay the state or other taxes accruing hereafter on the legacies as "money at interest."

The words of the will are, "I give and bequeath to my executor * * * the sum of fifty thousand dollars in trust that it do and shall invest the same, and pay over the income thereof to W. A. M.," etc.; and the theory of appellants' claim is that the corpus of the legacy is not the sum named in gross, but the income, and that the latter must therefore be protected from diminution by taxes during the whole period of the trust. But this is a very strained construction, not within the natural meaning of the words or any apparent intent of the testator. The thing given was the definite sum named. That was the legacy on which the taxes were to be paid out of the estate, and which was to be paid over in full without deduction. What the testator says about income is not by way of gift, but by way of direction to the trustee what to do with the gift. He did not give whatever money might be necessary to produce a definite income, free from deduction for taxes, but a definite sum, free from deductions at the time of payment, but necessarily contingent, as to income, upon the rate of interest obtainable, and the taxes that may or may not be imposed on the investment. These the testator could not anticipate with any certainty, and his will shows no intention to provide for.

Decree affirmed.

SHIELDS et al. v. McAULEY.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILL—CONSTRUCTION—NATURE OF ESTATE.

1. Testator devised to his married daughter certain real estate to be held and used by her, free from the control of her husband, and as her separate estate, with the further provision that her child, in case of her death, should have her share. *Held*, that she acquired a sole and separate use of the property without any power of disposition.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Bill by Helen D. Shields and Thomas L. Shields against James G. B. McAuley. From a decree dismissing the bill, plaintiffs appeal. *Affirmed*.

Helen D. Shields was a daughter of William Dickinson, a former resident of Massachusetts, who died there, having made his last will, by which he provided as follows: "Item 5th: All the rest and residue of my real estate or personal property I give and bequeath to said Mary W. Dickinson, Helen D.

Shields (to be held and used by her free from the control of her husband, and as her separate estate), Samuel F. Dickinson, and George Stewart Dickinson, each to have one fourth part thereof, share alike, and their children in the case of the death of either to have the share of the parent."

The following is the opinion of the court below:

"The bill is for specific performance of a contract for the exchange of land, and the cause was heard on bill and answer. The controversy between the parties arises from the interpretation of a clause in the will of William Dickinson, deceased, whereby he gave to Helen D. Shields, one of the complainants, and others, each a one-fourth interest of the lands in controversy, the gift being followed by the words, 'and their children, in the case of the death of either, to have the share of the parent.' The will also provides that the share of the complainant Helen D. Shields is 'to be held and used by her free from the control of her husband, and as her separate estate.' The contention of the defendant is that the deed of the complainant Helen D. Shields is not sufficient to convey a marketable title in fee simple in her one-fourth of the land, first, for the reason that the will creates a sole and separate use in her without giving her any power of disposing of her interest, and, further, that the provision that her children shall take in case of her death reduces her share to a life estate only. As to the first of these contentions we are clearly of the opinion that the interest of Mrs. Shields is held by her as a sole and separate use, and that she cannot dispose of the same by deed or otherwise. As to the second, we are equally clear that the will devised the land to her in fee simple; that her children can have no interest in the property, for the reason that the clause above stated in regard to the children having the property in case of her death refers to the contingency of her death before the death of the testator himself. It is the uniform rule in this state, for which it is not necessary to cite authority, that a clause in a will directing what shall be done with the property in case the devisee shall die without children, or die without issue, or other such contingency, in the absence of anything in the will to indicate the contrary, is always deemed to refer to a death without children or without issue before the death of the testator. In that case the words may be fairly capable of two interpretations—either referring them to the death of the testator before that of the devisee or to the death of the devisee without leaving children; and it would be possible for neither of these contingencies to happen. In the present case the contingency is not the death of the devisee before that of the testator. There is no contingency at all, as the devisee is sure to die at some time, and the words would, there-

fore, be practically without meaning. For the reason first assigned, however, the bill must be dismissed. Let a decree be drawn dismissing the bill at the cost of the plaintiff."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. S. Ferguson and E. G. Ferguson, for appellants. R. T. M. McCready, for appellee.

PER CURIAM. Judgment affirmed on the opinion of the court below.

In re RUCHIZKY'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 9, 1903.)

ADMINISTRATION—CLAIM OF HEIR—BURDEN OF PROOF.

1. Where a child of a decedent claimed certain real and personal property by descent as against her mother, who was averred to be the real owner under a resulting trust, the burden of proof was on the claimant.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Joseph Ruchizky. From a decree overruling exceptions to the adjudication, Laura Ruchizky appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT and POTTER, JJ.

George R. Jefferson, for appellant. J. Louis Brettinger, for appellee.

PER CURIAM. Certain real and personal property, the title and possession of which were in the decedent at the time of his death, was claimed by the appellant, one of his children, as hers by descent from her mother, who was averred to be the real owner under a resulting trust. The burden of proof was upon the claimant, and the court below found that the evidence totally failed to sustain it. There is nothing in the case but a question of fact, which does not justify further discussion.

Decree affirmed, with costs.

In re BYERS' ESTATE.

Appeal of DELAWARE WATER CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INDEMNITY—RELEASE OF SURETY—LACHES.

1. A corporation had a contract to build waterworks for a town, and the contractors therefor gave a bond to the corporation, conditioned for the faithful performance of the contract, which contract contained a clause indemnifying the town from liability for injuries to persons and property by the negligence of the corporation. A child was injured during the work, and nine years thereafter the town was sued. Seven months after the action was brought, and two days before trial, the company served

a notice on the administrator of one of its sureties as to the pendency of the action. The attorney for the administrator went to the court and found the case on trial, but did not participate in it, and judgment was rendered against the corporation, which conceded its liability. *Held* that, because of the delay in the notice, the surety was released.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of E. M. Byers, deceased. From a decree dismissing exceptions to the adjudication, the Delaware Water Company appeals. **Affirmed.**

The following is the opinion of the lower court:

"The Delaware Company, a New Jersey corporation doing business in this state, has presented a claim against this estate for \$4,654.79, with interest from June 11, 1901; being the amount of a judgment recovered against it in the common pleas court of Westmoreland county, by James C. Fisher, for use of the Dennison Water & Supply Company of Ohio. The latter company, by written contract made on March 6, 1888, with the village of Urichsville, state of Ohio, agreed to construct waterworks, lay water mains, and furnish the residents of the village with water, and also covenanted to be liable for all damages 'by failure to guard persons and property from injury, when occasioned by the negligence,' of the company, and to hold the village harmless therefor, and pay any sum that might be recovered against it. The Dennison Water & Supply Company on May 2, 1888, entered into a written contract with the Delaware Company, by which the latter agreed, for itself and successors, to construct the system of waterworks in Urichsville in accordance with the conditions prescribed in the contract between the Dennison Water & Supply Company and the village of Urichsville.

"On May 16, 1888, the Delaware Company entered into a written contract with McCormick & Moran, in which they agreed to construct the system of waterworks in Urichsville in accordance with the contract between it and the Dennison Water & Supply Company. On June 16, 1888, McCormick & Moran, with Walter J. Kelly and E. M. Byers, this decedent, as sureties, executed a bond to the Delaware Company in the sum of \$25,000 for the faithful performance of their contract. McCormick & Moran constructed the waterworks, laid the water mains, and finished their contract in March, 1889, when they were paid the contract price. On September 14, 1897, James G. Fisher, an infant, by his next friend, brought an action for damages in the common pleas court of Tuscarawas county, Ohio, against the village of Urichsville, alleging that he had been injured on August 29, 1888, by falling into a trench in Deersville avenue in said village. Thereupon the defendant filed a petition averring that, if the plaintiff sustained the injury, the trench was excavated by McCormick & Mo-

ran in constructing the system of waterworks; that the Dennison Water Company had covenanted to indemnify the village from all damages arising from the construction; and praying that the company be made a party defendant; and it, being duly summoned, was made a party to the action. It then, by letter of November 10, 1897, to McCormick & Moran, the receipt of which was acknowledged by Moran by letter dated November 19, 1897, gave them notice of the action, and requested them to be present and defend it.

"On May 6, 1898, the secretary of the Delaware Company served a notice from the company on the administrator of this estate, reciting the contracts and bond, the pendency of the action, which concluded as follows: 'You can appear and make such defense or have such defense made as you may determine will best protect you on account of your liability under said contract and bond.' On receipt of this notice the administrator, whose counsel was absent from the city, sent Mr. Shannon, another attorney, to New Philadelphia, Ohio, 'to see what the case was about.' When he arrived there, on May 11 or 12, 1898, the cause was on trial. He was requested to take part in the trial, but declined because 'he had no authority to take part in the case.' On May 14, 1898, a verdict was rendered against the village of Urichsville in the sum of \$3,300, and in favor of it on its cross-petition against the Dennison Water & Supply Company in a like sum. It, having paid this judgment, brought an action upon it in the common pleas court of Westmoreland county on March 21, 1901, in the name of James C. Fisher, for its use, against the Delaware Company, and entered judgment in default of an appearance and affidavit of defense for \$4,654.79, which the defendant company paid. The only notice the administrator of this estate had of the pendency of this action was contained in a petition filed in this court by the Delaware Company on March 22, 1901; averring, *inter alia*, that the suit had been brought, that it had no defense thereto, that it would have a claim against this estate for the amount recovered, and praying for a suspension of distribution of sufficient assets of this estate to satisfy its claim.

"The Delaware Company offered no evidence, other than the record of the judgment of the common pleas court of Tuscarawas county, Ohio, to show that the injuries for which the plaintiff there recovered resulted from the negligence of McCormick & Moran in laying the water mains in the village of Urichsville. The record of this judgment, as between the parties and privies thereto, is, as said by Judge Orlady in *Fowler v. Borough of Jersey Shore*, 17 Pa. Super. Ct. 366, 'conclusive evidence of the existence of the defect in the highway, the injury to the individual, and of the amount of the damages.' It is only, however, conclusive as to the liability of the defendants therein, as a party

brought in by notice 'would not be stopped from showing in the second trial * * * that the accident did not result through his neglect of duty.' *Fowler v. Borough of Jersey Shore*, supra. To make the administrator of this estate privy to the action, it was necessary that notice should be given to him of the pendency of the action, requiring him to appear and defend it. *Giltinan v. Strong*, 84 Pa. 242; *Brandt on Suretyship*, § 524. And notice to McCormick & Moran, the principals on the bond, would not be sufficient, as the record of judgment against a principal is not evidence to establish the debt against the surety in case of an unliquidated demand. *Hostetter v. City of Pittsburgh*, 107 Pa. 419. The notice to the administrator here we think sufficient in substance, but, to be effective, it must be given within a reasonable time. *Rawle on Covenants for Title*, 231, note 1, and cases cited. The purpose of the notice is to give the party notified sufficient time to investigate the case and prepare for the trial. This purpose is not consummated if the notice, as here, be not given until seven months after the action is brought, and a few days before the cause is tried. The claim was a very stale one—the cause of action having arisen nine years prior to the bringing of the suit; more time was necessary to investigate it than if it had been of recent origin; and it was the duty of the defendants to give persons, not parties to the record, of whom indemnity would be demanded, prompt notice, so that they would have ample opportunity for investigation and preparation for defense. The neglect to give this notice is not remedied by the fact that Mr. Shannon, at the instance of the administrator, went to the county seat to investigate the case. It was then on trial. He had no time for preparation, and, even if he had been authorized to appear for the administrator and participate in the trial, he would have been justified in refusing to do so. The administrator not being a party to the record, his attorney had no standing to apply for a continuance, as has been suggested Mr. Shannon should have done; and, if a continuance were desired, such application should have been made by the defendants' attorney. We think, then, the record of this judgment is not competent evidence here; nor is the record of the judgment of the common pleas court of Westmoreland county, upon which it is founded. An additional reason for excluding it is that no notice or opportunity was given to the parties to the bond to defend. In the petition filed in this court, and in the proceedings in the Westmoreland county court, the Delaware Company conceded its liability, but that concession would not affect the parties to the bond.

"The view taken of this case makes it unnecessary to consider the objections to the admission of the different contracts in evidence—it being claimed that their execution

was not properly proven—and the question raised as to whether or not the sureties on the bond of McCormick & Moran would be liable for damages arising from their negligence in laying the water mains.

"There being no competent evidence to sustain the claim of the Delaware Company, it must be disallowed."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. McF. Carpenter, Paul H. Gaither, and Cyrus E. Woods, for appellant. J. S. Ferguson, E. G. Ferguson, D. T. Watson, Johns McCleave, S. S. Mehard, R. A. Balph, and J. Balph, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

KRUEGER v. NICOLA.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

PAROL EVIDENCE—WRITTEN CONTRACT—ACTION FOR BREACH.

1. In an action to reform a written contract parol evidence is inadmissible, unless the declaration specially sets forth the omission to have been caused through fraud, accident, or mistake, and also in what such fraud or accident consisted.

2. Where plaintiff sued to recover damages for breach of a written contract for the exchange of land, and plaintiff, in replication to the affidavit of defense, set up an oral agreement before the execution of the written agreement, and nowhere averred that such agreement was omitted by fraud, accident, or mistake from the written agreement, plaintiff cannot offer evidence as to the alleged oral agreement.

Appeal from Court of Common Pleas, Allegheny County.

Action by Oscar E. Krueger against Frank F. Nicola. Judgment for plaintiff, and defendant appeals. Reversed.

On July 11, 1900, plaintiff and defendant entered into an agreement for the exchange of land. This agreement was not carried out, and plaintiff sued for the breach. The defendant filed an affidavit of defense, in which he averred that plaintiff did not own certain of the lands which he agreed to convey, but that the same were held by a third party, with whom there existed an oral agreement that plaintiff should have a conveyance of the land upon the payment of \$10,000. The defendant alleged that he was at all times willing to comply with his contract until he discovered that plaintiff made it absolutely impossible for the contract to be carried out. To meet the averments of the affidavit of defense, the plaintiff filed a replication, setting up an alleged contemporaneous parol agreement to the effect that defendant had agreed to raise the \$10,000 to pay for the land plaintiff was to get from the third party, defendant taking a mortgage for it on the land that defendant himself was to convey. It was not averred, either in

the statement of claim or in the replication, that the alleged parol agreement was omitted from the written agreement by fraud, accident, or mistake.

The court charged in part as follows: "I desire here to refer to what seems to me to be the most important part for your consideration. The agreement, as it is written, provides for the exchange of the properties upon the terms which have been detailed to you at great length. It is supposed, when parties enter into a written agreement, that it contains the whole of their agreement or understanding at the time, and all the negotiations or talk prior to the time of the actual execution of the agreement are merged in this agreement. But in this case it is alleged on the part of the plaintiff that there was a very important matter not included in this agreement, but clearly understood between them at the time, and that it was to be a part of the agreement, and that that additional agreement between them was part of the inducement or consideration which the plaintiff had for the signing or execution of the contract. The oral agreement or understanding between them outside of the written agreement was, as the plaintiff alleges, a covenant or agreement on the part of Nicola to furnish \$10,000 in cash, to be raised by mortgage or mortgages upon these Greenfield avenue lots, which were to be conveyed to the plaintiff. The plaintiff alleges that that was the distinct understanding at the time, and that, if it had not been so understood, he would not have entered into this agreement at all. He alleges that it was not included in the written agreement for the reason that the article of agreement was signed late in the evening of July 11th, and when they had not time, as was said, to incorporate that in it. They were about to adjourn. The remark was made, as the plaintiff alleges, by the defendant, Nicola, that it was well understood, and that it would be carried out, although not in the agreement, as explicitly as if it had been incorporated in the agreement. According to the plaintiff's allegation, they separated with that understanding that this raising of the \$10,000 by the defendant, Nicola, was as much a part of the agreement between them as if incorporated in the papers. The plaintiff, alleging that there was this additional agreement, which, in point of fact, varies the terms of the original agreement, the burden is upon him to satisfy you that this additional oral agreement was made. It is not only his duty to satisfy you from the weight of the testimony, but the burden is upon him to satisfy you that this oral agreement was made, which is not mentioned in the written agreement. He must satisfy you by proof that is clear, precise, and indubitable. Unless he has so satisfied you by the testimony, that is the end of this case, and your verdict must be for the defendant. This is the first and most important question

for your consideration. If the plaintiff has failed to satisfy you from the weight of the testimony, the burden being upon him, then his case falls; or if he fails to satisfy you by evidence or proof that is clear, precise, and indubitable, his case falls, and your verdict must be for the defendant."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. B. Rodgers, William M. Hall, Jr., and W. B. Adair, for appellant. D. F. Patterson and J. M. Stoner, for appellee.

BROWN, J. The agreement on which the appellant brought this suit was for the sale, or rather exchange, of real estate. He alleged in the statement of his cause of action his readiness and willingness to comply with the terms of the written contract, and claimed damages from the defendant for the latter's failure to perform them. An affidavit of defense was filed, in which the defendant averred his willingness to comply with the contract, and alleged the inability of the plaintiff to do so on account of obstacles that were set out in detail. A replication was then filed, in which the plaintiff, in answer to the averment in the affidavit of defense that he owed \$10,000 upon the property which he was to convey to the defendant, set up an alleged oral agreement entered into by the defendant before and at the time the written one was executed, by the terms of which the defendant had agreed to raise for the plaintiff the said sum of \$10,000 to enable him to pay off what was substantially a mortgage upon the premises. With the pleadings in this shape, the case came to trial, and, under objection by the defendant, the plaintiff was allowed to prove the oral cotemporaneous agreement set out in his replication.

Without proof of the kind required by the law in a case like this that Nicola had made the oral agreement to raise the \$10,000 for Krueger, it is clear the plaintiff had no cause of action against the defendant, and the jury were so instructed by the learned trial judge. It is equally clear that his statement, containing no averment of such an agreement, and its omission from the written one by fraud, accident, or mistake, was insufficient to support the action, and a judgment on it could not be sustained. To contradict or vary the terms of a written contract by an oral cotemporaneous agreement between the parties, there must be allegation as well as proof, not only of it, but of its omission through fraud, accident, or mistake from the writing. This has been ruled so frequently that reference is hardly needed to one or two of the many authorities on the subject.

In *Wodock v. Robinson*, 148 Pa. 503, 24 Atl. 73, the plaintiff's statement set forth a written lease, in which the lessee, her husband, covenanted to keep the premises in good order and repair during the term, but

there was an allegation of an oral agreement on the part of the lessor, at the time of the execution of the lease; that he would repair and maintain the property in good and safe condition. A demurrer was filed on the ground that the alleged oral agreement was contradictory of the terms of the lease, and inadmissible in contradiction of it, in the absence of any allegation of fraud, accident, or mistake. The demurrer was sustained, and in affirming the judgment we adopted as our own the following language from the opinion of the learned judge below: "It is nowhere alleged in the statement that the lessee was induced to sign the lease by any fraud, or that there was any accident or mistake in the drawing up of the instrument or in the insertion of the covenant by which the lessee bound himself for the repairs necessary to keep the premises in good order and condition. There is only the bald statement that the defendant, when the lease was executed, promised, through her agent, that she would repair. The alleged promise is therefore in flat contradiction of the terms of the instrument signed and sealed by the parties, and, in the absence of a distinct averment in the plaintiff's statement of fraud, accident, or mistake, could not be proved at the trial, for it is as true now as it ever was, and is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws, that all negotiations, all conversations, all oral promises, all verbal agreements, are forever merged in, superseded and extinguished by, the sealed instrument which is the final outcome and result of the bargaining of the parties. Unless you aver fraud or mistake, you can no more incorporate in it what does not there appear than you can make and seal a new bond for the parties without their consent. You can no more blot out a word which it contains than you can tear off the signatures and seals of the parties. 'Manent literæ scriptæ' is still the rule. The written instrument shall stand as the sole exponent of the minds of the parties."

Hunter v. McHose, 100 Pa. 38, was a case in which the plaintiffs offered to prove on the trial, just as here, an oral agreement on the part of the defendant which had not been incorporated in the written one, but was alleged to have been the inducement to them to sign it. There was no averment that it had been omitted by fraud or mistake, and the evidence offered was excluded. In sustaining this ruling, we said: "Had the declaration in this case contained the same averments as in *Gower v. Sterner*, 2 Whart. 75, namely, that the cotemporaneous parol agreement offered to be proved was intended by the parties to have been inserted in the covenant, but was omitted therefrom by the mistake of the scrivener, there would have been ground for holding that the offer of evidence rejected should have been admitted. Such an averment, if proved, would have justified a reformation of the instrument.

What a chancellor would decree to be done, the courts of this state consider as actually done. Covenant then would be the proper action upon the instrument as reformed. The plaintiffs, however, contented themselves with declaring on the instrument as they alleged was agreed, without an averment either of fraud or mistake. This did not meet the exigency of the rule, which requires that the defendant should have distinct notice of the ground upon which the proposed reformation is asked, that he might come prepared to meet it. * * * Parol evidence is inadmissible to reform a written contract according to the intention of the parties, unless the declaration specially sets forth the fraud as a ground for such reformation. The same rule applies, of course, to the case of a mistake." The rule that the allegata and probata must agree in a case like this is not a mere technical one. *Rogers, J., in Clark v. Partridge*, 2 Pa. 13.

Assuming, on the authority of *Mahon v. Gormley*, 24 Pa. 80, and *Murray et al. v. Keyes et ux.*, 35 Pa. 384, that a material defect in a narr. may be cured by a replication, to be regarded as an amendment to it (though the much better practice is to formally amend the narr. itself), such replication, it need hardly be said, must be as full as the amendment for which it is substituted. The replication here contains simply an averment of the cotemporaneous parol agreement, with no allegation of its omission from the written one by mistake. As a support to the defective narr., this replication was without strength, and useless. Under the pleadings, the testimony as to the oral agreement, promptly objected to on the ground that there was no allegation in the pleadings that it had been omitted from the written contract by fraud, accident, or mistake, should have been excluded.

At present it is not necessary that we consider other questions raised on this appeal, for in sustaining the first assignment of error we reverse the judgment without awarding a new trial.

Judgment reversed.

MILLER v. McKEESPORT CONNECTING R. CO.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

INJURY TO EMPLOYE—FELLOW SERVANT.

1. In an action by a brakeman injured while operating a switch by the rear car of a freight train jumping the track, it appeared that the cars were coupled with links instead of bars, causing the accident; that the trainmen had used them negligently, when there were many bars in the yard that could have been used. *Held*, that the injury was caused by the negligence of fellow servants.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Action by Jacob W. Miller against the

McKeesport Connecting Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff was injured while employed as a brakeman. At the time of the accident he was operating a switch near a curve, and as a train passed the rear car jumped the track and struck and injured plaintiff. It appeared that the accident was caused by the trainmen using links instead of bars to couple cars. The evidence showed that there were plenty of bars in the yard not in use. Verdict for plaintiff for \$4,066.

The following is the opinion of the trial court:

"There was a verdict for the plaintiff for damages for personal injuries, subject to the question of law reserved whether there was any evidence entitling the plaintiff to recover. There is evidence to go to the jury to the effect that the plaintiff's injury was caused by the failure to use a connecting bar instead of a link in coupling the cars, one of which left the track and struck the plaintiff. There is also evidence that these bars were not furnished by the company in such quantities as to be convenient, and to be found at all times by the trainmen without a considerable search, and complaints were made of this to the superintendent of the defendant company. The method of furnishing them was to distribute them on the ground along the tracks at various points, and to keep the surplus in a box at the stock house. They were made on the premises by blacksmiths at two different shops, a mile or so apart. The evidence of the plaintiff also shows that there were some 30 or more of them in the yard somewhere at the time of the accident. Only a few were needed at any one time, as they were only used on sharp curves in two or more places in the yards. It was usual, if none could be found elsewhere, to take them from the cars which were standing in the yards, upon which they had been previously used, although this involved considerable trouble.

"The testimony of the brakeman of the train, the car of which caused the damage, is that he thought coupling bars ought to be used in coupling the train to go on that particular curve; that he hunted for one on the ground along the tracks and at the stock house, and looked about the blacksmith shop, and, not finding any, he and the remainder of the crew proceeded to couple the cars with ordinary links, and to run them back and forth over the curve.

"The controlling question seems to be whether the cause of the injury was a failure on the part of the defendant to furnish connecting bars, or the negligence of the crew of the train by which the plaintiff was hurt in not finding some of the bars, which the plaintiff's evidence shows were in the yard, and using them in making up the train. As the bars were not fixed appliances, but in the nature of portable tools, and such as the em-

ployés of the company were expected to hunt for in the yard and along the tracks, and as there were in the yard several times as many as were needed, and there is no evidence that they were in use, it seems to us that it was the duty of plaintiff's co-employés, who made up the train and operated it, to hunt for the bars until they found them, and then to use them, and that to attempt to run the cars without them, and thus expose the defendant's property and the lives of themselves and their co-employés to great danger, was negligence; if so, the plaintiff was injured by the negligence of his co-employé, and cannot recover. It is ordered that judgment be entered for the defendant non obstante veredicto."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

T. C. Jones, John F. Calhoun, and George A. Johnston, for appellant. W. B. Rodgers, for appellee.

PER CURIAM. Judgment affirmed on the opinion of the court below on the point reserved.

WALL v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NEGLIGENCE.

1. Where a roadway within the limits of a city is a regularly laid out street, and has been so for several years, the city must maintain it in a reasonably safe condition, though it is on a hillside near the outskirts.

2. In an action to recover damages for personal injuries by an alleged defect in a street crossing, evidence held sufficient to take the question of the negligence of the city to the jury, so that an order directing a nonsuit was error.

Appeal from Court of Common Pleas, Allegheny County; Brown, Judge.

Action by Mary Wall against the city of Pittsburgh. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward J. McKenna and Charles F. McKenna, for appellant. W. A. Blakeley and T. D. Carnahan, for appellee.

DEAN, J. Mary Wall, the plaintiff, lived on the south side of Primrose street, in the city of Pittsburgh. On the north side of the street there is a board footwalk running the length of the street. There is no walk in front of plaintiff's residence. The street is higher than the board walk. There is a dirt crossing or path leading from almost in front of plaintiff's residence to the board walk on the north side of Primrose street. The street being almost three feet higher than the walk, there was a rather abrupt descent from the end of the crossing to the walk. On the evening of November 24, 1900,

after dark, the plaintiff left her home, and took the crossing from the south side to reach this board walk on the other side. In going down the descent, just after she had made a step or two, she fell into a hole, and broke her leg, bruised her thigh, and sustained other injuries which disabled her for several months. The hole into which she fell was just at the side of the descent from the street to the board footwalk, was about 2½ feet deep, and of about the same diameter. It had been there since the May previous, and was plainly observable in daylight. It was where a lamppost formerly stood, but the post had been removed, leaving the hole unfilled. The street was dimly lighted by gasoline lamps, but the hole was not visible in the nighttime, although plainly so by day. The plaintiff, every day for months, had taken the same route across the street, and then on the board walk to and from her work at a glass factory. She testifies she had never seen this hole.

The learned trial judge in the court below was of opinion negligence on the part of the city was not shown, and that plaintiff's own testimony disclosed contributory negligence on her part, and directed a nonsuit, which afterwards, on motion, he refused to take off, and we have this appeal by plaintiff.

On the question of the city's negligence the court seems to have ruled the case on the authority of *Monongahela City v. Fischer*, 111 Pa. 9, 2 Atl. 87, 56 Am. Rep. 241, and, if the facts in this case were at all the same, his ruling would be correct. That was a case, however, of an ordinary country road on the extreme outskirts of, although within, the city limits. It was ruled that: "In closely built-up portions of the city, it is the duty of the authorities to keep the entire street in a safe condition, but this is not the rule as regards country roads within the territorial limits of the city. It is sufficient if a portion of the width of the road is kept in smooth condition, and safe and convenient for travel." There is no doubt that, if a roadway be within the city limits, and still be kept in all respects a country road, the duty of the city with regard to it is greatly relaxed. Nor is a municipality usually bound to lay out, open, and construct streets until they are necessary for the accommodation of the public. But Primrose street was not an ordinary public road, as in *Monongahela v. Fischer*, supra. It was a regularly laid out street at the time of the accident, on the city plan, and had been so laid out for several years. True, it was on a hillside, and perhaps incapable of such compact settlement fronting it as some other city streets, yet it had an established width—40 feet; was lighted, although poorly, by street lamps; had a board footwalk on the north side. Perhaps, under the rulings, the duty of the city under the circumstances was not so rigid as imposed on it with reference to the closely built-up parts, but rela-

tively it was the same. What was its duty as to this street, not closely built up, having, therefore, a small population on a hillside near the outskirts of the city territory? Clearly, to maintain the street and sidewalk in a reasonably safe condition for public travel, under such circumstances, by night and by day. It had but one sidewalk—that on the north side of the street. The street was very slanting, and that one was probably sufficient for the somewhat thinly scattered inhabitants. There was no walk on the south side, and it invited no one to walk there. But it did profess to keep a reasonably safe walk on the north side. This was an invitation to the public to use it. Whether the city was negligent was, therefore, a question for the jury under the evidence, and not for the court.

The next question is, did plaintiff's evidence clearly disclose a case of contributory negligence? We think that was also a question for the jury. The night was dark. The street was muddy. The usual and apparently safe method was to cross at the crossing from her side of the street, where there was no footway, to the board walk on the other. As she descended the narrow path down the declivity from the street to the board walk, she fell into this hole, which was close to the path. The natural human instinct of an adult is to avoid peril to life and limb by exercising due care; hence the presumption of law is against negligence—a presumption which is only overcome by proof. True, the proof may be disclosed by plaintiff's own evidence, still we do not see such proof of it here as warrants a court as matter of law in declaring her guilty of contributory negligence. She testifies she did not know the hole was there. But suppose she did, she took the ordinary and only known narrow path to reach the board walk. Due care did not absolutely require she should see it on a dark night in her attempt to reach the board walk from the street. In the exercise of the greatest care she might have stepped into it. True, as argued by the court below and appellee here, she might have heedlessly rushed down a 3½ foot wide walk not looking where she placed her feet, and, if so, she was negligent; but that was a fact for the jury.

The judgment is reversed, and a *procedendo* awarded.

SMITH v. McCANN.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

REAL ESTATE AGENT—AUTHORITY.

1. A broker who has an exclusive right for 60 days to sell, at a fixed price, certain real estate, cannot bind his principal by a contract in which the time for completion of the purchase and the payment of the price is extended 30 days after the expiration of the 60 days.

Appeal from Court of Common Pleas, Allegheny County; Shafer, Judge.

Bill by A. G. Smith against David S. McCann, executor of Thomas N. Lea. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of the trial court:

"The bill is for specific performance of a contract to sell land. It is alleged that the defendant, as executor, had power to sell at private sale all of testator's real estate. That he signed, as executor, a writing by which he gave to one E. P. Kearns the exclusive right or privilege to sell, or offer to sell, at \$150 an acre, for 60 days all those 43.86 acres, more or less, belonging to the estate of Thomas N. Lea, in Scott township, Allegheny county; in case of sale, compensation to be 2½ per cent. That on the last of the 60 days Kearns made an agreement of sale, as agent for D. S. McCann, whereby he agreed to sell to Smith a certain tract of land in Scott township, which he describes by metes and bounds, containing 43.86 acres, for \$6,579, of which \$100 was paid to Kearns, and the balance on January 18, 1902, or sooner, at the option of the plaintiff.

"To this bill the defendant has demurred for several reasons, the chief of which is that the paper signed by McCann did not authorize Kearns to make a contract of sale with any one in McCann's name as executor, but was only an employment as a broker to effect a sale. This seems to be a true interpretation of the paper. Besides, even if the paper did authorize Kearns to enter into a contract of sale with plaintiff, it did not authorize the contract made by which the payment of the purchase money is postponed for 30 days beyond the time limited in the alleged power of sale.

"There is another reason, moreover, not assigned as ground of demurrer, which we think is equally fatal to the plaintiff—claim for relief—and that is, that the alleged power of sale, which must be relied on to take the case out of the statute of frauds, does not contain a sufficient description, or any description, of the land. It calls for 43.86 acres belonging to Thomas N. Lea's estate, in a certain township. There is nothing whatever to identify the land. The description is good enough, no doubt, for a contract of employment as a broker, which does not need to be in writing, but not sufficient in a contract to convey.

"The demurrer is therefore sustained, and the bill dismissed at the plaintiff's costs."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

E. L. Kearns, for appellant. Harry J. Nesbitt, J. J. Miller, and John L. Prestley, for appellee.

POTTER, J. This is a bill filed to enforce specific performance of a contract to sell real estate. On October 19, 1901, the defendant, as executor, gave in writing to one E.

P. Kearns an exclusive right, for and during the ensuing 60 days, to sell or offer for sale, at a fixed price, certain property belonging to the estate of Thomas N. Lea. In case of sale, a commission was to be allowed.

Mr. Kearns did not complete the sale within the time limited by the definite terms of his written authority, but on the day before the expiration of the period he undertook to make, on behalf of his principal, a contract of sale with the plaintiff in this case, in which the time for the completion of the purchase, and the payment of the purchase money, was extended for an additional 30 days.

We see nothing in the terms of the agent's employment which would justify the conclusion that the agreement made by Mr. Kearns with the plaintiff constituted a valid contract with the defendant. The employment of Mr. Kearns was only as a real estate broker, and it was not within the scope of his authority as such to bind his principal by an agreement, the terms of which were not authorized by him, and which was never brought to his notice or accepted by him. It follows that the contract, which is the foundation of this bill, was never authorized by the defendant. What he did do was to authorize Mr. Kearns to make a sale within the ensuing 60 days. The power to sell for a specific sum, unless otherwise stated, means a cash sale, and a sale is not completed until the purchase money is paid. If the agent had power to go beyond the terms of his written authority, and as in this case extend the authorized time limit for an additional 30 days, he would have power to extend it for an indefinite period.

There being no basis upon which the bill can be maintained, other points suggested in the argument need not be considered. The court below was entirely correct in sustaining the demurrer and in dismissing the bill.

The assignments of error are overruled, and the decree is affirmed.

SIMPSON v. REED.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

1. Testator devised to his unmarried daughter certain real estate for life only, remainder after her death "to her child or children in fee, but, if my said daughter at the time of my decease has neither husband, child, nor children," she may dispose of her share as she sees proper. There was a further provision that if any devisee refused to take his devise it should revert back to the estate, and be divided among his other "said heirs equally." *Held*, that the daughter took an estate in fee tail general, which under the act of April 27, 1855 (P. L. 1855, p. 368), resolved into a fee simple.

Appeal from Court of Common Pleas, Allegheny County.

Action by Martha Bell Simpson against

J. A. Reed. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. A. Balph and James Balph, for appellant. O. P. Robertson, for appellee.

DEAN, J. This is a case stated for the interpretation of the will of T. P. Simpson, late of Pittsburg, deceased. The will is dated in March, 1899. Clause 4 of it is susceptible of two distinct constructions, as to the exact estate taken under it by the devisee, this appellant. It is as follows: "Item 4. I give, devise and bequeath to my daughter, Martha Bell Simpson, the equal, undivided one-fifth part or share of all my real estate for life only, remainder after her death to her child or children in fee, but if my said daughter at the time of her decease has neither husband, child, or children she may also dispose of her said part or share of said real estate as she sees proper."

The court below was of opinion that appellant took but a life estate under this clause, and rendered judgment for defendant. Does the rule in Shelley's Case control the intention? We restate it: "When an ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, always in such cases 'heirs' are words of limitation of the estate, and not words of purchase." Although a cardinal rule in the interpretation of wills is to ascertain and then adopt the intention of testator, yet if the devise for consideration comes under the operation of Shelley's rule the words must be taken as they stand, in their strict legal signification. The question is not whether the testator intended the rule should not operate, for that is not subject to his power, but whether he used words synonymous with heirs of the body. The rule perhaps in every instance subverts an intent. It controls the interpretation of devises and grants by deed, and as said by Gibson, C. J., in *Hileman v. Bouslaugh*, 13 Pa. 344, 53 Am. Dec. 474, "is proof even against an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistency with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession than he is competent to create a perpetuity or a new canon of descent. * * * It has always been recognized by this court as a rule of property." Also see a concise and axiomatic discussion of the subject by Justice Mitchell in the very late case of *Shapely v. Diehl*, 203 Pa. 566, 53 Atl. 374.

While Shelley's rule, as a rule of interpretation, is still in existence in this state—for we have no statute abolishing it, as in New York and some of the other states—yet its original results, as a rule of property, by our statutes authorizing deeds barring estate's tail, and especially since the act of April 27, 1855 (P. L. 1855, p. 368), declaring that an estate in fee tail shall be construed as a fee simple, do not follow; practically an estate in fee tail under the rule no longer controls or determines the descent. This estate, instead of a life estate in the first taker and a fee tail because of the limitation to the lineal descendants of the first taker, is a fee simple in the daughter, the first donee.

Did the testator here use the words "child" or "children" in the sense of heirs of the body or issue? Prima facie they are words of purchase, and not of limitation, and the devisee took but a life estate (*Guthrie's Appeal*, 37 Pa. 9, and the many cases therein cited). But is the remainder to go to the general or lineal heirs of the first taker, as the law determines? Of course the estate of the first taker must be a freehold estate for life or for years. It is then to go to her child or children in fee, the lineal heirs of the first taker whom the law identifies. "Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate for life of the first taker to an estate in fee or estate tail by implication." This rule was, in the language quoted, first restated by Judge Oswald Thompson in the *Orphans' Court of Philadelphia* (Potts' Appeal, 30 Pa. 168), and was affirmed in a per curiam opinion by this court. It was followed and approved in many subsequent cases. A long list of those in which the words "child" and "children" have been held to be words of limitation, by analogy to the rule in Shelley's Case, is given by Agnew, J., in *Yarnall's Appeal*, 70 Pa. 335. Among them is *Haldeman v. Haldeman*, 40 Pa. 29, in which the words "child" and "children" are used by the testator in a devise almost identical in terms with the one before us. "The word 'child,' since the daughter had no child at the time, was not a designatio personæ, but comprehended a class, and the daughter took an estate tail." *Jones v. Davies*, 4 Barn. & Adolph. 43.

Then, in the twelfth clause of the will, he directs that if any of the devisees refuse to take their devises it shall revert back to his estate, and be divided among his other "said heirs equally," indicating that he uses the words "heirs" and "children" interchangeably. It is plain by the will that the testator restricts the estate to the lineal descendants or heirs of his daughter, the first taker.

In *McKee v. McKinley*, 33 Pa. 92, the devise was: "To my daughter Caroline for

her sole and separate use during her lifetime. * * * After her death to her children, if any surviving, or issue of such children; and, in case of no children or issue of children, then to return to my relations or lawful heirs." It was held that the devise was to the daughter for life, and then to her children in fee, and in default of these to testator's heirs; that this was only another way of devising to the plaintiff for life, with the remainder to her heirs or to the plaintiff and her heirs; that the roundabout way the testator takes to say "heirs" does not affect the substance.

It appears that at the date of the will the daughter was single, and did not contemplate marriage. She having no children, and no particular ones being in the mind of testator—for he could not know what children or how many would be the issue—we think he intended the "issue" to take in lineal descent. Therefore the daughter took an estate in fee tail general, which the statute of 1835 resolves into a fee simple.

We concede that the case is a close one, and we are not indifferent to the able argument of the learned counsel for appellee or the authorities cited by him, tending to show that the words "child" and "children" are generally words of purchase and not of limitation, but we cannot divest ourselves of the conviction that as used by testator in the fourth clause, taken in connection with the twelfth, they describe and apply to a class, legally lineal descendants of his daughter, the same as if he had used the words "heirs of her body."

The judgment of the court below is therefore reversed, and the judgment entered for the plaintiff on the case stated.

DEMPSTER v. UNITED TRACTION CO. et al.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

TOWNSHIPS—BOROUGH—STREET RAILROADS —CONSENT OF ABUTTING OWNERS.

1. Act April 28, 1899 (P. L. 104), relating to the organization of townships of the first class, did not create such township into a borough.

2. Street railway companies cannot be constructed upon the highways in townships of the first class without the consent of the abutting owners, such construction being an additional burden, and therefore a taking of or injury to the property of such abutting owner.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Alexander Dempster against the United Traction Company and others. Decree for defendants, and plaintiff appeals. Reversed.

The court below found the facts to be as follows: "(1) Plaintiff is the owner in fee of certain property in the township of North Versailles, having a front of 707 feet on one side and 545 feet on the other side of a pub-

lic road in said township. The defendants are a traction company, and a street railway company which has leased all its property and franchises to the traction company. (2) The defendant street railway company has laid out branches or extensions of its road over certain roads or streets in the borough of Wilmerding and the township of North Versailles, one of which is in the bill called a township road leading to Stewart Station, being the road which crosses the lands of the plaintiff, as above mentioned; and the defendants intend, if not restrained from so doing, to put an electric railway of the ordinary construction, with overhead wires, along said road in front of and through the property of the plaintiff. (3) The township of North Versailles is a township of the first class, and was such when the branches or extensions above referred to were resolved upon. (4) The defendants have the consent of the local authorities of the township to build these branches and extensions."

The last conclusion of law was as follows: "We are of opinion, therefore, that in a township of the first class the municipality has the same control over the streets for urban necessities and conveniences as a borough has, and that this extends to enabling it to authorize the construction of street railways on the streets or roads of the township, and that such a railway on the streets of such a municipality is not an additional burden on the owner of the soil, and may therefore be built without his consent. The plaintiff is therefore not entitled to the injunction prayed for, and the bill should be dismissed, at the plaintiff's costs."

After the appeal was taken a petition for leave to intervene, on the ground that petitioners were greatly interested in the question involved, and could be affected by its decision, was filed in the Supreme Court by certain citizens of Lower Merion township, Montgomery county, and Radnor township, Delaware county, both townships of the first class.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James R. Sterrett, Thomas Patterson, and M. W. Acheson, Jr., for appellant. J. H. Beal, J. H. Reed, Edwin W. Smith, George E. Shaw, and Samuel McClay, for appellees. John G. Johnson, for interveners.

DEAN, J. The defendant is a street railway corporation organized under the general acts of 1887 (P. L. 275) and 1889 (P. L. 211). It obtained the consent of the commissioners of North Versailles township to run on a public road in the township leading from Wilmerding to Walls Station. The township is one of the first class under the act of April 28, 1899 (P. L. 104). In laying out the route of its railway it adopted the township road mentioned. This takes it on and over the road through plaintiff's land, which abuts on the road 707 feet on one side and 545 feet on the

other. He objected to it going through at all. It claims the right to go through without his consent, and that it is not answerable to him for damages. Plaintiff then filed this bill to restrain the company from constructing its railway on the road through his land. The court below, after hearing, dismissed the bill, and we have this appeal by plaintiff from that decree.

In his opinion filed the learned judge of the court below held that a township of the first class, under the act of 1899 and those supplementing it in 1901 (P. L. 297, 361), is, as regards public roads, not essentially different from cities and boroughs, and has the same power over its highways as the latter have over their streets and alleys, and like them is exempt from answerability for damages for improvements on or under the highways; and, while the right to authorize street railways in townships of this class is not expressly given by the statute, it is fairly to be implied, because the public convenience and necessities of the citizens of the one are practically the same as in the other; and he cites, as legislative recognition of such necessities, the provisions in the township classification acts, giving the municipality power to lay out, open, grade streets, and require payment therefor by property benefited, to require abutting owners to pave and curb sidewalks, to establish a system of sewerage and to assess the cost on property benefited, to erect waterworks and supply water, to maintain fire engines, and to do other acts which cities and boroughs are authorized to do; that in all respects townships of this class are completely assimilated to boroughs. If water and gas companies are not bound to pay damages to the abutting owners for laying their pipes, he asks, why should a street railway be considered an additional burden and be answerable to him in damages? The answer, and the only answer, is, no statute has relieved it from such liability, no decision of the courts of this commonwealth has held that it was not liable. This is conceded by the learned judge, and he says: "The question is one of first impression, so far as we have been able to discover." In holding that a railway company is not answerable for imposing such a burden on the property owners, we are met first by section 8, art. 16, of the Constitution: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

In *Sterling's Appeal*, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246, we held that "laying a pipe line at the ordinary depth under the surface necessarily imposes an additional burden upon the land, not contemplated either by the owner or the public authorities

when the land was appropriated for a public road"; that, except subject to the mere right of passage to the public by the ordinary methods, the land was still the owner's, the same as before the road was laid out. Then in *Pennsylvania R. R. Co. v. Montgomery County Passenger Ry. Co.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, we held that, until there was legislation relating to them specifically authorizing the construction of street railways upon the highways or in country districts without the consent of the abutting owners, that consent must be obtained. In both these cases we as plainly held as language could put it that to construct an electric railway track or pipe line on or under a public road was an additional burden on the abutting owner, and therefore was a taking of or injury to his property, for which the Constitution, not the Legislature, guarantied him compensation. Whether it be expedient or wise to grant the right of eminent domain to a railway to the extent of occupying a public highway is purely a political question for the Legislature to answer, but whether such occupancy be a taking of private property or whether the use is a public one are purely judicial questions for the courts to determine. We have in the cases cited and others declared that such appropriation is a taking of private property, and that under the Constitution the owner is guarantied compensation. In *Hannum v. Media, etc., Electric Railway Co.*, 200 Pa. 44, 49 Atl. 789, opinion by Justice Mitchell, we distinctly announced our adherence to the principles enunciated in *Sterling's Appeal* and *Montgomery county cases*. There is nothing in the facts of the case before us to induce us to swerve from them. This is on the assumption that North Versailles is a township in law and fact as well as name.

By the legislation concerning it a township of the first class was not turned into a borough or anything resembling one, any more than that legislation turned it into a city of the first class. It is settled law, that abutting owners on streets and alleys in cities and boroughs have no claim for damages by reason of the appropriation of the surface or subsurface for public improvements to the advantage and benefit of all the inhabitants. It is much easier to say that such is the settled law than to give a wholly satisfactory reason for it. The one usually given, both in *McDevitt v. People's Nat. Gas Co.*, 160 Pa. 367, 28 Atl. 948, and in many cases preceding it, is that the borough is the representative of the inhabitants, considering their health, their family comfort, and their business needs, and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If it abridges his control of the soil, it makes him a sharer in the public advantage resulting from the appropriation. In a legal sense, it is an invasion of his

rights, but that is *damnum absque injuria*. But whether the reasoning to sustain the law be satisfactory or not, as a fact, the law is so deeply imbedded and firmly fixed as a rule of action that it is not likely to be disturbed, at least in our day.

We assume, then, that if the plaintiff were an abutting owner on a street in a borough he would have no standing to complain. But he is not on a street of a borough, but on an ordinary country road, in a township. How, then, can the railway company claim that he is in the same situation as a lot holder in a borough? The court below points out some special powers conferred upon townships of this class which are the same as the express or implied powers of boroughs under our general laws, and then says: "They [that is, townships of the first class] are in all these respects completely assimilated to boroughs and cities. * * * We cannot see, therefore, why a street railway should be considered an additional burden in such a municipality if gas lines and the like are not." This reasoning is not convincing.

Boroughs are very ancient municipal organizations, with well-defined powers, privileges, duties, and liabilities. We inherited an aptness and desire for their organization from England. In our earlier colonial history the large area of territory was divided into counties of such immense extent that it took several days traveling on horseback to reach the county seat; these again were divided into townships, some of them the size of our present counties; then, from special causes, such as trading posts, ferry approaches, or heads of river navigation, settlers became grouped in villages or towns, and from these last came a demand for local government specially adapted to their needs; so they severed from the larger territorial government of the township, and erected the borough municipality. It conveyed the idea, adopted from England, of a compact settlement, as distinguished from a township and county. So, through all the legislation since, the suggestion in thought is of a town or village identical with the borough. The general act of 1834 (P. L. 163), not quite 70 years ago, provided for the method of incorporation of any town or village into a borough. Although under the general act of 1851 (P. L. 320) incorporation of boroughs with less than 300 inhabitants was authorized, the idea of compactness of population and territory was still adhered to. In Borough of Little Meadows, 28 Pa. 256, it was held that the court had no jurisdiction to incorporate a territory $1\frac{3}{4}$ miles square, a part of the lines of which run through a wilderness, and which contains no collection of houses, collocated after a general plan in regard to streets and lanes.

Then came the act of 1863 (P. L. 200), which authorized the inclusion of farm lands adjoining a town or village in a borough,

but at the request of the parties owning them the boundaries should be run so as to exclude them. But in all the subsequent legislation there is no departure from the original idea, that to erect a territory into a borough it must have as its base a town or village. The act of classification does not attempt to create a hybrid borough, neither township nor borough. It obviously intends to preserve the old township organization, with all its powers and duties, except where it expressly enacts otherwise. The preamble states: "Whereas, in those more populous townships which are in large measure devoted to residential purposes, there is need of a form of municipal government having greater powers than are now possessed by the local governments of townships under the existing laws." It then declares that townships having a population of at least 300 to a square mile shall be townships of the first class, and that all existing laws relating to townships except as modified by that act shall continue in force. Then the powers which such township ought to possess, but which it did not have under the old organization, are particularly specified as heretofore referred to. Nowhere in the act is it intimated that as to existing roads and highways have the commissioners any other or greater power than theretofore existed as to the imposition of an additional servitude, such as street railways. Nor could such servitude have been imposed by the Legislature without at the same time providing compensation to the abutting owner for his property taken for public use. Calling the township a first-class township did not make it a borough in name, nor do its physical characteristics make it one in fact. It is not enough that many of its wants, and perhaps necessities, are those of a borough or city, and that some of these the Legislature attempted to enumerate. Street railways are not one of them. Legislative silence excludes them. However often the maxim, "*Expressio unius, exclusio alterius*," has been misapplied, it is in point here. There is no sound reason on which we can sustain the decree in this case; therefore it is reversed, the bill reinstated, and injunction directed to issue in accordance with the prayer of the bill.

ENGLISH v. YATES.

(Supreme Court of Pennsylvania. Feb. 9, 1903.)

LEASE—CONSTRUCTION—DEFAULT OF LESSEE —RELEASE OF SURETY—AFFIDAVIT OF DEFENSE.

1. A provision that a lease shall be void on breach of any of the covenants by the lessee does not make the lease void *ipso facto* by the default, but is a provision which may be enforced or waived at the option of the lessor.

2. A lessee under a lease providing that it shall be void on default cannot, by failing to

¶ 1. See *Landlord and Tenant*, vol. 22, Cent. Dig. §§ 322, 327.

pay an installment of rent, end the lease, and relieve his sureties from liability for future installments.

3. An affidavit of defense in an action against a surety of a lessee to recover rent due, which avers an offer by lessee to pay a sum mentioned on account of the rent, which sum was the amount the lessee had in the bank at that time, and that the plaintiff had refused to receive it, is insufficient.

Appeal from Court of Common Pleas, Philadelphia County.

Action by W. Frank English against Thaddeus N. Yates. From an order making absolute rule for judgment for want of sufficient affidavit of defense, defendant appeals. Affirmed.

Plaintiff, the owner of a hotel at Ocean City, N. J., rented it to Ella R. Curtis "for the seasons of the years 1901 and 1902—that is to say, from April 1, 1901, to November 1, 1902—at the rent or sum of \$5,000, to be paid in installments, as follows, viz., the sum of \$1,000 on July 25, 1901, \$1,500 on August 5, 1901, \$500 on April 1, 1902, \$1,000 on July 25, 1902, and \$1,000 on August 25, 1902. The defendant became her 'surety for the payment of the rent.' She took possession of the hotel under the lease on April 1, 1901, but did not pay the installments which became due during the season of 1901."

The defendant filed an affidavit of defense, substantially as follows: "Heretofore, to wit, October 5, 1901, the said Ella R. Curtis offered to pay to the said plaintiff on account of his said claim mentioned in the statement the sum of \$460.55, that sum being the amount which she had in bank at that time, as shown by her deposit book, and represented the profit (at that time) in the business of conducting a boarding house on the premises mentioned in the lease. But the plaintiff refused to receive the said sum of \$460.55, and stated to her that he would not accept the said sum from her. I am informed that this refusal on the part of the plaintiff was in violation of his duty to and contract with me, and that I am relieved from so much of his claim against me as is represented by said amount which he refused to accept from the said Ella R. Curtis. I have a defense to all the plaintiff's claim of the following nature: On November 30, 1901, under the proviso contained in the lease, there being at the time a default on the part of the said tenant in the payment of the first two installments, the plaintiff, on account of said default, re-entered the said premises, and took possession of the same to the exclusion of the tenant; and I am informed, and so claim, that under the said proviso the said lease upon which this suit is brought immediately became void, and that, therefore, I am not liable as surety thereon."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Leoni Melick and Potter & Dechert, for appellant. Frank M. Cody and Cody & Develin, for appellee.

PER CURIAM. It was decided in *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603, and *Westmoreland, etc., Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731, that a clause in a lease that it shall be null and void on failure of the lessee to pay rent or keep other covenants is not self-operating so as to make the lease void *ipso facto* by the default, but, being a provision for the benefit of the lessor, may be enforced or waived at his option. These cases have been followed by many others down to *Bartley v. Phillips*, 179 Pa. 175, 36 Atl. 217. It hardly requires more than a glance at the reason of the thing to show the applicability of this principle to the present case. Appellant became surety to the plaintiff for the punctual payment by the lessee of rent amounting to \$5,000. The claim now made is that the lessee, by his own default, could release his surety from all liability beyond the first \$1,000. Such a construction would reduce the security to the plaintiff to just one-fifth of the sum the contract expressly stipulates for. While parties may, as was said in *Wills v. Gas Co.*, supra, contract that on a default the lease may become void at the option of either party, yet such intent in the agreement must be so plain as to be unavoidable, in order to sustain such a construction.

The other question raised is equally untenable. There was not only no tender of a partial payment of the rent due, but not even a clear offer, merely a reference to the amount of money the lessee had in bank which was available on the rent account. This was much too vague and uncertain to reduce the liability even of a surety.

Judgment affirmed.

PANGBURN et al. v. AMERICAN VAULT, SAFE & LOCK CO. (No. 1.)

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

CORPORATION—INSOLVENCY—DIRECTORS—PREFERENCE.

1. Directors of an insolvent corporation cannot secure any preference over other creditors, but must share ratably with them in the distribution of the company's assets.

2. Where directors of a solvent corporation advanced money to pay an obligation of the company without any agreement that they were to be protected, they cannot, when the company thereafter becomes insolvent, to their knowledge, take a judgment note for such advances, thereby securing priority over general creditors.

Appeal from Court of Common Pleas, Allegheny County.

Bill by E. E. Pangburn and others against

¶ 1. See *Corporations*, vol. 12, Cent. Dig. § 2170.

the American Vault, Safe & Lock Company. From the decree, Lewis McMullen appeals. **Affirmed.**

The following is the report of the auditor:
 "There is some controversy concerning a number of claims presented. Such will appear in the schedule immediately after the list of wage claims, and in the order here considered.

"(1) Lewis McMullen, Trustee, v. American Vault, Safe & Lock Company, D. S. B. No. 150, December term, 1893, \$8,568.30, on which has been paid \$640. Upon this judgment, the entire fund for distribution, as shown by the account, is claimed.

"At a meeting of the board of directors held on June 12, 1893, a resolution was adopted authorizing the execution of a judgment note to cover the claim of S. O. Rhodes, P. T. B. Shaffer, T. W. Martin, B. W. Applegate, C. H. Underwood, O. F. Sheriff, and Josiah Speer, directors of defendant company, for money theretofore raised by them to pay a note of the company, originally \$10,000, then reduced to \$8,000. A *fi. fa.* was issued thereon at No. 150, December term, 1893, on October 10, 1893, and that writ is still in the sheriff's hands. Testimony was offered by exceptants as to the validity of this judgment. Counsel for the receiver maintain that the auditor has not power to go into the question. The cestuis que trustent under the judgment were the directors and officers of defendant company. Josiah Speer, secretary and general manager, now receiver, was one of them. In view of the facts that assets of very considerable value have been lost under the receiver's management of his trust, and it is sought to have what little is left appropriated to a judgment in which he, as well as all the other directors, is interested, your auditor considers that under the authority of Wenger's Estate, 2 Pa. Super. Ct. 611, and Wright's Estate, 182 Pa. 90, 38 Atl. 151, he was justified in hearing the testimony and finding the facts.

"On June 12, 1893, a resolution of the board of directors was passed, authorizing the proper officers of the company to execute a judgment note to Lewis McMullen, trustee, in an amount sufficient to protect the officers of the company on their indorsement of a certain note in the Central Bank for \$8,000. Josiah Speer says: 'I was in charge, and, also being an interested party on that indorsement, my recollection is that I was told to watch the condition of the company, and, if it was able to take care of its paper itself, there would be no necessity of entering a judgment. While the board had directed it to be given, yet there was no specified time. When I felt that there was danger, I notified the board, and called them together, and they directed then that the note be made in favor of Lewis McMullen, trustee.' At a directors' meeting of September 4, 1893, a

resolution was adopted directing the secretary to place in the hands of Lewis McMullen a judgment note for \$8,000, for use of indorsers on the Central Bank note for that amount. The note is dated June 13, 1893. It does not appear, other than from the above testimony, when it was actually drawn.

"Under the authorities, officers who have the power to protect themselves, and have exercised it, must show that the contract was fair under all circumstances. In *Muel-ler v. Fire Clay Co.*, 183 Pa. 450, 38 Atl. 1009, the court says, 'Even if the judgment was entered after insolvency was known, yet the contract having been made before insolvency, as an indemnity to the directors for individual indorsements, such judgment could be enforced as a lien against the corporate property, as in *Neal's Appeal*, 129 Pa. 64, 18 Atl. 564.'

"The directors had borrowed \$10,000 on the promissory note of the company, indorsed by them, in August or September, 1892, from the Central Bank of Pittsburgh. On the date this preference was authorized there was \$8,000 still due on that note. The question, then, is, were the defendant company's affairs in such condition when the judgment was authorized to be confessed that such action could be taken by the directors without prejudice to the rights of other creditors?

Take, for example, second inventory of assets hereinbefore set out.
 amounting to **\$126,813 01**

The manager, Josiah Speer, in his answer to the bill for receiver, puts the total liabilities at..... **\$ 52,410 65**
 There were issued 911 shares, of the par value of \$50, of preferred stock 45,550 00
 1,780 shares of common stock.... 88,950 00

Total liabilities then were..... **\$186,910 65**

Showing liabilities in excess of assets of **\$ 60,197 64**

"At the same meeting at which the judgment note was authorized to be given by the officers, June 12, 1893, the minutes say: 'The general manager reported that he had been unable to discount any paper last week, and, being without funds, could not pay the hands on Saturday last; that the concern is in rather an embarrassing condition, the Chicago branch being slow in making remittances.' The following motion was adopted: 'Whereas, the Chicago branch of this company has proven an unfailing source of loss to this company, and we find it beyond our ability to render it profitable: Therefore he it resolved, that Josiah Speer be and is hereby directed to proceed to Chicago at once and discontinue said branch.' Then follow some instructions in detail. The judgment note authorized at that meeting seems never to have been given, for on September 4, 1893, the directors adopted substantially the

same resolution, after having first heard the report of a committee that 'it had been unable to procure a loan or assignments of contracts.' The general manager reported he had not written to creditors, yet, asking for an extension of time on our accounts, for the reason he had on hand a likely sale of a block of capital stock. The parties are to be up on Tuesday afternoon train.' Then a claim due from the United States government was assigned to S. W. Applegate to repay him for \$500 he had paid on the company's note in the Central Bank. Then the following resolution was passed, viz.: 'Whereas, this company having become involved in an indebtedness, being balance for construction for material and labor, together with interest on its bonded indebtedness, amounting to the sum of over \$26,000, and our resources do not seem to be sufficient to pay the same at once, and some of our creditors pushing for judgment: Therefore be it resolved, that this company joins with our creditors wishing a receiver appointed, to take charge of its affairs, and ask the court to appoint some person competent to act as receiver until such time as it can do business without embarrassment and complete the contracts now on hand, and pay its accounts. This course seeming best in the interest of all creditors and stockholders.'

"But going back of the question of the financial standing of defendant company at the date the resolutions just quoted were passed, we find from the minutes and oral testimony that the company was organized with a capital stock of \$4,000. On July 14, 1891, a directors' meeting called a stockholders' meeting on July 15, 1891, at which the increase of the capital stock to \$200,000 was authorized. On the same day a directors' meeting provided for the issuing of \$50,000 preferred stock, and a stockholders' meeting voted in favor of such issue. On August 17, 1891, at a stockholders' meeting, the minutes of the last-mentioned action were approved, and the number of directors increased from three to seven. The minutes of a directors' meeting of August 18, 1891, and a stockholders' meeting on September 10, 1891, show the creation of a bonded indebtedness of \$25,000. The stockholders met on August 20, 1891, and entered into an agreement on the part of the company with E. W. Neff and C. H. Underwood to purchase the assets of the Chicago Safe & Lock Company from them at \$130,000, payable \$30,000 cash, \$25,000 in notes or bonds, and \$75,000 in stock of the company; the stock to be issued to Neff & Underwood, and the cash, notes, or bonds to be paid to the Chicago Safe & Lock Company. Neff and Underwood at that date had an option to purchase said effects at the price of \$25,000. At a special board meeting of October 31, 1891, J. R. Wiley, the treasurer, stated that he could not conscientiously countersign the stock certificates authorized by the board to be issued to Neff & Under-

wood, and he resigned his position. On motion of Martin, seconded by Applegate, the resignation was accepted, and R. T. Wiley was elected in his place. The receiver was requested to produce an inventory of the assets of the Chicago Safe & Lock Company, which he did not do. A directors' meeting of December 7, 1891, provided for calling a meeting of the stockholders on December 19, 1891, 'to devise some plan to relieve the company from its embarrassment occasioned by the failure of the Blaine Land and Improvement Company to complete our factory buildings.' On August 25, 1891, a resolution was passed by the board under which L. C. Tuttle loaned to T. W. Martin and Applegate, for the defendant company, \$2,500, upon condition of receiving therefor a bonus of \$500 of the stock of Underwood; Tuttle agreeing to subscribe for \$500 of the company's stock, the company paying him a bonus therefor of \$150 cash, provided, further, that \$1,000 of said stock be preferred stock. The minutes further show that on January 22, 1892, the company confessed a judgment to Martin & Applegate, to secure them in having procured this loan in the sum of \$2,000, the amount then unpaid. The minutes of January 16, 1892, show action by the board for the sale of \$50,000 of the stock of the company at figures netting the company seventy-five cents on each dollar of stock sold. On July 17, 1893, the minutes show that the company was indebted to Josiah Speer in a considerable sum, and, being unable to pay any part of it in cash, it was paid by Speer's taking from the company six safes at nineteen per cent. of the list price. The minutes of a stockholders' meeting on July 25, 1893, show liabilities of the company at that date, beyond the bonded indebtedness, of \$22,632.05; and on the same day the directors took action on the sale of the entire stock of the Chicago branch, including rented safes, to Mrs. M. A. Bigford, at twenty-two and one-half per cent. of list price. Mr. Speer says in his testimony that the company received \$58,000 to \$63,000, he thinks, in cash, from the sale of stock, and that it sold at par. Rose, Shaffer, Applegate, and Speer being present, a resolution was passed recommending to the stockholders' meeting the sale of stock for fifty cents on the dollar.

"Your auditor therefore finds that at the dates of the authorization of the judgment note, June 12, 1893, and September 4, 1893, the defendant company was insolvent; that the directors for whose benefit the judgment was confessed did not indorse the company's paper upon an agreement that they should be secured by such note; that the execution issued upon the judgment two days before the appointment of the receiver has not been returned; and, as a matter of law, that the trustee for the directors is not entitled to his claim in full, to the prejudice of the rights of other creditors, but shall receive his pro rata dividend of the funds for dis-

tribution, and, further, that the receiver be surcharged with \$730.12, the sum he paid the trustee on account of said judgment."

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

John F. Cox, for appellant. J. H. Beal, O. P. Robertson, J. P. Patterson, H. L. Goehring, J. H. Reed, George E. Shaw, and Edwin W. Smith, for appellees.

MESTREZAT, J. The principal and important question in this appeal is raised by the second assignment of error, wherein the appellant complains that the auditor and court below erred in finding that his judgment was not a preferred claim, and was not entitled to preference in the distribution of the fund in the hands of the receiver. The position of the appellant is stated in the assignment as follows: "The claim of the exceptant having been reduced to a judgment before the appointment of a receiver, and being a lien upon the real estate and part of the fund in the hands of the receiver (being the proceeds of the sale of real estate upon which exceptant's judgment was a first lien), the said judgment was entitled to be paid in full out of said fund, and an execution having been issued and in the hands of the sheriff and in force prior to the appointment of a receiver, and proceedings thereon being only suspended by order of the court appointing the receiver, was not, therefore, affected by said appointment, and became a first lien upon the said personal property." The facts bearing upon this claim as found by the auditor may be briefly stated: The American Vault, Safe & Lock Company was incorporated in 1891, and engaged in the manufacture and sale of vaults and safes in Allegheny county. In August or September, 1892, the directors of the company borrowed \$10,000 of the Central Bank of Pittsburgh on a note of the company indorsed by them. The amount of the note was subsequently reduced to \$8,000. On a bill filed by an unsecured creditor, the court, on October 11, 1893, appointed Josiah Speer receiver; reciting in the order that, "upon consideration of said bill and answer [of defendant company], the court find that the defendant company is in an insolvent condition." The receiver took possession of the property, real and personal, and continued to operate the plant until September 24, 1894, when, under an order of court, he sold it at public sale. The proceeds of this sale are in court for distribution, and Lewis McMullen, trustee, the appellant, claims that his judgment given to secure the directors for the indorsement of the company's note should be paid in full out of the fund. The board of directors adopted a resolution on June 12, 1893, authorizing the execution of a judgment note to cover the claim of S. O. Rhodes, P. T. B. Shaffer, T. W. Martin, B. W. Applegate, C. H. Underwood, C. F. Sher-

iff, and Josiah Speer, directors of the company, for money theretofore raised by them to pay a note of the company. At a directors' meeting on September 4, 1893, the secretary of the company was directed to place in the hands of Mr. McMullen a judgment note for \$8,000 for the use of the indorsers on a note of the Central Bank for that amount. Pursuant to the action of the board of directors, the judgment note, the subject of this controversy, was given to the trustee. Judgment was entered on the note on October 9, 1893, and a *fi. fa.* was issued thereon October 10, 1893. The auditor found—and no exception was taken thereto—"that at the dates of the authorization of the judgment note, June 12, 1893, and September 4, 1893, the defendant company was insolvent; that the directors for whose benefit the judgment was confessed did not indorse the company's paper upon an agreement that they should be secured by such note; and that the execution issued upon the judgment two days before the appointment of the receiver has not been returned."

The facts found by the learned auditor are clearly deducible from the evidence. It is equally apparent from the testimony that, at the time the judgment note was authorized to be executed, the directors knew the insolvent condition of the corporation. The auditor and court below were therefore right in holding that the appellant was not entitled to have his claim paid in full out of the fund for distribution. There is no equity in the claim of the appellant that would sustain a contrary conclusion on the facts disclosed by the evidence. The indorsement of the company's paper was made by the directors in 1892. They were not induced to assume this liability by reason of any misunderstanding or agreement that they should be protected by the company. The company at that time was presumably solvent and fully able to meet its obligations. The credit of the directors was not used to assist it in an emergency, nor to protect the corporate property from sacrifice. Several months after they became indorsers to the Central Bank, the directors undertook to secure themselves against the liability they had incurred the previous year, and by resolution authorized the execution of the judgment note upon which they claim a preference here. In the meantime conditions had changed, and the corporation had become hopelessly insolvent. After this was known to the directors, they directed the secretary of the company to deliver the note to their trustee. One of the directors, who was also the receiver, gives the circumstances under which the note was made, and clearly discloses the unfairness of the transaction. He testifies: "I was in charge, and, also being an interested party on that indorsement, my recollection is that I was told to watch the condition of the company, and, if it was able to take care of its paper itself, there would be

no necessity of entering a judgment. While the board had directed it to be given, yet there was no specified time. When I felt there was danger, I notified the board, and called them together, and they directed then that the note be made in favor of Lewis McMullen, trustee." At the meeting of the directors on September 4, 1893, when they authorized the making of the note, they resolved to join with other creditors in having a receiver appointed for the company. Two days prior to the appointment of the receiver, a judgment was entered on the note, and an execution issued thereon. This conduct of the directors was a clear violation of their official duties, and could secure for them as individuals no preference over other creditors of the company. Their action was not taken for the benefit of the company, but solely to give themselves a preference in the distribution of its assets. The burden was upon them to show that the preference was in all respects fair and conscionable, and that it was not collusive, for the mere purpose of preference. *Cowan v. Pa. Plate Glass Co.*, 184 Pa. 1, 38 Atl. 1075. This they have failed to do. They are therefore within the well-settled rule forbidding a preference which is recognized in the decisions of this court, and stated in *Morawetz on Corporations*, § 787, as follows: "Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with other creditors in the distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their power as directors to that purpose. Their powers are held by them in trust for all the creditors, and cannot be used for their own benefit."

The first assignment is based on a misapprehension of the facts. The wage claims were not allowed a preference out of the fund produced by the sale of the real estate, as the appellant claims; but, as distinctly stated by the auditor, they were held to be a lien, and payable out of the proceeds of the personality with which the auditor surcharged the receiver.

The other assignments need no special consideration. The claims which are the subject of these assignments were properly allowed to participate in the distribution of the fund in the hands of the receiver.

The assignments of error are dismissed, and the decree is affirmed.

PANGBURN et al. v. AMERICAN VAULT, SAFE & LOCK CO. (No. 2.)

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

RECEIVER—NEGLIGENCE—LIABILITY.

1. A receiver will be surcharged with the loss arising from his negligence in the management of the trust property, where he has wasted its assets and has sold the personal prop-

erty at an inadequate price, and has been interested in its purchase, and his commissions also will be disallowed.

Appeal from Court of Common Pleas, Allegheny County.

Bill by E. H. Pangburn and others against the American Vault, Safe & Lock Company. From the decree, Josiah Speer, receiver, appeals. Affirmed.

The following is the report of the auditor:

"Findings of Facts.

"(1) Josiah Speer was appointed receiver of the property and assets of the American Vault, Safe & Lock Company by decree of this court made October 11, 1893, and immediately took possession of the property of the company.

"(2) As such receiver, there came into his possession, among the assets of the company, merchandise, consisting of finished and unfinished safes, raw materials, and so forth, to the amount of \$36,088.89; bills and accounts receivable, \$3,269.75; and real estate, plants, tools, and other property of the company.

"(3) The receiver operated the works of the company from the date of his appointment until after September 29, 1894; and this was done by him upon his own responsibility, without any authority from the court, with the exception of a contract known as the 'Pennsylvania Railroad Contract,' on which contract he lost \$1,244.01.

"(4) On September 29, 1894, the receiver, at public sale, under order of court, sold the unoccupied real estate of the company to J. R. Wylie for \$2,000, which sale was confirmed by the court absolutely, and the money paid to the receiver.

"(5) On the same day, at a like sale, he sold the remaining real estate and plant of the company, and the personal property then on hand, to Hugh Morrison, at \$10,000 for the real estate, and \$1,300 for the personal property. This sale was confirmed absolutely on October 20, 1894. It was subsequently set aside by an order made January 13, 1896. On June 20, 1899, at the request of the receiver, he was permitted to make a sale of the property to M. M. Garland at \$10,000 for the real estate and \$1,300 for the personal property; the said Garland to take the property as of September 29, 1894, receiving the benefits of all sales made by the receiver after September 29, 1894, and assuming all expenses incurred by the receiver after that date with respect to the said property. The sale to M. M. Garland was consummated by the receiver, and the purchase money paid. The expenses in connection with the sales of the real estate, as shown by the accounts, amount to \$936.15, and the net proceeds from sales of real estate for distribution amount to \$11,063.85.

"(6) The purchase made by Hugh Morrison, as well as the purchase made by M. M. Garland, was each, in point of fact, made on be-

half of the syndicate; and the said receiver, Josiah Speer, was a member of each of said syndicates, and interested in the purchase of the property, and this fact was not disclosed by him until long after the sale to Garland.

"(7) That the value of the personal property sold by the receiver to M. M. Garland under the order above mentioned was \$20,506.95; this amount being the value of the merchandise on hand at the date of the McMeans inventory, \$18,106.80, and the net cash receipts in the hands of the receiver or the purchaser, \$2,400.15.

"(8) The receiver was negligent in his management of the trust estate, and wasted the assets thereof; his action towards the court and creditors has been characterized by an absence of good faith; his action in procuring the sale of the remaining personal property on hand, at an inadequate price, and being interested therein as a purchaser, without disclosing that fact, was inexcusable; and, because of these facts, he has forfeited his right to commissions.

"The Law of the Case.

"As this case presents itself to your auditor, there are but three questions of law involved, viz.: (1) As to the liability of the receiver for the loss, or some part thereof, incurred by him in the operation of the works; (2) as to the liability of the receiver for the loss incurred in the sale to Garland, in view of the fact that the receiver was one of the purchasers at this sale; (3) as to the receiver's right to commissions.

"(1) As to the liability of the receiver for the loss incurred in the operation of the works: The receiver having operated the works without authority from the court, it is sufficient to show the inventory and appraisal, and the burden is upon him to explain and account for the property. *McCay v. Black*, 14 Phila. 635. That the receiver thoroughly appreciated this fact appears from his testimony, in which he says very frankly that in operating the works he acted upon his own responsibility. That the operation of the works resulted in a large loss does not now admit of doubt. The expenses incurred by the receiver in the operation of the works not only exceeded his receipts, but, as shown by the findings of fact, his expenses exceeded the value of the merchandise coming into his possession and disposed of prior to September 29, 1894, plus all the moneys realized from bills and accounts receivable, by \$2,183.86. In other words, he had a deficit of that amount. So that, as a matter of fact, the loss occasioned by the conduct of the receiver in this respect would amount to the difference between the assets coming into his hands at the date of his appointment and the amount remaining in his hands on September 29, 1894. But looking at the case in this aspect, the receiver would be entitled to some reasonable allowance for collecting these bills receivable, and disposing of the personal property in the

condition in which it was at the time he took charge of it. No testimony has been presented to the auditor to enable him to make a finding upon this theory. Taking into consideration all of the circumstances of the case, and the receiver's statement that in the operation of the works he acted upon his own responsibility, it seems to the auditor that the least responsibility to which he could be held would be to require him to bear the amount of the deficit which he incurred—in other words, require him to pay the excess of his expenditures over the value of the property taken possession of and disposed of by him. He certainly cannot charge this deficit, occurring in the operation of the works, as against the moneys realized from the sale of real estate; nor has he any right, as it seems to your auditor, to deduct it from the amount found to be due from him to the creditors by reason of his conduct in purchasing at his own sale. The auditor is therefore of the opinion that the accountant should be surcharged with the amount of the net deficit arising from his management of the trust estate between October 11, 1893, and September 29, 1894, which amounts to \$939.85. In ascertaining this amount, the auditor has allowed the accountant credit for \$1,244.01; being the amount shown as the loss incurred on the Pennsylvania Railroad contract, which contract was authorized by the court, and also the loss on the item of bar iron, \$3,564.

"(2) As to the liability of the receiver for the loss incurred in the sale to Garland: The auditor has already found that the receiver was interested as a purchaser in the sale made by him to Garland, and that the amount realized for the personal property on this sale was vastly less than its real value. The great number of cases in which attempts have been made by executors, administrators, trustees, assignees, and receivers to purchase the trust property at their own sales, either directly or through the intervention of third parties, probably illustrates the necessity for the strict rules established by the courts in this class of cases. Be that as it may, in Pennsylvania it is certainly well established by an unbroken line of decisions, extending from *Moody's Lessee v. Vandyke*, 4 Bin. 31, 5 Am. Dec. 385, to *French v. Pittsburg Vehicle, etc., Co.*, 184 Pa. 161, 39 Atl. 63, that a trustee authorized to make sale of property, whether at public or private sale, is not permitted to bid upon or purchase said property, or be interested therein; that, if he does, such a sale is voidable at the election of the cestui que trust, without reference to its fairness, or the cestui que trust may, if the property has been disposed of by the purchasing trustee, require him to account for the difference between the purchase price and the value of the property, or the profit on a resale thereof. In 20 Am. & Eng. Ency. of Law, 148, the rule is stated thus: 'A receiver will not be permitted to bid nor purchase at his

own sale. Any purchase he may make will be held for the benefit of the parties interested, is voidable at their election, and may be set aside by the court.' A large number of cases are there cited which fully support this statement. In *Moody's Lessee v. Vandike*, 4 Bin. 31, 5 Am. Dec. 385, Chief Justice Tilghman says: 'Now, even if the administrators had power to sell, they ought not to have made the sale to one of themselves, because the power, being joint, ought to have been executed by all of them, and (which is of far greater consequence) because the policy of the law forbids a person to be the purchaser of that which he is appointed to sell. It requires but a small knowledge of the world to be sensible of the wisdom of this rule. The person intrusted with the sale has so perfect a knowledge of the subject, and so great an opportunity of taking advantage, by appointing the time and place of sale, and employing the agents who conduct it, that to permit him to become the purchaser would be placing too much confidence in the infirmity of human nature.' In *Webb v. Dietrich*, 7 Watts & S. 401, Mr. Justice Sergeant says: 'The rule of equity which prohibits a trustee for sale from purchasing the trust property is not founded on his being necessarily guilty of fraud in so doing. It is a rule of public policy which applies in all cases, whether there be fraud or not, and, indeed, its great object is to prevent fraud by taking away the temptation to commit it. Another reason for the rule is the difficulty, if not impossibility, in many instances, of ascertaining whether there was fraud or not.' The liability of the receiver, under the facts found, does not seem to the auditor to admit of doubt. A further question arises as to whether this liability of the receiver can be enforced by a surcharge on the present audit. That question seems to be settled by the case of *French v. Pittsburg Vehicle, etc., Company*, 184 Pa. 161, 39 Atl. 63, where a receiver made a sale of the trust property to a firm in which he was to become interested upon the winding up of the receivership. He did become interested in the firm, and upon the filing of his account was surcharged with the difference between the appraised value of the property, as shown by the inventory, and the amount realized on the sale. In *Rosenberger's Appeal*, 26 Pa. 67, executors were authorized to sell real estate at public sale, and one of them became interested with a third party in purchasing the property, which the purchasers subsequently sold at an advance; and, upon a settlement of the executors' account, they were surcharged with the entire amount of profit made by the purchasers. In *Wallington's Estate*, 1 Ashm. 307, President Judge King fully discusses this same question, and sustains a surcharge for the difference between the real value and the price obtained at the public sale. It should be noted in this con-

nection that the testimony shows that after the purchase in the name of Garland, and for the benefit of the syndicate, a new corporation, called the American Vault, Safe & Lock Company, was formed, to which this property was transferred, which has been carrying on business since the purchase; and, as to this personal property, it would now be impracticable to set aside the sale and require the receiver to resell. The only practicable method of adjusting the rights of the parties is by surcharging the receiver. The only answer made on behalf of the receiver to this liability is that the sale to Garland was a public sale, and that the receiver is protected thereby. Nearly all of the cases in which the question has arisen, and in which the trustee has been held guilty of a breach of trust in purchasing, are cases of public sales, and the cases are clear that the principle applies equally whether the sale be public or private. *Wallington's Estate*, 1 Ashm. 307. But in the present case the sale to Garland was in no sense a public sale. There was no competitive bidding at all. The receiver applied to the court, by petition, for leave to sell the property to Garland for a fixed sum, stated that he had accepted ten per cent. of the purchase money on account, and recommended that said sale be made, whereupon he received authority to make sale direct to the purchaser. This certainly does not constitute a public sale. Your auditor is therefore of the opinion that the receiver should be surcharged with the difference between the amount realized for the personal property on the sale to Garland and the value of that property.

"(8) As to the receiver's right to commissions: Commissions are a compensation allowed for the faithful performance by a trustee of his duties. Mere neglect, of itself, might not require the disallowance of commissions, but the action of the receiver in this case goes far beyond mere negligence. It resulted in a total loss to the creditors of the value of a large part of the personal property coming into his hands at the date of his appointment as receiver; and, as we have found, he has been guilty not merely of a lack of good faith towards the court touching the property remaining in his hands, and his connection with the sales of that property made by him, but also of concealing his connection with these sales, and of selling the property at a grossly inadequate price, and being interested in the purchase. Under these circumstances, the auditor recommends that the commissions be disallowed—especially so in view of the fact that the receiver has not been surcharged with the value of the personal property lost by him prior to September 29, 1894. 27 Am. & Eng. Ency. of Law, 187, and cases cited.

"Conclusions.

"Your auditor therefore recommends that the receiver's account be restated, so as to

charge him with the amount realized from the sale of real estate, less the expenses of making such sales, charging him with the amount received for the personal property, and surcharging him with the difference between the amount received from the personal property sold to Garland and the value of that property, and also surcharging him with the deficit arising from his operation of the works between October 11, 1893, and September 29, 1894."

Exceptions to auditor's report were dismissed by the court.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

E. P. Douglass, for appellant. J. H. Beal, O. P. Robertson, J. P. Patterson, H. L. Goehring, J. H. Reed, Edwin W. Smith, and Geo. E. Shaw, for appellees.

MESTREZAT, J. We have considered the questions raised on this appeal in connection with the appeal of Lewis McMullen, trustee, from the same decree, in which the opinion has this day been filed. 54 Atl. 504. After an examination of the numerous assignments of error, we are not convinced that the auditor, whose report was confirmed by the court below, has committed any reversible error in his disposition of the case. The exceptions to the report are principally to the findings of fact, and, under our well-settled rule, when the court below has approved the finding we will not reverse unless clear error is shown. Here there was evidence to warrant the auditor in reaching his conclusions of fact, and the appellant has failed to point out wherein they are clearly erroneous.

The investigation by the auditor was most careful and thorough and the appellant was afforded the fullest opportunity to have the alleged errors corrected on exceptions to two reports. The learned judge of the court below carefully examined the report and exceptions thereto, and, in confirming the report, says he is "convinced that the auditor's report reaches a result as nearly just and equitable as it is possible to arrive at, considering the manner in which the business was conducted by the receiver, and the accounts kept by him." We agree with this conclusion.

There is no merit in the exceptions to the learned auditor's conclusions of law. The surcharges were properly made, and the receiver's commissions disallowed. The reckless and negligent manner in which the receiver conducted the affairs of the trust estate, and the consequent loss to the creditors, legally deprived the receiver of the right to commissions. The law does not compensate an officer for inefficiency and wilful neglect of duty. It does, however, hold him strictly responsible for property placed in his hands, and imposes upon him the duty of fully accounting for it.

The assignments of error are overruled, and the decree is affirmed.

In re WEHRLE'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 5, 1903.)

EXECUTORS—RELEASE FROM DISTRIBUTEE—LACHES.

1. One of two executors paid a legatee certain money, taking a release of her interest, and gave to his coexecutor a release for his own share of the estate, and for all demands whatever against the same. Thereafter the legatee repudiated her release, and obtained an order that the coexecutor should pay her the full amount of her interest. *Held*, that the other executor could not, 40 years after the death of the testator, and after the death of the coexecutor, recover from the latter's estate the sum of money which he had paid to the legatee.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Francis J. Wehrle, deceased. From a decree dismissing exceptions to adjudication, Herrman Fischer appeals. Affirmed.

Stephen Fischer died in 1861, testate. He appointed Herrman Fischer and Francis J. Wehrle executors of his estate. An executors' account was filed in Allegheny county on April 18, 1862, but there was no audit. Instead, receipts and releases were taken from the distributees. Helena Weber, a daughter and legatee of the decedent, was paid \$1,000 by Fischer, and gave a receipt for her share of the estate, and released the executors. Thirty-five years after the account was filed she repudiated her release, and issued a citation calling upon the executors to pay her her distributive share of her father's estate. The orphans' court, in 1898, awarded her one-third of the balance shown by the account of 1862. The decision rested solely on her testimony that she understood little English and did not comprehend her release. The court further found that Wehrle was the acting executor, and charged him individually with the whole amount found due. Helena Weber testified that she had received in 1862 from Herrman Fischer, the coexecutor, \$1,000. Herrman Fischer claimed that this payment entitled him to subrogation, and that he now stands in Helena Weber's place, and can recover this amount from the Wehrle estate. On July 22, 1874, Fischer gave Wehrle a receipt and release for his share of his father's estate, "and of and from any and all other sum or sums of money of, touching, or concerning the estate of said Stephen Fischer, and of and from all accounts, reckonings, payments, suits, actions, accounts, claims, and demands whatsoever for or concerning any matter, cause, or thing whatsoever." The trial court dismissed the claim, Hawkins, P. J., filing the following opinion:

"Herrman Fischer, acting on the suggestion thrown out by the Supreme Court in Wehrle's Appeal, 189 Pa. 179, 42 Atl. 8, has come into this court asking appropriation of the credit allowed on the decree in favor of

Mrs. Weber against Mr. Wehrle. What was said by the Supreme Court does not amount to an adjudication. If it had been thought that there was enough evidence of record that court would no doubt have made a decree accordingly, but it did not do so, and it must be assumed that the question of his right was left open for determination of this court.

"Assuming that the Columblana county, Ohio, conveyance was on account, it does not necessarily follow that Herrman Fischer is entitled to subrogation as against his coexecutor, Wehrle. Foremost in his way stands a release of all claims against the estate.

"Nearly forty years have elapsed since its date without, so far as appears, any claim having been made by him of subrogation. In his answer to Mrs. Weber's petition by admitting her claim he impliedly concedes that he has none, and his subsequent conduct in that proceeding is in entire harmony with that concession. He made direct claim for his own share under the will, but to nothing through Mrs. Weber. He made no denial of her assertion of failure of his title to the Columblana county property, and consequent failure of consideration. If he had asserted a claim in opposition to Mrs. Weber in the first instance, the whole matter could and should have been disposed of at once. Were Mr. Wehrle living now, the disadvantage of raising another issue would be obvious. Having died, the disadvantages to his representatives are greatly increased, for they are not likely to know of the actual condition of affairs. Appeal of Bentley's Ex'rs, 99 Pa. 500. There is nothing in the case which calls for the interference of a chancellor.

"Courts of equity will sometimes refuse to grant relief, although the statute of limitations cannot be pleaded in bar, and although presumptions cannot arise from lapse of time, or may be conclusively rebutted. In such cases they proceed upon the ground that public convenience will not allow old and stale claims to be investigated, when many of the parties and witnesses are dead or their memories impaired or vouchers lost. And so, acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterward have relief. He is estopped by his acquiescence, and cannot undo what has been done. So, if a party stands by and sees another dealing with property in a manner inconsistent with his rights, and makes no objections, he cannot afterward have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and estops him.' Perry on Trusts, §§ 869, 870.

"Here Herrman Fischer not only made no claim in his own behalf for nearly 40 years,

but actively aided and abetted the inconsistent claim made by Mrs. Weber. He had his day in court, and, having misled Wehrle to his injury, there can be no returning footsteps. He is estopped by his release, by the statute of limitations, by gross laches, and by acquiescence in Mrs. Weber's claim. On the other hand, it would be a hardship at this late day to call on Wehrle's personal representatives, who have not the advantage which he would have had, to answer this, which is certainly an inconsistent claim. It seems clear, therefore, that Fischer has no equity to relief."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William A. Golden, A. V. D. Watterson, and A. B. Reid, for appellant. Frank Penrose Sproul and Thomas M. Marshall, Jr., for appellee.

PER CURIAM. The decree is affirmed on the opinion of Judge Hawkins.

SELLMAN et al. v. WHEELER.

(Court of Appeals of Maryland. Nov. 20, 1902.)

ASSAULT AND BATTERY—EVIDENCE—ADMISSIBILITY—OPINION EVIDENCE—HEARSAY—JOINT TORT FEASORS—INSTRUCTIONS.

1. Testimony by plaintiff that his injury made him very nervous, and he could not sleep nights, and when he went to stoop over he had great pain, and that he suffered a good deal of pain from the testicle, going along the cord into his stomach, was not inadmissible as opinion evidence.

2. Testimony by a physician, in an action for assault, that he examined plaintiff, who came to him complaining of a pain in his testicle; that he found him suffering from an enlargement of the testicle, and suggested treatment, and stated that if it continued he would have to have an operation performed; that he did not thoroughly diagnose the case; that the next time he examined plaintiff he saw that an operation had been performed; that he knew nothing about the cause of the trouble—was not irrelevant and immaterial.

3. The evidence was not hearsay.

4. Reasons assigned in support of an exception to a prayer as not supported by the evidence, which fail to specify the particulars in which the evidence is defective, will not be considered.

5. Testimony by plaintiff in an action for assault that on the day following the assault he was obliged to lie down most of the day; that from October to May he had not been able to do manual work, and that when testifying, May 16th, he suffered great pain from the testicle; that for the first time in his service there had been complaints about his work as operator; that the pain in his testicle began with the assault, and continued to the trial—together with a physician's testimony that he examined plaintiff, and found an enlargement of the testicle, and told him if it continued an operation would be necessary, tended to show that the assault was the cause of the injury, that medical and surgical attendance was made necessary thereby, and that plaintiff's capacity for manual labor and his efficiency as a telegraph operator might be diminished thereby, and warranted the granting of plaintiff's prayer, laying down the rule for assessing damages in such a case.

6. In an action for an assault and battery, the burden was on defendants to prove the truth of all the matters set up in their pleas of confession and avoidance.

7. The burden was on plaintiff to establish the assault and resulting injury.

8. If plaintiff entered a store, in which defendants kept a post office and general store, to inquire about a car he had ordered, and one of the defendants called him a liar and a thief, and told the other defendant, who was the postmaster, to throw him out, which the latter immediately proceeded to do, the defendants would be jointly liable for the assault.

9. A prayer is properly refused where everything properly embraced in it is covered by another prayer which is given.

10. An instruction to find for the plaintiff if the jury found the facts to be as stated in a certain prayer given for the plaintiff, unless they found the additional facts stated in a certain other prayer given for defendants, was not calculated to mislead the jury.

Appeal from Circuit Court, Carroll County; Thomas, Judge.

Action by Julian D. Wheeler against Robert Sellman and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Jas. A. C. Bond and F. Neal Parke, for appellants. Guy W. Steele, for appellee.

PEARCE, J. This is an action of trespass vi et armis for an alleged assault and battery by the appellants upon the appellee. The narr. contains but one count, in the usual form, charging the defendants as joint tortfeasors, and alleging special damages by reason of expense incurred for medical and surgical attendance. The defendants pleaded non cul., and also filed three pleas in confession and avoidance, in all of which it was alleged that at the time of the assault charged they were possessed of a building in which the plaintiff was trespassing, and from which, though requested, he refused to depart, and that they then removed him, using no more force than was necessary. The second and third of these pleas also alleged that the defendants kept the United States post office at Watersville, and a retail store in the building, and that plaintiff, while in the building, made a noise and disturbance therein, and conducted himself in a rude and quarrelsome manner. The plaintiff joined issue on the first plea, and replied to the second, third, and fourth pleas, alleging the use of more force than was necessary in his removal. Issues were joined on these replications, and an agreement was filed waiving all errors in pleading, and providing that either party might offer any testimony admissible under any state of the pleadings.

There are four exceptions presented by the record: Two with respect to evidence admitted subject to exception, and subsequently refused to be stricken out; one to the ruling upon special exceptions to certain prayers of plaintiff for want of evidence to support them; and one to the granting of certain prayers of plaintiff, and the rejection of cer-

tain prayers of defendants. The first and second exceptions present closely analogous questions. Plaintiff, as a witness, had described the circumstances which led to and characterized the assault, testifying that he had entered the building in a quiet and orderly manner to inquire about a car he had ordered; that Robert Sellman said plaintiff had ordered no car, and he replied that he had, but that Sellman had taken it for his own use, and that Sellman said he was "a damn liar and thief"; that at that time Alonzo B. Sellman, the postmaster, son of Robert Sellman, came in, and Robert Sellman said, "Throw the damn thief out," and Alonzo Sellman seized him by the back of the neck and the bottom of his pants, or by the suspenders, and he was thrown out, from a porch eight or nine feet wide and five feet high, to the ground. He further testified, subject to exception, that while being carried across the porch he had an aching and burning sensation in his left testicle, which pain had continued ever since. He further testified that a short time after the assault he left the place, and said: "I then went up the road through a woods of mine, and when I got in the woods I looked at my testicle, and found a red stripe over it, and it was very much swollen; and two or three weeks after that I found an injury there, and I went to Baltimore and had it taken out. Question. How did this injury that you speak of affect you? Answer. It made me very nervous, and I could not sleep at night, and when I went to stoop over to do anything, I had great pain. Question. What is your condition at present? Answer. My condition at present is that I suffer a great deal from the pain from the testicle going along the cord into my stomach."

The defendants moved to strike out the testimony above embraced in quotation marks, and the first exception was taken to the refusal to strike this out. In support of this exception, defendants rely upon the rule that the opinions of nonexpert witnesses are not evidence, and they argue that the testimony objected to is merely the opinion or inference of the plaintiff. They admit that he can testify as to his condition before and after the injury, in order that from these facts the jury may form its opinion and draw its inferences as to the cause of the injury; but they say that to ask the witness, "How did this injury which you speak of affect you?" is to ask the very question the jury had to decide, and that to permit the witness to answer, "It made me nervous," etc., is to give probative force to the mere inferences of the witness as to the cause of the injury. It certainly cannot be seriously contended that the rule invoked excludes that part of the testimony objected to, which precedes the question as to how the injury affected him, since that is a simple description of his physical condition and of facts which he knew. City Pass. Ry. Co. v. Nugent, 86 Md. 360, 38 Atl.

† 6. See Assault and Battery, vol. 4, Cent. Dig. § 36.

779. Nor do we perceive any valid objection to the two following questions and the answers thereto. Each of these questions called for the statement of facts only, descriptive of his physical condition, to which he was certainly competent to testify, and the answers contained nothing but such statements of facts. Neither the questions nor the answers dealt with the cause of the injury. That related exclusively to its effect. The Maryland cases cited by the appellants upon this point have no pertinency to the question here; nor does the language of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1918, quoted upon their brief, have any greater pertinency, when the case is examined. That case concerned an insurance effected through a broker, who testified "that he did not believe the insured would have meddled with the insurance if he had seen certain letters" in evidence, and it was of this "belief" that the court said: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and the jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." We find no error in this ruling.

Dr. Joseph Hering, a practicing physician, then testified that plaintiff came to him in December (the assault having been in September), and further testified, subject to exception, as follows: "I examined Mr. Wheeler, who came to me complaining of a pain in his testicle. I found him to be suffering with an enlargement about the testicle. I suggested some treatment for him, and that if it continued he would have to go to the hospital and have an operation performed. I did not thoroughly diagnose the exact condition, but there was an enlargement of the left testicle. I next examined Mr. Wheeler yesterday morning, and saw that an operation had been performed, from a scar." Upon cross-examination, Dr. Hering testified: "I know nothing of the cause of the trouble."

The second exception was taken to the refusal of the court to strike out this testimony. The ground of the objection is that this testimony was immaterial, irrelevant, and hearsay. But if Dr. Hering had not been sworn it would have been a legitimate argument to the jury that the plaintiff had failed to produce the best available evidence of the character and extent of his injury. Upon that point, therefore, his testimony cannot be either immaterial or irrelevant. Nor is it hearsay. Mr. Greenleaf says (vol. 1, § 102, 14th Ed): "The representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account rejected." In *Fleming v. Springfield*, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268, it was held that a statement by plain-

tiff in an action for personal injuries, made to his physician, as to his symptoms at the time, if made for the purpose of medical treatment and advice, is admissible in his favor, though the interview was only a day or two before, or possibly during, the trial. And in *N. P. R. R. v. Urlin*, 158 U. S. 275, 15 Sup. Ct. 840, 39 L. Ed. 977, the text of *Greenleaf* and the case just cited are approved. It will be observed that the only statement made by plaintiff to Dr. Hering was of his suffering at the time, though it was held in *Roosa v. Boston Loan Co.*, 132 Mass. 439, that a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensation, and feelings, both past and present, and that these are admitted from necessity, because in this way only can the bodily condition of the party be ascertained. We are not required, however, to go to that extent here. It was also held in that case—and we think properly—that this does not extend to the patient's declaration of the cause of the injury. In the case before us there was no such declaration by plaintiff, and Dr. Hering expressly testified that he knew nothing of the cause. We think this ruling of the court was correct.

The third exception was to the overruling of the special exceptions to the plaintiff's eighth prayer as modified by the court, for the reason that the evidence does not support the prayer. We think there is ample evidence to support this prayer, which lays down the rule for assessing damages so familiar in cases of this character. Five reasons are assigned in support of the special exception. Of these, the first and second fail to specify the particulars in which the proof is supposed to be defective, and need not, therefore, be considered. The third alleges there is no evidence that the plaintiff was disabled or unfitted for pursuing his ordinary occupations; the fourth, that there is no evidence to show that the injury complained of resulted from the alleged assault; and the fifth, that there is no evidence that the medical attention and the operation was necessitated by the alleged assault. Wheeler testified that he had been telegraph operator at *Watersville* for 17 years; that he was at the time of the assault engaged in handling and shipping baled hay; that on the day following he was obliged to suspend this work and lie down most of the day; that from October following the assault in September, until May, he had not been able to do any manual work; and that when testifying, May 16th, he suffered a great deal of pain from the testicle; also that for the first time in his service there had been complaints about his work as operator. His own testimony shows that the pain in the testicle began with the assault, and continued up to the time of the trial. Dr. Hering's testimony was that, if the enlargement continued, an operation would be necessary, and that on

his subsequent examination he saw one had been performed. We are not concerned with the weight of this testimony, which is always for the jury; but it certainly tends to show that the alleged assault might have been the cause of the injury, that the medical and surgical attention was made necessary thereby, and that his capacity for manual labor and his efficiency as a telegraph operator might be diminished thereby. If there was any evidence of any other cause to which the injury could be rationally attributed, or if they thought all the plaintiff's testimony unworthy of belief, the jury could have so indicated by a verdict for defendants; but, in the face of the testimony we have mentioned, the court could not properly have sustained this special exception.

Plaintiff and defendants each offered eight prayers. Of these, the plaintiff's seventh prayer was granted as offered, the eighth was modified and so granted, and the third was modified and so granted in connection with defendants' fourth prayer. Of defendants' prayers, the third and fourth were granted, and all the others were rejected. The fourth exception was taken to these rulings upon the prayers. It follows from what we have said in reference to the special exception to the plaintiff's eighth prayer as modified that we think it was correctly granted; it having been too often approved by this court, when supported by legally sufficient evidence, to require any citation of authorities.

Plaintiff's seventh prayer instructed the jury that the burden of proof was on defendants to show by preponderance of evidence all the matters alleged in their pleas of confession and avoidance, and it was correctly granted. The rule has been well stated in *Blake v. Damon*, 103 Mass. 199, thus: "If plaintiff alleges acts which if proved, and not justified, will sustain his action, and the defendant seeks to justify them, the burden is upon him to prove his justification." And this rule was well illustrated in *St. John v. Eastern Ry.*, 1 Allen, 544, where it was said: "Where plaintiff was a passenger on a railroad, and defendant, by its agents, assaulted him, if the assault is proved the burden of justifying it rests upon the defendant, as in ordinary cases."

Upon the same principle, defendants' third prayer, relating to the burden of proof on plaintiff to establish the assault and the resulting injury, was properly granted. The defendants' first prayer asked that the jury be instructed that there was no evidence legally sufficient to entitle the plaintiff to recover under the pleadings as against Robert Sellman. This is upon the theory that Alonzo B. Sellman, as postmaster, ejected the plaintiff, as authorized by the postal laws and regulations read in evidence, and that in this act of expulsion Robert Sellman did not participate directly or indirectly, and he therefore incurred no liability, even if undue

force was used by Alonzo Sellman. But this would ignore the plaintiff's testimony that the difficulty originated with Robert Sellman, who cursed him and called him a liar and a thief when he came to see England about the car he had ordered; that, as soon as Alonzo Sellman appeared upon the scene, Robert Sellman called to throw plaintiff out, which was immediately done by Alonzo B. Sellman. If the jury believed this testimony, Robert and Alonzo Sellman were jointly liable for the wrong done, and this prayer, therefore, was properly refused.

The defendants' third prayer, as modified and granted, covers everything properly embraced in the second prayer, and there was no error in the rejection of the second prayer for this reason. Moreover, the attempt to distinguish in the second prayer between damages which would, and those which would not, entitle the plaintiff to a verdict, was sufficient to justify its rejection. The plaintiff's third prayer, as modified by the court, was granted in connection with defendants' fourth prayer—the court indorsing on the plaintiff's third prayer an instruction that it was to be read in connection with defendants' fourth prayer; and these prayers, we think, fairly and fully covered the law of the case. The plaintiff's third prayer requires the jury to find all the facts necessary to constitute an assault by both defendants. The authorities abundantly support the proposition that all persons actually present, aiding, abetting, or counseling an assault, are guilty, as principals. Thus in *Com. v. Hurley*, 99 Mass. 433, it was held that evidence that one of a noisy crowd near a policeman cried out "kill him," about the time when others knocked the officer down, was sufficient to convict of an assault upon the officer.

Defendants' fourth prayer set forth all the facts of justification, which, if found by the jury, would relieve the defendants from legal liability. These two prayers, taken together, as required by the instruction to that effect, were, in substance, a direction that notwithstanding the jury, upon the plaintiff's evidence, might find an assault by the defendants, yet if, upon defendants' evidence, they should find the assault justified, their verdict must be for defendants, or, in other words, that, if they found the facts stated in the third prayer, they must give a verdict for the plaintiff, unless they found the additional facts stated in the fourth prayer, in which event they must render a verdict for the defendants; and it is not possible to suppose that the jury could have been in any way misled or confused by such instructions. This practice has been frequently approved, as in *Deford v. Dryden*, 46 Md. 256, and in *Garey v. Sangston*, 64 Md. 38, 20 Atl. 1034. Under these instructions the jury could determine from all the evidence whether the plaintiff was ejected, without undue violence, in a bona fide attempt by Alonzo Sell-

man to exercise his lawful authority as postmaster, or whether the defendants intended from the first to commit a wrong, with the purpose then or subsequently formed to set up Alonzo Sellman's legal authority as postmaster as a cover for their joint illegal conduct. *Taylor v. Jones*, 42 N. H. 35.

Defendants' fifth, sixth, and seventh prayers contain no proposition of law which was not embraced in their fourth prayer, and the court cannot be required to repeat and reproduce the same legal proposition with a mere difference of phraseology. Such practice has been condemned, as tending to confusion and uncertainty, in *Green Ridge R. R. v. Brinkman*, 64 Md. 61, 20 Atl. 1024, 54 Am. Rep. 755, and in *Spencer v. Trafford*, 42 Md. 21.

It follows from what we have said in regard to the first and second exceptions that there was no error in rejecting defendants' eighth prayer, which asserts that there was no legally sufficient evidence to show that the necessity for the operation upon plaintiff was the result of his ejection from the store by defendants.

Finding no error in any of the rulings, the judgment will be affirmed.

BROWN et al. v. BROOKE et al.

(Court of Appeals of Maryland. 1902.)

OFFICERS—TERM OF OFFICE—ABRIDGMENT.

1. Const. art. 7, § 1, as amended in 1890 (Acts 1890, p. 277, c. 255), providing for the election of county commissioners, declares that "they shall be elected at such times, in such numbers, and for such periods, not exceeding six years, as may be prescribed by law." Respondents were elected commissioners of a certain county under Acts 1892, p. 637, c. 442, which fixed their term of office at six years. Acts 1901, p. 41, c. 13, provided for the election in that year of county commissioners for such county to hold office for two years, and declared that upon their qualification the term of office of the commissioners then in office should "cease and determine as fully as if when elected they had only been elected to serve until that time." *Held* constitutional by divided court.

Appeal from Circuit Court, Anne Arundel County; Revell, Judge.

Mandamus by Samuel Brooke and others against William H. Brown and others. Writ awarded, and respondents appeal. Affirmed by divided court.

Const. art. 7, § 1, formerly read as follows: "County commissioners shall be elected on general ticket of each county by the qualified voters of the several counties of this state, on the Tuesday next after the first Monday in the month of November, 1867, and on the same day in every second year thereafter. Their number in each county, their compensation, powers and duties shall be such as are now or may be hereafter prescribed by law." This section

was amended by Acts 1890, p. 277, c. 255, adopted by vote of the people on November 3, 1890, so as to provide as follows: "County commissioners shall be elected on general ticket of each county by the qualified voters of the several counties of the state, on the Tuesday next after the first Monday in the month of November, commencing in the year 1891; their number in each county, their compensation, powers and duties shall be such as are now or may be hereafter prescribed by law; they shall be elected at such times, in such numbers and for such periods, not exceeding six years, as may be prescribed by law." Acts 1892, p. 637, c. 442, provided for the election in November, 1893, of three county commissioners for Anne Arundel county, to hold their offices for the terms, respectively, of six, four, and two years, as the governor should designate, and that at the expiration of their respective terms of office their successors should be elected for the term of six years.

The appellants (respondents) were in office as county commissioners of Anne Arundel county under this act (their terms being unexpired) when Acts 1901, p. 41, c. 13, was passed. This repealed the act of 1892, and provided that at the general election to be held in November, 1901, seven county commissioners should be elected for Anne Arundel county to hold office for two years, and that, upon the qualification of the seven county commissioners then elected, "the terms of the present county commissioners of Anne Arundel county shall cease and determine as fully as if when elected they had only been elected to serve until that time." The persons elected county commissioners under this act in November, 1901 (the appellees in this appeal), applied for a writ of mandamus directing the respondents to surrender to them the offices in question. The respondents denied the constitutional power of the Legislature to abridge the terms of office for which they had been elected under the act of 1892. The circuit court ordered the writ of mandamus to be issued as prayed in the petition. Upon appeal the order was affirmed April 1, 1902, because this court was equally divided—there being four judges in favor of affirmance, and four in favor of reversal—and consequently no opinion was filed.

E. C. Gantt, for appellants. Jas. R. Brashers, for appellees.

ADAMS v. WIESENTHAL et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

REFPLEVIN—REDELIVERY BOND—ACTION—PLEA.

1. An averment in a plea that the defendant tendered the goods "in as good condition as the same were at the time of signing the bond" is no answer to an alleged breach of the condition of the bond that the said defendant would

¶ 1. See Constitutional Law, vol. 10, Cent. Dig. § 557; Officers, vol. 37, Cent. Dig. § 71.

deliver the goods and chattels "in as good condition as the same were at the time of making the claim of property therein."

2. A plaintiff in replevin is under no duty to demand a return of the goods redelivered to the defendant in replevin by the sheriff, after a judgment in the replevin suit in his favor, and an assessment of his damages for the taking and detaining of the goods, before he can sue upon the bond given to the sheriff by the defendant.

(Syllabus by the Court.)

Action by Israel G. Adams against Isaac Wiesenthal and Lewis Evans. Demurrer to plea. Sustained.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Thompson & Cole, for the demurrer. G. A. Bourgeois, opposed.

FORT, J. This was a suit upon a replevin bond given by a defendant in replevin to the sheriff, with a claim of property, under section 9 of the replevin act (Gen. St. p. 2772, § 9). The condition of the bond was, "If the said S. S. S. shall deliver the said goods and chattels in as good condition as the same were at the time of making such claim to the said I. G. A. * * * then this obligation to be void," etc.

There were three pleas: (1) Non est factum. (2) Actio non, because before suit the defendants tendered to the plaintiff the goods and chattels mentioned in the bond, "in as good condition as the same were at the time of signing said bond." The plea concludes with a verification, and prays judgment if the plaintiff ought to have or maintain his action, etc. (3) Actio non, because the said plaintiff did not demand a return of the said goods and chattels mentioned, from S. S. S., before instituting the suit. This plea concludes to the country.

The demurrers are to the second and third pleas. Each of these pleas has a defective conclusion. The second plea should have concluded to the country, and the third plea with a verification. But both pleas are otherwise deficient. The second, because the statement that the plaintiff tendered the goods "in as good condition as the same were at the time of signing the bond" is no answer to the alleged breach of a condition that "the said S. S. S. would deliver the said goods and chattels in as good condition as the same were at the time of making the claim of property therein." Where a declaration on a bond with condition sets out conditions, and specially assigns breaches, the plea, to be good, must traverse the breaches as laid, and conclude to the country. *Dime Savings Inst. v. American Surety Co.* (N. J. Sup.) 53 Atl. 217. The third plea is bad because the facts alleged in it, if true, are no defense. The plaintiff in replevin is under no duty to demand a return of the goods redelivered to the defendant in replevin by the sheriff upon the delivery to

him by the defendant of a bond under the statute. Upon the determination of the suit in replevin in favor of the plaintiff, and an assessment of his damages for the taking and detention of the property, he may at once sue upon the bond given to the sheriff, which has been assigned to him.

Both demurrers are sustained.

SENSFELDER v. STOKES et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

NEW TRIAL—RULE TO SHOW CAUSE—THEORY OF LAW.

1. Upon a rule to show cause, a verdict cannot be supported upon a theory of the law contrary to that upon which the case was submitted to the jury.

(Syllabus by the Court.)

Action by Elizabeth Sensfelder against Ezra Stokes and John G. MacElroy. Verdict for plaintiff. Rule to show cause. Verdict set aside.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Howard Carrow, for plaintiff. John W. Westcott, for defendants.

PITNEY, J. This is an action of tort to recover damages for alleged fraudulent misrepresentations made by the defendants to the plaintiff. The plaintiff having obtained a verdict, a rule was granted requiring her to show cause why the verdict should not be set aside and a new trial granted, on the ground, among others, that the verdict is contrary to the weight of the evidence.

The gist of the plaintiff's case is that she was the owner of a hotel property of considerable value, and that the defendants induced her to exchange it for \$1,100 in cash and \$11,000, par value, of the stock of the Investors Company (a corporation owned and controlled by the defendants), by falsely and fraudulently representing to her that the company owned certain lands of large value, had cash assets, and had been paying substantial dividends; that these representations were false, and known by the defendants to be so; and that the stock received by her in exchange for the hotel property was entirely worthless. The plaintiff did not claim to have rescinded the transaction. On the contrary, the action was based on an affirmation of the exchange of properties as valid and binding; the plaintiff claiming damages simply for the deceit. It was on that basis that the trial judge undertook to submit the case to the jury. At the same time it appeared in evidence that some time after the plaintiff conveyed her hotel to defendants, and received from them the stock in exchange, some negotiations took place between her and the Investors Company, or its

¶ 1. See New Trial, vol. 27, Cent. Dig. § 20.

representatives, looking towards a surrender to that company of her shares of stock in exchange for some of the lands owned by that company. The great weight of the evidence showed that this exchange had been carried into effect; the plaintiff having transferred her stock to the company, and having received, through an agent, deeds of conveyance made by the company to her. This transaction was closed before the commencement of the suit.

The trial judge ordered an amendment of the pleadings, by directing that the defendants file a special plea setting up that before the bringing of this suit the plaintiff had parted with all right, title, and interest in her shares of stock, and ordered that the trial proceed upon that issue. And in his charge to the jury the judge instructed them that, before considering the proofs upon the question of fraudulent misrepresentations made by the defendants to the plaintiff, the jury must "consider another question which has become one of the issues in this case, and with respect to which during the trial the court has said that the pleadings are to be considered as amended, because the action has been tried fully on both sides; and that is whether the plaintiff had not parted with her \$11,000 worth of stock voluntarily before she brought this suit. It is needless to say that, if she was not the owner of this stock—if she had no interest at all in it—at the time that she brought this suit, she cannot have any damages with respect to what had happened before she parted with her stock, because she can only be a plaintiff in this suit on the theory that she is or was the owner of the stock at the time she brought the suit." And after referring to the evidence upon the question of the transfer of the stock from the plaintiff to the Investors Company, the judge proceeded to charge the jury that, "if you believe that this transfer took place as these men testify that it did, then your verdict must be for the defendants, for the simple reason that the plaintiff has no interest in the stock that she then parted with. If she parted with it, in fine, she has no longer any interest in this suit."

Plaintiff's counsel did not assent to this instruction, but, on the contrary, noted an exception thereto. The ground of this protest, doubtless, was that, inasmuch as the plaintiff was not seeking to rescind the exchange made between her and the defendants, she was not obliged to hold herself in readiness to restore to them that which she had received from them in the exchange; that, as she had affirmed the exchange, she was entitled to deal with the stock as her own for all purposes, and, if she had subsequently transferred it to the Investors Company for a consideration, she was only doing what she had a right to do with her own property, and did not thereby disable herself from recovering damages from the defendants for their fraudulent representations.

With this contention of the plaintiff it would not be difficult for us to agree. But that consideration cannot move us to sustain the present verdict. For it is well settled that a verdict cannot be supported upon a theory of the law contrary to that upon which the case was submitted to the jury. *Hays v. Pennsylvania R. Co.*, 42 N. J. Law, 446; *Marts v. Cumberland Ins. Co.*, 44 N. J. Law, 478; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. Law, 26.

Because the verdict of the jury is contrary to the great weight of the evidence upon an issue that the trial judge instructed them must be controlling, the verdict will be set aside, and a new trial granted.

LANGSTAFF v. METROPOLITAN LIFE INS. CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

LIFE INSURANCE—CONSTRUCTION OF POLICY.

1. A policy upon the life of L., insuring the payment of a sum of money to A. in case of the death of L., declared upon its face that "no obligation is assumed by the company until the first premium has been paid, nor prior to this date, nor unless upon this date the insured is alive and in sound health." Held, that such a policy did not become binding by a tender or payment of the premium while L. was ill, and before the delivery of the policy to L.

(Syllabus by the Court.)

Action by Lydia Langstaff against the Metropolitan Life Insurance Company. Verdict for defendant. Rule to show cause discharged.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Voorhees & Booraeru, for plaintiff. Willard P. Voorhees, for defendant.

FORT, J. The decision of this case is controlled by the case of *McClave v. Mutual Reserve Fund Life Association*, 55 N. J. Law, 187, 26 Atl. 78. It is impossible upon principle to distinguish that case from this. The application for the policy sued upon in this case contained this clause: "I further agree * * * that the contract of insurance, if one be issued, * * * shall not be binding upon the company unless upon its date and delivery the insured be alive, and in sound health." The policy issued reads as follows: "No obligation is assumed by the company until the first premium has been paid, nor prior to this date, nor unless upon this date the insured is alive, and in sound health." Conceding the payment of the premium to a clerk in the office of the agent of the company at New Brunswick to be proven that it was good as against the company, still it is an unquestioned fact in the case that at that time the insured was not in sound health. The agent of the defendant company, who knew of the illness of the insured

when he received the policy from the company, was justified in refusing to deliver the policy on the tender to him of the premium; and the subsequent leaving of the amount of the premium with a clerk of the agent at his office, without his knowledge or consent, while the insured was still ill, did not alter the situation. The clerk notified the person so leaving the money that she had no authority to give a receipt therefor, and she gave none. One of the conditions of the policy forbids payments of premiums at other places than at the home office, unless a receipt signed by the president or secretary and countersigned by the person receiving the premium be given to the person so paying it. This policy was received in New Brunswick on November 30th, and at that time and the time when the premium thereon was tendered the agent, the insured was ill with typhoid fever, from which he died on December 5th following.

The rule to show cause will be discharged.

KULIN v. HELLER.

(Supreme Court of New Jersey. Feb. 25, 1903.)

TRESPASS—DIRECTING VERDICT—SALE TO WIFE.

1. In a suit brought by plaintiff to recover damages for breaking and entering her shop and carrying away her goods and chattels:

The plaintiff requested the trial court to direct a verdict for plaintiff, which was refused.

Held no error, because it was a question for the jury as to the goods and chattels, and therefore the request was too broad. The request should have been to direct a verdict only as to damages to the real estate.

2. It was error to charge the jury that, to pass title from husband to wife, the bill of sale to S. must have been delivered to him in person, and by him delivered to the wife.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Clara Kulin against Margaret Heller, executrix of William Heller, deceased. Verdict for defendant. Plaintiff brings error. Reversed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Wm. S. Stuhr, for plaintiff. McDermott & Fisk, for defendant.

VAN SYCKEL, J. This suit was brought by Clara Kulin against William Heller for breaking and entering her place of business on the 28th of June, 1897, and carrying away her goods and chattels. Pending the suit William Heller died, and his wife was substituted, as his executrix, as defendant in the case. At the time of the alleged trespass, William Heller was sheriff of the county of Hudson, and, by virtue of an execution against Frederick Kulin, entered upon the premises specified in the declaration, and levied upon said goods and sold them as the

property of said Frederick. Clara Kulin claimed that the goods were her property, and not the property of her husband. Clara claimed to have acquired title to the goods from her husband, who was engaged in the butcher business. After the alleged sale to her, the business was continued in the same way as before the sale, and the judgment under which the goods were sold was recovered for articles sold to the husband for the business at the butcher shop.

The trial court properly submitted to the jury the question whether the alleged sale to the plaintiff was an attempt to protect the property of the husband from seizure by his creditors, with instructions that, if it was the property of the wife, she was entitled to recover the value of the goods. The jury found a verdict in favor of the defendant.

The plaintiff testified that she owned the premises upon which the trespass was committed. This testimony was erroneously overruled, but she was afterwards permitted to prove and offer in evidence her deed.

On the cross-examination of the plaintiff, the trial court permitted certain questions to be asked, to which her counsel objected; but she replied that she did not know, and therefore she suffered no injury thereby.

The plaintiff testified that William Heller broke open the front door of her premises and came in. This was overruled, but, as she afterwards testified that she did not know William Heller, it was evidently hearsay, and therefore not competent.

The plaintiff requested the trial court to direct a verdict for the plaintiff, and assigns error for refusal to do so. The plaintiff was not entitled to this direction, for two reasons: (1) It was not proven that a trespass upon the plaintiff's lands was committed by Heller, or by any one acting for him and under his authority. (2) The request was general—to direct a verdict. As to the personal estate, it was a question for the jury, and therefore the request was too broad. It should have been a request to direct a verdict for the plaintiff for the alleged trespass on the real estate.

The counsel of defendant asked the trial court to charge that "if the bill of sale from Kulin to Suderly was not delivered to Suderly, as Mr. Stuhr says it was not, then Mrs. Kulin certainly acquired no title, because Suderly did not have either actual or constructive possession of the business." In reply to this request the court charged as follows: "The Court: I will charge you that, so far as the bills of sale are concerned, the husband cannot transfer directly to his wife. It must be done through a third party, and the third person then transfer it to the wife. You have heard the testimony on that point—that while the paper title appears to pass from Mr. Kulin to Mr. Suderly, and then to Mrs. Kulin, it appears by the testimony that Mr. Suderly never had possession of the property, either actual or constructive, and never

had possession of bill of sale to him. In addition to that, it would not be necessary to make any paper title at all, where personal property is concerned, if there is an actual delivery, and vendor takes them into her possession; but where property is not delivered, and vendor does not take possession, it is necessary, in order to protect the property from the creditors, to pass a paper title. There is no record that this title has passed; the bills of sale were not recorded; and you will take the testimony, and ascertain whether or not the title did pass to Mr. Suderly, and whether he ever had either actual or constructive possession, so he could pass it to Mrs. Kulin. But, if the possession of the goods and chattels changed to vendee, title would not be necessary." Exception was taken, and error assigned. The evidence of Stuhr, which was uncontradicted, is that a bill of sale of the goods from Frederick Kulin to Suderly, and a bill of sale from Suderly to the plaintiff, were executed in his presence for the purpose of conveying the title from the husband to the wife, and that when they were duly executed both of said bills of sale were handed by him to the plaintiff. The charge of the trial court left the jury to understand that because the bills of sale were not actually delivered into the hands of Suderly, and by him delivered in person to the plaintiff, no title passed to Suderly or to the plaintiff. That was a fatal error. The delivery by Stuhr was a delivery for the parties to the transaction.

The judgment below should be reversed.

FAUX v. WILLETT.

(Supreme Court of New Jersey. Feb. 24, 1903.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. A verdict founded upon divergent facts will not be set aside because the court may think that, if it had been passing upon the facts, it might have found otherwise.

(Syllabus by the Court.)

Action by William J. Faux against Sarah J. Willett. Verdict for plaintiff. Rule to show cause discharged.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

A. H. & T. Strong, for the rule. George S. Silzer, opposed.

FORT, J. There were but two grounds upon which it was seriously contended that there should be a new trial in this case. They were (1) because the verdict was against the charge of the court and (2) because it was against the weight of the evidence.

The charge of the court certainly did give to the defendant every intendment and implication which the jury might gather from the

facts, and state to the jury that an acceptance of the view of the facts as expressed by the court could lead to no other result but the finding for the defendant; but it likewise left a theory upon which the defendant might be found to be liable. That view the jury took. While we might not have found that way had we been the jury, still we cannot say that the result is erroneous. The jury may be right in their view. The law as to the liability of a married woman was correctly stated to the jury by the court, and under it they have found, from the evidence, that the contract in this case was made with the defendant.

Nor can we say that the weight of evidence is so preponderatingly against the verdict as to require its overthrow. If it be true that the original order for the purchase of the coal in this case was given by the defendant—and the jury have so found—then many other facts are explainable from the method of transacting the business. The order of the defendant was given by Theodore Willett, her husband. He was the person with whom the plaintiff had all his negotiations and correspondence. This makes a perfectly clear theory for explaining the fact that all the letters were addressed to him. They were written to him as the agent of the wife. The jury evidently accepted the plaintiff's explanation of the way the account came to be charged on the plaintiff's books to Theodore Willett instead of Sarah J. Willett. About the fact that the original order was given in the name of Sarah J. Willett, and that Theodore Willett was authorized to and did sign it in her name, there is no fair doubt under the evidence. This being established, it would not be proper to reverse a verdict because subsequent letters from the plaintiff might be said to throw doubt upon the original order when the original order itself proved to be free from doubt. There is a theory, as we have above seen, upon which these subsequent letters are all explainable, consistent with the defendant's personal liability. That theory the jury were told they must find, or the defendant was entitled to their verdict. They found that theory to be the explanation of the letters. We cannot say it was not justified under the proof. This leads to the discharge of the rule to show cause.

UNITED NEW JERSEY R. & CANAL CO.
et al. v. GUMMERE, County Clerk, et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CERTIORARI—REVIEW OF ASSESSMENT.

1. A certiorari should not be allowed to set aside an assessment levied under the public road act of March 12, 1895 (Gen. St. p. 2902) § 14, merely because of defects in the commissioners' report of assessments, unless the certiorari is applied for within 30 days after the confirmation of the assessment.

(Syllabus by the Court.)

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3223.

Certiorari by the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company against Barker Gummere, Jr., and others, to review an assessment. Writ dismissed.

Argued November term, 1902, before HEN-DRICKSON and DIXON, JJ.

Alan H. Strong, for prosecutors. J. Lef-ferts Conard, Aaron V. Dawes, and Linton Satterthwait, for defendants.

DIXON, J. This certiorari brings under review an assessment for the improvement of a public road in Mercer county under the act of March 22, 1895 (Gen. St. p. 2902). The assessment was confirmed by the circuit court of the county on April 3, 1902, and certiorari was allowed October 22, 1902.

The fourteenth section of the act above mentioned enacts that no certiorari shall be allowed to review any of the proceedings, nor in any way to effect any assessment, after the lapse of 30 days from the making of the order of the court confirming such assessment. The prosecutors rely on a single reason both to escape from this limitation and to overthrow the assessment, namely, that the commissioners failed to report that their assessment on the several parcels of land had been made in proportion to, and not in excess of, the benefits received from the improvement. Such a distribution being necessary to a constitutional assessment, the prosecutors insist that under our decisions the statutory limitation cannot be enforced, and they refer in support to *Meredith v. Perth Amboy*, 63 N. J. Law, 520, 44 Atl. 971, and cases there cited. But these cases do not sustain the position of the prosecutors. Their purport is that, where a statute under which the assessment is levied is unconstitutional (*Traphagen v. West Hoboken*, 39 N. J. Law, 232; *Id.*, 40 N. J. Law, 193; *Kirkpatrick v. Commissioners*, 42 N. J. Law, 510), or where the tribunal confirming the assessment is without jurisdiction of the matter—for example, if it has failed to give the required notice (*Pardee v. Perth Amboy*, 57 N. J. Law, 106, 29 Atl. 587), or where the circumstances are such that no assessment can constitutionally be made (*Benedictine Sisters v. Elizabeth*, 50 N. J. Law, 347, 13 Atl. 5; *Meredith v. Perth Amboy*, 63 N. J. Law, 520, 44 Atl. 971), there the statutory limitation will not bar. None of these grounds, nor any akin to them, appears in the present case. The statute provides for a constitutional assessment, the lands of the prosecutors are subject to assessment, and the circuit court caused due notice of the time and place for hearing objections to be given. The sole ground of complaint is the defect in the report of the commissioners. Such a complaint is precluded by the statutory bar. *Benedictine Sisters v. Elizabeth*, 50 N. J. Law, 347, 13 Atl. 5. The defect could certainly have been remedied by order of the

circuit court under section 13 of the act in question, and ought now to be disregarded as a cause for reversing the assessment under the act of March 23d, 1881 (Gen. St. p. 3404).

The writ should be dismissed, with costs.

LOWRY v. TIVY.

(Supreme Court of New Jersey. Feb. 24, 1903.)
ACTION ON NOTE—EVIDENCE—TRANSACTIONS
WITH DECEASED PARTNER.

1. In an action founded upon a promissory note, in which a surviving partner and the personal representative of a deceased partner are joined as parties defendant severally liable, pursuant to section 29 of the practice act (Gen. St. p. 2537), if the several issues are tried together without objection, the plaintiff may give testimony concerning transactions with and statements by the deceased partner, so far as relevant to show the liability of the partnership firm upon the note, notwithstanding section 4 of the revised evidence act (Laws 1900, p. 363).

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Hannah Lowry against Peter Tivy and others. Judgment for defendants, and plaintiff brings error. Reversed.

Argued November term, 1902, before GUM-MERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Leon Abbett, for plaintiff in error. William S. Stuhr, for defendant in error.

PITNEY, J. This action was brought to recover moneys alleged to have been loaned by the plaintiff to the firm of Tivy & Schmidt, composed of Peter Tivy and August J. Schmidt, as partners, and alleged to have been secured by two promissory notes made by Schmidt individually, payable to the order of the plaintiff, and indorsed with the firm name of Tivy & Schmidt, signed in the handwriting of Schmidt. Schmidt having deceased, the plaintiff joined as parties defendant the administrator of the deceased partner and Peter Tivy as surviving partner. The declaration contains the common money counts, and to it are annexed copies of the promissory notes, which are referred to in the declaration, and thereby made a part of it, as permitted by section 123 of the practice act (Gen. St. p. 2554). The pleader relied upon section 29 of the practice act (Gen. St. p. 2537), entitling the holder of a promissory note, instead of bringing separate actions against the parties separately liable, to include them in one action. No question is raised as to the applicability of that section in a case like the present, for notice of misjoinder was not given in the manner prescribed by section 38 of the practice act (Gen. St. p. 2538). Therefore the plaintiff was entitled to proceed to trial and recover judgment against either or both of the defendants, according as her proofs warranted. *Patterson v. Loughridge*, 42 N. J. Law, 21; *Elliot v. Bodine*, 59 N. J. Law.

567, 36 Atl. 1038; *Bank of Toronto v. Mfrs. & Merchants' Fire Assn.*, 63 N. J. Law, 5, 42 Atl. 761, at page 13, 68 N. J. Law and page 764, 42 Atl.

The defendants severed in their pleadings, but the several issues were brought on to trial together, without objection. The plaintiff proved the making and delivery of the promissory notes by Schmidt, and proved that the indorsements were in his handwriting, and that a partnership existed at that time between Schmidt and Tivy. The notes were thereupon admitted in evidence. They were made long before the enactment of the recent general act relating to negotiable instruments (Laws 1902, p. 583), and so the present case raises no question of the effect of section 17 of that act, which prescribes that, where the language of the instrument is ambiguous, certain rules of construction shall apply, and, among others, that, where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser. Therefore, since the notes in question were the individual notes of Schmidt, payable to the order of the plaintiff, and indorsed in the firm name of Tivy & Schmidt, the indorsement in and of itself alone does not import any contract on the part of the firm. But extrinsic evidence is admissible to show what was the contract of the parties. *Chaddock v. Van Ness*, 35 N. J. Law, 517, 10 Am. Rep. 256; *Haydon v. Weldon*, 43 N. J. Law, 128, 39 Am. Rep. 551; *Johnson v. Ramsey*, 43 N. J. Law, 279, 39 Am. Rep. 580, at page 282; *Building Society v. Leeds*, 50 N. J. Law, 399, 18 Atl. 82, 5 L. R. A. 353; *Middleton v. Griffith*, 57 N. J. Law, 442, 31 Atl. 405, 51 Am. St. Rep. 617, at page 448, 57 N. J. Law, and page 407, 31 Atl.

The plaintiff was sworn as a witness, and was asked concerning certain transactions alleged to have taken place between her and Schmidt at the time of the making of these notes. She was also asked whether she had loaned moneys to the firm of Tivy & Schmidt at the time the notes were given. These questions were objected to by counsel for the defendants on the ground that under the revised evidence act (Laws 1900, p. 363, § 4) Mrs. Lowry, being a party to the action, was excluded from testifying to any transaction with or statement by the deceased, Schmidt. The objection was sustained by the trial court. At the close of the case the court directed a verdict in favor of the plaintiff against Schmidt's administrator, and granted a nonsuit in favor of the defendant Peter Tivy on the ground of want of evidence against the firm. At the instance of the plaintiff, exceptions were sealed to the rulings just referred to, and she now brings this writ of error seeking to reverse the judgment of nonsuit.

If the administrator of Schmidt had been the sole party defendant, the rulings of the

trial judge with respect to admission of evidence would have been manifestly correct. But as against the defendant Tivy, who was sued individually, and not in a representative capacity, the plaintiff was entitled to give testimony as to transactions between her and the deceased partner relating to the partnership business. And, as the trial was permitted to proceed upon the combined issues raised by the pleas of the several defendants, whatever was admissible in evidence against one defendant was proper evidence to be admitted in the cause. If either defendant had a right to limit the force and effect of any testimony, this might have been done by proper instructions to the jury. The total exclusion of the evidence offered was erroneous, and the error obviously prevented the plaintiff from completing her proofs as against the defendant Tivy.

The judgment under review should be reversed, and a venire de novo awarded.

CORKHILL et ux. v. CAMDEN & S. RY. CO.
(Supreme Court of New Jersey. Feb. 24, 1903.)
**STREET RAILROADS—INJURY TO PASSENGER—
NEGLECT OF MOTORMAN.**

1. The motorman of an electric street railway car started his car at moderate speed to cross an intersecting steam railroad consisting of three tracks, after his conductor had gone forward upon the crossing and had used proper care to ascertain that no railroad train was to be expected. While thus proceeding over the crossing at moderate speed, the motorman became suddenly aware of a railroad train rounding a curve near by, and coming toward his car at a high rate of speed, without timely warning by bell or whistle. A collision seemed imminent, and was in fact narrowly averted. The motorman, on seeing the danger, instantly applied all power, and increased the speed of his car to the utmost, in order to escape the collision. It was claimed that in the lurch of the street car thereby occasioned a passenger was thrown to the floor of the car and injured. *Held*, that a verdict attributing negligence to the motorman on these facts cannot be supported.

(Syllabus by the Court.)

Action by Adam Corkhill and wife against the Camden & Suburban Railway Company and the Pennsylvania Railroad Company. Verdict against defendant Camden & Suburban Railway Company. Rule to show cause made absolute.

Argued November term, 1902, before GUM-MERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Howard Carrow, for plaintiffs. Joseph H. Gaskill, for defendant.

PITNEY, J. This action was brought against the present defendant and the Pennsylvania Railroad Company to recover damages for personal injuries alleged to have been sustained by Mrs. Corkhill while a passenger upon a street car of the Camden & Suburban Railway Company at the crossing of that railway over the tracks of the Pennsylvania Railroad Company. Upon the trial

a nonsuit was ordered with respect to the latter company. This ruling is not complained of. The plaintiffs recovered verdicts as against the present defendant, and a new trial is asked because those verdicts are against the weight of the evidence.

With respect to the liability of the Camden & Suburban Railway Company, the questions raised are, first, was there negligence on the part of the motorman or conductor in attempting to cross the tracks of the steam railway; secondly, was there negligence on the part of the motorman in suddenly increasing the speed of the car while upon the crossing; and, thirdly, did such negligence, if any, result in a physical injury to Mrs. Corkhill.

Taking the evidence most strongly in favor of the plaintiffs, it shows: That while Mrs. Corkhill was seated in an electric street railway car operated by the employees of the present defendant the car came to the crossing of the steam railroad (which consisted of three tracks) at Twelfth and Federal streets, in the city of Camden. That it stopped before entering upon the crossing. That the gates were at this time down. The conductor of the electric car went forward to the center of the crossing, and looked for trains upon the steam railway. He saw no train save a freight train, which was standing on one of the tracks near by. The railroad flagman told the conductor to cross, as the train was going to stand there. Then the gates were raised. The conductor beckoned to the motorman to come ahead, and he did so. Thereupon the electric car started over the crossing at a moderate speed. While it was passing over, a train unexpectedly approached on the railroad, rounding a curve, and, so far as the evidence shows, it gave no signal by bell or whistle. The evidence shows that a collision appeared imminent. The flagman upon the railroad waved a red flag in front of the locomotive in order to avert a collision, and the train was finally stopped within 50 feet of the electric car. The situation was so critical that every passenger in the car was alarmed, and stood up, and looked out of the windows; and the motorman, seeing the danger, instantly applied all power, in order to carry his car across as quickly as possible. Mrs. Corkhill's story is that by the sudden lurch caused by the increased speed of the electric car she was thrown to the floor, and the inference sought to be drawn from this is that the fall caused the paralysis from which she has since suffered.

The case is devoid of evidence to show any want of care in either conductor or motorman in attempting the crossing; on the contrary, there is affirmative evidence to show that the conductor took every reasonable precaution, and that neither he nor the motorman had any warning that a train was coming. As to the conduct of the motorman in turning on full power when confronted

with the imminent danger of a collision, his act evidenced complete presence of mind and the exercise of the highest degree of care. If, on being confronted with such a danger, he had failed to make extraordinary efforts to increase his speed, there would, perhaps, have been ground to charge him with negligence, and the only excuse would have been that in the sudden peril he lost his presence of mind. If he had presence of mind (as he manifestly had) it was his plain duty to instantly apply the utmost power possible, in order to carry his passengers across without loss of life. Even though that might necessarily result in some danger of bruising, or even of more serious personal injury to the passengers, such injury was far preferable to the loss of life of one or more of the passengers, which would undoubtedly have resulted from a collision with the locomotive.

The cases that have held street railway companies liable for injuries to passengers caused by the lurch of a car have gone upon the ground that there was a sudden increase of speed under circumstances that evinced a disregard of the safety of the passengers. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 182; *Scott v. Bergen Co. Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060. See, also, *May v. North Hudson Co. Railway Co.*, 49 N. J. Law, 445, 9 Atl. 688; *Halle v. Clayton & Hoff Co.*, 61 N. J. Law, 197, 38 Atl. 805; *Burr v. Pennsylvania R. R. Co.*, 64 N. J. Law, 30, 44 Atl. 845; *Paynter v. Bridgeton Traction Co.*, 67 N. J. Law, 819, 52 Atl. 367.

In the present case the trial judge properly charged the jury, in effect, that, unless there was negligence on the part of the conductor in allowing the car to cross without exercising proper vigilance, or negligence on the part of the motorman in managing the car as it crossed the railroad, the plaintiff could not recover. The finding of the jury that there was such negligence was contrary to the great weight of the evidence. It is therefore unnecessary to deal with the question whether Mrs. Corkhill's paralysis did not result, according to the great weight of the evidence, from mere fright, as insisted by the defendant, rather than from her being thrown to the floor of the car, as claimed by the plaintiffs.

The rule to show cause will be made absolute.

HAWKINS, Fish and Game Warden, v. AMERICAN COPPER EXTRACTION CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

CONSTITUTIONAL LAW—TITLE OF ACT.

1. Section 17 of "An act to provide a uniform procedure for the enforcement of all laws relating to fish, game and birds, and for the recovery of penalties for violations thereof," ap-

proved March 29, 1897 (P. L. p. 109), is unconstitutional, because its object is not expressed in the title of the act.

(Syllabus by the Court.)

Certiorari to Justice of the Peace.

Action by the state, by Charles M. Hawkins, fish and game warden, informer, against the American Copper Extraction Company. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

P. H. Gilhooly, for prosecutor. Francis Scott, for defendant.

DIXON, J. The offense complained of in the court below was a violation of section 22 of "An act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and close seasons for such capture and possession," approved March 22, 1901 (P. L. p. 261). This section imposes a penalty of \$100 for each offense. The twenty-ninth section enacts that the provisions of the act shall be enforced in accordance with the provisions of the act of March 29, 1897, the title of which is given at the head of this opinion. The seventeenth section of the act of 1897 declares that in all cases where a person shall be convicted a second time double the penalties prescribed shall be imposed upon such second conviction. On the present complaint a penalty of \$200 was imposed in accordance with this section 17, and the present certiorari is brought to reverse that judgment.

We think section 17 is rendered inoperative by article 4, § 7, par. 4, of the Constitution, because its object is not expressed in the title of the act. The title relates wholly to procedure, and gives no intimation of a purpose to impose or increase penalties. The recent decision of this court in *George Jonas Glass Co. v. Ross*, 53 Atl. 675, is based on a similar distinction. Section 29 of the act of 1901 does not aid the plaintiff below, for that section merely directs how the provisions of the act of 1901 shall be enforced, and that act authorizes only the penalty of \$100. We incline also to think that the clause in the act of 1901 directing that the penalty for each offense shall be \$100, making no distinction between the first and subsequent offenses, is inconsistent with, and therefore overrides, the earlier provision that a double penalty should be imposed for each offense after the first.

The judgment should be reversed, with costs.

MACKENZIE v. GILBERT.

(Supreme Court of New Jersey. Feb. 24, 1903.)

JUSTICE COURT—TRIAL BY JURY—JUDGMENT.

1. The right to a trial by jury cannot be denied to a defendant in justice's court who makes

reasonable application therefor, except upon condition of prepayment of the costs of the jury. A judgment obtained before the justice after such refusal is invalid for want of jurisdiction. (Syllabus by the Court.)

Certiorari to Justice of the Peace.

Action by Rowland H. Mackenzie against Edward L. Gilbert. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Warren Dixon, for plaintiff.

HENDRICKSON, J. This writ brings up for review a judgment in the court for the trial of small causes in the county of Bergen. The only ground alleged for reversal is that the defendant was refused a trial by jury, although the same was duly demanded at the trial. The transcript shows that on the first adjourned day "the parties appeared. Defendant demanded a jury, and refused to pay for the same, whereupon the court refused to call a jury. Defendant then moved to dismiss the case. The court refused, and proceeded to trial." There is no provision in the act under which justices' courts are established making the prepayment of the costs of a jury a prerequisite to the right of trial by jury guaranteed in our Constitution. It was decided by this court in the case of *Clayton v. Clark*, 55 N. J. Law, 539, 26 Atl. 795, that in an action brought in the district court, when the matter in dispute is above the sum of \$200, a demand for a jury made by the defendant at the proper time deprives the court of jurisdiction to try the cause otherwise than by jury. It was further held that such a demand gives the defendant the right to a trial by jury without prepayment of costs, or to have the action against him dismissed. The early cases show that this court has ever carefully guarded the right to trial by jury, even in the small-cause courts. *Carey v. Forsyth*, 3 N. J. Law, 432; *Morelander v. Hays et al.*, 2 N. J. Law, 161; *Daniels v. Scott*, 12 N. J. Law, 27. The principles enunciated in *Clayton v. Clark*, ubi supra, should, we think, have application to justices' courts, the jurisdiction of which has been enlarged to the sum of \$200.

The result is that for the error complained of the judgment below will be reversed, with costs.

PEASE v. PATERSON & STATE LINE TRACTION CO.

(Supreme Court of New Jersey. Feb. 24, 1903.)

HIGHWAY—DEDICATION—ACCEPTANCE—CONDEMNATION.

1. A street or avenue laid out by an owner upon his land, and by him dedicated to the public use, in the absence of its acceptance by the public is not a street or highway within the

¶ 1. See *Dedication*, vol. 15, Cent. Dig. § 64.

meaning of the traction act of 1893 and the supplement thereto. P. L. 302; Gen. St. 3235.

2. The owner of land in a street thus dedicated, but not accepted, is an owner of land within the meaning of section 14 of the traction act, regulating the proceedings to condemn lands.

(Syllabus by the Court.)

Action by J. F. Pease against the Paterson & State Line Traction Company. Plaintiff brings certiorari to set aside appointment of commissioners. Affirmed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Cornelius Doremus, for plaintiff. Preston Stevenson, for defendant.

HENDRICKSON, J. The plaintiff seeks to set aside the appointment of commissioners to condemn that portion of her lands contained within the filed location of defendant's railway at the village of Ridgewood in Bergen county. The proceedings were taken under the traction act of 1893. P. L. p. 302; Gen. St. 3235. This case was argued with the case of Houston against the same defendant, decided at this term (54 Atl. 403), involving a similar proceeding as to lands within the defendant's line of railway at the above village. Many of the facts recited in the opinion are pertinent to this discussion, and need not be repeated. The lands here sought to be condemned are portions to two separate tracts situate within the village, running to the center line of two mapped streets; one to a street named "Murray Avenue," the other to a street named "Clinton Avenue." The reasons present but one objection to the proceedings. The allegation is that the avenues in question are public highways in the control of the board of trustees of the village, and, the municipality being no party to the proceedings, they must fail. Upon examining the agreed statement of facts, we find that these alleged streets have their origin in a map of "Ridgewood Park," so called, upon which they are plotted, consisting of lots and avenues, filed in the clerk's office of Bergen county (presumably by the then owners of the tract) in the year 1868. The location was then in Franklin township (now in the village of Ridgewood). But a single building has been erected upon the plot, it being a dwelling house on Clinton avenue; and said streets have remained in their natural state, without grading or other improvement, and, with the lots fronting them, have been occasionally used for passage for pedestrians or vehicles from time to time since that date. The case also shows that no formal dedication of the streets was ever made to the public authorities, and that there has been no acceptance of them as such by formal resolution or otherwise. Nor have the public authorities assumed any charge, care, or responsibility for either of said streets. I have not undertaken to recite all the facts; and whether, upon the whole case, there was a dedication

of these streets to the public use as such, it is not necessary to now decide. But granting, for the purposes of the argument, that there was such a dedication, we conclude that there has been no acceptance of said streets by the public authorities, and no such public user as would amount to an acceptance. And such an acceptance is necessary before streets thus dedicated can become public highways. *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Central R. R. Co. v. Elizabeth*, 35 N. J. Law, 359; *Long Branch R. R. v. South Amboy*, 57 N. J. Law, 253, 30 Atl. 628; *Booraem v. N. H. C. R. R. Co.*, 39 N. J. Eq. 465.

The streets in question are not highways in the sense used in the traction act, requiring consents from the municipality and the abutting owners before the company can lay down its tracks. And when they are streets by dedication only, but without such acceptance, the owner thereof is the owner of land within the intent and meanings of the provisions of the traction act, regulating condemnation proceedings. This principle was recognized by the court in *De Groot v. Jersey City*, 55 N. J. Law, 120, 25 Atl. 272.

The result is that the proceedings below must be affirmed, with costs.

ABRAHAMS et al. v. JACOBY.

(Supreme Court of New Jersey. Feb. 24, 1903.)

JUSTICE OF THE PEACE—AMENDMENT OF SUMMONS.

1. The defendant in this case was summoned before a justice's court by his proper surname, which was preceded by the initial letter of his Christian name. On the return day no regular appearance was entered, but his attorney at law appeared for him, and objected to the summons, and moved to set it aside, because, as he stated, the first or Christian name of the defendant was not inserted therein. The justice denied the motion, and thereupon amended the summons by inserting the proper Christian name of the defendant. It was held on review that the justice had power to amend under the 138th section of the practice act (Gen. St. p. 2556), and also under the supplement thereto approved April 16, 1891 (Gen. St. p. 2594), these acts having been extended to the practice in justices' courts.

(Syllabus by the Court.)

Certiorari to a Justice of the Peace.

Action by Louis Abrahams and others against Abraham Jacoby. Judgment for plaintiffs, and defendant brings certiorari. Affirmed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Ephraim Cutter and Thomas S. Henry, for plaintiffs.

HENDRICKSON, J. We think the action of the justice of the peace in this case in causing the summons which was directed

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 265.

against A. Jacoby to be amended so that defendant's name would read "Abraham Jacoby" should be sustained. The defendant did not himself appear on the return day, but the record shows that before the trial began Ephraim Cutter, an attorney of the defendant, appeared for him, and objected to the summons, and asked that it be set aside, because the first or Christian name of the defendant was not inserted therein. The justice denied the motion, and thereupon amended the summons.

It will be noted that the attorney of the defendant made no objection to the service, which appears to have been regular, and what he said was practically an admission that the right party had been served. His objection was that the defendant's Christian name was not inserted in the summons. Presumably, the plaintiff did not know defendant's full name when the suit was brought. We think the 138th section of the practice act (Gen. St. p. 2556, § 138), which has been extended to justices' courts (Id. p. 1886, § 113), justified the amendment of the summons.

We have been pointed to *Elberson v. Richards*, 42 N. J. Law, 69, and *Dittmar v. Leon*, Id. 540, to show that such a defect in the summons is fatal. But they were proceedings under the attachment act, to which the amending statute does not apply. We think the supplement to the practice act approved April 16, 1891 (Gen. St. p. 2594) would also apply to this case, and justify the action of the court below.

The judgment is affirmed with costs.

BAKER v. KENNEY.

(Supreme Court of New Jersey. March 11, 1903.)

MONTHLY TENANCY—TERMINATION—NOTICE TO QUIT.

1. Where premises have been rented for the period of one month at a monthly rental, and the tenant holds over with the consent of the landlord, a monthly tenancy is established.

2. In order to terminate a monthly tenancy, only one month's notice to quit is necessary. The notice must be to quit on one of the recurring periods of the holding, and, if served on a corresponding date in the preceding month, it is sufficient.

(Syllabus by the Court.)

Certiorari to District Court of Camden.

Action by James F. Baker against Thomas Kenney. Judgment for plaintiff, and defendant brings certiorari. Affirmed.

Argued November term, 1902, before DIXON and HENDRICKSON, JJ.

Henry I. Budd, Jr., for plaintiff.

HENDRICKSON, J. This writ brings up for review an order of removal under landlord and tenant proceedings. The principal

ground relied on for reversal is that the affidavit shows that the defendant below was a tenant at sufferance, and not from month to month; that the one-month notice to quit was insufficient to terminate the tenancy; and that therefore the district court was without jurisdiction. The affidavit of the landlord sets forth "that he let and rented the said premises to Thomas Kenney on the 13th day of April, A. D. 1902, for the term of one month—from the 13th day of April, A. D. 1902, to the 13th day of May, A. D. 1902—at the monthly rental of forty-five dollars a month, payable monthly, and that the said Thomas Kenney entered into the possession of said premises by virtue of the said agreement, which said term has expired, and the said Thomas Kenney holds over and continues in possession of the said premises"; "that on the 13th day of July last he made demand and gave notice in writing to the said Thomas Kenney to deliver to him the possession thereof, by giving him personally a copy thereof, which notice is hereunto annexed, and is hereby made a part hereof." The notice annexed reads as follows: "Mr. Thomas Kenney: You are hereby notified and required to quit the premises rented by you of me and now occupied by you, being," etc., "* * * on the thirteenth day of August, A. D. 1902, that being the end of a monthly term your occupation, and your term being hereby ended at that time, and to deliver possession thereof unto me on that day. James F. Baker. Dated July 11, 1902."

The affidavit shows a rental for one month, and that the tenant was holding over, and the date of the demand and notice to deliver possession shows that the tenant had then held over for the period of two months succeeding the term of the lease. Now, if this holding over was with the consent of the landlord, the relation of the tenant with the landlord would be that of a tenancy from month to month, and not a tenancy at sufferance. The doctrine is stated by Lord Mansfield in *Right v. Darby*, 1 Term R. 162, as follows: "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year." This doctrine was approved in *Den v. Adams*, 12 N. J. Law, 99. The same principle applies where the lease is for less than a year, and it has been held that a tenant for the specified period of one month, who holds over with the consent of his landlord, thereby becomes a tenant from month to month. *Stoppelkamp v. Mangeot*, 42 Cal. 316. The authorities are uniform on this subject. 32 Cent. Dig. col. 393; 18 Am. & Eng. Enc. of L. (2d Ed.) 201. Now, when we look at the notice which is made a part of the affidavit, in connection with the other facts stated therein, we think the consent of

¶ 2. See *Landlord and Tenant*, vol. 32, Cent. Dig. § 396.

the landlord to the holding over is sufficiently shown.

The notice in terminating the tenancy on August 13, 1902, declares that to be the end of a monthly term of the tenant's occupation, and declares the term ended at that time. The previous holding over up to that time is thus recognized as a monthly tenancy. This view is strengthened by that part of the affidavit which describes the terms of the rental as "at the monthly rental of forty-five dollars a month, payable monthly." Where the tenancy is a monthly tenancy, one month's notice to quit is sufficient. *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214.

Another ground urged for reversal is that the notice should have been served before the 13th day of July, in order to constitute a month's notice to quit on August 13th following. But this ground is clearly untenable. In a tenancy by the month, the notice must be to quit on one of the recurring periods of the holding, and, if the notice be served on a day of the corresponding date in the preceding month, it will be sufficient. *Steffens v. Earl*, 40 N. J. Law, 134, 29 Am. Rep. 214; note 1 to section 477 of Taylor on L. & T. (8th Ed.) 57, and cases cited.

The result is that the proceedings below are affirmed, with costs.

LEARY et al. v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. March 9, 1903.)

JURY—PEREMPTORY CHALLENGE—TIME OF MAKING.

1. Under the "act concerning juries," approved March 27, 1874 (Gen. St. p. 1852, § 40), and the "act concerning jurors," approved April 9, 1902 (Laws 1902, p. 640), the right of peremptory challenge in civil actions must be exercised as the names of the jurors are drawn from the box.

2. The supplement of 1887 to the jury act of 1874 (Laws 1887, p. 132; Gen. St. p. 1855, § 54), applies only to challenges for cause, and not to peremptory challenges.

3. Where a challenge is permitted "at any time before the juror is actually sworn," it must be interposed before the commencement of the ceremony.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Annie Leary and Richard Leary, her husband, against the North Jersey Street Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Argued November term, 1902, before GUMMER, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Chauncy H. Beasley, for plaintiff in error. Samuel Kalisch, for defendants in error.

PITNEY, J. It appears from the bill of exceptions that upon the trial of this action, while the clerk was administering the oath to the jury, defendant's counsel inter-

rupted for the purpose of challenging one of the jurymen. The trial judge refused to permit the administration of the oath to be interrupted for that purpose, giving as a reason that the defendant had already interposed three challenges. As the request for leave to challenge was not accompanied by the suggestion of any cause for the proposed challenge, it will be presumed that a peremptory challenge was intended, and it is upon this basis that the cause has been argued in this court; the insistence being that under the act concerning jurors, approved April 9, 1902 (Laws 1902, p. 640), the defendant was entitled to six peremptory challenges. That act was approved shortly before the trial of this action, and took effect immediately.

The plaintiff in error further insists that in view of the supplement of 1887 to the revised act concerning juries, approved March 27, 1874 (Laws 1887, p. 132; Gen. St. p. 1855, § 54), which provides that "all challenges to jurors for any cause whatever in any kind of a suit, civil or criminal, may be made at any time before the jury is actually sworn," the right of challenge was seasonably asserted in the present case. In our opinion, this contention must be overruled, for two reasons, viz.:

1. By the act of 1902 the right of peremptory challenge in civil actions is conditioned upon its being exercised as the names of the jurors are drawn from the box. At common-law there was no right of peremptory challenge in civil actions. *Thomp. & Mer. on Juries*, §§ 152, 154; 1 *Thomp. on Trials*, § 42; *Creed v. Fisher*, 9 Exch. 472; 23 L. J. Exch. 143; 18 Jur. 228; 2 W. R. 196; 15 Eng. R. C. 54; *Pearse v. Rogers*, 2 Fost. & Fin. 137; *Marsh v. Coppock*, 9 Car. & P. 480. What Sir William Blackstone says in the third book of his Commentaries, pp. 359-363, concerning the procedure in civil actions, relates wholly to challenges for cause. But in his fourth book, p. 353, in discussing the criminal procedure, he draws the distinction between a challenge for cause and a challenge "without showing any cause at all, which is called a 'peremptory challenge.'" See, also, 1 Bouv. L. D. tit. "Challenge." In this state the practice of returning a general panel of jurors at each trial term, and of placing their several names, written on separate pieces of paper, into a box, and drawing therefrom a jury of 12 for the trial of a civil action, was given a statutory basis by "An act relative to juries," passed March 9, 1836 (Laws 1836, p. 323). This act was repealed, and a somewhat different procedure established on the same general lines, by a supplement passed November 9, 1836, to the act of 1797 relative to juries and verdicts (Laws 1836-37, p. 17). The right of peremptory challenge in civil causes originated in a supplement passed March 13, 1844 (Laws 1844, p. 236), by which it was enacted that upon the trial of any issue in any civil action in any court except the courts for the trial of small causes, and other

cases before justices of the peace, each party should be entitled to challenge peremptorily, as their names were drawn from the box, six of the general panel of jurors summoned and returned by the sheriff or other officer. In the revised act of 1846, relative to juries and verdicts, similar provisions were embodied in sections 19, 23, and 24, except that the number of peremptory challenges in civil actions was reduced to three (Rev. St. 965). When the right of peremptory challenge was extended to civil causes before justices of the peace, in whose courts there was no general panel, the form of the enactment was "that the right of each party in any civil suit to challenge peremptorily three jurors as their names are called, be and the same is hereby extended to trials in the courts for the trial of small causes and other actions before justices of the peace." Laws 1869, p. 619. In the revised act concerning juries, approved March 27, 1874 (Gen. St. p. 1847), the above provisions of the act of 1846 with respect to the summoning of a general panel, and the drawing of a jury therefrom, are substantially reproduced. Section 23 appears in the new revision as section 27. The provisions of the former section 24 and of the supplement of 1869 were made a part of the new section 40, and with them was combined a provision for peremptory challenges upon the trial of indictments for the less serious crimes. Again the privilege of peremptory challenge was required to be exercised "as their names are drawn from the box." By the revised criminal procedure act of 1874, approved on the same day with the jury act just mentioned (Gen. St. p. 1119), the matter of defendant's right to peremptory challenges upon trial of an indictment for crime of a high grade was taken care of in section 71. Twenty such challenges were allowed, and there was no language requiring them to be interposed as the names of the jurymen were drawn from the box. Therefore they might, of course, be taken, as at common law, at any time before the swearing of the juror. By an act approved April 4, 1878, and doubtless intended as a supplement to the revised act concerning juries, approved March 27, 1874—this, however, is left in doubt by a defect in the title (Laws 1878, p. 284)—it was enacted that upon the trial of any indictment, where twenty peremptory challenges are not allowed, the defendant shall be entitled to challenge peremptorily, at any time before the jury is sworn, six of the general panel, and that upon the trial of any indictment the attorney general or prosecutor of the pleas shall be entitled to challenge peremptorily, at any time before the jurors are sworn, six of the general panel. This act, if valid (see *Moschell v. State*, 53 N. J. Law, 503, 22 Atl. 50), had the effect of rendering the practice uniform with respect to the time allowed for interposing the peremptory challenge in criminal cases, irrespective of the grade of the crime. By a supplement approv-

ed April 1, 1887 (Laws 1887, p. 132; Gen. St. p. 1855), it is enacted "that from and after the passage of this act all challenges to jurors for any cause whatever in any kind of a suit, civil or criminal, in all courts of this state, may be made at any time before the juror is actually sworn." It is this supplement that is invoked by the plaintiff in error in the present case. The act shows on its face, however, that it has reference only to challenges for cause. The defective act of 1878 just alluded to, and an act of 1891 that was intended in part to supersede it (Laws 1891, p. 24), were repealed in 1898, in the revision of the acts relative to criminal procedure (Laws 1898, pp. 930, 939). By the revised criminal procedure act of that year (Laws 1898, p. 896), it is provided in section 80 that, upon the trial of certain crimes of a high grade, 20 peremptory challenges shall be allowed; and by section 81 it is enacted that in other cases a lesser number of peremptory challenges shall be allowed, and that challenges in all cases may be made at any time before the jury is sworn. In this state of the law, the act of 1902 was passed. While it has an independent title—"An act concerning jurors"—it is, of course, in *pari materia* with the jury act of 1874. It entitles each party in a civil cause "to challenge peremptorily, as their names are drawn from the box, six of the general panel of jurors summoned and returned by the sheriff or other officer." It is entirely clear from the foregoing recital that it was the legislative purpose to grant this right of peremptory challenge in civil cases only upon condition that it be exercised with respect to each individual juror as his name is drawn from the box. The right has been aptly called "a right to reject, and not a right to select." 1 *Thomp. on Trials*, § 43. The existing legislation confers the right in civil cases upon condition that it be exercised with respect to each juror, before the name of the next juror is drawn from the box. It is not intended to decide that the opposite party may complain if the challenging party be allowed any longer time than the statute indicates, but only that the challenging party may not complain if he be not allowed a longer time. The record in the present case, sufficiently shows that the challenge was postponed until 12 names had been drawn, and until the oath was being administered to the 12. It thus conclusively appears that the right of peremptory challenge was not exercised with the promptness that the statute requires, and it was therefore not incumbent upon the trial court to allow the challenge. The fact that the court assigned, as one of its reasons for refusing, the circumstance that three challenges had already been interposed, does not detract from the legal validity of the ruling.

2. But even did the act of 1887 apply, so as to permit the challenge to be interposed "at any time before the juror is actually sworn," we still think the record discloses

no error. We see no reason to doubt the correctness of the rule laid down in the English books, that the challenge must be before the oath is commenced, and that the moment the oath is begun it is too late. *Regina v. Frost*, 9 Car. & P. 129. In that case it was said the oath is begun by the juror taking the book, having been directed by the court officer to do so; but, if the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. See, also, *Reg. v. Giorgetti*, 4 Fost. & Fin. 546, at p. 553. *Brunskill v. Giles*, 9 Bing. 13. In a Pennsylvania case (*McFadden v. Com.*, 23 Pa. 12, 62 Am. Dec. 308, at page 17), Chief Justice Black said that the right to challenge for cause "cannot be exercised after the juror has lifted up his right hand, or taken the book in obedience to the officer, or after the formula of the affirmation has been commenced." To the same effect is *Com. v. Marra*, 8 Phila. 440, 443. See, also, 12 Ency. Plead. & Prac. 438, 494.

It is manifest that, if any regard is to be had to orderly procedure and the solemnity of the oath itself, all other proceedings in the cause are excluded pending its administration. Any right, therefore, that a party is required to exercise before the jury is sworn, must be asserted before the commencement of that ceremony.

The remaining exceptions, so far as discussed in argument, have been examined and found to be unsubstantial. The judgment will be affirmed.

HOLLOWAY v. DICKINSON et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

QUO WARRANTO—BOARD OF EDUCATION.

1. Members of a de facto board of education organized under the general school law (Laws 1902, p. 69) cannot be ousted at the instance of a private relator in quo warranto on the ground that such board of education has no legal corporate existence.

(Syllabus by the Court.)

Quo warranto, on the relation of J. Edward Holloway, against Frank Lee Dickinson and others, to determine title to office. Demurrer to information sustained.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

Samuel W. Beldon, for relator. E. G. C. Bleakly, for respondents.

PITNEY, J. This information was filed in the name of the Attorney General, at the relation of a resident and property owner, acting under leave of the court. Its purpose is to contest the right of the respondents to hold and execute the office of members of the board of education of the city of Camden. The proceeding is instituted under the act of March 17, 1795, relative to informa-

tions in the nature of a quo warranto. Gen. St. p. 2632. So far as this court is concerned, it is established by a long line of decisions that the scope of this act is confined to cases where there exists an office or franchise de facto or de jure, and where the controversy relates to the right of an individual or individuals to hold such office or franchise; that the act does not contemplate or authorize an attack to be made upon the existence of a public corporation by a private relator, and that such an attack must still be conducted by the Attorney General, acting as the representative of the people of the state. *State v. Paterson & Hamburg Turnpike Co.*, 21 N. J. Law, 9; *State ex rel. Mitchell v. Tolon*, 33 N. J. Law, 195; *Terhune v. Potts*, 47 N. J. Law, 218; *Stout v. Zulick*, 48 N. J. Law, 599; *Gibbs v. Somers Point*, 49 N. J. Law, 515, 10 Atl. 377; *Steelman v. Vickers*, 51 N. J. Law, 180, 17 Atl. 153, 14 Am. St. Rep. 675; *Richman v. Adams*, 59 N. J. Law, 239, 36 Atl. 699; *Hann v. Bedell*, 67 N. J. Law, 148, 50 Atl. 364. In the first three cases the question arose on application made to the court for the exercise of its discretionary power to grant leave to file an information. But in *Gibbs v. Somers Point* such leave had been granted, and on demurrer to the information filed thereunder it was held that the act of 1795 did not permit an information against a corporation to be joined with an information at the instance of private relators against officers in the corporation. The joinder of the name of the Attorney General was treated as a matter of form, and it was held that the pleading in this form was illegal. And in *Steelman v. Vickers*, which was likewise decided on demurrer to an information, it appeared simply that the title of the incumbents of certain municipal offices was attacked on the ground that the public corporation had no legal existence. And, although the information did not assail the corporate life of the municipality itself, it was held that, to permit a private relator to oust one of the corporate officers on the ground suggested would be to permit that to be done indirectly which could not be done directly, and therefore the demurrer was sustained. The decision in *Richman v. Adams* is to the same effect.

In the present case, among the causes of demurrer specified is one to the effect that it is not competent for the people, through the relator, to question the respondents' title by quo warranto. If, therefore, it appears from the information that their title is questioned solely on the ground that the corporation of which they assume to be members has no legal existence, the demurrer must be sustained. Among the averments of the information are these: That prior to March 28, 1902, the public schools in the city of Camden were under the control and management of a board of education, known as the "Commission of Public Instruction," organized under the provisions of an act of the

Legislature approved March 10, 1892, providing for the establishment of such a commission in certain cities (Laws 1892, p. 82; Gen. St. 1899, p. 3096); and that since the 28th day of March, 1902, there has existed and now exists in the city of Camden a corporation known as the "Board of Education of the City of Camden," created and established under and by virtue of "An act to establish a system of public instruction," approved March 26, 1902 (Laws 1902, p. 69). The information avers that the board appointed under the act of March 10, 1892, is the proper board of education of the city of Camden. It nowhere avers in terms that the respondents claim title to membership in that board; nor is such an inference to be derived from the facts averred in the information, unless the force of the act of 1902 is merely to change the personnel of the board of education, and not to establish a new corporate body in place of the former one. The title claimed by the respondents will appear from what follows.

By "An act to establish a system of public instruction," approved March 23, 1900 (Laws 1900, p. 192) §§ 45, 46, and by an amendatory act approved March 21, 1901 (Laws 1901, p. 222), it was provided that in each city, incorporated town, borough, township, or other municipality divided into wards it should be referred to the people to determine whether their board of education should be selected by appointment of the mayor or other chief executive officer, or should be chosen by vote of the people. By section 85 of the act of 1900 it was provided that in municipalities not divided into wards the board of education was to be elected at the annual school meeting. The information avers that in the city of Camden in the year 1900, under the provisions of the general act of that year just referred to, the question of acceptance of the provisions of section 46 of that act was submitted to the voters of the city, and was determined in favor of the creation of an elective school board; and that at the general election held in November, 1901, the respondents were elected members of the board of education, to take office July 1, 1902. Shortly thereafter the Court of Errors and Appeals decided the act of 1900 to be unconstitutional in toto by reason of its discrimination between municipalities that are divided into wards and those that are not so divided. *Lewis v. Jersey City*, 66 N. J. Law, 582, 50 Atl. 346. Thereafter the Legislature enacted another "Act to establish a system of public instruction" (Laws 1902, p. 69), which was approved March 26, 1902, and took effect immediately. In this act sections 42 to 80, inclusive, are grouped under the title, "Art. VI. Boards of Education in City School Districts." These sections provide, in effect, that in school districts located within any city there may be a submission to the qualified voters of the question whether the members of the board of

education shall be elected by the people or shall be appointed by the mayor or other chief executive officer. Whichever method is adopted, the members are to be selected accordingly, and, when organized, are created a body corporate with full powers. The public school property of the district is vested in the corporation thus created, and the supervision, management, and control of the public schools of the district are confided to the same body. By section 80 it is distinctly declared that, until the organization of a board of education in accordance with the provisions of section 42 or section 43, the administration and conduct of the public schools and the management and control of the school property shall remain in any board of education or other body theretofore having control, and that upon the organization of a board of education as provided in section 42 or 43, the board of education theretofore having control of the public schools in such city shall be ipso facto abolished. The sections from 81 to 99, inclusive, are grouped under the title, "Art. VII. Boards of Education in Township, Incorporated Town and Borough School Districts." These sections provide for the establishment of a school district in each of the municipalities indicated, of a board of education, whose members are to be chosen by election at the annual school meeting; there being no option conferred upon the voters to adopt the appointive instead of the elective system of choosing the members, such as is conferred upon city school districts by the provisions of article 6. We deem it entirely clear that the purpose of the provisions contained in article 6 of this act is to terminate the corporate existence of all public corporations theretofore created for the management and control of the public schools in the cities of this state, and not merely to change the personnel of their membership.

The information shows that since the approval of the act of 1902 there has been no submission to the qualified voters of the city of Camden of the question whether their board of education shall be elected or appointed. The averment is that the respondents claim office under and by virtue of the provisions of section 246 of that act. This section declares, in substance, that all elections or submissions to the vote of the qualified voters of any school district of the question whether in such school district the board of education should be created by election by the people or otherwise, and the attendant proceedings heretofore done or taken pursuant to and in substantial compliance with the act of 1900 shall be validated and confirmed as fully and to the same extent as though done after the passage of and in conformity with this act, and in every such district, hereafter, if the appointive system have been adopted, the board of education shall be appointed and organized under the provisions of section 42 of this act, and, if the elective system have been

adopted, then the board of education shall be hereafter elected and organized under the provisions of section 43 of this act; and all elections for members of the board of education in any such school district held pursuant to and in substantial compliance with said act of 1900 shall be validated and confirmed as fully and to the same extent as if done after the passage of and in conformity with this act; and the members so elected shall constitute and be the board of education of such school district, and shall be deemed to be incorporated under section 48 of this act; and all other elections, actions, and proceedings heretofore done or taken in substantial compliance with said act are hereby validated and confirmed as fully and to the same extent as though done after the passage of and in conformity with this act. It will be seen at once that, if the act of 1902 is valid, including section 246, the effect of the latter section is to make the vote of the people of Camden taken in the year 1900 as efficacious for adopting the elective system of choosing members of the board of education as if that election had been held after the passage of the act of 1902; and in like manner the election of November, 1901, at which the respondents were chosen to hold office in that board, is made as good and valid as if it had been held after the passage of the act of 1902. If these proceedings had taken place after the latter enactment, the respondents would be a board of education organized under section 43 of this act, and would be made a corporation by the terms of section 48 and the other sections in article 6 contained. And by the terms of section 80, upon their organization as such board, the former board of education, known as the "Commission of Public Instruction," that was organized under the act of March 10, 1892, would be ipso facto abolished.

The attack of the relator upon the title to office of the respondents is based principally upon the unconstitutionality of section 246 of the act of 1902. The act of 1900 classified all school districts, for the purposes of the management of the public schools, with respect to a single characteristic of the several municipalities in which those districts are respectively located. Whatever the corporate form of the municipality, whether city, incorporated town, borough, or township, if the municipality was divided into wards, the management of its free public schools was to be in the hands of a board of education, to be either appointed or elected, according as the people should determine. But all school districts that were located within a municipality not divided into wards (whatever the corporate form of the municipality) were, in any event, to be under the control of a board of education elected by the people. By the act of 1902 a classification of school districts for the general purposes of the act is made solely with respect to the corporate form of the municipality within which the district is

located; that is to say, all districts that are located within a city are to be in one class, and all districts that are located within any other form of municipality are to be in another class. In the former class there is a referendum with respect to the method of selecting members of the board of education. In the latter class the members of the board are to be elected by the people irrespective of the views of the people upon the propriety of that mode of selection.

The principal ground upon which the relator claims that section 246 of the act of 1902 is unconstitutional is that in confirming proceedings taken under the referendum contained in the act of 1900 and the supplement of 1901 that section sets apart in a class by themselves those school districts that happen within a limited time to have taken certain proceedings under an unconstitutional law. It is clear that this attack affects not only the title of the respondents to hold office, but affects the existence of the office itself. Indeed, it seeks to deprive the respondents of office only by demonstrating that the board of education of which they claim to be members has no corporate existence. This is the precise question that, as this court has repeatedly held, cannot be litigated by a private relator, and will be determined only at the instance of the Attorney General acting in his public capacity as the representative of the people of the state.

It is equally obvious that, if we were to determine that the act of 1902 is void in toto by reason of its classification of school districts solely with respect to the corporate form of the municipality within which the district is located, the result would be the same, so far as the present controversy is concerned; for, if the whole act falls, the present board of education of the city of Camden has no legal existence, and it is in that board only that the respondents claim membership.

The respondents are entitled to judgment on the demurrer.

SHILLINGSBURG v. RIDGWAY, Collector.
(Supreme Court of New Jersey. Feb. 24.
1903.)

TAXATION—PERSONAL PROPERTY.

1. In order to sustain a tax for visible personal property, levied against an inhabitant of this state elsewhere than at the place of his residence, it must be shown that the property was found in the taxing district on the day prescribed by law for commencing the assessment of taxes.

(Syllabus by the Court.)

Certiorari by William Shillingsburg against Frank B. Ridgway, collector, to set aside taxes. Assessment set aside.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

H. H. Voorhees, for prosecutor. Hampton & Fithian, for defendant.

DIXON, J. This writ of certiorari is prosecuted to set aside taxes for the year 1901 levied upon the prosecutor in the town of Greenwich, county of Cumberland, because of his ownership of seven vessels engaged in the oyster business in Delaware Bay. The prosecutor is, and for many years past has been, a resident of the city of Camden, where the vessels are registered under the United States statute, and he was taxed for them in that city during the same year. The sixth section of "A general act concerning taxes," approved March 19, 1891 (Gen. St. p. 3345), enacts "that the tax on visible personal estate shall be assessed in and for the * * * taxing district where such property is found; the tax on other personal estate shall be assessed on each inhabitant in the * * * taxing district where he resides, as of the day prescribed by law for commencing the assessment for each year." The pre-existing act, approved April 11, 1866 (Gen. St. p. 3293, § 6), required the tax on personal property to be assessed upon each inhabitant in the township or ward where he resided on the day prescribed by law for commencing the assessment in each year. Construing these acts together, their import seems to be that, for personal property belonging to an inhabitant in this state, he should be assessed at the place of his residence on the day for commencing the assessment, except that for visible personal property found elsewhere in this state on that day he should be assessed at the place where it is found. Under this construction of the statutes, taxes for personal property cannot be levied on an inhabitant in the state, elsewhere than at the place of his residence, unless it appear that the property was visible and was found in the taxing district on the day prescribed by law for commencing the assessment. The evidence in this case shows that during the year 1901 the vessels were either on the waters of the Delaware Bay, or at a pier in Greenwich township, but it fails to show that they were within the limits of the township on the day prescribed by law for commencing the assessment. We think the greater probability is that they were then elsewhere.

We therefore conclude that the tax was not lawfully assessed, and should be set aside, with costs.

JACKSON v. PENNSYLVANIA R. CO.
(Supreme Court of New Jersey. Feb. 24, 1903.)
PLEADING—REPLICATION—RELEASE—MIS-REPRESENTATIONS.

1. If a plaintiff reply to a plea that is bad for duplicity, he must reply to each distinct material matter that is contained in the plea.
2. A misrepresentation as to the legal effect of a written instrument will not avoid the instrument.

(Syllabus by the Court.)

Action by Frank L. Jackson against the Pennsylvania Railroad Company. Demurrer to amended replication sustained.

Argued November term, 1903, before GUM-MERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

David F. Edwards, for plaintiff. James B. Vredenburg, for defendant.

PITNEY, J. This action has been once tried by jury, and the resulting judgment was reversed by the Court of Errors and Appeals. *Jackson v. Penna. R. R. Co.*, 66 N. J. Law, 819, 49 Atl. 730, 55 L. R. A. 87. Since that decision amended replications have been filed to a special plea of the defendants, and to one of these replications a general demurrer has been interposed. Upon the issue at law thus joined we are to give judgment against the party in whose pleading the first defect of substance is found.

The declaration sufficiently sets forth that the plaintiff received personal injuries through the negligence of the employés of the defendant. The special plea sets up that the alleged grievances, if any, were committed jointly by the defendant and by the Adams Express Company, and that after the committing of the grievances, and before the commencement of this suit, the plaintiff accepted and received from the Adams Express Company a certain sum of money in full satisfaction and discharge of any and all claims accrued or to accrue in respect of all injury or injurious results, direct or indirect, arising or to arise by reason of the said grievances, and did in writing release unto the said Adams Express Company all claims and demands for damages occasioned by the said supposed grievances. It will be seen that this plea sets up two distinct defenses: First, an accord and satisfaction with the alleged joint tortfeasor; and, secondly, a release given to such joint tortfeasor. The plea is, therefore, bad for duplicity. But this vice cannot be reached by a general demurrer. At the common law it required a special demurrer, and under our practice requires a motion to strike out the pleading. 1 Chit. Pl. (6th Am. Ed.) 261; *Buckelew v. Stults*, 28 N. J. Law, 150; *Star Brick Co. v. Ridsdale*, 84 N. J. Law, 428; *Weber v. Morris & Essex R. R. Co.*, 36 N. J. Law, 213, at page 217; *Wheeler v. Essex Public Road Board*, 40 N. J. Law, 138, at page 141.

We are thus brought to consider the replication. This pleading avers that the defendant, fraudulently contriving with the Adams Express Company to deprive the plaintiff of the rights accruing to him by reason of the grievances mentioned in the plaintiff's declaration, fraudulently represented to the plaintiff that the Adams Express Company would retain the plaintiff in its employ at the same rate of wages as before, notwithstanding his disability; that afterwards, when he received his wages, the Adams Express Company, in pursuance of said fraudulent purpose, informed the plaintiff that he must sign not only the usual form of receipt, but also a certain paper releasing the Adams

Express Company from any liability on account of the injuries which the plaintiff had suffered; that thereupon the Adams Express Company, at the instigation of the defendant, falsely represented to the plaintiff that said paper was a release of claims against the Adams Express Company only, and that the Adams Express Company was not liable for the said grievances, but required the said release to be signed as a matter of form; and that thereupon the plaintiff, not knowing the representations to be false, but relying upon the truth thereof, took the money in said plea mentioned, and signed the release therein described. And the replication further avers that the representations so made by the Adams Express Company that said company was not liable for said grievances, and that said release was a release of claims against said express company only, were false, and so known to be by said express company, and were made with the fraudulent purpose of obtaining from the plaintiff a release of claims of the plaintiff against the defendant by reason of said grievances.

In this pleading there are two substantial defects, both of which are within the specification of causes of demurrer furnished by the defendant as required by the practice act, viz.:

First. The replication does not either traverse or confess and avoid the accord and satisfaction set up in the plea. It being a fundamental principle that a pleading must furnish a complete answer to the preceding pleading, it follows that, if the plaintiff reply to a plea that is bad for duplicity, he must reply to each distinct material matter contained in the plea. 1 Chit. Pl. (6th Am. Ed.) 261; 1 Ventr. 272; Stephen (2d Ed.) 327. It will be observed at once that, if there was an accord and satisfaction, the defense is complete, although the release may have been procured by fraud.

Secondly. The replication sets forth no misrepresentation of matters of fact sufficient to avoid the release. The representation that the Adams Express Company would retain the plaintiff in its employ was, of course, a mere promise, and not a representation concerning matters in present. The representation that the paper in question was a release of claims against the Adams Express Company only appears to have been in accord with the form of the paper itself as set forth in the plea and conceded in the replication. If it is intended to be averred that defendant represented that the release could have no force or effect except in favor of the Adams Express Company, this was a representation concerning a matter of law, and not a matter of fact. And the same is to be said with respect to the alleged representation that the Adams Express Company was not liable for the tort in question, but required the release to be signed as a matter of form. It is well settled that a

misrepresentation as to the legal effect of a written instrument will not avoid the instrument, except where there exists a relation of trust or confidence between the parties. 14 A. & Eng. Encyc. Law (2d Ed.) pp. 54, 56, tit. "Fraud and Deceit."

The defendant is entitled to judgment on the demurrer.

HENDERSON et al. v. ATLANTIC CITY.

(Court of Chancery of New Jersey. March 21, 1903.)

LANDS UNDER WATER—CONSTITUTIONAL LAW—GRANT.

1. By force of article 4, § 7, par. 6, of the state Constitution, coupled with an act (P. L. 1894, p. 123), lands under tide water, belonging to the state of New Jersey, are irrevocably devoted to the support of free schools.

2. The provisions of an act (P. L. 1901, p. 374) which confers power upon the board of riparian commissioners to make a grant of such lands to certain cities for a nominal consideration is unconstitutional, and a grant made to Atlantic City under color of this provision is void.

(Syllabus by the Court.)

Bill by Charles G. Henderson and others against the city of Atlantic City. Decree for complainants.

George A. Bourgeois, for complainants.
Henry Wootton, for defendants.

REED, V. C. On October 10, 1901, the board of riparian commissioners made a grant to the complainants of certain lands under water in front of riparian lands of which the complainants were then owners. On the same day the same board made a grant of a larger tract, including the tract granted to the complainants, to the city of Atlantic City. Preceding the time these grants were made, a contest existed respecting the right of these respective grantees to receive a grant of the property included in the grant to the complainants. The complainants claimed the right as owners of the ripa, and the defendants claimed their right under the provisions of an act passed by the Legislature and approved March 22, 1901 (P. L. 1901, p. 374). The grant to the complainant was made subject to the right, title, and interest acquired by Atlantic City under the grant of the above date. The grant to Atlantic City contains the proviso that if the act of 1901 should be at any time hereafter decided unconstitutional by a court of competent jurisdiction, and no appeal from such decision (if any appeal lies therefrom) is taken within one year from the date the same is made, then and in that event "this instrument and conveyance, so far as same binds the state, and all the conveyances herein on the part of the state, shall be void." This suit is brought by the complainants to quiet the claims of Atlantic City under the grant to it just mentioned. The condition of affairs respecting possession of the prop-

erty seems to put the complainants in a posture to bring this suit. Indeed, it is admitted that the complainants are in peaceable possession. The insistence of the complainants, as is perceived, is that Atlantic City cannot assert any right by virtue of the riparian grant to it, and therefore the grant to the complainants is exclusively operative.

The unconstitutionality of the act of 1901 is grounded upon the insistence that lands under tide water, belonging to the state of New Jersey, are irrevocably devoted to the support of free public schools, and that the act of 1901 devotes a portion of such lands to other purposes. The premises upon which this argument rests are based upon article 4, § 7, par. 6, of the Constitution of New Jersey, coupled with an act passed in 1894 (P. L. 1894, p. 123). It is insisted that these constitutional and legislative laws have put it beyond the ability of the Legislature to devote any of the lands under tide water to any purpose other than the support of free schools in this state.

The language of the constitutional provision is this: "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public schools for the equal benefit of all the people of the state; and it shall not be competent for the Legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever." The act of 1894 is entitled "A supplement to an act to establish a system of public instruction." The language of this supplement of 1894 is "that all the lands under water belonging to this state be and the same hereby are irrevocably appropriated for the support of free schools in this state, and that all moneys hereafter received from the sales and rentals of such lands under water belonging to this state, shall be paid over to the trustees of the school fund, and appropriated for the support of free public schools and shall be held by them in trust for that purpose, and shall be invested by the treasurer of the state, under their direction, in the same manner as the funds now held by them are invested, the same to constitute a part of the permanent school fund of the state and the interest thereof to be applied to the support of public schools in the mode which now is or may hereafter be directed by law, and to no other purpose whatever."

Assuming that by force of this act the lands under water belonging to this state were appropriated to the support of free schools, the question is whether the act of 1901 infringes the constitutional provision.

The act of 1901 is entitled "A further supplement to an act to ascertain the rights of the state and the riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in the state." The first clause of this act provides that "whenever any public park has been or shall hereafter be laid out or provided for, by ordinance of any city or other municipality, under the authority of any act of Legislature of this state, along or fronting upon any of the tide waters of this state, and whenever any streets or highways shall extend to said tide waters, such municipality may apply through its legislative body to the commissioners appointed under the act to which this is a further supplement, for a grant or conveyance to such city or municipality of the lands under water within the limits of said public park and of the land in front of said streets or highways; such grant to contain a provision that any land under water granted or conveyed for park uses shall be kept and maintained as an open public park or place for public resort and recreation, and that no building or other structures shall be erected on such park or on the lands under water so granted and conveyed inconsistent with its use as a public park or place for public resort and recreation: provided, however, that public walks and drives may be constructed along or upon any portion of the land so granted or conveyed." The second section provides that "the commissioners may make all such grants or conveyances applied for as aforesaid, for the lands under water owned by the state extending from the inland limits of such park to the exterior line established or to be hereafter established by the said commissioners, and for all land under water within the lines of the streets or highways, and in front of the ends of such streets or highways and extending from the high water lines to said exterior line, and may in their discretion charge therefor a nominal consideration only; and said grant or conveyance shall also contain a provision that if at any time after the grant or conveyance aforesaid has been made, such public park or highway shall cease to be used as such park or place for public resort and recreation, or as such street or highway, the lands under water granted as aforesaid in front thereof, shall at once revert to the state." Section 3 provided that "no conveyance shall hereafter be made by the said commissioners, except to the municipality aforesaid, of any land under water within the limits of such park, or within the lines or at the end of any such public street or highway."

In my judgment, the only ground for attack upon this act is to be found in that part of section 2 which provides that the commissioners may, in their discretion, charge therefor a nominal consideration only. It is quite clear that the grant provided for under the act of 1901 is for a public purpose. It is equally clear that, apart from the act of

1894, the Legislature could devote the property of the state to any public purpose. It seems, also, manifest that the appropriation of these lands as property under the constitutional provision had in view the conversion of this property into money, which was to be securely invested. There was left in the state, therefore, the discretion when and how to transmute this property into money, and to make all reasonable regulations for the use of the property until it was sold. It could probably grant a perpetual right to lay out streets or highways through it, regarding the presence of such streets as likely to enhance the value of this property. So, too, perhaps, a privilege could be granted to a municipality to use it as a park until such times as the state thought it to the benefit of the school fund to transmute the land into money by sale or lease. So, too, I think the state had a right to provide that, under the conditions mentioned in the act of 1901, a sale should be made exclusively to a municipality having control of a public park. The question, however, is whether it could make a perpetual gift of these lands to any one; for this, it cannot be doubted, is intended by the language of the legislative act. The grant is for an easement which is practically perpetual and exclusive. There remains nothing of the least value to the state. The grant is intended to be gratuitous. While it is true that a board may charge the same rate for a grant to a municipal corporation for a public park as to any other grantee, nevertheless the purpose for which the discretionary power was conferred upon the riparian board is manifest, and that purpose was executed in making this grant. For the extensive grant made to Atlantic City the consideration is \$1, and for the restricted grant made to the complainants the consideration is \$900. The grant to Atlantic City would have been null if the same consideration had been charged for it as for other grants to riparian owners, for the power to charge nothing taints the statutory clause, and entirely destroys its force as an authority to make any grants. In the language of Judge Earl in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, "the constitutional validity of a law is to be tested, not by what has been done under it, but by what by its authority may be done."

I am constrained to the conclusion that Atlantic City has no claim to the locus in quo under its grant.

KREUTZ v. CRAMER et al.

(Court of Chancery of New Jersey. March 19, 1903.)

MECHANICS' LIENS—STOP NOTICE—PAYMENTS TO CONTRACTOR—INCHOATE LIEN.

1. A stop notice served in accordance with the requirements of section 3 of the mechanics'

lien act (Gen. St. p. 2073) obliges the owner of a building being erected under a filed contract to retain for the benefit of noticing creditors any part of the contract price which may have become payable, but which has not been paid to or assigned by the contractor, at the time when a stop notice is served, and also all money which may thereafter come to be payable under the contract.

2. The fifth section of the supplement of 1895 to the lien act (now section 5 of the revised lien act of 1898, p. 539), as interpreted by the Court of Appeals in the case of *Slingerland v. Binns*, 39 Atl. 712, 58 N. J. Eq. 415, does not relieve the owner from the requirement to retain moneys, part of the contract price actually in his hands, unpaid to and unassigned by the contractor at the time a stop notice is served upon him, whether such moneys are by the terms of the contract due and payable or not. The purpose of section 5 is to make the owner, in case he pays an installment of the contract price in advance of the time when by the contract it comes to be due, liable to any claimant who serves a stop notice before such installment comes to be due.

3. The effect of the statute, as construed by the *Slingerland* decision, being to create an inchoate lien in favor of workmen and materialmen upon all installments of the contract price up to the time when by the contract they come to be payable, an owner noticed to retain an installment of the price remaining in his hands after it has become due cannot pay it out, relying upon reimbursing himself out of an installment yet to come due, for this would defeat the inchoate lien of workmen and materialmen in the latter installment.

(Syllabus by the Court.)

Bill by Ida L. Kreutz against Charles H. Cramer and others. Dismissed.

This is an interpleader bill filed by Ida L. Kreutz, an owner who has obtained a building to be erected for her under contract, etc., filed in the county clerk's office. The defendants are the contractor (one Goings) and the creditors of the contractor, who have given notices to the owner to retain the amount of their several claims from the contract price, under the statute, etc. There are no disputes between the parties as to the payment by the owner of the first, second, and third installments of the contract price. No notices were served until after these installments had been earned by and paid to the contractor. It is admitted that the fourth installment came to be due and payable to the contractor on the 25th day of May, 1902, and before any stop notice was served, and that its amount was \$900. On the 27th day of May, 1902, the defendant, Charles H. Cramer, a subcontractor, served a stop notice upon the owner, Ida L. Kreutz, to retain \$2,085—the amount due him for labor done and materials furnished in the erection of the building. At the time of this service of Cramer's notice the fourth installment, of \$900, had matured under the terms of the contract; but none of it had yet been paid out to or for the contractor, nor had any assignment been made of any portion of it, nor had any other stop notice been served. Many stop notices have been served since the service of Cramer's, and, with these later stop notices, the total amount demanded from the owner com-

¶ 1. See *Mechanics' Liens*, vol. 24, Cent. Dig. § 148.

plainant exceeds \$4,000. The owner, Ida L. Kreutz, files her bill of complaint for an interpleader decree against these conflicting claimants, tendering the above sum of \$3,275.76 as the total amount rightfully payable under the contract to the noticing creditors. They appear and dispute this claim, insisting that by the service of the Cramer notice on May 27, 1902, the owner was obliged to retain and apply the whole of the fourth installment of \$960, so far as it would go, to the payment of the Cramer claim, and that the sum which she must deposit in court in order to entitle herself to file an interpleader bill must be—

The sum of the fourth installment..	\$ 960 00
Less the payment to Risley on account of Cramer.....	17 80
	<hr/>
	\$ 942 20
And of the last installment.....	3,000 00
	<hr/>
	\$3,942 20

On this contention the cause has come to a hearing between the complainant and the defendants.

The foregoing statement of the facts is a summary of the admissions made by the parties at the hearing.

Higbee & Endicott, for complainant. Thompson & Cole, for defendant Somers Lumber Co. William M. Clevenger, for defendant Cramer. R. H. Ingersoll, for defendant Mulock.

GREY, V. C. This case must turn upon the construction to be given to section 3 of the mechanics' lien act (Gen. St. p. 2073), when considered with relation to section 5 of the amendatory act of March 14, 1895 (Gen. St. p. 2074), both of which have been re-enacted in the revision of the mechanics' lien act of 1898 as sections 3 and 5 (P. L. 1898, pp. 538, 539), and the decisions of the courts of this state declaring the meaning of those sections.

The issue joined in this case between the parties raises the question whether the complainant owner has in her interpleader bill tendered to the contesting claimants the full sum of money which, under the building contract, and the notices served upon her, the owner was bound to hold at their disposal. If by her present suit she tenders the full sum due, she has a right to be protected against the defendants' conflicting claims, and they must contest with each other for its distribution. If, however, the complainant does not tender the full sum which, under the contract and the notices served upon her, she was bound to retain, she cannot require the defendants to interplead for the distribution among them of a less sum than is their due.

The parties are agreed as to the facts. The dispute is limited to the disposition made of the fourth installment, of \$960. It had come to be due to the contractor, but had not been paid to him, and he had not in any

way disposed of it. The owner still had the whole of it in his hands. The final payment of \$3,000 had not yet come to be due. While this was the condition of affairs, the defendant Cramer, a subcontractor who had done work and furnished materials to the building, served a stop notice, according to the requirements of section 3 of the mechanics' lien act, upon the owner (the complainant), notifying her to retain for him \$2,085 from the contract price. The owner, after receiving Cramer's stop notice, paid out to the contractor, or to his order, various sums, amounting to \$684.24. Shortly after many other stop notices were served, sufficient in amount largely to exceed the total sum of the moneys remaining in the hands of the owner.

The complainant insists that when Cramer served his notice the fourth installment, of \$960, had matured, and was payable to the contractor or to his order, and that no stop notice served after its maturity could have any effect to oblige the owner to retain it in her hands; that she had a right to pay this matured installment to the contractor, and to rely upon the final payment of \$3,000 to pay Cramer. The effect of this contention, if supported, will be to pay Cramer's claim, in great part, out of the last payment due under the contract, and thus defeat the later noticing claimants, who duly served stop notices against that payment. In support of her contention the complainant cites the decision of the Court of Appeals in *Silgerland v. Binns*, 56 N. J. Eq. 415, 39 Atl. 712, where the court declares that the effect of the enactment of section 5 of the act of 1895 was "to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract until that liability matures according to the terms of the contract; such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given, for a notice served after maturity derives no aid from this provision." The complainant contends that, as Cramer's notice was served after the fourth installment had matured, Cramer had no lien on that installment. The legislative purpose in all the legislation on this subject is not in any way in doubt. The title of the original mechanic's lien statute defines it with precision. It is declared to be "An act to secure to mechanics and others payment for their labor and materials in erecting any building." All amendments or supplements to the original act should be construed with relation to this declared object of the original statute, and provisions which modify the act ought not to be held to take away the security which the legislation gives to workmen and furnishers of materials, unless that purpose is clearly within the legislative expression. Section 3 of the lien act declares that the owner is authorized to retain the sum claimed "out of the amount

owing by him * * * to the contractor, or that may thereafter become due from him to such * * * contractor," etc. Gen. St. p. 2073. Under this provision the amount owing by the owner to the contractor at the time of the service of the stop notice, whether yet due and payable to the contractor or not, was to be retained for the noticing claimants. The Court of Appeals, in *Mayer v. Mutchler*, 50 N. J. Law, 162, 13 Atl. 620, declared that the third section made it the duty of the owner, when a stop notice was served upon him, to retain from any moneys then due or which might thereafter become due to the contractor a sufficient amount to answer the notice.

In the conduct of the business, workmen and materialmen supplied work or materials to a building, relying upon their right to serve stop notices, and thus have the contract price retained to secure the money due them. They were notified by the filed contract that the contract price would come to be due at certain periods in named installments. Naturally, they supposed a notice served before an installment came to be due would retain that installment. But it came about that the contractor would give orders against the installments before they were due, and the owner would accept these and pay the installment before the period when, by the contract, it would have come to be due. A stop notice served on the owner failed to affect the part of the contract price which the owner had previously paid to the contractor before it was due, or which the contractor might have assigned before the stop notice was served upon the owner. *Craig v. Smith*, 37 N. J. Law, 550 (Court of Appeals). It was declared that the workman had no lien on the contract price, and that his right attached only when the notice was served, and affected the contract price as it then existed. If when the stop notice came to the owner there was nothing owing the contractor, because of previous assignment by or payment to him, the predicament contemplated by the statute did not exist, and the notice was ineffectual. *Id.* This was the state of the law previous to the statute of 1895. It worked an injustice to those who contributed labor or materials to the erection of a building, because the contractor might defeat their claims by assigning the contract price, or by inducing the owner to anticipate payment, before any stop notices were served, or by creating any condition before the stop notice was served, whereby at the time it was served the owner owed nothing on the contract price to the contractor. This was the mischief which the supplement of 1895 was intended to remedy. That statute did not take away the right of the noticing claimant (given by the third section) to have the contract price remaining in the hands of the owner at the time of the service of the stop notice retained for the benefit of the claimant. It gave the noticing claim-

ant an additional security, for it declared that the owner could not in any way discharge his liability to pay under the contract until according to its terms the time to do so had arrived. Until that time did arrive the workmen and materialmen who served the statutory notice were given a lien upon the fund. The change wrought by the supplement of 1895, as construed by the decision of *Slingerland v. Binns*, was this: Before that supplement, the claimant, relying on the terms of payment set forth in the contract, might have served his stop notice before an installment came to be payable; but if the owner had previously paid out the money to the contractor, or to his order, he was not liable to the noticing claimants. By that supplement, workmen and materialmen were given an inchoate lien upon the contract price up to the period when by the terms of the contract it became payable, which lien could be made complete as to any claim by service of a stop notice before the time when by the contract the price became payable. The lien given by the supplement was discharged by the maturing of any payment without service of such notice. This I understand to have been the construction of the supplement of 1895 by the Court of Appeals in the case of *Slingerland v. Binns*.

It will be noticed that the court did not deal with the situation presented by the case now under consideration. In the *Slingerland Case* the claimant had served his stop notice before the last installment had under the contract come to be due, and had thereby perfected the lien given him by the fifth section of the act of 1895. The owner had previously laid out, on orders from the contractor, \$690.68 of this last installment. The contest was between the owner and the stop-noticing claimant, on the point whether these advance payments of the contractor's orders, made previous to the service of the stop notice, should, to that extent, relieve the owner from liability for this last installment of the contract price. The court held that, as the owner had paid this money before the installment was due, he was, under the act of 1895, liable to the noticing claimant, as if it had not been paid. The court did not deal with the question of the liability of an owner who at the time when a stop notice is served still has in his hands a part of the contract price which has come to be due. Such money, being an "amount owing by the owner to the contractor," was liable to be noticed to be retained, under section 3 of the lien act, before the supplement of 1895, and still remains so liable, for that supplement did not deal with that liability, or change it in any way. It did not repeal section 3. On the contrary, that section was re-enacted as part of the supplement of 1895, with a slight change of phrasing, not affecting the point presently under discussion. Section 8 makes any part of the contract price owing from the owner to the contractor, due or to become due, liable

to a served stop notice. Section 5 of the supplement of 1895 makes the owner liable for any installment of the contract price to any claimant serving a stop notice before the time when by the contract it was payable, notwithstanding the owner may have previously advanced the money. One section makes the contract price liable to notice so long as it is owing to the contractor when the notice is served. The other makes the owner liable, even if the contract price is not owing to the contractor when notice is served, if the notice is given prior to the date when the money became payable by the contract. It is no longer a defense for the owner that he has made advance payments before the notice was served, or that the contractor had previously assigned the contract price. In the present case the fourth installment had matured. No stop notice had been given previously to the date when it was payable. The lien referred to in the Slingerland Case was discharged. The money, though in the hands of the owner, was lawfully payable to the contractor. If he had collected it or assigned it, the owner would not have been liable for having recognized the contractor's right. But the contractor did neither. The money remained in the owner's hands, part of the contract price owing to the contractor. At this stage of the business, Cramer's stop notice was served; and the installment, being an amount in the owner's hands, part of the contract price owing to the contractor, the owner was bound to retain under the requirements of section 8 of the lien act. The notice served operated as an assignment, pro tanto, of the contract price owing by the owner to the contractor.

It is no defense for the owner to say that she relied upon the fact that the final payment of \$3,000, yet to come due when Cramer's notice was served, was large enough to satisfy Cramer's claim, and that she paid out the fourth installment to the contractor on this assumption. The owner, having the fourth installment in her hands when Cramer's stop notice was served, was charged with knowledge that the law made that payment liable to the notice, and that the final payment was subject also to inchoate liens, which any workman or materialman might make complete at any time before that payment came to be due, by serving his notice. The owner had no right to shift the burden of paying Cramer's claim from the fourth to the last installment, and thus defeat the liens of these claimants who might afterwards effectually notice her to retain the last installment for their benefit. The principle applies that where A. has a lien upon two funds, and B. has a lien only upon one of them, B. may (other equities not being superior) compel A. to look first to that fund on which B. has no lien.

A careful examination of the supplement of 1895, and of the decisions of the Court of Appeals which deal with that statute, will

show that section 5 of that act was not intended to discharge any part of the contract price which remained in the hands of the owner unpaid to and not assigned by the contractor at the time a stop notice was served. The fifth section of the act of 1895 was intended to be an addition to the security of the workmen and materialmen, by giving them a lien on the moneys which by the contract were yet to be paid. The lien ceases when the installment of the contract price matures, and the owner may then rightfully pay it to the contractor or to his order; but, if a stop notice be served before it is paid to or assigned by the contractor, the installment, being an amount owing to the contractor, must, as is required by the third section, be retained by the owner for the noticing claimants. In *Bayonne v. Williams*, 59 N. J. Eq. 620, 43 Atl. 670, the Court of Appeals, referring to section 5 of the act of 1895, declares: "All that the supplement effects is that the contractor shall not by assignment, nor the owner by a premature payment, defeat a duly served notice. The express provision is that 'such owner or owners shall be liable in the same manner as if no such payment had been made.'" In *Smith v. Dodge, Bliss & Co.*, 59 N. J. Eq. 586, 44 Atl. 639, the same court construes the act of 1895 as applicable to prevent advance payments and secret arrangements between the owner and contractor, whereby the contract price might not be owing to the contractor when stop notices were served. Mr. Justice Pitney, speaking for the Supreme Court in the case of *Taylor v. Reed* (June T. 1902) 52 Atl. 582, after citing the above cases, declares: "Upon the whole, it seems well settled that while a claimant who serves his stop notice after the owner's liability to the contractor has matured still has the benefit of his notice, so far as it entitled him to stand in the shoes of the contractor and recover from the owner any moneys then due from the owner to the contractor, to the extent of the claimant's demand, yet such a belated stop notice has no retroactive effect, and does not entitle the claimant to any benefit of the provisions of section 5 of the act." In the present case, Cramer, the stop-noticing claimant, does not ask the benefit of the provisions of section 5 of the act. He stands, as above shown, upon the provisions of section 3, and seeks to make the owner liable, not because the owner had made advance payments, but because when his notice was served the owner had the contractor's money (part of the contract price) still in his hands.

The result is that the complainant owner ought to hold at the disposal of the contesting claimants the sum of \$942.20, which is the whole of the fourth installment, except the \$17.90 paid to Risley on Cramer's order, and also the whole of the last installment of \$3,000, making a total of \$3,942.20, and should, in her interpleader bill, have tendered this \$3,942.20 to the defendants, as the total sum due them from the complainant. By her bill

the complainant tenders only \$3,275.76. She has no equity to compel the defendants to interplead for any less sum than is rightfully payable to them.

I will advise that the complainant's bill be dismissed, with costs.

SPEER v. ERIE R. CO.

(Court of Chancery of New Jersey. March 26, 1903.)

RAILROADS — FARM CROSSING — CHANGE OF GRADE — DEMAND — LACHES — PROPOSITIONS FOR SETTLEMENT — COVENANT — HEIRS — EASEMENT.

1. Where a strip of land through a farm was conveyed to a railroad by a deed in which it covenanted "to make and maintain the necessary fences on each side of said tract of land, and provide the party of the first part with a suitable and convenient road crossing," etc., such covenant created an easement appurtenant to the land, and the sole heir of the grantor was entitled to its benefit, though the word "heirs" was not used.

2. A railroad, in procuring a right of way across a farm, covenanted to provide the owner with a suitable and convenient crossing, where he should direct. He selected a place where the railroad was nearly at grade, and the crossway was constructed and used for several years. The company then raised the grade of its road 13 feet, destroying the crossway by the embankment. When the work of raising the grade commenced, the owner notified the company of his rights, and demanded that the crossing be left open through the embankment. Held, that the rights of the parties were fixed when the crossing was constructed, and the company would have to open up the embankment and bridge over the crossway in compliance with the demand.

3. The owner could not be compelled to accept compensation in lieu of the crossing; the charter of the original company (Laws 1867, p. 306, c. 160, § 9) having preserved the old road to the owner, and Gen. St. p. 2661, § 84, under which the present company is formed, requiring that suitable wagonways be constructed over, under, or across the railroad where it intersects any farm, and the company not having a right to condemn that which in every condemnation proceeding is expressly reserved or given to the owner.

4. The owner's right to the crossing was not affected by the fact that the expense of removing the embankment and bridging over the crossing would be great.

5. The owner's right to insist on the crossing was not affected by the fact that after making the demand he waited a few months before commencing suit to enforce his right, and in the meantime listened to, but did not accept, several propositions made by the company for a different crossing or a money compensation.

Bill by Abram Speer, against the Erie Railroad Company to compel restoration of a farm crossing. Decree for complainant.

Halsey M. Barrett, for complainant.
Chauncey G. Parker, Cortlandt Parker, Jr., and Cortlandt Parker, for defendant.

STEVENS, V. C. The bill is filed to compel the defendant company to restore a farm crossing over its tracks in Upper Montclair. By deed dated June 20, 1870, John A. Speer

conveyed in fee to the predecessor of the defendant company, for the consideration of \$487.50, a strip of land 100 feet in width, running through the middle of his farm. The farm contained about 40 acres. In this deed the grantee company stipulated as follows: "The said party of the second part doth for itself and its successors agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing, across the track of said railway where the party of the first part may direct." In conformity with this stipulation, the grantee directed that the crossing should be where an old road ran through the middle of the farm. To this direction the company assented, and provided a crossing accordingly. Its single track ran through the farm nearly at grade, the rails being laid about 18 inches above the natural surface. On both sides of the track, planking was laid, and the crossing so constructed that the grantor could cross with his farm wagons, horses, and cattle. The way was used by the grantor, and after his death by the complainant, his sole heir at law, up to the month of April, 1900. During the latter part of this period, however, the complainant seems to have utilized it only as a driveway for cows; so much of the farm as lay west of the track having been devoted to pasturage. In the year 1897 the company constructed an additional track, and in April, 1900, raised both tracks so as to run over the valley road at an elevation of 13 feet (clear head room), pursuant to a decree of this court regulating the use of that highway as between the North Jersey Street Railway Company and the defendant company. In thus raising them, the latter company was obliged to raise them at the farm crossing, and it constructed across complainant's land a solid earthen embankment about 15½ feet high. It did not bridge the crossing, but completely destroyed it. Complainant can only now go from the easterly to the westerly part of his farm by making a considerable circuit on land not his own. Just before or very shortly after the work of grading had begun, the complainant notified the agents of the company of his right. The notice of claim is dated March 23, 1900. The company's first reply is dated March 29, 1900. Mr. Moore, the company's engineer, says the work of elevating began about the 1st of April of that year. The company, notwithstanding the notice, went on and constructed the embankment across the way.

The stipulation in the deed is only that the company and its successors shall provide the party of the first part with a suitable and convenient road crossing. It does not, in terms, extend to his heirs and assigns; but it has been settled that these terms are not,

¶ 1. See Covenants, vol. 14, Cent. Dig. § 82.

in a case like the present, necessary to attach the covenant perpetually to the land. In *Pipe Line Co. v. D., L. & W. R. Co.*, 62 N. J. Law, 254, 274, 41 Atl. 759, 766, the stipulation was that the company should erect and forever maintain under the rails of its railroad a suitable wagon road or crossing, etc. Mr. Justice Depue, speaking for the Court of Errors, said: "The grant, in terms, is to Stewart without the word 'heirs' or words of perpetuity. Such a grant at common law would create only a personal right for the life of Stewart. Where the right is granted in a deed, in the nature of a reservation, and it is manifest from all the recitals in the deed on the subject that the plain purpose of the parties was to create a right for the benefit of the part of the whole tract which had been severed by the conveyance, the grant will be construed as creating an easement appurtenant to the premises, and will pass as such without the word 'heirs,' at least in equity." The covenant in the case in hand does not differ essentially from that which was the subject of consideration in the *Pipe Line Case*, so far as it is in the nature of a reservation. Here, as there, the plain purpose was to create, or, rather, to preserve and perpetuate, a right for the benefit of the several parts of the whole tract. It therefore follows that the complainant, who is the sole heir of the grantor of the land, is entitled to the benefit of it.

In view of the decision in the *Pipe Line Case*, the company does not seriously contest its liability in some form. It says that it is willing to give a crossing in one of three ways: (1) It will undertake to give an outlet to the valley road over a right of way to be acquired by it. This will compel the defendant to make a circuit, off his own land, in order to go from his house and barn and from the valley road to his land west of the raised tracks. (2) It will provide approaches on its own land, parallel to its tracks, which will carry the crossing over the road at grade; or (3) it will construct approaches on the complainant's land so as to carry the crossing over the road at right angles to the direction of the tracks. The company suggests further that, in case the court shall be of opinion that the complainant is not obliged to accept either of these three modes of crossing, then, it shall itself ascertain the damages which the complainant will suffer from the severance, and compel him to accept them, in lieu of the specific relief which he asks. The complainant refuses to accept any of these propositions, and insists upon his right to a crossing at the level at which it existed for the 30 years prior to the raising of the tracks. In reply to this insistence, the company says that such a crossing would cost over \$5,000, while any of the other modes of crossing would not cost more than five or six hundred.

It would seem at first blush as if a crossing such as the company offers would answer

complainant's requirements, and that the rule should be applied that if subsequent events have made literal performance by defendant so onerous that it would impose great hardship upon the company, and be productive of little or no benefit to complainant, then it will not be decreed. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365. But a little consideration will show, I think, that this case does not fall within the reason of the rule. In the first place, if the company will now be obliged to spend \$5,000 upon what I shall call a tunnel crossing, it is only because, in the face of not only constructive, but actual, notice of complainant's rights, it chose to go on and disregard them. The company's engineers do not tell us what such a crossing would have cost, had it been made while the work was progressing. It is obvious that it would have cost very much less than it will now. The company was under no compulsion to construct the embankment as it has constructed it. If the company deliberately disregarded complainant's right, it should not be permitted to stand in any more favorable position for having done so. In the second place, the evidence shows very clearly that the right as it has heretofore been enjoyed is gradually becoming more valuable. There is evidence on both sides that the land in the vicinity is coming into the market for residence purposes, and that it now possesses a value much above its value as farm land. An outlet to the valley road, such as the tunnel crossing would afford, would give added value to the complainant's land west of the embankment.

If, then, the complainant has a legal right to a tunnel crossing, there is nothing in the present situation, created by the defendant itself, after full notice, that would warrant the application of the above rule. I will first consider the nature and extent of the right, and then whether equity should deprive him of it, in the form in which it was given.

The covenant is that the predecessor of the defendant company will "provide the party of the first part with a suitable and convenient road crossing across the track of said railway." This right is not, as it was in the *Pipe Line Case*, supra, limited "so as to enable said S. to travel and cross freely between his land on each side of said granted premises." It is an unlimited right—a right of passage for all purposes; and the case in hand, as it seems to me, comes within the principle of the cases cited with approval in the *Pipe Line Case*, which hold that a crossing has been given for all the purposes to which at the time, or at any future time, the owner or any grantee of the whole or any part of his land may think fit to appropriate it. One of the passages quoted with approval in the *Pipe Line Case* is taken from a judgment of Lord Justice Mellish in *United Land Co. v. Great Eastern Ry. Co.*, L. R. 10 Ch. App. 587, and is as follows: "When a

right of way is created by grant or act of Parliament, it must depend on the proper construction of the grant or act of Parliament whether the right of way is to be used for all purposes, or for only limited purposes. No doubt, there are authorities that from the description of the land to which the right of way is annexed, and of the purposes for which it is granted, the court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes." See, also, *Newcomen v. Coulson*, 5 Chan. Div. 138. A glance at the map makes it apparent that, on a subdivision of the land into lots, the tunnel crossing would be far preferable as a means of reaching either on foot or by vehicles what is the principal highway in that locality, viz., the Valley Road. Speer had by the above-quoted reservation the right to go from the westerly part of his farm to that road, and the above cases show that his grantees, however numerous, would have the same right.

This brings me to the question whether complainant has the right to the tunnel crossing which he now claims. The deed provided that the crossing was to be "where the party of the first part may direct." It is admitted that the direction was both given and complied with. That irrevocably fixed the place of crossing. The case is identical with that suggested by Chief Justice Beasley in *M. & E. R. R. v. Central R. R.*, 31 N. J. Law. 209. He says: "If A. grant to B. a right of way over his farm, such way to be laid out by B., it could not be plausibly pretended that, after such way had once been located and ascertained by B., it could afterwards be relocated or altered or added to by him." The precise location having been once for all settled, it is as binding upon the parties as if it had been fixed by an actual description in the deed itself. But it is obvious that, if its location could not be changed laterally, it could not be changed vertically. The vertical change here proposed would be much more inconvenient than any lateral change. The way, if changed vertically, would not be the way located and agreed upon by the parties. It has been suggested, however, that, while a crossing with raised approaches would not be as convenient as the old crossing, a tunnel crossing would be more convenient, because, the tracks not being crossed at grade, the element of danger would be eliminated, and that, if complainant ought not to be compelled to accept an inferior crossing, he is not entitled to a better. But certainly this ought not to be urged as an argument why the company should not perform its contract. The crossing would only be better in the sense that it would be less dangerous. In all other respects it would be the same. It would hardly be permitted to defendant to say, "I ought not to be compelled to give you the very way which I have stipulated to give you,

because I will now be obliged to so construct it as to obviate all danger of collision."

It being clear that complainant has the legal right to the very crossing which his father designated and the company gave, the question, then, is whether equity ought to compel him to take something else. I do not see any reason for compelling him to take a roundabout crossing off his own land, nor do I see any reason for compelling him to accept as a substitute a more dangerous and inconvenient one over the tracks of the company, whether that crossing be constructed on the company's land, with approaches parallel to the tracks (a very awkward way of getting over them), or a crossing with approaches constructed on complainant's land (land which he never gave for the purpose) at right angles to these tracks; it being remembered that the only ground on which this is asked is that of expense, and the expense having been, to a considerable extent, at least, incurred only as a result of the violation of complainant's right after notice.

It is urged, however, that, if complainant cannot be compelled to take a less advantageous mode of crossing, he should at least be compelled to take damages in lieu of performance. If complainant could condemn, there would be much force in the contention; for it has been repeatedly decided, both here and in the Court of Errors, with reference to analogous cases, that this court has power to award damages. But it is conceded by counsel on both sides that this right of way cannot be condemned. And the reason is obvious. The charter of the original company preserved the old road to the landowner (Laws 1867, p. 306, c. 160, § 9), and the general railroad act under which the present company is formed requires that suitable wagonways shall be constructed over, under, or across the railroad where it intersects any farm (Gen. St. p. 2661, § 84). The company could not condemn that which in every condemnation proceeding is expressly reserved or given to the owner.

If, then, the law gives the right to the crossing, and if the crossing has been actually located, constructed, and maintained under an agreement or covenant which neither party may vary from without the consent of the other, it would seem plain that the court should enforce the agreement as it finds it, and not give something as a substitute, unless the company can show that, under the particular circumstances of the case, to enforce the legal right would be inequitable. It is very clear that the mere expense will not, under the circumstances, give rise to an equity. Long and undisturbed possession may create an equity, but here the possession was with the complainant, and not with the company. Laches might, if present, give rise to an equity, but here there was diligence. It is, indeed, contended that complainant should have acted while the pro-

ceedings between the railroad and trolley companies were in progress. But how could he have acted? Even if it were shown that complainant had other than constructive notice of these proceedings, he could hardly have anticipated that the company, without necessity, would obstruct his way with an embankment, when they might have easily bridged.

There is only one other conceivable ground on which it can be claimed that complainant is estopped from claiming the very right which the law and the contract both gave him, and that is the ground suggested by the case of *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820. In that case it appears that the *Bryam River* flowed partly in the state of New York and partly in the state of Connecticut. It had two branches; the East Branch being in Connecticut, and the West Branch being chiefly in New York. The city of New York was constructing a dam near the Connecticut line, with the intention of appropriating the waters of the West Branch to increase its water supply. The bill was filed by a riparian owner in Connecticut, lower down the stream, to enjoin the city from making this appropriation. The Circuit Court of Appeals (96 Fed. 1005) affirmed the decree of the Circuit Court (76 Fed. 418) granting an injunction, but the Supreme Court reversed, and held that the complainant should have damages, and not an injunction, unless the damages were not paid. It is, of course, apparent that the city of New York could not condemn land in Connecticut. The grounds upon which the Supreme Court refused to sanction the injunction in the first instance were these: That it was not a case between two individuals, one of whom asserted that his property rights were being infringed by the other; that it was, rather, a case between an individual having a right that was of small value to him, and a public corporation which was undertaking to supply its citizens with a necessary of life; that the city had been engaged in this work of public utility, to the knowledge of complainant, for two years prior to the commencement of his suit; that during all that time the plaintiffs and the city had been trying to agree upon the amount of compensation, thus showing, as Justice Brewer says, "that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work"; and that, had the injunction been continued, a costly public work would have been rendered useless. In view of these facts, Justice Brewer says: "If one aware of the situation believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to

great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal." *Simmons v. Paterson*, 60 N. J. Eq. 393, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642, is, in our own state, decided upon the same principle. The case in hand differs from the case cited in the very particulars which justified the court in giving compensation rather than an injunction. In the first place, no public interest is involved. It is perfectly immaterial to the public whether the defendant's trains be carried over a bridge or arch 12 or 13 feet wide, or over an embankment. The plaintiff does not ask that the company be ejected from the lands or restrained from running its trains. In the second place, the lapse of time intervening is considerably less. The parties were in negotiation for a few months, and not for two years; and the negotiations related not only to a money equivalent, but also to the alternative rights of way proposed, and proposed only, by the company. In the third place, the parties appear from the start to have been hopelessly at variance, because of the opposite views taken of the nature and value of complainant's right; and Mr. Moshizker, the company's agent in the matter, admits that Mr. Speer did not go so far as to agree to accept a money equivalent. It is not a fair inference from the evidence that complainant waived his right to an injunction. From the outset he insisted upon it. The situation was this: The company, in the face of notice, obstructed the crossing, and, having obstructed it, began to propose substitutes for it. Unless it was improper for the complainant to have merely listened to these proposals, he was not lacking in diligence. It would seem plain that he has done nothing which the company is in a position to insist upon as being a waiver of the right which the deed, and long-continued enjoyment under the deed, give him.

DOWNING v. DOWNING.

(Court of Chancery of New Jersey. March 11, 1903.)

DIVORCE—ALIMONY—AMOUNT.

1. On an application to settle permanent alimony, the evidence showed that, while defendant had no property, his annual income from personal labor amounted to from \$820 to \$1,000. *Held*, that an allowance of \$30 a month for his wife, and \$10 a month for the maintenance of his child, would be granted.

Bill for divorce by *Ida M. Downing* against *Joseph M. Downing*. On application to settle permanent alimony. Application granted.

J. E. Lanning, for petitioner. S. A. Patterson, for defendant.

EMERY, V. C. Defendant has no property, but he has ability to work and earn an income, and has always since his marriage earned enough to support himself and his wife and child. Of late years (since 1899) he has been earning, at first \$75 a month, since reduced to \$60 a month, owing to causes which seem to be temporary. His occupation has been as assistant in managing summer hotels, with a woman who advertises his name as a partner, in order to aid her business, as she says; and, in addition to the salary above mentioned, he receives his board during the summer or hotel months, while employed at the hotel. This should be worth at least \$20 a month more for five months in the year, making his total income from his personal labor \$820 to \$1,000 a year. Under his present circumstances appearing from the evidence, I must make these figures the basis from which to estimate the permanent alimony. He should pay \$30 a month as the alimony for the wife, and \$10 a month for the maintenance of the child; together, \$40 a month. Security in the sum of \$1,000 must be given for the payment. The amount will run from the date of application for increase of the temporary alimony from \$32.50 per month. Complainant's counsel is allowed an additional counsel fee of \$35; making \$75, in all, for his services as counsel.

BARRETT v. BLOOMFIELD SAV. INST. et al.

(Court of Chancery of New Jersey. March 25, 1908.)

SAVINGS BANKS — MANAGERS — RELATION TO DEPOSITORS — DISSOLUTION OF INSTITUTION — GROUNDS — OBJECTIONS — STANDING OF DEPOSITORS.

1. The managers of a savings institution are trustees of a public franchise granted to and held by them for the benefit of the public, and especially for that part of the public in the immediate neighborhood, as well as for the depositors.

2. The depositors in a savings institution occupy a double relation to the corporation as such. In case of insolvency, they are its creditors; in other cases, they are in the nature of partners or stockholders; but in all cases they are the *cestui que trustent* of the managers.

3. The managers of a savings institution occupy the position of holders of a public trust of a benevolent and charitable nature, and it is their duty to preserve and foster with reasonable zeal the object of the trust.

4. The managers of a savings institution have no more right to destroy the entity of the corporation while transferring to themselves its most valuable asset, its good will, than an ordinary trustee of property has to purchase the property himself, though paying a fair price for it.

5. Act April 9, 1902 (P. L. 1902, p. 677, c. 224), authorizes the managers of a savings institution to dissolve it, if, at a meeting of the managers, "a resolution declaring the dissolution to be advisable be passed by a two-thirds

vote of the whole board." Gen. St. pp. 3001, 3002, §§ 8-11, providing for the organization of savings institutions, requires the state board to ascertain "whether greater convenience of access to a savings bank will be afforded to any considerable number of depositors"; "whether the density of the population affords a reasonable promise of adequate support"; "whether the responsibility," etc., of the persons named in the certificate, is such "as to command the confidence of the community." Section 9 directs the board to issue the certificate if they are satisfied the bank will be of "public benefit." Section 11 directs that, if the board is not satisfied that the establishment of the bank "is expedient and desirable," they shall refuse. *Held* that, in determining whether dissolution is "advisable," the managers are to consider whether further continuance of the institution would be of "public benefit," and "expedient and desirable," as tested by the needs of a considerable number of depositors, by the density of the population, and by the reasonable promise of adequate support.

6. In determining whether dissolution is "advisable," the managers must not be guided by their own personal pecuniary interests.

7. The mere fact that a trust company has been organized in the same community with a savings institution does not show that the dissolution of the latter is "advisable," the mode of investment adopted by trust companies being more hazardous than that allowed to savings institutions under the restrictions imposed on them by law, and they, therefore, being less adapted to the needs of persons of moderate means.

8. P. L. 1899, p. 455, authorizing trust companies "to receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company," does not repeal, by implication, P. L. 1876, p. 357, which declares "that it shall not be lawful for any bank, banking association, firm, stock company, corporation or individual banker, to advertise or put forth a sign as a savings bank, either directly or indirectly, or in any way to solicit or receive deposits as a savings bank, except in the case of banks or deposit companies now authorized by law to receive deposits on interest, or banks incorporated under this act."

9. A national bank does not afford to persons of moderate means the same facilities for depositing money as savings institutions.

10. P. L. 1876, p. 846 (the savings bank act), made applicable by section 52 thereof to institutions already organized, expressly declares that "all vacancies in such board, by death, resignation or otherwise, shall be filled by the board of managers," etc., and the unwillingness of the present managers to continue in office is therefore no ground for dissolving the institution.

11. If a national bank attempts to compete with a savings institution, the latter should appeal to the law to prevent the national bank from seeking savings deposits.

12. It does not lie in the mouth of the managers of a savings institution who have themselves formed a trust company, which competes with it for savings deposits, to say that dissolution of the institution is advisable because of competition between it and a newly organized national bank.

13. The attorney general is not the only one who is entitled to maintain a bill to prevent the managers of a savings institution from dissolving it, but a depositor therein may, in her status as depositor, and also as a citizen of the community, maintain such a bill.

14. The fact that a depositor, in case of dissolution of a savings institution, will receive back his deposit and share in the surplus, cannot prevent him from maintaining a bill to prevent the dissolution.

Bill by Mary C. Barrett against the Bloomfield Savings Institution, William H. White, Joseph H. Dodd, and others. On order to show cause why a temporary restraining order should not be continued to the final hearing. Heard on bill and affidavits and the joint and several answer of the several defendants and affidavits. Injunction continued to final hearing.

Halsey M. Barrett, for complainant. Robert H. McCarter and Gilbert Collins, for defendants.

PITNEY, V. C. The object of the bill is to restrain an alleged breach of trust. The complainant, Mrs. Barrett, sues in behalf of herself and her four children as severally depositors in the defendant corporation, the Bloomfield Savings Institution, and charges that the individual defendants, William H. White, Joseph H. Dodd, and the others named in the bill, are the president, treasurer, and managers thereof, and as such are engaged in carrying through a proceeding which, if consummated, will amount to a breach of trust on their part.

Briefly stated, the allegation is that in the summer of 1902 the individual defendants, 11 in number, being then officials and managers of the savings institution, comprising all but two of the board, organized themselves, with two additional persons, into a trust company, of which they are the directors, and the defendant White the president, and the defendant Dodd the treasurer; that they opened a banking office in the room of the defendant corporation, and conducted their business as a trust company over the counter and by the officers of the savings institution; that in the last days of December, 1902, they, as managers of the savings institution, took proceedings under the act of April 9, 1902 (P. L. 1902, p. 677, c. 224), to wind up the institution and distribute its assets, not including its good will, among its depositors, and took measures to induce all its depositors to transfer their deposits to their trust company, thereby attempting to appropriate to the latter company the benefit of the good will and established reputation of the savings institution. The defendants justify their conduct under the terms of the act just cited. The bill was presented, and an interim restraint granted, before the transaction was completed. The question now is whether such restraint shall be continued until the final hearing of the cause.

The question involved in the record is of great importance, and has been argued with much ability by the eminent counsel who appeared for the respective parties. I have given it the best consideration of which I am capable. I have said that the question is of great importance, not so much to the parties to this cause as to the public at large, and especially to those citizens who believe that the savings bank system of this state,

and indeed of most of the other states of the Union, is of great value to the public at large, in that it tends to promote industry, thrift, and contentment among what are known as the "laboring classes," to give them a stake in the community, to repress a disposition to be led away by the fallacies of socialism and anarchy, to promote civic virtue, and to produce good citizens. And the importance of the question lies right here: That it is quite certain that if the project of the defendants to convert the Bloomfield Savings Institution into a trust company—for that is what it amounts to—cannot be arrested by legal process, either at the suit of the Attorney General or of some citizen, then it follows that it is within the absolute power of the managers of every savings institution in this state to wind up their several institutions, divide among the depositors the net value of the assets, not including the good will, and, by the simple process of the organization among themselves of a trust company, to be located in the very building and managed by the very same officers as those of the expiring savings institution, appropriate to themselves the good will thereof, amounting in value in the aggregate to many millions of dollars, and at the same time to practically destroy the whole system.

I will give the result of my consideration by stating, at the outset, more in detail the facts of the case, and then inquiring, first, whether a breach of trust is threatened by the defendants, or is possible under the act. And if that proposition is found in the affirmative, then, second, whether the present complainant has any standing in this court to seek to restrain the same, or whether the only party who has such standing is the Attorney General, in behalf of the state.

The Bloomfield Savings Institution was organized under a special act approved March 21, 1871 (P. L. 1871, p. 647), by which 29 gentlemen therein named, residents of Bloomfield, were incorporated and authorized to conduct a savings institution. A recital of its provisions is unnecessary, except to say that they are, in substance, the same as are found in all savings institutions created about that time. Thus, the managers are forbidden to receive any compensation for their services, or to borrow, either directly or indirectly, any money from the institution, or to have any interest whatever in any deposits therein. They are restricted in the securities in which they may invest the funds of the depositors. It seems to have been well managed. It commenced, as all such institutions must, with small beginnings, and to use the language of the answer, "the same, by careful attention, has developed gradually, so that on the first day of January, nineteen hundred and three, it had total deposits amounting to \$829,224.63, and a surplus of \$67,477.18, and in so far as said figures represent the savings, and man-

fest the thrift, of the said depositors, of whom these defendants believe there are about twenty-three hundred, not all of whom reside in the town of Bloomfield, these defendants believe that the said institution, like any other similar and carefully managed savings bank, has been of advantage to the community. * * * It is also true that within the last six years the deposits in said institution have increased at about the rate of \$70,000, and that the surplus has grown from \$30,000 to between \$60,000 and \$70,000, and that said institution has been, and is, prosperous and successful." A schedule, contained in the answer, stating the annual deposits for 10 years from January 1, 1894, to January 1, 1903, inclusive, shows a gradual increase of deposits from \$213,000 to \$829,000, of which \$74,000 accrued during the calendar year of 1902, and \$18,500 in the month of December, 1902, and the surplus in six years has grown from \$30,000 to nearly \$70,000.

In the month of May, 1902, the individual defendants, with two other persons, applied to the Banking and Insurance Department of New Jersey for a charter for a trust company, with the name of the "Bloomfield Trust Company," under the act concerning trust companies (Revision 1899, P. L. 1899, p. 450), and in pursuance thereof, on July 1, 1902, the Bloomfield Trust Company was incorporated, and on September 10, 1902, it opened business in the office and banking house of the Bloomfield Savings Institution, and with the same officers.

And here we come upon the only region of disputed fact. The bill alleges that from the beginning of the trust company project, the individual defendants intended to wind up the savings institution and turn its assets and business over to the trust company. This is denied by the defendants. They say that they first thought of winding it up in the latter part of December. I am unable to assume, in the face of the other allegations in the answer and the admitted facts of the case, that the defendants' account of the affair in this respect is absolutely true. I should prefer to hear them cross-examined upon it. I should like to be informed how they expected to conduct two such companies at the same time, in the same office, and by the same officers.

Taking all the allegations of the answer and the admitted facts, I am unable to accede to the contention of the defendants that the winding up of the savings institution was not in their minds from almost the start. Be that, however, as it may, on the 31st of December, 1902, a special meeting of the managers of said institution was called, at which all but two of the members of the board were present, and at that meeting the following preamble and resolution were adopted:

"Whereas, a request in writing by a majority of the board of managers of the Bloom-

field Savings Institution has been heretofore presented to the president, asking that he call a special meeting of the board of managers of this institution for the purpose of considering and passing a resolution declaring the dissolution of this institution to be advisable; and

"Whereas, acting upon said request, the president did, on the twenty-seventh of December, nineteen hundred and two, call a special meeting of this board upon at least three days' notice given by mail to every manager, stating the object thereof; and

"Whereas, this meeting is attended by more than two-thirds of the board of managers of said institution, to wit, by eleven members out of thirteen; and

"Whereas, by reason of the fact that the Bloomfield Trust Company are prepared to offer to savings investors through their savings department, the facilities and advantages heretofore offered by this institution, and the further security and safeguard of their capital and surplus amounting to \$120,000; and

"Whereas, said Bloomfield Trust Company have offered to facilitate the liquidation of the affairs of the institution, and the payment of its obligations and depositors by purchasing its securities and otherwise;

"Now, be it resolved, that this meeting declare the dissolution of this institution to be advisable, and be it further

"Resolved, that the president and secretary of this institution be, and they are hereby authorized to certify to a copy of this resolution, as having been passed in manner provided for by chapter 224, p. 677, of Laws of 1902, and entitled, 'An act, etc.' On motion, duly recorded, the officers of this institution were authorized and empowered to demand notice of the withdrawal of deposits at their discretion, subject to the by-laws, from all depositors."

Immediately, and pursuant to these resolutions, they issued and inclosed in one envelope, and sent by mail to each depositor of the savings institution, over 2,000 in number, two circulars, as follows:

"Bloomfield, N. J. December 31, 1902.

"To the Depositors of the Bloomfield Savings Institution:

"The Bloomfield Trust Company, a strong and reliable banking institution, has offered to take over the entire business of the Bloomfield Savings Institution, to continue it in the same location, and to pay depositors the old rate of interest, viz., $3\frac{1}{2}$ per cent. per annum.

"Although the Bloomfield Savings Institution is a sound and prosperous concern, yet, in view of the fact that the new institution will offer absolute security to its depositors, with a capital and surplus nearly twice as large as the surplus of the savings bank, the managers, acting according to their best judgment for the interests of all, have resolved to go into voluntary liquidation; thus

leaving the field to the new institution and practically accepting their offer.

"A dividend has been declared, as usual, up to January 1, 1903, at the rate of $3\frac{1}{2}$ per cent. per annum. The surplus will be credited to depositors, pro rata, as soon as liquidation shall have been completed.

"All of our depositors are requested to continue their accounts with our successors, whom we heartily recommend as being worthy of their confidence. Their circular will be found enclosed herewith.

"By order of the board of managers,

"Joseph H. Dodd, Secretary."

"Bloomfield Trust Co. No. 7 Broad Street.

"Paid up Capital and Surplus, \$120,000.

"Officers: William H. White, President. John Sherman, Vice President. Joseph H. Dodd, Secretary and Treasurer. James N. Jarvie, Chairman of Executive Committee. Robert M. Boyd, Jr., and Edward Oakes, Counsel. Directors: James N. Jarvie, Wm. R. Broughton, John M. Van Winkle, John Sherman, Allison Dodd, A. R. Brewer, Edwin M. Ward, William H. White, William W. Snow, Edward Oakes, Robert M. Boyd, Jr., N. Harvey Dodd, Joseph H. Dodd.

"Referring to the enclosed circular of the Bloomfield Savings Institution we desire to say that the Bloomfield Trust Company is prepared to purchase the entire assets and assume all the liabilities of the savings bank.

"The savings department of this company will be located in the room the savings bank has occupied, the same tellers will be in attendance and deposits will be received and payments made as usual without interruption. Depositors are assured careful and prudent management, the president, vice president, secretary, and nine of the directors of the trust company being of those who have managed the savings bank for many years past. All money now on deposit will draw interest from to-day, and hereafter moneys deposited on or before the third day of any month will draw interest from the first day of said month.

"Bloomfield Trust Company,

"William H. White, President.

"Bloomfield, N. J., Jan. 1, 1903."

Those circulars reached the complainant on the 2d of January, 1903, indicating that they had already been printed before the resolutions were adopted. Shortly afterwards the complainant, by her husband as counsel, called upon the managers and remonstrated with them, and asked them to suspend their operations, threatening suit in chancery. He waited a day or two for their answer, and, learning from them that they conceived that they were justified in their action, he thereupon filed this bill.

It is impossible, in the face of the resolutions and circulars above set forth, for the defendants to assert, with any hope of success, that their object in the winding up of the savings institution was not to turn over all

its deposits and its business to their trust company, and that by so doing they would acquire, without paying anything therefor, the good will and established reputation of the institution, which for over 30 years had been successfully managed by competent persons, and, as the case shows, enjoyed the confidence of the community.

This brings me to the principal question, and that is: Have the defendants been guilty of any breach of trust? And that leads to an examination of the question—which, however, seems to me really to need no examination—of the real relation which the managers of this and other savings institutions bear to the public and to the depositors. And I will say at once, before citing the authorities, that I had supposed that, if anything was perfectly well settled in New Jersey, it was that the managers of a savings institution occupied the position of trustees of the depositors; and I think an examination of the authorities shows that their position is of even a higher grade than that: They are trustees of a public franchise granted to and held and exercised by them for the benefit of the public at large, and especially that part of the public in the immediate neighborhood of the location of the particular institution, as well as for the depositors in their institution. In this state, the leading exposition of the character of the trust is found in the admirable opinion of the late Judge C. S. Green, in *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378. I think it worth while to quote therefrom: "In the solution of this question, regard must be had to the peculiar character of the corporation itself, and to the mutual relations of the depositors to each other and to the corporation. Savings banks differ widely in their objects, organization, and character from ordinary banks and other joint-stock companies. They have no capital stock. They are incorporated and organized, not for the advantage of the corporators, but solely for the benefit of the depositors. Their object, as stated in some of the early charters of this state, is to receive and safely invest the savings of mechanics, laborers, servants, minors, and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality. Properly organized and conducted, a savings bank is a quasi charitable and purely benevolent institution; its only object, the safe-keeping and provident investment of the funds of the depositors. The members of the corporation have no property interests in its funds, of which they are by law constituted the managers and guardians. The depositors, who alone are beneficially interested in the prosperity of the bank, have no voice in its management, nor even in the selection of the persons to whom its management is intrusted. The assets of the bank

are its invested funds, the common contributions of all the depositors, in which they all have a common interest. All the profits of the business are divided among the depositors, or accumulated in a surplus fund for their joint benefit and greater security. * * * In a savings bank the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity they are the stockholders, among whom the profits are divided. In case of insolvency, they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed. If the depositors were themselves made by law the corporators, empowered to elect managers from their own number, thus forming a mutual savings bank, the similarity would be more complete, and the natural equity of the depositors in their mutual relations to each other and the corporation more clearly apparent. The fact that the law, for the greater security of the depositors and the more provident investment of their funds, has wisely taken the management out of their control and placed it in the hands of disinterested corporators, cannot, in equity, change the relations of the depositors to each other, or affect their mutual interest in the common fund."

Next, we have *Chester v. Halliard*, 36 N. J. Eq. 313. There several depositors sued the managers alone in equity to recover losses occasioned by their misconduct in office, and it was held that the complainants occupied the position *pro hac vice* of creditors of the corporation (not of the managers), and could only maintain the suit in the interests of the latter, and that it should be made a party. It was not suggested that, if properly framed, and free from multifariousness, the bill would not lie against the managers. The only basis of such a suit was, of course, that the managers were trustees and had been guilty of a breach of trust.

In *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, the relation of trustee and cestui que trust between the depositors and managers is declared in the strongest terms. I quote as follows: "It is a mistake, sure to mislead, to regard this suit as one solely in right of the insolvent corporation. It does not rest upon that narrow footing, for the receiver represents, not only the corporate body, but likewise the depositors and creditors; and the question which presents itself, therefore, is as to the status of the managers with reference to the latter two classes of persons; and as to them I entertain no doubt whatever that these officers must respond to them in the character of their trustees." In reaching this conclusion, the principle so often stated in the decisions and text-books is in no wise controverted, that a trust, to be exempt from the operation of the statute of

limitations, must be of a nature to stand the triple test, viz.: First, it must be a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the cestui que trust. And in each of these respects the present case harmonizes with the standard. If it is a trust at all, it certainly is a direct one, for it arises immediately upon the placing of the funds under the control of this body of officers. Such a transaction has nothing of the nature or qualities of those indirect trusts that require for their creation a decree of a court of chancery, as, for example, where money, under certain circumstances, has been fraudulently secreted, and a decree in equity will oftentimes convert it into a trust. It is admitted on all sides that depositors in one of these banks acquire *ipso facto* an equitable right, which, by taking a certain course, they can put in force against the directors or managers, if they have sustained a loss by reason of the misfeasance of such officers; and if such a right exists, what is it, if not the right of a cestui que trust against his trustee? This right thus referred to is, very plainly, not a right inherent in a contract; for a depositor pays his money to the corporation, and makes no bargain with the managers. And yet the law indisputably establishes an equitable right in his favor from the naked fact of his relationship with this class of officers. And it would be singular, indeed, if the law did not raise up a trust out of such a connection. The affair between the depositor and the managers embraces all the materials out of which trusts are created, for I know of no reason why the transactions denominated 'trusts' have been invested by law with their peculiar qualities and characteristics, except that the property that they embrace is put, by way of confidence, under the absolute control of the person called the 'trustee,' and that the person in whose favor it is so placed cannot enforce or protect his interest in a court of law. And this in all respects is the situation when a man places his money in one of these banks: The transfer of such money is nominally to the corporation, but with the intent to put it under the unsupervised control of the managers, in whose appointment the depositor takes no part, his sole reliance being in the honesty and general trustworthiness of such officers; and such an affair, as it admittedly creates an equitable right on the one side, and a correlative obligation on the other, necessarily establishes a direct trust. It will be also observed that the transaction exhibits the second and third requisites of a trust, inasmuch as the right of the depositor to look to the managers for reparation, when a loss has been occasioned by their default, is an equitable one, cognizable only in a court of conscience, and the present proceeding is between the trustee and the legal representative of the cestui que trust."

It was on this principle that the managers were held liable in the Newark Savings Institution Case, *Wilkinson v. Dodd*, 42 N. J. Eq. 234, 7 Atl. 327, and in the *Mechanics' and Laborers' Savings Bank Case*, *Williams v. McKay*, supra, and 46 N. J. Eq. 25, 18 Atl. 824.

As displaying the peculiar character of the trust, the language of Justice Strong, speaking for the Supreme Court of the United States in *Huntington v. Savings Bank*, 96 U. S. 388, 394, 395, 24 L. Ed. 777, is valuable: "We think the complainants have mistaken the nature of the corporation. It is not a commercial partnership, nor is it an artificial being, the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as churchwardens, for the conservation of the goods of a parish; the college of surgeons, for the promotion of medical science; or the society of antiquaries, for the advancement of the study of antiquities. * * * It is like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for provident investment/in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are quasi benevolent and most useful, because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks. * * * Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends, or in a reserved surplus for their greater security. Such, very plainly, is the defendant corporation in this case. The complainants have therefore no pecuniary interest in it, and no right to the relief they ask."

Again, we find the Supreme Court of Massachusetts, in a case sent for its opinion by the Senate of that state, saying, in Opinion of Justices, 9 Cush. 609: "These institutions are established wholly for public purposes, are intrusted with large amounts of money belonging to persons who can ill afford to lose it, and who are in no condition to be able to judge of or provide for its security. The officers and managers of these institutions have no private, personal, pecuniary interest in them, but conduct them wholly for the benefit of the poorer classes of the community, and therefore laws made for the benefit and security of depositors cannot be objected to by these officers on the ground that any interest of their own is affected. The directors and managers of banks, generally, are personally interested in them, but

the officers of savings banks are wholly for the public, and for the poorer and less prosperous classes of the public. The usefulness of the institutions of savings must depend on their possessing the public confidence, and the public confidence must very much depend upon their being under the wholesome inspection and control of the government. It is, no doubt, important, both as regards the public confidence and as regards the safety of their operations, that all these institutions should be subject to one uniform system of regulations, particularly in a matter of so much importance as the mode of investing deposits; and the general laws upon this subject, being clearly within the general and rightful power of the Legislature, and relating to a matter of great public concernment, must be binding upon the Provident Institution for Savings in Boston, in common with other similar institutions, unless that institution is beyond the power of the Legislature in this particular by force of the provisions in its particular act of incorporation."

And in *Burrill v. Savings Bank*, 92 Pa. 134, 37 Am. Rep. 689, the Supreme Court of that state says: "Savings banks, like the defendant * * * are really charities for the benefit of the poor."

Against this view the learned counsel of the defendants urged what was said by Judge (now Chancellor) Magle in the famous case of *Dodd v. Una*, 40 N. J. Eq. 672, 705, 706, 5 Atl. 155. But an examination of that case shows that what he said there has no force in the present connection. There the question was whether the Court of Chancery had jurisdiction to deal with the Newark Savings Institution, in the manner it did, upon a mere petition. If it had such jurisdiction, then it had power to convict Mr. Dodd of contempt. If it had not such jurisdiction, then the court held that it had not such power. The jurisdiction was attempted to be sustained in the learned argument of Mr. Kalisch (page 682, 40 N. J. Eq., and page 155, 5 Atl.), on the ground that the savings institution was a charitable trust or use, in the strict sense which that word has acquired in English jurisprudence; and that proposition was contested by the other side, and was the proposition about which Chancellor Magle expressed doubt. He had not before him for consideration the question whether the managers of a savings institution in the management thereof occupy the position of trustees towards the depositors, or the question whether they occupy a position of public trust exercised for the benefit of the public at large. The distinction between such a trust and a charitable use, strictly speaking, is quite clear. It has, indeed, been said, and very properly, that the depositors occupy a double relation to the corporation as such (not to the managers). That in case of insolvency they are creditors of the corporation; that in cases lacking the element of insolvency they are in the nature

of partners or stockholders. But in all cases they are the cestuis que trustent of the managers, precisely, but in a more marked degree, as the stockholders of an ordinary trading corporation are the cestuis que trustent of the directors. One is liable to fall into confusion of thought and inaccuracy of expression in this connection, if one does not keep in mind the clear distinction between the corporate entity and its managers. The relation between the depositors and the corporation may be quite different from that between the managers and the depositors. Judge Magie, in *Dodd v. Una*, supra, held (page 710, 40 N. J. Eq., and page 163, 5 Atl.) that, admitting that the affair assumed the shape of a charitable trust, the court had no jurisdiction.

The result I reach from a consideration of the judicial utterances above quoted, in connection with our scheme of legislation on the subject, is that these defendants occupy a position of the holders of a public trust of a benevolent and charitable nature, similar to that held by the trustees of the hospitals for the insane and of the normal school, and the like, which are created and maintained by the state for the benefit as well of the public as of a particular class of persons, citizens of the state, in the operation and result of which the trustees have no personal pecuniary interest, except their stated compensation; that the terms of their trust are laid down with great precision in the statute creating it; that their plain and imperative duty is to preserve, promote, and foster with reasonable zeal the object of the trust, and to avoid assuming any attitude hostile to or destructive thereof. (They had no more right by any sort of contrivance to destroy the entity of the corporation, while transferring to themselves its most valuable asset, its good will, than an ordinary trustee of property has to purchase the property himself, though paying a fair price for it. The destruction of the corporate entity was a breach of trust, and the appropriation to themselves of its good will, was another, unless justified by legislation.) What would be said of a conveyance of a part of the shore front of the state by the riparian commissioners to a third party for their own direct or indirect benefit, or of a sale by the managers of a lunatic asylum or of the state normal school to themselves or a third person to their use of a portion of the personal property under their management?

In this connection the cases of *Porter v. Woodruff*, 36 N. J. Eq. 174, and *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52, 19 Am. St. Rep. 435, are instructive.

The defendants assert that they are justified in what they have done by the language of the act of April 9, 1902 (P. L. 1902, p. 677). That act authorizes them to dissolve the institution, if, at a meeting of the managers called to consider the question, "a resolution declaring the dissolution of said institution to be

advisable be passed by a two-thirds vote of the whole board." The meaning of the word "advisable" is sufficiently clear and simple. That is "advisable" which is expedient, prudent, and proper to be done, and therefore proper to be advised to be done. Its synonyms, according to Webster, Worcester, and the Century Dictionary, are "expedient," "proper," "desirable," "prudent," "wise," "best." It seems clear to my mind that in the act here in question the word "advisable" includes those qualities as applied to the continuance of the existence of the defendant corporation in view of the interests of the public generally, as well as in the interests of that portion of the public in the immediate neighborhood of Bloomfield. I am unable to conceive that the Legislature intended that the managers, in judging upon and determining such advisability, should take into consideration their own individual interests or that of their friends, or even act from mere indifference, or a desire to be relieved from the duties of their offices. In my judgment, the only considerations which the Legislature intended should influence their judgment are the interests of the public.

In determining the particular considerations which should influence their judgment in deciding upon the advisability of the dissolution of the institution, we may properly look to the savings bank legislation providing for the organization of new institutions. Sections 8-11, Gen. St., pp. 3001, 3002. By section 8 it is provided that the State Board, consisting of the Governor, Secretary of State, and Comptroller, shall determine as to the propriety of granting an application for the incorporation of a savings bank association, and for that purpose shall ascertain from the best sources of information at their command: (1) Whether greater convenience of access to a savings bank will be afforded to any considerable number of depositors by opening a savings bank at the place designated in such certificate. (2) Whether the density of the population in the neighborhood designated for such savings bank, and in the surrounding country, affords a reasonable promise of adequate support to the enterprise. (3) Whether the responsibility, character, and general fitness for the discharge of the duties appertaining to such a trust of the persons named in such certificate are such as to command the confidence of the community in which such savings bank is proposed to be located. Section 9 provides that if the State Board shall be satisfied, from the information so gained on the points just named, that the organization of a savings bank as proposed will be a "public benefit," they shall proceed to issue certificate, etc. Section 11 provides that, if the State Board shall not be satisfied that the establishment of a savings bank, as proposed, "is expedient and desirable," they shall refuse.

It seems to me, from the consideration of

these provisions, that the question submitted by the Legislature to the judgment of the managers of this institution was whether its further continuance would be a "public benefit," and is "expedient and desirable," as tested by the needs of a considerable number of depositors, and by the density of population in its neighborhood, and the reasonable promise of adequate support for its continuance.

The next question is this: Did the Legislature commit that important question of "advisability" to dissolve to the managers acting as trustees, such as I have described, disinterestedly and semijudicially, having in view only the interests of the public and the needs of the community; or did the Legislature intend that they might act in disregard of the object and purpose of their trust, and be guided in their judgment by their own personal pecuniary interests? If the former, then the legislation relied on cannot aid them. It is a cardinal rule that all trustees must act disinterestedly; that they can do no act as such with the view of forwarding their own interests. Hence, authority given to a trustee to do any act, including, of course, the exercise of judgment, is presumed to be given to him in his character of trustee, and subject to the rules governing trustees; and, as above observed, he must in all things act disinterestedly. This is a rule of universal application, and governs all trustees, however appointed, and by whatever name described. Thus, commissioners appointed by a court to divide, or, in case of inability, to sell lands; the riparian commissioners, who are empowered to sell lands of the state under tide waters; also administrators empowered by the orphans' court to sell lands to pay debts; and others of that class—are subject to it, as well as trustees under a will or a family settlement. Each and every of them must in all things act disinterestedly. They cannot be either directly or indirectly interested in any sale that they make, or in any other act done as such trustees.

It is impossible to escape the conviction, on the case as now presented, that the managers were not acting disinterestedly in resolving that it was advisable to dissolve this institution, and that they were liable to be influenced in their judgment on that question by their individual interests, and hence were guilty of an abuse of the authority given them by the act invoked in their justification. The whole transaction, therefore, upon well-settled principles, must be held to be *prima facie* void or voidable, and therefore subject to review in this court. If I am right in this conclusion, then the present restraint should be continued until final hearing, to the end that the merits of the question involved may be fully investigated and deliberately considered.

But the defendants by their answer attempt to justify their judgment of advisability

by stating the grounds of their judgment. Their position was elaborately argued, and received my careful consideration, and I will state my views upon it. They say they were no longer obliged to keep up the organization of the savings bank, and that it was no longer "advisable" to do so, because its continued prosperity was threatened by the competition (1) of a national bank, and (2) by the trust company which they themselves had organized; and they say there was no necessity for its continuance, because their trust company offered an equally safe place of deposit in which their depositors might place their money. The language of the answer is: "That Bloomfield has a population of about eleven thousand, which has perhaps more than doubled since the organization of said savings institution." They likewise admit that such population includes many persons of moderate means, and that there are several factories and manufacturing establishments located in said town, and that the said savings institution was organized by public-spirited citizens of the town for the purpose for which all savings banks are intended to be organized, the encouragement of thrift and saving on the part of people of moderate means, and that no banking institution of any kind then existed in Bloomfield or Montclair. They show, however, that the occasion for the continuance of said savings institution no longer exists; that two other solvent and well-managed institutions have in the meantime been organized and are now in successful operation [referring to the national bank and the trust company], offering to the same class of persons an equally advantageous opportunity to deposit their savings. And, again, they say that the purpose and object they had in dissolving was because they considered it "advisable," in view of the fact that no longer a necessity seemed to exist therefor, and because ample opportunity was afforded to the depositors to enjoy even better privileges in institutions of high standing and good management.

With regard to their statement that the new trust company offered equal and better advantages for the class of depositors known as "savings bank depositors," I have to say that therein they are running counter, not only to the settled convictions of most of the intelligent and conservative citizens of the state, but to the clear and settled policy of the state, as manifested by the charter of every savings institution lately granted by it, and, more particularly, by the general savings bank act. Those charters, and especially the general savings bank act, which applies in most of its important features to those savings institutions which were already in existence at the time it was passed, put certain restrictions upon both the officers of the savings institution and upon their mode of conducting the business. They absolutely prohibit any savings bank officer or manager from having any pecuniary interest

in or deriving any benefit, directly or indirectly, from his bank, except his salary or fees paid him for his services, and which are subject, where not actually restricted by statute, to the approval of the Banking Department. Then the legislation just mentioned restricts the investment of the moneys of the depositors to a certain class of securities, which are of a character that come, as nearly as practicable, to insuring depositors against any loss. Experience of many years has shown all those who are versed in matters of this kind the value of these restrictions. They are based on the familiar principle that better security can be obtained for money loaned at a low rate of interest than for that loaned at a higher rate, and that the class of persons who patronize savings institutions are best served by a safe investment at a low rate, and as nearly as practicable free from hazard. Those restrictions are not found in the act regulating trust companies, and it is a well-known fact that the mode of investing their moneys and of making gains adopted in this country by trust companies is more hazardous than that allowed to savings banks under the restrictions imposed upon them. It is unnecessary to particularize the lines of business indulged in by trust companies which are hazardous. They are well known to all business men.

The general business of banking is divided into many classes, and some parts of each class of business may be carried on by the same institution; but the particular class of business indulged in by trust companies in this country, and by which they have made their principal gains, is probably well and briefly described by the author of the article on "Banking" in the ninth edition of the *Encyclopedia Britannica*, under the head of "Credit Companies" (page 328), thus: "Credit companies, such as the *Crédit Foncier*, the *Crédit Mobilier*, etc., etc., are strictly analogous to land mortgage banks, except that they invest their funds in loans on the security of general industrial undertakings, to which business they have added the function of negotiators of direct loans between companies formed for the conduct of such undertakings and the capitalist public. In doing this, the modern trust company frequently invests its own and its depositors' money in large blocks of fresh issues of corporate securities, based upon all sorts of modern enterprises, while as yet in their experimental stages, at what are supposed to be low prices, in the expectation of being able to sell them at an advance. This, I believe, is called 'financing' a new enterprise. In marked contrast with this class of investments is that to which savings banks are by statute confined. They are first mortgage loans upon improved real estate, to the extent of not more than one-half its carefully appraised value. Besides these, they may invest as follows: In the stocks or bonds or interest-bearing notes or obligations of the United

States, or those for which the faith of the United States is distinctly pledged; in the interest-bearing bonds of this state; in the bonds of any state in the Union that has not within ten years previously defaulted in the payment of any part of either principal or interest in any debt authorized by any Legislature of such state to be contracted; in the stocks or bonds of any city, town, county, or village of this state, issued pursuant to the authority of any law of this state; or of the cities of New York, Brooklyn, or Philadelphia; or in any interest-bearing obligations (other than those commonly known as 'improvement certificates') issued by the city, town, or borough in which such bank or institution shall be situated; in the bonds of any city or county of any state of the United States of America which have been or may be issued pursuant to the authority of any law of any such state; provided, that no such city or county has, within ten years previous to making such investment by any such savings bank or institution of this state, defaulted in the payment of any part of either principal or interest of any debt authorized by law of such state to be contracted; and provided, further, that the total indebtedness of any such city or county is limited by law to ten per cent. of its assessed valuation." "In first mortgage bonds of any railroad company which has paid dividends of not less than 4% per annum regularly on their entire capital stock for a period of not less than five years next previous to the purchase of such bonds; or in any consolidated mortgage bonds of any such company authorized to be issued to retire the entire bonded debt of such company." "In real estate strictly in accordance with the following provisions: (a) A plot whereon is erected, or may be erected, a building or buildings requisite for the convenient transaction of its business, and from portions of which, not required for its own use, a revenue may be derived. The cost of such building or buildings and lot shall in no case exceed 50% of the net surplus of such corporation." They are expressly prohibited from investing in any bank stock.

The fact that trust companies, during the great increase in business and general prosperity of the country, have been successful for several years past, is no guaranty that such success will continue in the future. It is rather to be apprehended that younger and weaker companies will be tempted, by the great success that has attended some of the operations of the older and stronger companies, to attempt to reap over the same ground that has already been gleaned, and in their confidence that they also may succeed, and in their anxiety for success, may meet with disaster. Be that as it may, that class of investment is quite outside those authorized by the savings bank act. The forty-sixth section of the present savings bank act expressly prohibits any other banking

institution from doing what is called a "savings-bank business"; and I know of nothing in the national law authorizing the creation of national banks which saves them from being subject to the provisions of that act.

It is claimed by the defendants that trust companies are authorized, notwithstanding that act, to do a savings bank business, and they rely upon the eighteenth subdivision of the sixth section of the act concerning trust companies, revision of 1899, which is in this language: "To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company." P. L. 1899, p. 455. I am unable to construe that section as repealing by implication the forty-sixth section of the savings bank act, above referred to, approved April 21, 1876 (P. L. 1876, p. 357), and which declares "that it shall not be lawful for any bank, banking association, firm, stock company, corporation or individual banker, to advertise or put forth a sign as a savings bank, either directly or indirectly, or in any way to solicit or receive deposits as a savings bank, except in the case of banks or deposit companies now authorized by law to receive deposits on interest, or banks incorporated under this act"; and then proceeds with the penalty—\$100 a day for every day such offense shall be continued.

Now, the section in the trust company act above cited, and relied upon by the defendants to justify them in seeking savings deposits, does no more than authorize a trust company to do just what every business man or institution has a right to do without it, namely, to borrow money from whom he pleases, and at the best rate he can. Besides, the words "savings institution," or "savings bank," have come to have a special meaning in the minds of small savers, as indicating an institution especially adapted for the use of that class, and giving them a peculiarly safe place of deposit for their savings of the character above described, and legislation concerning banks and trust companies ought not to be construed to include savings banks deposits except by the use of very clear language. The truth is, that the defendants' whole position and argument on this part of the case entirely overlooks the spirit and object of the savings banks system of this and other states of the Union. Its governing principle, as already stated, is that it assures safe security with small interest, with no profit to the managers, as contradistinguished from large interest and less safe security. It is therefore quite improper to say that the class of persons I have mentioned were furnished by the national bank and the defendants' new trust company with a place of deposit for their money equally advantageous and secure as that of the defendant corporation. In coming to this conclusion I mean no disparagement to

the business of general banking as pursued by the trust companies and other banking institutions. It is a perfectly legitimate business, but, like all mercantile enterprises, however conservatively conducted, it has in it an element of speculation and hazard, and requires a talent for business management quite different from that required for a savings institution. It does not affect this reasoning to say that the two classes of business are to some degree intermingled, and that many persons, other than the classes above attempted to be described, do take advantage of savings institutions. This cannot be entirely avoided; but it is well known that the managers of such institutions generally graduate their dividends, giving to the smaller depositors a larger rate of interest than to the larger, thereby discouraging the use of the institution by those who are not within the scope of its proper province, and the managers can and do sometimes decline deposits from persons who apparently do not need to use a savings institution.

Counsel for complainant contends, and I agree with him, that the circulars above set forth are distinct and direct solicitations by the defendants for the receipt of savings deposits; and I think it is a clear breach in spirit, if not in letter, of the restrictive clause of the savings bank act above cited.

Again, it was asked, if the managers of a savings institution are indisposed to further continue its maintenance, can they be compelled to continue it against their will? It must be confessed that there is no express provision in the charter of the Bloomfield Savings Institution or in the general savings bank act for the continuance of the life of a savings bank when the officers shall determine not further to continue it. However, I think there is no difficulty in perpetuating its existence, if competent men can be found who are willing to undertake the task. The charter of the defendant corporation provides that the managers "may" fill any vacancies. But the sixteenth section of the general savings bank act (P. L. 1876, p. 346) is, by the fifty-second section thereof, made applicable to savings banks already organized; and that section declares that "all vacancies in such board, by death, resignation or otherwise, 'shall' be filled by the board of managers on approval by the State Board, with persons duly qualified by section two of this act, as soon as practicable, at a regular meeting after such vacancies shall occur." It was, therefore, clearly the duty of the defendants to fill any vacancies that might occur in the board of managers, and there was not the least difficulty in their doing so, in accordance with their duty, provided they could find proper men willing to assume the burden; and by a series of resignations and elections they could have worked an entire change in the personnel of the board. There is no pretense that they attempted to do this.

They further ask what course they could pursue in order to meet the competition of the national bank; and the answer is, they could appeal to the law to prevent that bank from seeking saving deposits. But it hardly lies in their mouth to claim that they were at all embarrassed by the competition of the national bank, when they themselves did not hesitate, before the national bank held out its advertisement, to start a trust company for the purpose of entering into a like competition with the savings institution, and without at the time, as they aver in their answer, having any intention of winding up that institution. So that they are in the position, on their theory, of not only not attempting to protect the savings institution against the competition of the national bank, but they are themselves chargeable with organizing an institution in direct and palpable competition with the savings institution.

It is asserted in the answer that, shortly after the open advertisement in September by the national bank for savings bank deposits, namely, in October and November, 1902, there occurred a marked falling off in the deposits of the savings institution. It is not shown how much of such alleged falling off was due to the competition of the national bank, and how much to that of the new trust company. Be that as it may, I find by the schedule inserted in the answer that the increase in the deposits for the whole year of 1902 was \$73,886.11, about \$8,000 more than for the previous year, and more than for any previous year. And I further find that the amount deposited in December, 1902, was \$18,517.58, which was more than that of any previous December, except that of 1898; that it was nearly \$7,000 more than in December, 1901. It seems to me that one of two inferences follow immediately from this showing: Either that there was no such falling off of deposits as the defendants claim, or some persons obtained an inkling of the defendants' intention, and made unusual deposits for the express purpose of sharing in the division of the surplus.

This review of the defense leads me to the conclusion that, so far as above considered, it cannot avail the defendants.

The remaining question is: Has the complainant a standing in this court to maintain this action? It was urged by counsel that only the Attorney General representing the state has such standing. I am entirely satisfied that he has such standing, and must presume that if the matter had been brought to his attention, and he had taken the same view of the law applicable thereto as I have taken, he would have acted. There was nothing before me to indicate that it had been brought to his attention in such manner as to require him to act; nor did I think it necessary or expedient to require him to be brought into the case as a party representing the public. But I am not ready to accede to the proposition that no individual has such

right. Complainant and her children are and have been for many years depositors in that institution. They are residents of Bloomfield, and a part of that portion of the great public for whose benefit the institution was created and maintained. They are thus interested both in their individual and representative characters in the continuance of the institution with all its beneficent results.

But it was urged that they are not injured because they will receive back whatever money they originally deposited, with interest and a share of the surplus. But is it true that they are not injured in fact? Is it not supposable that they may prefer to have the institution continued, and its surplus devoted to giving it stability and strength in a financial storm, and at all times to contribute to the expenses of its management, rather than now to receive a share in their hands? And is not such the policy of the law? And, if so, are they not entitled to be heard both on their own account and that of other present and prospective depositors?

With regard to the division of the surplus. There is, indeed, no known mode of dividing a surplus of a savings bank, when such division becomes necessary, except among the bona fide depositors at the time of the dissolution. *Morristown Sav. Inst. v. Roberts*, 42 N. J. Eq. 496, 8 Atl. 315. But it does not follow that such division is just and equitable. It is a rule of convenience and necessity, not of equity. Consider, in that connection, the temptation of eleventh-hour people to come in as depositors in anticipation of dissolution. In fact, I am confirmed in the view I stated at the argument, that the attempt to make an equitable division of the surplus of a savings institution, such as we have to deal with here, presents an insoluble problem. That surplus is the result of the surplus earnings of all the money that has been deposited by all the depositors from the beginning of the bank. It is well known that many of those have already withdrawn, and thereby, as it has been well said, have abandoned their share in the surplus; but it by no means follows that the equitable rights of those who remain are any greater by such abandonment than they would have been without it. Then, of those who remain at the end, some have been depositors for a longer time than the others. The present case presents an example of that. In my opinion, the true status of a surplus is that it is held by the institution in trust for the benefit of the immediate community in assisting to maintain and perpetuate the existence of the institution.

It is admitted by the answer that the complainant and her children have been depositors for many years, and her equity is much greater than the new depositors'. This institution is, as I have said, a public institution, created and promoted by the state for the benefit of such as may deposit therein. The deposits of the complainant and her children

are not large, and it cannot be said that she is not one of those who come within the purview of the object of such institution. By becoming a depositor, she becomes peculiarly interested in the institution, and in its permanency and continuance, and that interest is over and above that of the public at large. She has a right to say that she prefers to have the institution continue, rather than to have it wound up and to take her share of the surplus, and, in my judgment, she has a right to say this, not only as a depositor, but as a citizen for whose benefit it was created. The object of an accumulation of surplus is, as before remarked, to guard against loss to the depositors in those ever recurring, but seldom expected, financial revulsions which from time to time sweep over the country and cause a temporary depreciation in the value of the best investments. The surplus also serves by its earnings to diminish the cost to the present depositors of the management of the institution. The complainant, then, may well come to the conclusion that it is more to her pecuniary interest to have that institution continue as a custodian of her deposit, than to receive back the amount of her deposit, with her share in the surplus. It is plain that the natural disposition of many depositors in an institution of this kind, with a large surplus, would be to have the same wound up, provided they get a share of the surplus. Hence, the larger the surplus, the more thoroughly established the institution, the greater the relative amount of its surplus to its deposits, the more anxious many of the depositors would be to have it wound up. And this peculiar situation tends to justify the conclusion at which I have arrived, that the Legislature intended the managers in this case to act judicially and judiciously and disinterestedly for the good of the public in the exercise of the judgment confided in them by the act of 1902.

For these reasons, I shall advise an order that the restraint be continued until the final hearing of the cause.

FORST et al. v. KIRKPATRICK et al.
(Court of Chancery of New Jersey. March 20, 1903.)

CONTRACT WITH FIRM—CHANGE OF FIRM—CONTINUANCE OF BUSINESS—ENFORCEMENT BY NEW FIRM—PAYMENTS—APPLICATION.

1. Where a mortgage is given a firm, and thereafter one of the members retires, the new firm, although pursuing the same business and under the same name, cannot enforce the obligation unless the right to enforce it is acquired by a new contract.

2. Where, after the dissolution of a firm, an account with it is carried on as a running account with the succeeding firm, payments made to the succeeding firm, unless appropriated, will go to discharge the oldest items of the account.

Suit by Joseph M. Forst and others against Maria Kirkpatrick and others to foreclose a mortgage. Bill dismissed.

B. B. Hutchinson, for complainants. James Buchanan, for defendant Maria Kirkpatrick. Scott Scammell, for defendant Maria E. Vroom.

REED, V. C. The mortgage sought to be foreclosed was made by Alexander Kirkpatrick, the husband of Maria Kirkpatrick, the defendant, to Daniel P. Forst, William H. Skirm, Charles W. Leeds, and Joseph M. Forst, partners trading as D. P. Forst & Co. It was executed March 18, 1875, and purported to be made to secure the sum of \$1,300. Mr. Leeds and Mr. D. P. Forst are dead, and William H. Skirm has assigned his interest in all the assets of the firm to the present members of the firm of D. P. Forst & Co., who are the complainants.

On January 18, 1876, Alexander Kirkpatrick, through one Charles Huston, conveyed the property mortgaged to his wife Maria, who now owns the equity of redemption. Previous to and at the time the mortgage was made, the firm of D. P. Forst & Co. were wholesale dealers in groceries and provisions, and Alexander Kirkpatrick was a retail dealer in the same articles, and bought his supplies from the firm. At the date of the mortgage he owed the firm \$1,286. Contemporaneous with the execution of the mortgage, the following paper was signed by the firm: "Whereas, Alexander Kirkpatrick and wife have this day executed and delivered to Daniel P. Forst, William H. Skirm, Charles W. Leeds, and Joseph M. Forst, partners trading as D. P. Forst & Co., a bond and mortgage on a certain lot of land and premises, situate on the easterly side of Clinton street, in the city of Trenton, N. J., securing the payment of the sum of \$1,300, with interest in one year from the date thereof. Now we do hereby certify that the said bond and mortgage were executed and delivered to us as collateral security for the present and future indebtedness of the said Alexander Kirkpatrick to the said firm of D. P. Forst & Co." After the execution of these papers, Alexander Kirkpatrick continued to deal with D. P. Forst & Co. as before, and the amount due to the firm on March 18, 1875, was carried along as a part of the current account until the final close of the account on May 6, 1899. On January 31, 1879, Charles W. Leeds withdrew from the firm, releasing his interest therein to the remaining partners. On January 1, 1883, William S. Covert became a member of the firm. On May 9, 1897, Daniel P. Forst died, bequeathing his interest in the firm to Joseph M. Forst. On July 1, 1901, William H. Skirm retired, transferring his interest to the remaining partners, the complainants herein. During the entire life of the current account between the parties, cash was received from time to time and credited to Alexander Kirkpatrick. In 1883, 1884, and 1886, certain payments were made by Mrs. Kirkpatrick, viz.: April 6, 1883, \$50; May 31st, \$25; June 27th, \$25; September

25th, \$30; in 1884, April 21st, \$30; November 10th, \$40; in 1886, July 21st, \$50. It appears that nothing was said at the time of these payments, or indeed at the time of any other payment, respecting the bond and mortgage in suit. The payments made by Mrs. Kirkpatrick were entered in a passbook in the possession of Mrs. Kirkpatrick under the following heading: "Alexander Kirkpatrick. In account with D. P. Forst & Co." The question is whether, after the lapse of time since the execution of the mortgage, it can be now enforced. The defendants insist that, inasmuch as more than 20 years intervened between the execution of the mortgage and the filing of this bill without recognition by the mortgagor or by Mrs. Kirkpatrick of the existence of a mortgage, the right of entry is barred.

On the part of the complainants it is insisted that there have been payments upon the mortgage debt which have kept the mortgage alive. It is suggested by the counsel for the complainants that the firm of D. P. Forst & Co. was an entity, which continued in existence during all the fluctuations in its membership; that the security of the mortgage covered all the merchandise sold by these different firms; and that all payments made to them must be regarded as payments upon the debt secured by the mortgage.

It is entirely settled, in respect to the contractual relations between a firm and another person or firm, that those relations are confined to the members of the firm with whom the contract was made. Upon the death or discharge of a member, or upon the introduction of a new member, the new combination constitutes a distinct entity. The new firm, although pursuing the same business under the same name as the preceding firm, is irresponsible for and unable to enforce the obligations of the contract with the dissolved partnership, unless such responsibility is assumed, or the right to enforce is acquired, by a new contract. A mortgage given to a firm can be enforced only by the members or surviving members of that firm. Where securities have been deposited in a bank to secure future advances, and a change has occurred in the banking firm before the making of some of the advances, *prima facie* the securities extend only to those advances which are made by the firm, whilst its members continue the same as when the securities were deposited. And, similarly, if a partner pledges his separate property for future advances to be made to his firm, and he afterwards dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged. *Lindley on Partnerships*, mar. 119; *Abat v. Penny*, 19 La. Ann. 289.

It requires a new agreement to extend the security given to the old firm for advances by it, so as to make the security available to cover advances made by a new firm. In

Kensington Ex parte, 2 Ves. & B. 79, deeds were deposited with a firm of bankers, to remain as collateral security for the balance of any sum which the bankers might at any time advance for the borrower's account. One of the members of the firm of bankers retired, and advances were afterwards made to the borrower. Lord Eldon held that the security, originally, only covered advances made while the firm remained the same, and that there must be an agreement proved to make it cover subsequent advances. In *Ex parte Alexander*, 1 Glyn. & J. 409, the same rule was applied, but an agreement was found to have been made, after the change of partnership, expressly pledging the same securities with the new firm to secure the debt of the old, as well as the debt of the new partnership. In *Ex parte Marsh*, 2 Rose, 239, a new agreement was found upon the construction of a letter written to the new firm. In the present case there is not a scrap of testimony to show any such agreement. It does not appear that the bond and mortgage was ever named between the parties from the date of its execution. It follows, therefore, that the mortgage of March 18, 1875, secured only the moneys then due, and advances made up to the date of the retirement of Mr. Leeds on January 31, 1879. At that date there was due to the firm, for the balance due at the time of the execution of the mortgage, together with advances subsequently made, less payments of cash by the mortgagor, a balance of \$1,221.27. Now, as already remarked, in no payment, and, therefore, of course, in no payment subsequent to January 31, 1879, was the bond and mortgage mentioned, nor was there any request whatever that the sums paid should be applied to any particular account. There was no appropriation of payment made by the payors. By the firm, these payments were entered on the credit side of the running account as they were made.

At this point the doctrine of appropriation of payment intervenes. As I have already remarked, the balance due the firm at the time of the execution of the mortgage was carried along in the current account down to 1899. Subsequent to January 31, 1879, there appears to have been paid to the firm and credited to Alexander Kirkpatrick, in its books of account, sums amounting to \$4,961.08, exclusive of the notes accepted by the firm and materials returned to the firm. The well-known rule respecting the appropriation of payments to running accounts is that, on a failure of the payor to appropriate, the law will discharge the first debit items. Since the case of *Devaynes v. Noble*, 1 Mer. 529, the rule has been recognized that if, after dissolution of a firm by a change in the partnership, an account is carried on as a running account with the succeeding firms, payments made to subsequent firms, unless appropriated by the party, will go to discharge the oldest items of the account.

Bates on Partnership, par. 497; *Simson v. Cooke*, 1 Bing. 452; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Pemberton v. Cakes*, 4 Russ. 154; *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214.

This case, then, seems to stand thus: The only payments made upon the mortgage debt are not so made expressly by the payor, but only by legal appropriation, which can in any way be regarded as a recognition by the payor of the existence of the mortgage. If, however, it could be regarded as a payment upon the mortgage, the application of such payments extinguishes the mortgage debt entirely. I am therefore constrained to the conclusion that the complainants' bill must be dismissed.

KLINGE v. WILLIAMS et al.

(Supreme Court of New Jersey. March 18, 1903.)

EJECTMENT—MESNE PROFITS—PLEADING.

1. In ejectment there cannot be a recovery of damages for mesne profits; the declaration not making claim therefor, as required by Gen. St. p. 1289, § 45, and Sup. Ct. rule 85, when it is desired to hold defendants for use and occupation, but merely demanding possession of the premises, alleging that plaintiff had been wrongfully deprived thereof.

Error to Circuit Court, Atlantic County.

Ejectment by Sarah A. Klinge against John Williams and others. Judgment for plaintiff. Defendants bring error. Reversed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Harry Wooton and William I. Garrison, for plaintiffs in error. Allen B. Endicott, for defendant in error.

GUMMERE, C. J. This action was brought by the defendant in error, the plaintiff below, to recover possession of certain premises in the city of Atlantic City, leased by her to the defendant Williams for a term extending from the 13th day of June, 1901, to the 23d day of September of the same year. In and by the lease between the parties, which was in writing, the defendant covenanted not to assign it, nor to underlet the premises leased thereby, nor to permit any person or persons to occupy the same, or any part thereof; and it was provided in the lease that, if default should be made in any of its covenants, then it should be void, and that the plaintiff should have a right, without notice, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof. It appeared from the evidence submitted by the plaintiff, and it was not denied by the defendants, that during the term, and about August 15th, the defendant Williams and his family moved out of the

premises, and the defendant Welsh and his family, by the permission of Williams, moved in and occupied the same, and that the latter continued in possession thereof until the commencement of this suit. This was in direct violation of one of the covenants of the lease, and, by the express terms of that instrument, worked a forfeiture, and entitled the plaintiff to re-enter. It was proper, therefore, for the trial judge to direct the jury to find by their verdict that the plaintiff was entitled to recover possession of the premises. In addition to the evidence already alluded to, the plaintiff offered testimony showing that the rental value of the premises during the period of possession by the defendant Williams was \$301. No contradictory evidence being offered on behalf of the defendants, the trial judge charged the jury to assess damages in favor of the plaintiff, and against the defendants, in the amount mentioned, for use and occupation. The question of liability for use and occupation was not within the issue raised by the pleadings. By her declaration the plaintiff demanded possession of the locus in quo, alleging that she was wrongfully deprived thereof by the defendants, and this was her whole claim. If she had desired to hold the defendants for the use and occupation of the premises after the forfeiture had been incurred, the statute required that she should make claim therefor in her declaration. Ejectment Act, Gen. St. p. 1289, § 45; Supreme Court rule 85. Not having done this, it was error for the trial judge to direct the jury to assess damages against the defendants for mesne profits. As this is assigned for error, the judgment under review should be reversed.

SELLER et al. v. GREEN et al.

SAME v. WOODBURY MFG. CO. et al.

(Supreme Court of New Jersey. Feb. 24, 1903.)

NEW TRIAL—SEPARATE ACTIONS—SINGLE VERDICT.

1. Where two separate actions by the same plaintiffs against different defendants were tried together, and the judge charged that the actions were separate, and gave separate instructions in each case, and the jury, notwithstanding, returned but a single verdict against all the defendants in both cases, a new trial was necessary.

Actions by Robert W. Seller and another against George G. Green and others, and by the same plaintiffs against the Woodbury Manufacturing Company and another. The jury returned a single verdict against all the defendants in both cases. On rule to show cause. Rule made absolute.

Argued before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John Meirs, for plaintiffs. A. H. Swackhamer, for defendants.

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 457.

PER CURIAM. These are actions of tort, and were tried together at the Camden circuit. The state of the case shows that the defendants in one case were charged with an unlawful entry upon the plaintiffs' premises on the 9th day of January, 1901, and the defendants in the other case were charged with a separate and independent act of trespass committed upon the same premises three days later. The trial judge instructed the jury that the actions were separate, and gave separate instructions in each case. In spite of this, the jury rendered but a single verdict, which was a finding of \$3,500 damages as against all the defendants in the two cases, saving one individual, who was discharged by order of the judge. It is obvious that this mistake on the part of the jury can only be remedied by a new trial.

Let the rules to show cause be made absolute.

TUCKER v. ERIE RY. CO.

GEIL v. SAME.

(Supreme Court of New Jersey. March 18, 1903.)

MALICIOUS PROSECUTION—ARREST BY RAILWAY POLICEMAN—LIABILITY OF COMPANY.

1. Act Respecting Railroads and Canals (Gen. St. p. 2671) § 22, empowers the Governor, on application of a railroad corporation, to commission such persons as the company may designate to act as policemen for it. Section 23 gives persons so appointed the powers, in the counties through which the railroad may run, of policemen and constables. Section 25 requires the compensation of such policemen to be paid by the company. Section 27 provides that, when the company no longer requires their services, it shall file notice with the Secretary of State, whereupon the power of such policeman shall cease. *Held*, that the railroad company was not liable for a false arrest and malicious prosecution made and instituted by its policemen on their own responsibility.

Actions by Patrick Tucker and Jacob Geil against the Erie Railway Company. On rules to show cause. Rules absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John J. Fallon, for plaintiffs. Corbin & Corbin, for defendant.

GUMMERE, C. J. Tucker and Geil, the plaintiffs in these cases, were arrested while at the "oil switch" of the Erie Railroad Company, in the village of Garfield, on the evening of the 8th day of November last, by one Dwyer, without a warrant, upon a charge of stealing the brass journals from some freight cars which were standing on the company's tracks at that point. They were first taken by Dwyer to the office of the Standard Oil Company, which was near at hand. While they were there, two other men (Flynn and Delurey) came to the office; and, shortly after their arrival, Dwyer, with their assistance, took the plaintiffs before a magistrate whose

office was in the building, where a complaint was made against them by Dwyer, charging them with the larceny of the journals. On this complaint the plaintiffs were committed to the county jail by the magistrate, and Flynn and Delurey took them to Hackensack, where the county jail was located, and there delivered them into the custody of the jailer. They were subsequently indicted for the offense charged against them in Dwyer's complaint. The trial of the indictment resulted in an acquittal. The plaintiffs then—each of them—instituted a suit against the defendant company for false arrest and malicious prosecution. Their suits were tried together by consent, and resulted in verdicts in their favor.

The responsibility of the defendant company is rested upon the doctrine of respondeat superior; and the primary question presented by these rules to show cause is whether the three men, Dwyer, Flynn, and Delurey, in causing the arrest and imprisonment of the plaintiffs, were acting as the agents or servants of the defendant company. The evidence shows that they were "railway policemen," appointed and commissioned as such, on the application of the defendant company, by the Governor of the state, in pursuance of the authority conferred upon him by the act respecting railroads and canals (Gen. St. p. 2671). By the provision of section 22 of that act, the Governor, upon the application of any railroad corporation made to him to commission such persons as the corporation may designate, to act as policemen for such corporation, "may appoint such persons, or so many of them as he may deem proper, to be such policemen, and shall issue to such person or persons so appointed a commission to act as such policemen, a copy of which commission shall be filed in the office of the Secretary of State." The twenty-third section of the act declares "that every person so appointed shall, in the counties through which such railroad may run, possess all the powers of policemen and of constables, in criminal cases, of the several cities, wards of cities, and townships in such counties." By the twenty-fifth section of the act the compensation of such policeman is required to be paid by the company upon whose application they are appointed; and, by the twenty-seventh section, whenever the company shall no longer require the services of such policemen it shall file a notice to that effect in the office of the Secretary of State, and thereupon the power of such policemen shall cease and determine. It is plain, from a reading of the provisions of this statute, that although these men were appointed on the application of the defendant company, received their compensation from it, and were subject to be divested of their powers by its act, they were nevertheless state officers, charged with the performance of public duties. They were, in law, police officers, constables, authorized to arrest per-

sons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where the crime was committed or the peace broken within the boundaries of any of the counties through which the company's railroad ran. For the proper discharge of their official duties, as well as for the proper exercise of their official powers, they were responsible, not to the defendant company, but to the state. *Healey v. Lothrop*, 171 Mass. 263; 50 N. E. 540; *Tolchester Beach Imp. Co. v. Steinmaier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. In order, therefore, to render the defendant company legally responsible for the unwarranted arrest made by them, and the subsequent criminal prosecution maliciously instituted by Dwyer, it was necessary to show that their action was instigated by the company, or by some of its officers or employees; that what they did was done by them as agents of the company, and not solely of their own volition, as peace officers. *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590. No such evidence was offered. On the contrary, the case made by the plaintiffs, and established as true by the verdict of the jury, under the charge of the court, was that their arrest was made by Dwyer on his own responsibility, without consultation with or instruction from any one, and without the existence of any facts to justify him in his action; that this was equally true of the action of Dwyer, Flynn, and Delurey in taking the plaintiffs before the magistrate; and that the subsequent prosecution was maliciously instituted by Dwyer, and was attempted to be supported by evidence manufactured by him, with the assistance of Flynn, for the purpose of making it appear that the plaintiffs were guilty of the charge which Dwyer had made against them. So far as the case shows, the indictment subsequently found against the plaintiffs was not procured by the defendant company, nor by any one acting in its behalf, and was prosecuted by the state without any suggestion by or assistance from it.

The rules to show cause should be made absolute.

WILTBANK v. AUTOMATIC AMUSEMENT MACH. CO.

(Supreme Court of New Jersey. Feb. 25, 1903.)

CORPORATIONS—AGREEMENT BETWEEN CORPORATORS—COMPENSATION FOR SERVICES.

1. An agreement between the corporators of a company that in consideration of their respective services to each other and to the company, and of a payment of \$1 by each to the other of them, the remainder of the company's stock, after paying with it for property and patent rights acquired by the company, should be divided among them, did not preclude a recovery for services rendered by one of the parties as manager of the company.

Action by Peter W. Wiltbank against the Automatic Machine Company. There was a verdict for plaintiff, and defendant takes out a rule to show cause. Rule discharged.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John W. Wescott, for plaintiff. Clarence T. Atkinson, for defendant.

PER CURIAM. This action was brought by the plaintiff to recover compensation for services rendered by him as manager of the defendant company. The jury rendered a verdict in his favor for \$450. It appeared in evidence in the cause that the plaintiff was one of the incorporators of the defendant company, and that at or about the time of the organization of the company he and his fellow incorporators entered into a written contract, by the provisions of which the parties thereto agreed that in consideration of their respective services to each other and the company, and in consideration of \$1 paid by each to the other of them, so much of the company's stock as was left after paying with it for certain patent rights and property acquired by the company should be divided among them. The ground upon which a new trial is asked by the defendant is that by the terms of this agreement the plaintiff was not entitled to recover compensation for his services as manager of the company, except by the allotment of his share of the company's stock to him. The services referred to in the written contract were those rendered by the parties prior to and at the time of the incorporation of the company, and such services as should afterwards be rendered by them as directors. This did not include services to be afterward rendered by any of the parties to the agreement as employees of the company.

The rule to show cause should be discharged.

DE ROCHE v. MYERS.

(Supreme Court of New Jersey. Feb. 27, 1903.)

DOWER—FAILURE TO ASSIGN—WIDOW'S QUARANTINE.

1. The daughter of testator sued his widow to recover certain premises on the ground that the will, which left nothing to the daughter, was invalid. It appeared that the premises were the mansion house of the testator, and that he had resided there with his wife up to the time of his death, and that no dower had been assigned. *Held*, that a verdict for plaintiff was erroneous, since, if the will was valid, plaintiff had no rights in the premises, and, if invalid, defendant was entitled to the mansion house by virtue of her right of quarantine, under the express provisions of Gen. St. p. 1276, § 2.

Action by Mary A. De Roche against Salie R. G. Myers. Verdict for plaintiff. Rule to show cause made absolute.

Argued at November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John W. Wescott, for plaintiff. William F. Boyle and R. O. Moon, for defendant.

GUMMERE, C. J. The plaintiff was a daughter, and the defendant was the wife, of Charles Myers, deceased, who at the time of his death was seised of the lands involved in this suit. The real object of the action is to test the validity of the will of the decedent. The plaintiff was cut off by that will, and on the trial undertook to show, first, that it had not been executed in compliance with the provisions of our statute; and, second, that it was the product of undue influence. The jury, after hearing the testimony on these points, rendered a verdict for the plaintiff. The issue submitted to the jury was whether or not the plaintiff was entitled to the possession of the premises, which, at the time of the bringing of the suit, were occupied by the defendant. Their finding that she was cannot be supported upon any legal ground. The case was tried upon the theory that the right of the plaintiff depended upon whether or not the will of her father was a nullity. This was a manifest misconception of the legal situation. It appeared by the undisputed evidence in the case that the locus in quo was the mansion house of the testator; that he resided there, with his wife, up to the time of his death; that after his death she continued to reside there up to the time of the institution of this suit; and that no dower had been assigned to her. When those facts appeared, the right of the defendant to remain undisturbed, by the plaintiff, in her occupancy of the premises, was demonstrated. As I have already stated, this was the mansion house of the deceased at the time of his death. If his will was valid, the plaintiff had no right, title, or interest whatever in the premises, if his will was void, and the decedent died intestate, the defendant, by virtue of her widow's right of quarantine, was entitled to the occupancy of the mansion house so long as her dower remained unassigned. Gen. St. p. 1276, § 2.

The rule to show cause should be made absolute.

NEW JERSEY SOC. FOR PREVENTION OF CRUELTY TO ANIMALS v. MICKELLOIT.

(Supreme Court of New Jersey. Feb. 25, 1903.)

CERTIORARI—RETURN—JUSTICE OF THE PEACE—RESIDENCE.

1. On certiorari to review a judgment of a justice of the peace imposing a penalty, an objection that he resided in a city where there existed a district court is not sustained when there is no proof thereof.

2. Where a conviction before a justice of the peace was not summary, it is not necessary that the return to certiorari should set forth the testimony.

Action by the New Jersey Society for the Prevention of Cruelty to Animals against Ewald Mickelolt. Heard on certiorari on petition of the defendant. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

John W. Crandall, for prosecutor. W. H. Darnell, for defendant.

PER CURIAM. This writ brings up a judgment of a court for the trial of small causes in an action for a penalty. Two points are made: First, that the justice of the peace resided in Atlantic City, where there existed a district court; second, that the return does not set forth the testimony. As to the first point, there is no proof that the justice resided in Atlantic City; as to the second, the return is sufficient, this not being a summary conviction.

The judgment is affirmed.

KNOTT v. KNOTT.

(Court of Chancery of New Jersey. March 11, 1903.)

DIVORCE—RECORD IN OTHER SUIT—DISCLOSURE OF PETITIONER'S ADULTERY—EFFECT.

1. Where it appears that a petitioner for divorce on the ground of desertion and adultery has himself been guilty of adultery and bigamy, as disclosed by his answer and affidavit filed in another suit before the chancellor, the case will be referred to a master to inquire into petitioner's right to a decree; the statute providing that, if it shall appear to the court that both parties have been guilty of adultery, no divorce shall be granted.

Suit by John J. Knott against Margaret Knott. On petition for divorce after a master's report. Reference again ordered.

Robert I. Hopper, for petitioner.

STEVENSON, V. C. This is an ex parte divorce suit. The master reports in favor of a decree of absolute divorce in favor of the petitioner on the ground of desertion. The proofs amply support the finding of the master. The marriage took place in 1893. In 1894 the defendant eloped with a paramour, with whom she subsequently lived. The difficulty about the case arises from facts which were not proved before the master, and of the existence of which he had no notice. These facts were proved before this court in a suit between one Lena Knott and the said John J. Knott (reported 51 Atl. 15). This suit was commenced by a petition filed by Lena Knott on December 18, 1901, setting up that she was married to the said John J. Knott in the city of Philadelphia on November 11, 1899, and that at the time of such marriage John J. Knott was married to an

other woman, named Maggie Walder. The petition filed in this present case gives the defendant's name as Margaret Knott, and her maiden name as Margaret Walder. There seems to be no question about the identity of the parties. The object of the first-mentioned suit was to have the marriage between the petitioner, Lena Knott, and the said John J. Knott annulled, and to compel said John J. Knott to provide for the support and maintenance of the said Lena and the children of the union of the said Lena and John.

The petition of Lena alleged that after the Philadelphia marriage she and Knott lived as man and wife for a year and a half, when Knott eloped with a woman named Rose Sonnebrun, whom he married, and with whom he lived in Weehawken; and that Knott was indicted by the grand jury of Hudson county for bigamy, and pleaded guilty, and was fined. The petition of Lena Knott further alleged that the said John J. Knott, before his marriage to her, was also married to one Clara Seeker, from whom he had never obtained a divorce; and that Knott, after being arrested, confessed that he had four wives, all living.

The answer filed by Knott to the petition of Lena admits his marriage to Maggie Walder on July 4, 1893, and that he had never been divorced from her, and that she was still his legal wife. The answer further admits that marriage ceremony with Lena in Philadelphia, and that he lived with Lena in Philadelphia for a short time, and afterwards in Paterson. The answer sets up no denial of the other charges in the petition, but interposes a single defense to the effect that the petitioner, Lena Knott, had full knowledge, when she married the said John J. Knott, "that he was already married to the said Maggie Walder, from whom he had never been divorced."

In this suit of Lena Knott to have her marriage annulled a motion was made on her behalf for alimony and counsel fees pendente lite, on which motion affidavits were presented to the court, which are now on file in the cause; among them the affidavit of John J. Knott. This affidavit admits his marriage to Lena in Philadelphia, and the birth of a daughter by her; also admits that he married Maggie Walder in 1893, and lived with her until October, 1895, when, as the affidavit states, the said Maggie deserted him; and that neither party had obtained a divorce, but that she, the said Maggie Walder, was "his legal wife"; that on July 5, 1896, "while under the influence of liquor," he was married to Clara Seeker, and lived with her for about four hours after the marriage, when he left her, but that neither party had obtained any divorce. The affidavit further alleges that the said Lena represented to him, the said John J. Knott, that, as Maggie Walder had remarried, he was thereby allowed to marry again. The affidavit refers to the

indictment for bigamy so as to practically admit the fact.

Our divorce act provides that, if it shall appear to the court that both parties have been guilty of adultery, no divorce shall be decreed. Ordinarily, the defense of recrimination is presented by the defendant; but a divorce suit is a somewhat unique judicial proceeding in this respect: that the state has an interest to such an extent that it is often referred to as a third party to the suit. It is the duty of the court to see that divorces are not fraudulently obtained by parties who are not entitled thereto. It is not the duty of the court to conduct an investigation into the conduct of the petitioner in a case like this because of rumors or suspicions that he had been guilty of adultery, which would bar him of his divorce, if the same were proved in the case. But it happens in this instance that sworn testimony, including the affidavit of the petitioner, John J. Knott, himself, has been laid before the court recently in another cause, apparently proving that the said Knott has not only committed adultery since his marriage with the defendant, from whom he now seeks to be divorced, but that he has committed a series of adulteries with different women, and that he has also committed the crime of bigamy or polygamy, once in the state of Pennsylvania, and probably twice in the state of New Jersey. The court cannot ignore these depositions now on file in the office of its clerk.

Of course, no adjudication against the petitioner would be made upon the testimony above referred to, which has not been presented in this cause. The testimony should be brought into the cause, and the petitioner should have an ample opportunity to meet it.

An order of reference will be advised to the same master who has already reported, in which order the master will be specially directed to inquire and report as to the alleged adulteries of the said John J. Knott with the said Clara Seeker, Lena Knott, and Rose Sonnebrun.

ZELIFF v. WHRITENOUR.

(Supreme Court of New Jersey. Feb. 25, 1903.)

TOWNSHIPS—BOARD OF FREEHOLDERS—APPOINTMENT BY TOWNSHIP COMMITTEE—DECLARATION OF VACANCY.

1. Under Act March 7, 1901 (P. L. 1901, p. 49), providing that a vacancy existing in the office of chosen freeholder in any township may be filled for the unexpired term by the township committee, the township committee cannot appoint to the board of chosen freeholders unless there is an actual vacancy for one of the causes specified in the act. Their declaration that such a vacancy exists, where contrary to fact, and consequent appointment thereon, is a nullity.

Information in the nature of quo warranto on the relation of Daniel P. Zeliff against Edgar Whritenour. On demurrer to plea. Demurrer overruled.

Argued November term, 1902, before GUM-MERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Francis Scott, for relator. James G. Blauvelt, for defendant.

PER CURIAM. By the second section of a supplement to the act to incorporate the chosen freeholders in the respective counties of this state, approved March 7, 1901 (P. L. 1901, p. 49), any vacancy existing in the office of chosen freeholders in any township, by reason of resignation, removal, death, or any other cause, may be filled for the unexpired term by the township committee. It appears from the information in this case that the respondent was duly elected a chosen freeholder of the county of Passaic from the township of Manchester, and that while occupying this office the township committee, after formally declaring his office vacant upon the ground that he had removed out of the state, appointed the relator to fill the alleged vacancy for the unexpired term. The defendant, in his plea, denies that his office ever became vacant, and asserts that ever since his election he has continued to be, and still is, a resident of the township of Manchester. This plea contains a complete answer to the information. The demurrer admits the facts set out in it to be true. The power of the township committee to appoint a member of the board of freeholders for this township depends upon the existence of the conditions prescribed in the statute. Their declaration that one of the conditions exist—the declaration being contrary to the fact—affords no ground for action on their part, and such action is a nullity.

The defendant is entitled to judgment on the demurrer.

FULTON v. GRIEB RUBBER CO.

(Supreme Court of New Jersey. March 2, 1908.)

INJURIES TO SERVANT—SAFE PLACE TO WORK—INSPECTION.

1. The insulation on an incandescent lamp wire, which hung from the ceiling in a factory, became worn away from a small section of the wire, and the wire was blown by the wind against a steam pipe, whereby a servant received an electric shock and sustained injuries. *Held*, that there could be no recovery against the master because he had not inspected the wire; it appearing that the electric light system had not been installed more than a few months, and defendant not having been bound to anticipate the probability of plaintiff's being so injured.

Action by Colton Fulton against the Grieb Rubber Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued November term, 1902, before GUM-MERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Linton Satterthwaite, for plaintiff. G. D. W. Vroom and E. R. Walker, for defendant.

PER CURIAM. Plaintiff was injured while working at a "mill" in the defendant company's factory. His story of the accident was that as he was standing at his mill, with his hand resting upon its frame, an incandescent electric light wire, which was suspended from the ceiling, and which, when not swaying, hung down at a distance of about two or three feet from the mill, was blown by the wind against a steam pipe connected with the mill thereby momentarily charging the mill with electricity; that, by reason of the contact of his hand with the frame of the mill, he received an electric shock which caused him to lose his balance and fall against the rolls of the mill; that his hands were caught in them, and so severely crushed as to necessitate amputation. There was a verdict for the plaintiff. We think it should be set aside, for two reasons:

1. It rests upon the conclusion that the accident happened substantially in the way described by the plaintiff; i. e., by his receiving an electric shock, communicated from the incandescent light wire in the way described. This conclusion is against the preponderance of the evidence.

2. The evidence shows no negligent act or omission on the part of the defendant which contributed to plaintiff's injury. The incandescent light wire, when it was originally installed, was properly covered with insulating material, but at the time of the accident this material had been torn or worn away from a small section (about half an inch) of this wire at the point where it was said to have come in contact with the steam pipe connected with the mill on the occasion of the accident. The alleged negligence of the master (the defendant company) was its failure to inspect this wire. The duty of a master to make inspection of appliances furnished to workmen, or located in the place in which they are working, does not require such inspection to be continuous. It is to be made at reasonably frequent intervals. Where the appliance is not normally subjected to any wear and tear, and there is no apparent likelihood of its getting out of order, or, if it does so, of its being in the slightest degree dangerous to employes, much less frequent inspections by the master are necessary, in the discharge of his duty to his servants, than when the appliance is a machine in constant use, and dangerous to them when out of order. In this case the electric lighting system (including this incandescent wire) in the defendant company's factory had only been installed for a few months. There is nothing in the case to suggest that the insulating material which covered this wire would not have remained intact for years, unless injured by some outside agency. Nor is there anything in the case which will justify the conclusion that the defendant, in the exercise of a reasonable prudence, should have anticipated the probability of its being so injured. For this reason, the failure of

the defendant to inspect this wire between the time of its installation and the time of the plaintiff's accident was not negligence.

For both reasons, the rule to show cause should be made absolute.

SMITH v. THOMAS IRON CO.

(Supreme Court of New Jersey. March 18, 1903.)

SERVANT—INJURIES—WARNINGS—CONTRIBUTORY NEGLIGENCE.

1. It was not necessary for the owners of a mine to warn an employé of the dangers he might encounter if he wandered off the regular path in going to his work, where they furnished him a guide to take him to the place of work.

2. A miner who had always before been conducted to his place of work by a guide, and who, on a particular occasion, finding that the guide had gone on before, attempted to reach the place alone, though the path was dark, was guilty of contributory negligence as matter of law, and could not recover for injuries sustained by falling into a pit alongside the path.

Action by Patrick Smith against the Thomas Iron Company. Verdict for plaintiff. On rule to show cause. Rule made absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Edward A. & William T. Day, for plaintiff. William D. Wolfskell and William Fackenthal, for defendant.

GUMMERE, C. J. This is an action for personal injury. The trial resulted in a verdict for the plaintiff. The facts upon which his right to recover was rested are accurately summarized in the brief of his counsel as follows: He was engaged by the defendant company to work as a miner in one of its mines on March 2, 1900. The place where he was set to work was in the interior of the mine. To reach this place it was necessary for him to descend, by means of a ladder, a shaft sunk vertically in the earth to a level in the mine. After leaving the shaft, it was necessary for him to go through the level, which was dark, for a distance of 250 feet, and then turn to the right into an opening, down which a passage was had to a lower level, upon which was the place where he was set to work. At a point about 150 feet from the shaft there was another opening on the right of the level, which was the mouth of a "stope" or pit about 10 feet deep. The plaintiff had been taken down into the mine, to the place where he was set to work, on the first day, and on all subsequent trips, until the morning when he was injured, in the charge and care of one Roberts, called a "chargeman." He had never been allowed to go alone. He had never had his attention called to the first opening to the right in the level, and had not been warned of the danger thereof. On the morning of the 10th of March the men in the gang who were working under the supervision of the chargeman,

including the plaintiff, had gone to the superintendent's office with a demand for higher pay, and, in consequence, there was a delay of about 15 minutes in going to work. After leaving the superintendent's office, there was a scramble on the part of the men in the gang for the first opportunity to get down into the mine. In the scramble the plaintiff was left to the last, and when he reached the level he was alone, and in darkness. In going along the level, probably mistaking the first opening for the one further on, and which he should have taken, he turned into it, fell down into the "stope," and was seriously injured. On these facts the trial court left it to the jury to determine, first, whether the injury resulted from any negligence by the defendant in the performance of any duty which it owed to the plaintiff as his employer; and also whether the plaintiff, by any negligence on his part, contributed to the injury. The jury resolved both of these questions in favor of the plaintiff. A rule to show cause was allowed, in order that it might be determined whether, upon the facts stated, the conclusion of the jury can be supported.

The defendant owed to the plaintiff the duty of exercising reasonable care to provide him with a safe means of passage to and from his work. The contention of the plaintiff is that the failure of the defendant to call his attention to the existence of the first opening to the right in the level, and the danger which might result from his not avoiding it, was evidence of a failure on the part of the defendant to perform this duty. We do not think so. As has already been stated, up to the time of the accident the plaintiff had always been taken down into the mine, to the place of his work, in the charge and care of Roberts. Having furnished him with a guide, it was not necessary for the defendant to warn him of the dangers which he might encounter if he wandered off from the path; for, so long as he remained in the charge of his guide, he was safe. The only ground upon which responsibility for the plaintiff's accident can be imposed upon the defendant company is that in performing the duty of guiding the former to the place of his work, Roberts, the chargeman, was acting as the representative of the company, and not as the fellow servant of the plaintiff (*Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834), and that his failure to perform that duty on the day when the plaintiff was injured was the proximate cause of the latter's accident. It is not necessary, however, for the determination of this case, to stop to consider whether the facts referred to bring it within the principle laid down in the *Mooney* Case, and establish the negligence of the defendant; for, conceding that they do, still the plaintiff is barred from a recovery by his own negligence, on the evidence submitted. When he reached the bot-

tom of the shaft he found that Roberts, whose duty it was to pilot him to the place where he was to work, had gone on before, leaving him alone. The level along which his path lay was in darkness. Having no knowledge of the dangers which he might incur if he should stray from the path, with no one to guide him, without sufficient light to illumine it, he attempted the foolhardy experiment of finding his way, in the darkness, to the place of his work, without assistance. That in doing this he exhibited a reckless disregard of his own safety seems too plain for argument.

The rule to show cause should be made absolute.

VOGEL v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 25, 1903.)

INJURY TO CHILD—SUI JURIS—CONTRIBUTORY NEGLIGENCE—ALLOWING CASE TO BE OPENED.

1. Whether a child seven years old, run over by a street car, was sui juris, and, if so, whether, considering his years, he was guilty of contributory negligence, are questions for the jury.
2. Allowing plaintiff, after closing his case, to open it and introduce evidence, is matter of discretion, and not reviewable.

Error to Circuit Court, Essex County.

Action by Joseph Vogel against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.,

Chauncey H. Beasley, for plaintiff in error.
Samuel Kalisch, for defendant in error.

PER CURIAM. The defendant in error, the plaintiff below, sued to recover for personal injuries received by him by being run over by a car of the defendant company. At the close of the plaintiff's case there was a motion to nonsuit him on the ground that he was sui juris and was guilty of contributory negligence. The court refused to nonsuit, and this is assigned as error. We think the nonsuit was properly refused. The plaintiff was a little over seven years old. Whether he was or was not sui juris was a question for the jury. So, too, it was for the jury to say, even if they found him to be sui juris, whether, taking into consideration his tender years, he was guilty of contributory negligence.

It is further alleged for error that the trial court, after the plaintiff had closed his case, permitted the case to be opened, and further evidence introduced on his behalf. Such action on the part of the trial court is purely discretionary, and affords no ground for review.

As the evidence stood at the close of the case, it was clearly for the jury to determine

whether or not the plaintiff was entitled to recover. This being so, there was no error in the refusal of the trial judge to direct a verdict for the defendant.

We find no error in the charge of the court as delivered, nor in its refusal to charge certain of the requests submitted to it on behalf of the defendant.

The judgment below should be affirmed.

BAKER v. BANCROFT.

(Supreme Court of New Jersey. Feb. 25, 1903.)

WITNESSES—COMPETENCY—ACTION AGAINST EXECUTOR.

1. Under the Evidence Act, P. L. 1900, p. 363, § 4, making illegal any testimony given by a party to an action as to any transactions with a testator represented in such action, save on certain conditions, includes the testimony of plaintiff in an action against an executor for plaintiff's services as nurse to testator.

Action by Dorcas Baker against Charles T. Bancroft, as executor, etc. Judgment for plaintiff. Rule to show cause made absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Howard Carrow, for plaintiff. John W. Wescott, for defendant.

PER CURIAM. The plaintiff sues to recover for services rendered by her as nurse to the defendant's testator. She was sworn as a witness in her own behalf, and was permitted to testify, against objection, to various services rendered by her to him, made necessary by his illness.

The proviso contained in the fourth section of the evidence act, as revised in 1900 (P. L. 1900, p. 363), makes illegal testimony given by any party to an action as to any transactions with or statements by any testator or intestate represented in such action, except upon conditions which were not present in this case. That services rendered by the plaintiff as nurse to the testator of the defendant are transactions with such testator within the meaning of this statutory provision was decided by this court in the case of Dickerson v. Payne, 66 N. J. Law, 35, 48 Atl. 528.

The admission of this testimony was harmful error. The rule to show cause should be made absolute.

HATCHER v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Feb. 25, 1903.)

INJURY TO PASSENGER—NEGLIGENCE—EVIDENCE—SETTING ASIDE VERDICT.

1. A passenger's story as to how he was injured being entirely uncorroborated, and the overwhelming weight of the testimony showing that he was injured solely because of his own negligence, a verdict for him should be set aside.

Action by Reuben R. Hatcher against the Pennsylvania Railroad Company. Heard on rule to show cause. Rule made absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

John T. Dunn, for plaintiff. Alan H. Strong, for defendant.

PER CURIAM. The plaintiff was injured while alighting from a train of the defendant company at its station at Elizabeth. His story, as told upon the witness stand, is that after the train had come to a stop he went upon the platform of the car to alight, that before he had done so a brakeman pushed him from the train, and that just as he was pushed the train started up, and he was thrown off. His story is entirely uncorroborated. The overwhelming weight of the testimony contradicts the plaintiff's story, and shows that he was injured solely by reason of his own negligence; that he was not pushed off the train, but that he either stepped or jumped off while it was still in motion, and before it had come to a standstill.

The rule to show cause should be made absolute.

VAN ALSTYNE v. FRANKLIN COUNCIL, NO. 41, J. O. U. A. M.

(Supreme Court of New Jersey. Feb. 27, 1903.)

BENEFIT INSURANCE—FORFEITURE OF CERTIFICATE—ACTIONS—PLEADINGS—GENERAL ISSUE.

1. Under Prac. Act, § 126 (Gen. St. p. 2554), providing that, where plaintiff avers performance of conditions precedent generally, defendant shall not be permitted to deny such averment unless he specifies the particular condition precedent the performance of which he intends to contest, a defense of forfeiture of a benefit certificate for nonpayment of assessments within the time required was not available under the general issue.

Error to Union Circuit Court.

Action by William Van Alstyne against Franklin Council, No. 41, Junior Order of the United American Mechanics. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Fergus A. Dennis, for plaintiff in error. George W. Moy, for defendant in error.

GUMMERE, C. J. This action was brought to recover the sum of \$250 death benefits due from the defendant, a subordinate council of the Junior Order of the United American Mechanics, to the plaintiff, as the beneficiary of Harry B. Van Alstyne, a deceased member of said council. The council at the trial set up as a defense that by reason of the ac-

tion of the deceased member in permitting his dues to remain in arrears and unpaid for a period of 20 weeks preceding his death all rights in the benefit certificate had been forfeited by force of article 9 of the constitution of the council, which provided that "a member of this council who is thirteen weeks or more in arrears for weekly dues, forfeits all his rights and privileges, except that of being admitted to the council chamber during its session." This defense was overruled by the trial judge on the ground that the only plea filed by the defendant was that of general issue, and that no such defense could be made under the plea. This ruling was clearly a proper one. Under the 126th section of our practice act (Gen. St. p. 2554), where the plaintiff avers performance of conditions precedent generally, the defendant is not permitted to deny such averment unless he specifies in his plea the particular condition precedent the performance of which he intends to contest. That this statutory provision bars a beneficial society from avoiding liability on a benefit certificate on the ground that the deceased member failed to pay his assessments within the time required by its constitution and by-laws, unless such defense is specially pleaded, has been decided by the Court of Errors and Appeals in the cases of *Supreme Assembly v. McDonald*, 59 N. J. Law, 248, 35 Atl. 1061, and *Ottawa Tribe No. 15 v. Munter*, 60 N. J. Law, 459, 38 Atl. 696.

There being no error on the part of the trial court, the judgment under review should be affirmed.

ROSENGARTEN v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey. Feb. 25, 1903.)

WITHDRAWAL OF JURORS—NEW TRIAL.

1. Withdrawal of a juror by direction of the court produces a mistrial, so that, there not having been any trial, a new trial cannot be directed.

Action by Samuel G. Rosengarten against the Central Railroad Company of New Jersey. Heard on rule allowed to defendant to show cause. Rule discharged.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Joseph H. Gaskill, for the rule. John W. Wescott and Herbert A. Drake, opposed.

PER CURIAM. This was an action brought by the plaintiff to recover damages for the destruction of his growing timber, grass, etc., by fire communicated from one of the engines of the defendant company. At the close of the plaintiff's case, defendant's counsel moved for nonsuit upon the ground that the proofs submitted did not correspond with the allegations contained in the

¶ 1. See Insurance, vol. 28, Cent. Dig. § 1998.

declaration. This motion was denied, and then, upon the application of counsel for the plaintiff, and against objection upon the part of the defendant, the trial court permitted a juror to be withdrawn. The defendant then applied for and obtained a rule to show cause why a new trial should not be directed.

The rule to show cause should be discharged. The withdrawal of a juror by direction of the court produced a mistrial. There never having been any trial of the cause, it is obvious that a new trial cannot be directed. The original venire still remains in force, and parties are entitled to proceed under it. Rule discharged.

CASWELL et al. v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. Feb. 25, 1903.)

DAMAGES—INADEQUATE VERDICT.

1. Where a verdict cannot be declared inadequate, plaintiff cannot have it set aside as too small, though a considerably larger sum would not have been declared excessive.

2. A verdict of \$100 to a husband for deprivation of his wife's society, and for expenses necessarily incurred by him because of her injuries, will be set aside as inadequate, the undisputed evidence showing he has paid or is liable to pay considerably more than that for expenses rendered necessary by her injuries.

Action by Lorenda G. Caswell and husband against the North Jersey Street Railway Company. Heard on rule to show cause. Verdict set aside as inadequate.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Benjamin & Benjamin, for plaintiffs. Howard MacSherry, for defendant.

PER CURIAM. This was an action for personal injuries received by the female plaintiff. The jury rendered a verdict of \$500 in favor of the wife, and of \$100 in favor of the husband. The contention on behalf of the plaintiffs is that the amounts allowed by the jury in each instance are too small. So far as the amount allowed by the jury to the wife as compensation for the injury received by her is concerned, although a considerably larger sum could not have been declared to be excessive, yet, on the other hand, the amount fixed by them cannot be declared inadequate. The verdict in her favor, therefore, must stand. The compensation allowed to the husband for the deprivation of the society of his wife, and for the expenses necessarily incurred by him, by reason of her injuries, is clearly inadequate. The undisputed evidence in the case shows that he has either paid out, or is legally liable to pay, for medical attendance to his wife, necessitated by her injury, and for other expenses rendered necessary thereby, a sum considerably in excess of the amount

allowed to him by the jury. The verdict in favor of the husband should, therefore, be set aside, and a new trial allowed to him.

OLEARY v. WALDRON.

(Supreme Court of New Jersey. Feb. 25, 1903.)

UNLAWFUL DETAINER—AFFIDAVIT—JURISDICTION.

1. Where, in a landlord's proceeding for possession, his affidavit shows neither his ownership, nor any right of possession in him, the court has no jurisdiction.

Appeal from District Court of Trenton.

Action by Margaret Cleary against John J. Waldron. From a judgment for plaintiff, defendant appeals. Reversed.

Argued November term, 1902, before GARISON and GARRETSON, JJ.

Wm. J. Walsh and James J. Cahill, for appellant. Scott Scammell and Jno. T. Van Cleef, for appellee.

PER CURIAM. This is a landlord's proceeding for possession, instituted by Margaret Cleary, whose affidavit shows neither her ownership of the premises, nor any right of possession in her. The district court was without jurisdiction, and its judgment must be reversed.

GEORGE JONAS GLASS CO. v. GLASS BLOWERS ASS'N OF UNITED STATES & CANADA et al.

(Court of Chancery of New Jersey. March 16, 1903.)

TRADE UNIONS—STRIKES—PICKETING—INTIMIDATION OF EMPLOYEES—INJUNCTION PENDENTE LITE.

1. Where, on an order to show cause why an injunction should not be granted against strikers and the labor union, restraining picketing and illegal interference with plaintiff's employees pending suit for permanent relief, the only showing by defendants consisted of a large number of affidavits, written on printed blank forms—the spaces being filled with the names of the particular answering defendants—which consisted merely of a denial of the facts alleged in the bill, and allegations that the strike which was in progress was being conducted without violence or unlawful interference with complainant's business, and it did not appear that the issuance of the injunction until final hearing would result in any hardship to defendants, the injunction would be granted.

Suit by the George Jonas Glass Company against the Glass Blowers Association of the United States & Canada and others for an injunction to restrain defendants from picketing and illegally interfering with plaintiff's employees. On order to show cause why an injunction should not be granted pendente lite. Decree for complainant.

Hampton & Fithian and John W. Harding, for complainant. H. L. Miller and John W. Westcott, for defendants.

GREY, V. C. (orally). In this case an order was made that the defendants show cause why an injunction should not issue according to the prayer of the bill of complaint. Accompanying that order, an ad interim stay was allowed, restraining certain named defendants "from entering or attempting to enter complainant's premises, consisting of its glass manufacturing plant at Minotola, in the township of Buena Vista, county of Atlantic and state of New Jersey; and from obstructing or attempting to obstruct the free passage of any employé or employées of complainant in going to and from complainant's premises; from in any wise threatening or using any coercive language or coercion whatever in order to induce any employé of complainant not to work for complainant; and from in any wise interfering with, or annoying by acts or words, any such employé of complainant, against his will, in going to and from, or while engaged in, such employment; and from entering its grounds and premises for the purpose of interfering with, hindering, or obstructing its business; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, annoying language, or acts of force and violence any of the employées of complainant to refuse to or fail to perform their duties as such employées; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, annoying language or acts, force or violence, any of the employées of complainant to leave the service of complainant; and from preventing or attempting to prevent any person or persons, by threats, intimidation, annoying language or acts, force or violence, from entering the service of the complainant; and from congregating at or near the said premises of complainant, or in the public highway, for the purpose of intimidating complainant's employées or preventing them from rendering their services to complainant, and from inducing, by the payment of money, or by promises to pay money, or coercing by threats, annoying language, or acts, said employées to break their contracts of employment with complainant and to leave its employment; and from collecting, either singly or in combination with others, in and about the approaches to complainant's said plant, or in the public highway, for the purpose of picketing or patrolling or guarding the streets, highways, gates, and approaches to complainant's said property for the purpose of intimidating or coercing any of the employées of the complainant in going to and from their work, and the said factory of the complainant; and from congregating at or about any place at Minotola for the purpose of intimidating, threatening, or coercing any person or persons seeking employment of complainant; and from going, either singly or collectively, to the homes of complainant's employées, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employ

of complainant, or from entering complainant's employment; and from intimidating or in any manner threatening the wives and families of said employées at their homes because of their said employment; and from conspiring in meetings, or otherwise conspiring together, by threats or other coercive action, to induce or coerce any of the employées of complainant to leave the service of said complainant, or to prevent any person, by threats, intimidation, force, or violence, from entering the service of complainant; and that the said William M. Doughty be, and he hereby is, restrained from using money in furtherance of the purpose of preventing employées of the complainant from returning to their work, and from paying money to such employées to induce such employées to leave their employment with complainant." On the coming in of the order to show cause, the defendants filed separate answers, to the number of about 100, most of them using the same printed form; blank spaces being filled with the names of particular answering defendants. Numerous affidavits were attached to these answers, in which printed forms were used; many of the defendants swearing to the same precise form of words. Additional separate affidavits were also submitted in opposition to the allowance of the writ.

Neither by these elaborate pleadings, nor the accompanying affidavits, nor in the arguments of the defendants' counsel, is it claimed that the terms of the restraint allowed by the above-recited ad interim stay work any hardship or oppression upon the defendants. The whole burden of the pleadings, proof, and argument submitted by the defendants is directed to a denial of the facts and circumstances set up in the complainant's bill, and to contentions that the strike which is now admittedly being conducted under the direction of the defendants at the complainant's works is carried on without either violence, intimidation, or other unlawful interference with the complainant's business. The situation is this: A restraint is outstanding which imposes no hardship upon the defendants, and the legality of which is not challenged, save as it is contended that in point of fact there is no occasion for its exercise. At the present stage of the case, this question is before the court upon ex parte affidavits. The cause has been set down for a day certain on final hearing, when witnesses will be produced in open court and subjected to cross-examination on the very same points which are now presented only by voluntary affidavits. It is indicated that the case will turn almost wholly upon the credibility and weight of the testimony of witnesses of whose worthiness the court has but little opportunity to be advised. If I pass upon the credibility of this testimony as exhibited by the affidavits on file, I shall have prejudged this case, and have subjected the parties to embarrassment when the same facts shall be presented by the same wit-

nesses on the stand, giving their testimony in open court. There will be two hearings and decisions on substantially the same question. The cause can be disposed of on the final hearing in a much more intelligent and conclusive manner.

As the ad interim restraint is not injurious to the defendants, but its removal may work great harm to the complainant, the present status may remain until the final hearing gives a full opportunity to pass upon the whole case by a single judgment.

GEORGE JONAS GLASS CO. v. GLASS BLOWERS ASS'N OF UNITED STATES & CANADA et al.

(Court of Chancery of New Jersey. March 16, 1903.)

TRADE UNIONS—STRIKES—INTIMIDATION OF EMPLOYEES—INJUNCTION—VIOLATION—EVIDENCE.

1. Defendants, who were engaged in a strike, had been restrained from intimidating plaintiff's employes, and from congregating for the purpose of intimidating any person seeking employment of plaintiff. In an application to punish defendants for contempt, the only evidence was that two men who approached plaintiff's works were asked whether they were going to work in the factory, and were accompanied by several strikers to the gates of the factory, but were permitted to enter without molestation; that when they came from the factory they were followed at a distance, but, on their return, entered the factory without molestation, but were thereafter followed to the house of a third person, with whom some of the strikers offered to fight. The proof as to the assemblage of the persons was uncertain. *Held*, that the evidence was not sufficient to justify a finding that the injunction had been violated.

Application by the George Jonas Glass Company against the Glass Blowers Association of the United States & Canada and others for the punishment of defendants for violation of an injunction. Denied.

See 53 Atl. 138.

Hampton & Fithian and John W. Harding, for complainant. H. L. Miller and John W. Westcott, for defendants.

GREY, V. C. (orally). The petition in this matter asks that certain defendants may be adjudged to be guilty of contempt because of their action on September 17, 1902, in alleged breach of a restraining order of this court made on the 7th day of July, 1902. The order restrains the defendants from attempting to prevent any person, by threats, intimidation, annoying language or acts, force or violence, from entering the service of the complainant, and from congregating for the purpose of intimidating, threatening, or coercing any person seeking employment of complainant, etc. An order to show cause was allowed, and testimony in open court was taken in support of and in opposition to the charges of the petition. The petitioner's testimony is that two men, named Mingin and

Noble, had been told that, if they applied at the works of the complainant company, they could probably get employment. They approached the complainant's factory by walking along the railroad which passes by it. They were met by two or three men, apparently strikers, one of whom asked whether they were going to the factory to work. They denied that they were, and proceeded towards the factory; several of the strikers accompanying them nearly to the gates. They went into the factory without interference or molestation of any sort. They then left the factory to go to the house of a Mr. Schaible. Three or four other men went ahead of them, and some followed them on bicycles; no conversation passing between them. They were unable to find Mr. Schaible's house, and returned to the factory without hindrance from any one; some of those who had accompanied them going before and some behind them, at distance varying from 25 to 75 yards. At the factory they stated their inability to find Schaible's house, and started out again with a Mr. Dare to find it. They testify that they were now followed, at some yards' distance, by a considerable number of men on bicycles and afoot. When they were going across a lot, one of these men threw an apple at them, and, Mingin says, called Mr. Dare a foul name. Noble says, if he understood them aright, the men called foul names after all of them. When they got to the Schaible house, Mingin, Noble, and Dare went into the house, while the men who followed remained outside. One of the latter came to the door, and wanted to talk to Mingin and Noble. Mingin went to the door, and was asked by the man if he was going to work at the factory. Mingin again told him that he "didn't know as he was." Mr. Schaible and the men then had some words, and one of the latter pulled off his coat and invited Schaible to fight. The two—Mingin and Noble—stayed in the house three-quarters of an hour, and then left by a back door. Neither Mingin nor Noble was hired to work at the factory, and both declared they were afraid to stay. Their testimony is flatly contradicted by that of a large number of witnesses who deny the use of any opprobrious words or threats. It is shown by the testimony of Mingin and Noble themselves that they had been drinking when they came to Minotola, and the proof strongly indicates that they were considerably under the influence of liquor. They admit that they told the first man they met that they did not mean to apply for work at the complainant's factory, and that they afterwards repeated this statement at Mr. Schaible's house. There is no pretense of proof that there was in fact any interference seeking to prevent the two men from entering the complainant's factory. They went into the factory twice without any attempt on the part of any one to stop or molest them. The testimony as to a showing of hostility to Mingin and Noble

is by words only, which might, of course, be sufficient, if proven by the weight of the evidence. But the evidence given by the complainant's own witnesses as to the words used is neither consistent nor clear in stating what was said, and it is flatly contradicted by numbers of witnesses who were in the party, or followers of it.

There is but one element in the proofs which leads me to hesitate in disposing of this motion, and that is on the charge that there was a congregating of a large number of men for the purpose of intimidating those who might wish to seek employment at the complainant's factory. There can be no question, taking the whole case together, that at and near the complainant's factory a system of picketing has been inaugurated. All of the approaches to Mr. Jonas' factory are watched by these men, who frankly say that they propose to persuade (as they say, peaceably) anybody from taking employment in the factory. I have not been invited to declare that mere peaceable picketing of public roads is in itself a breach of the restraint. I am not prepared to say, if that question were under consideration, that men may not, under the law, stand in a public road and try in a peaceable way to persuade other people not to take work in a factory. The difficulty in such cases is that the picketing is usually done by persons who are ignorant of the line where persuasion ends and intimidation begins; who are actuated to a considerable extent by a determination to accomplish the ultimate object—the prevention of employment at the factory. They are men who have never felt the responsibility attendant upon the exercise of power. When they know that the result which they wish to accomplish can be certainly attained by the use of intimidation or force, the line of persuasion is very apt to become obscure and to be ignored, and conduct which ought to be a simple persuasion between one man and another becomes a course of threatening or violence for the accomplishment of the result sought. The proof on the point of the assemblage of a number of persons for the purpose of intimidating persons seeking the complainant's employment was uncertain and variant as to their number, and still more so as to their purpose. Noble and Mingin themselves differ as to their number, and do not show that at any time the followers approached at all nearly to them—apparently not near enough for them to distinguish their remarks with any certainty. On this point, however, the testimony comes nearer to showing a breach of the restraint than on any other line of the examination. I make this judgment with some hesitation, but, considering the weight of all the testimony, I am not able to say that a breach has been shown.

The prayer of the petition that certain defendants be held to be in contempt because of their conduct in the incident of September 17, 1902, narrated in the petition, is refused.

HICKS v. LONG BRANCH COMMISSION et al.

(Supreme Court of New Jersey. Feb. 21, 1903.)

CITIES—OFFICERS—INTEREST—LEGISLATIVE BODY—PUTTING MOTION—RESULT.

1. Where a member of a city commission acted for a water company on two occasions, in each of which the city was equally interested—one being advice to pay a franchise tax to the city, and the other to secure an injunction to prevent the pollution of the city's water supply—he was not thereby disqualified to vote on a resolution awarding a contract to such company.

2. Where the president of a board of commissioners refuses to put a motion duly made, any member may put it, and declare the result.

3. On a viva voce vote in a legislative body, the whole body is counted as the chair announces, and where the declaration that a motion was carried was not challenged, and the minutes showing that it was carried were approved at the succeeding meeting, the motion should be considered properly carried, as against an objection subsequently made that an insufficient number of votes were heard in favor of the motion.

Certiorari, on petition of Alfred O. Hicks, against the Long Branch Commission and Tintern Manor Water Company, to review a resolution of the commission. Writ dismissed.

McCarter, Williamson & McCarter, for prosecutor. Corbin & Corbin, for defendant Tintern Manor Water Co. Thomas P. Fay, for defendant Long Branch Commission.

FORT, J. The certiorari in this case brings up a resolution of the Long Branch commission passed November 24, 1902. There are but few questions that need to be considered.

There is no proof to justify any allegation of fraud, or of a palpable abuse of discretion, in the board of commissioners, in passing the resolution. In awarding contracts, where there are no arbitrary statutory regulations, a municipal body vested with the power to make them has a large measure of discretion. In reviewing such action, the court will only inquire into the honesty and good faith of its exercise. Two cases recently decided in this court contain a reference to like decisions on this subject: *Ryan v. Paterson*, 66 N. J. Law, 533, 49 Atl. 587; *Kraft v. Board of Education*, 67 N. J. Law, 512, 51 Atl. 483.

Upon the evidence in this case, I find the following facts:

First. That the resolution brought up was duly passed by a viva voce vote on November 24, 1902.

Second. That Winfield S. B. Parker, one of the commissioners, was not, at the time of the passage of said resolution, the attorney of the Tintern Manor Water Company, and that he had no interest therein. There is proof in the cause, not controverted, that Mr. Parker represented the water company during 1902 in two matters, but in both of these matters it likewise appears that the city was quite as much interested as the

water company. In the spring of 1902, Mr. Parker had insisted that the water company should pay to the city its franchise tax, and the secretary of the company told him that they did not think it was a legal tax against them, but that if he would look it up, and advise them that it was legal, they would pay. He did this, and gave them an opinion that they were bound, and the water company paid and the city received the tax. It would be difficult to question Mr. Parker's motives in that case. The other case was one in which the city was more vitally interested than the water company, and under quite as great an obligation to take proceedings. One Dangler was polluting the city's water supply by maintaining objectionable conditions adjacent to it. The water company asked Mr. Parker to secure an injunction to prevent the continuance of the nuisance. He did so. The nuisance was abated. It would have been equally proper for the city to have done this. There could be no possible antagonism to the city's interests under these employments. There is not a semblance of proof that in any other way or at any other time did Mr. Parker ever appear for the Tintern Manor Water Company. The proof is that he has not now, and never has had, any interest in the company. Mr. Parker is a member of the bar in good standing and of excellent repute. No attempt was made to show that he received any improper compensation in either case. Upon the passage of the resolution in question he was clearly entitled to vote. This case does not come within the rule enunciated in the case of *The Traction Co. v. Board of Works*, 56 N. J. Law, 431, 29 Atl. 163. In that case the member of the board voting was clearly an interested party at the time he gave his vote.

Third. That there was sufficient appropriation, legally voted and unexpended, to cover any sums required to meet the expenditure authorized, if any was authorized, by the resolution.

Fourth. That there was no irregularity in the procedure in passing the resolution which should vitiate it. The president of the board of commissioners of Long Branch is only the mouthpiece of the commissioners. It is his duty to put a motion duly made. If he refuses, any member may put it. Any other rule is destructive of legislative functions.

Fifth. That the evidence is conclusive that he did refuse to put the motion on the passage of the resolution here attacked.

Considerable evidence has been taken, and, on the argument, much stress was laid, upon the alleged fact that only two votes were heard in favor of the passage of the resolution. The minutes show that it was carried, and these were duly ratified at the succeeding meeting. There was no challenge by any member of the announcement that the resolution was carried, when that statement was made by the chair, nor any demand for ver-

ification of the vote by show of hands or roll call. On a viva voce vote in a legislative body, the whole body is counted as the chair announces. Mr. Cushing states it this way: "In all his official acts and proceedings, therefore, he represents and stands for the assembly; and his will is taken for that of the whole body, compendiously expressed through him, and by his mouth, instead of being collected from the individual wills of all the members." *Cushing's Law & Practice of Legislative Assemblies*, § 294. But if it be proper to go into the proof of the actual vote, then in the case before me the proof is as clear as it can be made that five members of the board voted for the resolution. There is but one question before me, viz., as to the legality of the passage of this resolution to authorize the making of a contract. Whether all that was necessary to be done to have a contract executed, or whether the form of agreement in the report of the finance committee on November 17, 1902, was approved and authorized by the action of November 24, 1902, to be executed, is not decided; for, as I view this case, it is not before the court. Whether there is any contract, pursuant to that resolution, must be tested in some other way.

The writ is dismissed.

BUDD et al. v. CITY OF CAMDEN et al.
(Supreme Court of New Jersey. Feb. 25, 1903.)

CERTIORARI — LACHES — STREETS — USE BY TROLLEY COMPANIES — REASONABLENESS.

1. Certiorari to set aside a municipal ordinance granting rights to a trolley company six years after its passage, prosecutor having known of the ordinance all the time, is too late.

2. The question whether the proposed use of a highway by a trolley company is reasonable is for the municipality, and not for the court.

Application for certiorari by Hiram E. Budd and others against the city of Camden and the Camden & Suburban Railway Company. Denied.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Francis D. Weaver, for applicants. E. A. Armstrong, for defendants.

GARRISON, J. The prosecutor is in laches. The ordinance sought to be set aside was passed on September 12, 1896. The prosecutor at that time knew of the proposed ordinance, for he refused to give his consent to the exercise of municipal discretion in the premises, and employed counsel, who, on August 28, 1897, filed a bill in equity. At this date the ordinance had stood for nearly a year, and work had been done under it. Six years had passed before the legality of the ordinance was directly drawn in question by the present application. During all this time the trolley company had a right to assume

that its ordinance was valid, and to act upon that assumption, which it has done.

We think, moreover, that the question whether the use of the highway was a reasonable one in view of the facts was for the municipality, and not for the court.

The application is denied.

DITTMAN et al. v. DISTILLING CO. OF AMERICA et al.

(Court of Chancery of New Jersey. March 28, 1903.)

TRUSTS—CORPORATIONS—HOLDING STOCK OF OTHER CORPORATIONS—POWERS—MONOPOLIES—SUIT BY STOCKHOLDERS—QUO WARRANTO—DIVERSION OF ASSETS—USURY—ULTRA VIRES—BILL—AMENDMENT—MULTIFARIOUSNESS.

1. Under Rev. Laws 1875, p. 6, § 10, providing that corporations may be organized for certain specified purposes, "or any lawful business or purpose whatsoever," and Corporation Act 1896, p. 294, § 51, providing that corporations organized thereunder are authorized to hold shares of stock of any other corporation, a corporation created for the purpose of holding stock and controlling the operations of other corporations was organized for "a lawful purpose," and was entitled to purchase and hold such stock.

2. Where it was alleged that a corporation organized for the purpose of purchasing and holding stock in other corporations was illegal, as organized to create a monopoly, but such monopoly, if any existed, arose from the exercise of the powers conferred on the corporation by its charter or certificate of organization, such question could not be determined in a court of equity at the suit of a stockholder, but could only be considered on quo warranto, on relation of the Attorney General, to oust the corporation from its franchises.

3. Where it was alleged that a corporation authorized to purchase and hold stock in another corporation had created a monopoly, but such monopoly, if it existed, arose from the exercise of the corporation's power, expressly granted in its charter, to make contracts for the purchase of such stock, the exercise of such power could not be enjoined.

4. Where certain property of a corporation which was merged in another corporation, created for the purpose of holding and controlling the stock of such corporation and others engaged in the same line of business, was mortgaged to secure bonds, which were thereafter pledged to secure a loan on its becoming impossible to sell the bonds, which loan was negotiated to provide a working capital for all the constituent companies, and thereafter the holding company issued its own collateral bonds to raise money for the same purpose, a part of which had been loaned to the merged corporation as working capital, and on payment of which such corporation was entitled to a return of the bonds issued on security of the mortgage so executed, an allegation in a stockholders' action that the assets of the merged corporation were being improperly diverted, by reason of such mortgage, for the benefit of the holding company, was not sustained.

5. Where a corporation organized to hold and control the stock of other corporations negotiated a loan to obtain a working capital for the corporations merged, one of the constituent companies, to which a portion of the money so raised was loaned, was properly charged with its proportion of the expenses incurred by the holding company in negotiating the loan.

6. Where money was loaned by a corporation holding a majority of the stock of various constituent corporations to one of such companies, neither the latter company, nor its stockholders, prior to the repayment of the debt, were entitled to allege that the holding company had illegally charged such company with usury, in the form of additional expenses incident to making a loan, and interest thereon.

7. Where under an agreement between the holder of an option on certain distilling companies, which were to be sold to the K. Co., the option holder was entitled to apportion the consideration received from the K. Co. among the different grantors, and under such reservation a payment in cash and stock of the K. Co. was delivered to one of such grantors, such payment could not be questioned in a subsequent suit against a corporation into which the K. Co. was subsequently merged, on the ground that it constituted a misappropriation or a diversion of the K. Co.'s assets.

8. Where a corporation was authorized to manufacture and sell whisky and spirits either at wholesale or retail, and to purchase the stocks of other corporations for such purpose, it had power to organize and hold the stocks of corporations in other states through which it sold its manufactured product.

9. In the absence of evidence to the contrary, it must be presumed that the laws of West Virginia are similar to the laws of New Jersey, so as to authorize a corporation formed in New Jersey to exercise in West Virginia the powers conferred upon it by its charter and the laws of New Jersey.

10. Where a bill was brought against a corporation organized to hold and control the stock of other corporations, to dissolve the same for illegality, and against the corporations whose stock was so held, a requested amendment to the bill alleging that complainants, as preferred stockholders of one of the constituent companies, were entitled to receive a stated quarterly dividend from the net profits of its business, and that such dividends had been accumulated, but not paid, and praying payment thereof, could not be allowed, since, as it affected but one of the parties to the suit, it would have rendered the bill multifarious.

Suit by Henry I. Dittman and others against the Distilling Company of America and others. On final hearing and application to amend bill. Application denied. Bills dismissed.

J. O. H. Pitney and Messrs. Lindsay and Kremer, for complainants. Messrs. Lindabury and Mayer and Alexander & Green, for defendants.

EMERY, V. O. In this case an original bill was filed August 17, 1900, and an amendment to the bill on March 6, 1902, and on the argument on final hearing at the close of the proofs an application for a further amendment to the bill was made. This application to amend is opposed. The issues raised upon the pleadings and proofs are substantially as follows: Complainants are owners and holders of preferred stock of the Kentucky Distilleries & Warehouse Company, organized under the laws of this state on February 3, 1899. On July 11, 1899, the Distilling Company of America was organized also under the laws of this state. Among the designated objects for which this latter company was formed was (article 81) the purchase and holding of the shares of stock or property of other corporations of this state or elsewhere, and

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 16, 17.

the operation of such properties, exercising the rights of owners of the stock, including the right to vote thereon. Although one of the objects for which it was organized was to manufacture, sell, and distribute whisky and spirits, the Distilling Company has not in fact engaged in such manufacture or sale, but is altogether a company holding the stocks of several constituent companies, thus managing or controlling the business of all the companies. These constituent companies are five in number, all engaged in the manufacture, sale, or distribution of whiskies or spirits. They are the Kentucky Distilleries & Warehouse Company, the Spirits Distributing Company, and the Standard Distilling & Distributing Company, three companies organized under the laws of New Jersey; the American Spirits Manufacturing Company, organized under the laws of New York; and the Hannis Distilleries Company, organized under the laws of Maryland. All of these companies are parties defendant to this suit, except the Hannis Distilleries Company. The Distilling Company is the owner of over 90 per cent. of the capital stock of each of these companies, and of substantially all of the stock of the Hannis Company. It became such owner by issuing its own shares for the purchase from the individual holders of the stock of the constituent companies; the relative values of the stock of the several companies, and the amount of Distilling Company stock issued therefor, being fixed by an agreement dated June 21, 1899, called the "Deposit Agreement," under which stockholders in each of these companies desiring to sell their stock deposited it with a trust company, through which the deliveries or exchanges were carried out upon the subsequent incorporation of the Distilling Company. Complainant and other stockholders of the Kentucky Company to the amount of about 4,000 shares have not consented to exchange their preferred stock, but complainants have exchanged their common stock for like stock of the Distilling Company.

The grounds for relief set up in the original and amended bill which were relied on at the argument on final hearing may be classified as follows: First. That the Distilling Company is not authorized, under its certificate of organization or under the laws of the state of New Jersey, to purchase and hold the stock of the Kentucky Company or the other constituent companies for the purpose of controlling their operation. Second. That one of the objects of the organization of the Distilling Company, and of the transfer to it of the controlling interest in the stock of the constituent companies, was the creation of a monopoly in the manufacture and sale of spirits, alcohol, and whiskies; that such monopoly has been in fact created; that such monopoly is unlawful, and renders the Kentucky Company liable to the pains and penalties of the laws in restraint of monopoly, and endangers its property. Third.

That the assets of the Kentucky Company have been unlawfully and improperly diverted for the benefit of the Distilling Company. Fourth. That the directors of the Kentucky Company have unlawfully diverted its assets and property, by the organization and management of subsidiary companies, to which the Kentucky Company has conveyed portions of its assets in consideration of stock in the subsidiary companies.

In reference to the first question—the authority of the Distilling Company to hold the stock of the Kentucky Company and of the other constituent companies, and to act merely as a holding or operating company—the status of our legislation and decisions is as follows: Previous to 1893, corporations organized under the general corporation law (Revision of 1875, p. 3) had no express statutory authority to purchase or hold the stock of other corporations, or to vote thereon. This Revision of 1875, p. 6, § 10, specified the numerous purposes for which corporations might be organized, adding at the end of the specified purposes "or any lawful business or purpose whatever." In *Ellerman v. Chicago Junc. Ry. Co.*, 49 N. J. Eq. 217, 23 Atl. 287 (Green, V. C., 1891), it appeared that the Junction Company was incorporated to purchase, hold, sell, etc., and deal in, the stock of a company called the Transit Company, incorporated under the laws of the state of Illinois, and also, in the promotion of its corporate business, to purchase the stock of any corporation, and in respect to it exercise the rights and privileges of ownership. The stock of the Transit Company, to the extent of about 130,000 of the entire 132,000 shares, was purchased by the Junction Company for about \$22,600,000, the money being raised by the issue of bonds of the Junction Company, secured by the Transit stock purchased and the sale of about \$12,500,000 of the entire capital stock (\$13,000,000) of the Junction Company. *Ellerman*, a stockholder of the Junction Company, filed a bill attacking the validity of an agreement made by the Junction Company with *Armour* and others subsequent to the acquisition of his stock; one objection being that the company agreed to purchase the stock of a certain other company—the *Tolleston* Company, a corporation of the state of New Jersey. Vice Chancellor Green held (page 245, 49 N. J. Eq., page 297, 23 Atl.) that inasmuch as by its certificate of organization the corporate business of the Junction Company was to acquire and deal in stock of the Transit Company, and to do anything authorized by its charter to increase the value of this stock, and inasmuch as the purchase of the *Tolleston* stock was shown to have been for the purpose of increasing the value of the Transit Company's business, it was within the power contemplated by the charter certificate. The right of the Junction Company to purchase and hold the shares of the Transit Company—the principal object of the creation

of the company—was not questioned in the Ellerman suit (opinion, page 231, 49 N. J. Eq., page 292, 23 Atl.), and the validity of this purchase seems to have been assumed by complainants as the basis of their own claim (opinion, page 239, 49 N. J. Eq., page 294, 23 Atl.) that the right to purchase stock was by the certificate limited to stock of the Transit Company, and could not be extended to the stock of the Tolleston Company. In the subsequent suit brought by another stockholder of the Junction Company (Willoughby v. Chicago Junction Railway Co., 50 N. J. Eq. 656, 25 Atl. 277; October, 1892) attacking the validity of the same agreement which had been sustained in the Ellerman Case, complainant attacked the validity of the incorporation of the Junction Company upon the ground that the purchase and holding of the stock of another company, and the control of such company, were invalid and contrary to law. The conclusiveness of the decree in the Ellerman Case, affirming the validity of the agreement, was impeached by reason of the alleged collusive character of that suit. Unless so impeached, the court held the decree in the Ellerman suit to be conclusive upon this and other points involved. Vice Chancellor Green (page 675, 676, 50 N. J. Eq., pages 284, 285, 25 Atl.) and Vice Chancellor Van Fleet, who sat with him (page 701, 50 N. J. Eq., page 294, 25 Atl.), declined to consider the question of the right to organize a company for the purpose of holding stock of another company, upon the grounds (1) that, as a rule, such questions can only be presented by the Attorney General, acting on behalf of the state; and (2) that the failure to raise this question in the Ellerman suit, which was based on the validity of the incorporation, was certainly not evidence of collusion in the Ellerman suit. The decree in the Ellerman suit was therefore held to be conclusive on the question as to all of the stockholders, as I understand the opinion. After these decisions, and on March 14, 1893, a supplement to the corporation act was passed (P. L. 1893, p. 301), authorizing corporations organized under the act to purchase and hold shares of stock of any other corporation of this or any other state, and to exercise, while such owners, all the powers, including the right to vote thereon, which natural persons, as owners, could exercise. This provision was included in the Revision of 1896, p. 294, as section 51 of the corporation act, and is the law now in force. In this revision of 1896, the previous corporation act was repealed, the specification of the purposes of incorporation made in the previous acts was omitted, and incorporation was authorized "for any lawful purpose or purposes whatever other than savings banks," and other specified purposes, such as railroads, canals, etc., not important for present purposes. The ownership of stock, and control of corporation by means of such ownership, by either an individual or partnership,

is in general a lawful act; and the organization of a partnership for the purpose of such ownership and control, either alone or in connection with other objects, is unquestionably a lawful object or purpose of association of individuals. The only theory upon which the formation of corporations for the purpose of holding stock of other corporations can be held not to be a "lawful purpose," within the meaning of the act, is that an authority to own the stock and control the management of other corporations must be given expressly and in terms in the section authorizing the formation of companies, in order to be lawful. This power to own and control stock of other corporations is expressly given by a subsequent section to all corporations, when organized, and to the same extent as individuals. Such ownership of stock is therefore a lawful act. This legislative declaration as to the lawfulness of the ownership of stock by corporations precludes the courts, as it seems to me, from declaring that such ownership cannot be included within the "lawful purposes" for which a corporation may be formed, merely for the reason that it is not expressly and specially authorized in the section of the act defining the purposes of incorporation. What purposes are "lawful," within the meaning of this section, must be ascertained by reference to the scope of the laws in force declaring the lawful character of acts; and, taking the whole scope of the act, it would seem that the ownership of stock in other corporations, either alone or in connection with other objects, as the purpose of the corporation, is a purpose of incorporation authorized by the act. I have considered this question as one which the complainants had the right to raise, on the assumption that, as owners of the Kentucky Company stock, they might have the right to question the control of the Kentucky Company by another corporation which had no right to hold or vote upon its stock. The status of the complainants may be different from that of the complainants in the Ellerman and Willoughby suits, and these cases may, perhaps, not control this case upon this point. But there are undoubtedly very grave difficulties as to the trial or settlement of this question in a suit like the present, or as to giving herein the appropriate relief, if the holding of the stock and control of the Kentucky Company by the Distilling Company had been found to be illegal, and in this decision I do not intend to pass upon this question.

The second claim for relief is that one of the objects of the organization of the distilling company, and of the transfer to it of the controlling interest in the stock of the constituent companies, was the creation of a monopoly in the manufacture and sale of spirits, alcohol, and whiskies, and that such monopoly has been created. This claim is not well founded, and for two reasons: First, the proofs fail to establish the monopoly

charged; and, second, the monopoly, if any exists, arises from the exercise of powers given by the charter or certificate of organization. Where no right of property in complainant is at stake, a court of equity has no power to declare unlawful the exercise by a corporation of the powers conferred by its charter, even though the purpose of the organization may have been unlawful. The right of the Attorney General, on behalf of the state, to question in a court of equity the exercise by a corporation of its powers under its charter for the purpose of creating a monopoly was expressly denied by Vice Chancellor Reed in *Attorney General v. American Tobacco Company*, 55 N. J. Eq. 352, 369, 36 Atl. 971 (1897), and his opinion was adopted on appeal (*Miller v. Tobacco Co.*, 56 N. J. Eq. 847, 42 Atl. 1117 (1898)). In this suit, also, the right of an individual to equitable relief was denied. *Attorney General v. Tobacco Co.*, 55 N. J. Eq. 378, 36 Atl. 971. The reason upon which this decision as to want of equitable jurisdiction is based is that any order or decree of a court of equity restraining a corporation exercising private, and not public or quasi public, franchises, from acts which are within the powers conferred by its charter or certificate of incorporation, is pro tanto an annulment of its charter. It is therefore to that extent an ouster from its franchises, and such ouster is rightful and legal only when made by judgment upon quo warranto—a proceeding brought to test the very question on behalf of the state in the Supreme Court, which has, under the Constitution, exclusive jurisdiction. *Attorney General v. Tobacco Co.*, 55 N. J. Eq. 367, 36 Atl. 971. This rule does not prevent a court of equity from restraining quasi public corporations from acts beyond their corporate powers, where such acts involve a public nuisance or other public injury. *Id.*, 55 N. J. Eq. 366, 36 Atl. 971. This decision is conclusive upon the right of the complainants to raise the question that the effect of the charter and acts under it is to create a monopoly. If, however, it should be considered that this question is now properly before the court for determination, the decision of the Court of Errors and Appeals in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612 (1899), would seem to be fatal to the complainants' contention. It was expressly decided in that case (see pages 524, 525, 58 N. J. Eq., pages 729, 730, 43 Atl., 46 L. R. A. 255, 78 Am. St. Rep. 612) that where a monopoly results or may result from the exercise of the power of making contracts expressly granted by the Legislature to corporations, such exercise of power cannot be enjoined. This is upon the ground that the Legislature granting the power must be taken to have made a final and authoritative decision upon the question of public policy as to the creation of the monopoly thus resulting.

The third claim for relief is the unlawful and improper diversion of the assets of the Kentucky Company for the benefit of the Distilling Company. The only specific charge of such diversion of assets made in the bill was in paragraph 12, which charged that the directors of the Kentucky Company, acting under the control of the Distilling Company, on or about January 1, 1900, caused a mortgage or trust deed of \$5,000,000 to be executed by the Kentucky Company upon all its property and assets, present and future, to secure bonds of that amount, and that contrary to the usual course of business, and contrary to the interests of the Kentucky Company, a considerable portion of these bonds were hypothecated by the directors of the Kentucky Company (five of its seven directors being also directors of the Distilling Company), and have been pledged in the proportion of \$1,000 of bonds to secure \$100 of loan; that no proper occasion existed for borrowing money for the Kentucky Company; and that the execution and pledging of the bonds was part of the general scheme for a diversion of the assets of the Kentucky Company, and the purpose of executing this deed and making these loans was to bring about the foreclosure of the mortgage on a comparatively small loan, so that the interests of complainants and other stockholders of the Kentucky Company might be cut off. The answer claims that this mortgage or trust deed did not cover the whisky, book accounts, and personal property of the Kentucky Company, worth many millions of dollars; that the mortgage was duly authorized by two-thirds of each class of stockholders, as required by the articles of association, and that, with the exception of \$1,500,000, all the bonds were at the time of the answer still in the possession of the Kentucky Company; that the bonds and deed were authorized to provide additional working capital which was necessary; that the bonds could not be sold at a satisfactory price, and therefore part of the bonds were used as collateral security for loans, not over \$1,500,000 being deposited at any time, and that amount is held as collateral security for a loan of \$500,000 made February 16, 1900, to run for two years, payable by the Kentucky Company at any time on 30 days' notice. It appears by the proofs that this loan of \$500,000 has since been paid off, and that the \$1,500,000 bonds were returned to the Kentucky Company. Subsequently, and on the recommendation of a committee of the stockholders of the Distilling Company, called the "Protective Committee," a plan for securing necessary working capital for all the constituent companies was recommended and carried out, under which the Distilling Company issued its own collateral trust bonds for \$5,000,000, and has disposed of something over \$4,000,000 at 80 cents on the dollar. The proceeds of the sale of these bonds have been turned over to the Distilling

Company, which has loaned to the Kentucky Company for working capital over \$3,500,000, which is still unpaid. The \$5,000,000 bonds of the Kentucky Company constitute a portion of the collateral for the collateral trust bonds of the Distilling Company. The collateral trust agreement or mortgage, however, provides that, when the Kentucky Company pays off what it owes to the Distilling Company of America, these \$5,000,000 Kentucky bonds are to be returned to the Kentucky Company. As the \$5,000,000 Kentucky Company bonds were originally deposited with the Distilling Company to secure money due and to become due to it from the Kentucky Company, this company would seem to be fully protected against the diversion of any of its assets secured by the mortgage to pay any other loans or indebtedness than its own indebtedness to the Distilling Company for money borrowed and used for its own purposes. The questions to be considered at the hearing as arising out of this transaction were therefore reduced to two. The first is whether the loan from the Distilling Company to the Kentucky Company was within the proper exercise of the judgment and discretion of the directors of the Kentucky Company, acting for the interest of the company and all its stockholders, or whether it was an abuse of their authority and control, exercised for the benefit of the Distilling Company only. The proofs fail to establish any case of the abuse or fraudulent exercise of the directors' powers in the management of the company in making this loan, or to show any reason for interference by this court with their judgment, which appears to have been made with entire good faith. The second objection to this loan is one made by the amended bill after the facts relating to the mortgages and loan had been developed. This is, that in addition to 6 per cent. interest on its loan to the Kentucky Company, the Distilling Company has charged to the Kentucky Company the sum of \$217,591.35 for expenses on procuring the loan, and that the Kentucky Company is still liable to pay a further large amount—between \$400,000, and \$500,000. This item of \$217,591.35, as appears by the answer and the evidence, is the proportion of the entire expense of obtaining the loan on the Distilling Company collateral trust company bonds (about \$292,000), which is chargeable to the Kentucky Company on the basis or proportion of the amount of the proceeds received by the Kentucky Company. The latter company has not as yet paid to the Distilling Company any portion of this amount of \$217,500. The \$4,000,000 bonds issued by the Distilling Company were sold at 80, were payable in ten years, \$500,000 are redeemable each year, and, by the arrangement or accounts of the loan kept between the companies, the Kentucky Company is to be charged with its proportion of the price paid, over 80 per

cent. for redeeming the bonds, and to be credited with the proportion of the price paid, under 80, for the redemption. Up to the time of the hearing, none had been redeemed under 80, and the additional sum of \$15,000 had been charged as the Kentucky Company's share of the expense of redeeming the bonds payable during the first year. It is claimed that these charges against the Kentucky Company are usurious, inequitable, and unfair. The objection as to the equity of the charge appears to be unfounded, and I can see no equitable reason, under the circumstances disclosed by the evidence, why the Kentucky Company should not pay its proportion of the expenses incident to loans made for its benefit, as well as that of the other companies, and which it has secured and used for its own purposes. It must be borne in mind that since the act of April 3, 1902 (P. L. p. 459), corporations can no longer set up the plea of usury on any obligations executed by them, even if this transaction between the companies comes within the scope of the usury acts. But these questions as to the liability of the Kentucky Company for interest alleged to be usurious, or for charges for expenses claimed to be inequitable, are plainly premature. None of these charges or expenses have been in fact paid, and the Kentucky Company has not yet paid or offered to pay its loan of \$3,500,000—the money actually received, with legal interest—all of which is undoubtedly due; and, until it does so, all questions as to the legality of charging additional expenses or additional interest before returning the bonds or other evidences of debt to the Kentucky Company are premature. When the Kentucky Company has in fact paid, or offers to pay, the admitted debt, with legal interest, the question whether any additional payments or charges can be enforced against it by the Distilling Company, or, if actually made by the Kentucky Company, should be returned to it, may, perhaps, be brought in question in appropriate proceedings brought to test the question; but, until payment of the admitted debt is made or tendered, decision upon the question is premature, and therefore unnecessary. By the amended bill two other classes of diversion of assets of the Kentucky Company are alleged. One is that in 1899, and shortly after the organization of the Kentucky Company, this company paid over to the American Spirits Manufacturing Company more than \$1,000,000 in money or in the capital stock of the Kentucky Company; that this was done in anticipation of the organization of the Distilling Company, which organization was then contemplated by the persons now controlling the three corporations, in order that the Distilling Company, as the owner of the large majority of the stock of the Spirits Manufacturing Company, might secure the benefit of this misappropriation of the assets of the Kentucky Company. These

allegations of misappropriation or diversion are denied in the answer, which sets out at length the particulars of the transaction, which are, in my judgment, sustained by the proofs. The payments which are complained of (\$400,000 in cash and \$700,000 in stock of the Kentucky Company), which were paid for two of the distilling properties which the Kentucky Company was formed to purchase, were portions of the entire payment agreed to be made by the Kentucky Company (about \$29,000,000 in stock or cash) to one Stoll, who had options or controlled the properties (over 50 in number) as the vendor for the entire properties, to be conveyed according to the prospectus and underwriting agreement to which complainants were parties. As against the purchaser (the Kentucky Company), Stoll, as the vendor, retained under the arrangement the right to apportion or divide the consideration among the different grantors; and it was under this reservation to Stoll, the vendor, that the Spirits Manufacturing Company, the owner of two of the fifty or more properties conveyed, received the payments now questioned, on making the conveyance to the Kentucky Company. To require now the Spirits Manufacturing Company or its directors to account for or repay this portion of the entire consideration to the Kentucky Company, which has received the properties and retains them, would be, in effect, to make a new bargain for the purchase, and in the absence of Stoll. This suit is not appropriate for the trial of a question of this character, and the charge that the alleged diversion was the result of any fraud or breach of trust on the part of the directors of the Kentucky Company for the benefit of the Distilling Company or its directors is not sustained by the proofs.

The remaining question, as to diversion of assets of the Kentucky Company charged by the amended bill, arises out of the following facts appearing by the answer and proofs: The Kentucky Company has organized under the laws of West Virginia two subsidiary companies for the purpose of selling and distributing some of the whiskies which it manufactures to retailers. It conveyed to each of these companies a portion of its stock of whisky—to one company, whisky valued at \$75,000, and to the other an amount valued at \$900,000—for which it has received full-paid capital stock of the respective companies to these amounts. These sums are the entire capital stock of the companies, and this stock in both companies is owned by the Kentucky Company, and is controlled by it through its nominees, who are employees, subject to removal. The company with the capital of \$75,000, called the "Y Company" in the proofs, was formed for the purpose of selling to the retail trade, direct, a particular brand of whisky manufactured by the Kentucky Company, and, according to the evidence of Mr. Bradley, the president of the

company, it has been successful and profitable; the Kentucky Company selling to the Y Company its whiskies at a profit, and in turn making a reasonable profit upon the capital of the Y Company. With the Z Company, capitalized at \$900,000, business of the same character is transacted, but on a larger scale, and at present it supplies the largest outlet for the product of the Kentucky Company; distributing about 50,000 barrels a year, upon which both the manufacturers' and retailers' profits are made. The Kentucky Company is also the owner of another distributing company, which was previously organized, called the "W Company," the stock of which it purchased and controlled. The W Company distributes for the Kentucky Company annually between 20,000 and 30,000 barrels—about one-seventh of its entire product—and is doing now a business of about \$100,000 monthly. The business and property of the W Company, including its good will, was purchased for about \$150,000. As appears by its certificate of incorporation, the Kentucky Company was formed for the manufacture, sale, and dealing in whiskies, and also for the purpose of carrying on any part of its business, and to invest in all kinds of property, real or personal, within or without the state of New Jersey, including the shares of stock of other corporations. The right of the Kentucky Company, under the charter and under the laws of the state, to purchase the stock of the pre-existing company—the W Company—for the purpose of its business was not contested at the hearing. It cannot be questioned, I think, that the method of distribution of its products by the machinery of subsidiary companies, considered merely as a matter of business management, is one with which this court will not interfere; nor will it attempt to control the business judgment of the directors, which appears to have been honestly exercised. The only question is that of power of the Kentucky Company to invest its capital and organize such companies for this purpose. The doctrine of *ultra vires*, where it concerns purely a matter of business management of the corporate property by the directors or by the company, and where the power is called in question by a stockholder, must be applied reasonably, and not unreasonably. The rule applied in these cases is the one announced by Lord Selbourne, in the House of Lords, in *Atty. Gen. v. Directors, etc., of Great Eastern Railway Co.*, 5 App. Cas. 473, 49 L. J. Ch. (N. S.) 545, 547 (1880), and approved by Vice Chancellor Green in *Ellerman v. Chicago Junc. R. Co.*, 49 N. J. Eq. 242, 23 Atl. 287. This rule is that whatever may be fairly and reasonably regarded as incidental to or consequential upon those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*. The Legislature has here expressly authorized the manufacture and sale of a product

and this sale may undoubtedly be either at wholesale or retail. It has also, by the certificate, authorized the purchase of stocks of other corporations for the purpose of this business of selling, and by the express provisions of the corporation act (section 51) has also authorized the purchase of the stock of corporations of other states. Considering this fifty-first section of the statute to be subject to the implied limitation that the purchase and ownership must be for the purposes of the business, this condition is complied with in the present instance, for the purchase and ownership is exclusively for the promotion of the business of the sale or distribution of the product manufactured by the company. The ownership of stock of other corporations for the purpose of the corporate business is the substantial thing authorized in these provisions, and in the case of a private business corporation, exercising no public franchise of any kind, the method of acquiring such ownership of stock is incidental only. The second section of the corporation act of 1896 expressly authorizes corporations to exercise all the powers contained in the act, so far as the same are necessary or convenient to the attainment of the objects set forth in the charter or certificate. Under this provision, no question is or can be raised as to the power of purchasing stocks of existing companies for the purpose of accomplishing the distribution of the product; and, in my judgment, the organization of subsidiary companies for the same purpose and with the same object may be fairly and reasonably regarded as incidental to or consequential upon the business which is expressly authorized, and convenient for the attainment of its objects, and should not by a judicial construction be held to be ultra vires. As to companies in which New Jersey Companies may hold stock, and the states in which subsidiary companies may be organized, it may be that the late decision of the Court of Errors and Appeals in *Coler v. Tacoma Railway Co.* (March, 1903), 54 Atl. 413, limits the power of New Jersey companies to hold stock of corporations of other states to the holdings of stock in companies organized in states whose laws authorize their own domestic corporations to hold stock in and control their own domestic companies. In the *Coler Case* the Court of Errors and Appeals, on the application of the stockholder of a New Jersey Company which owned a railroad in the state of Washington, enjoined the sale of the railroad to a Washington Company in consideration of stock of the Washington Company; one ground being that, under the statutes of Washington and the decisions of the Washington courts, a Washington corporation had no power to purchase or hold the stock of a Washington Company, and that it must therefore be concluded by the courts of this state that the ownership of the stock of a Washington corporation by a foreign corporation was against

the public policy of Washington, and, this holding and control being thus against the public policy of the state of Washington, it should be enjoined in New Jersey. In the present case there is no proof as to the statutes or decisions of the state of West Virginia upon the question of the right of a West Virginia corporation or of a foreign corporation to hold stock in a West Virginia corporation; and it must, in the absence of such proof, be assumed, under the laws of evidence, as well as of comity, that the laws of West Virginia are similar to our own laws, and authorize the Kentucky Company, formed under our laws, to exercise within the limits of West Virginia the powers conferred upon it under our statutes and its charter. The law of comity, settled in American jurisprudence by the decisions to which I referred at some length in my opinion in *Coler v. Tacoma Ry. Co.*, 53 Atl. 680, is that a corporation of one state of the Union may exercise within another state all the powers of its charter, to the extent that its exercise thereof has not been prohibited in such other state, or affirmatively declared by the Constitution, statutes, or decisions of such other state to violate its own public policy. Such violation of the declared public policy of a foreign state must be proved, and cannot be assumed.

The questions above considered are all of the claims for relief raised by the bill or amended bill which were relied on at the argument, or briefs on final hearing, and the only remaining question is the application of complainants to amend the bill. This application, which was made after the closing of the proofs and at the time fixed for argument of the cause, is resisted. No application is made to open the proofs, and the general rule applicable to amendments applied for under such circumstances is that amendments may then be made, if necessary and proper, in order that issues which have been in fact tried by the parties, and upon which both parties have been practically and fully heard, may be formally set out in the pleadings, so that the pleadings may conform to the proofs. *Story*, Pl. § 905, and cases cited in *Ogden v. Thornton*, 30 N. J. Eq. 569, 573. But complainant cannot amend at the hearing in order to present a new or inconsistent case. *Pasman v. Montague*, 30 N. J. Eq. 385, 393, (*Runyon*, Ch., 1879); 1 *Dan. Ch. Prac.* (6th Am. Ed.) 418, note "a." The amendment sought is to add a claim that complainants, as the preferred stockholders of the Kentucky Company, under the certificate of incorporation, are entitled to receive a stated dividend, payable quarterly, from the net profits arising from the business of the company; that net profits applicable to such dividends have been accumulated, but have not been paid. A prayer is added that such dividends may be directed to be declared and paid by the Kentucky Company to the complainants. It is manifest that this cause of

action concerns the Kentucky Company and its directors alone, and that the parties to this suit, other than the Kentucky Company and its directors, have no interest in this litigation. This amendment would make the bill multifarious. This claim, also, is for the specific performance of the contract to pay dividends, based on the valid, continuous existence and management of the Kentucky Company as a going corporation. It is therefore inconsistent with the case and claim for relief set up in the bill, which are based upon the supposed illegality of the management of the company, and pray for its dissolution and winding up by this court, and for the repayment to complainants of the amounts paid for their stock. It is also a claim as to which no notice was given in the issues made up on the pleadings, and to which no evidence has been specially directed, and upon which the Kentucky Company and its directors have not been heard.

The application to amend is denied, and the bills must be dismissed.

LEONARD v. HOBOKEN PRINTING & PUBLISHING CO.

(Supreme Court of New Jersey. Feb. 25, 1903.)

PUNITIVE DAMAGES—REVIEW.

1. Punitive damages being allowable, the Supreme Court cannot say that they are excessive.

Action by Clement De R. Leonard against the Hoboken Printing & Publishing Company. Heard on rule to show cause. Rule discharged.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

William H. Speer, for plaintiff. James B. Vredenburg and William S. Stuhr, for defendant.

PER CURIAM. The court properly refused to nonsuit the plaintiff or to direct a verdict for the defendant. There was no error in its rulings upon evidence or in its charge to the jury. The case was one in which the jury were justified in awarding punitive damages. That they did so is evident from the amount of the verdict. The damages being punitive, this court cannot say that they are excessive.

The rule to show cause will be discharged.

POLT v. POLT.

(Supreme Court of Pennsylvania. March 9, 1903.)

CONVEYANCE OF PROPERTY—REVOCATION—MENTAL INCAPACITY.

1. The evidence showed that, at the time a father 80 years old transferred all his property by check to his son, he lacked mental capacity

to transact business, and did not apprehend the nature of his act. *Held*, that a decree compelling the repayment of the money was justified.

2. Where the repayment of money given by a father to his son is compelled because of the mental incapacity of the father at the time of making the transfer, it is proper to order that the money should be paid to the guardian of the father, who was appointed after the suit for reconveyance was begun.

Appeal from Court of Common Pleas, Wayne County; Purdy, Judge.

Bill by John Polt against Joseph Polt. Decree for plaintiff, and defendant appeals. Affirmed.

The court below found the following facts and conclusions of law:

"Findings of facts: On September 4, 1900, the defendant obtained from the plaintiff a transfer of \$1,635 from the plaintiff's account in the Wayne County Savings Bank to that of his own, by means of a check given by the plaintiff for this amount without consideration. At the time of this transfer the plaintiff, then eighty years of age, was having trouble with his family, was in great mental distress, and was largely under the influence and control of his son, the defendant. In giving the check to the defendant, the design of the plaintiff was to put the money beyond the reach of his wife and other members of his family; and, while he was not a lunatic, his mental condition was such that he did not understand the legal effect of the transaction, or that he was putting the money beyond his control, but supposed it was to be for his use as before. This money so transferred was substantially all of the property the plaintiff owned, except a lot of land which was fully covered by a judgment for \$1,500 which he had confessed to the defendant but a short time before. The money still remains to the credit of the defendant in the Wayne County Savings Bank, no other rights having intervened. The transfer was not the intelligent and deliberate act of John Polt, the plaintiff, but was made under mental stress, without a clear understanding of its legal effect, and was an improvident disposition of his property.

"Conclusion of law: The defendant should be declared a trustee of the said money for the benefit of the plaintiff; the same to be paid to the plaintiff, or to such person as may be legally authorized to receive it for him.

"Decree: This cause came on to be heard at an adjourned court held January 14, 1902, and was duly argued by counsel, and determined by the court that the said plaintiff was entitled to the relief asked for in his bill, but that the said plaintiff was not of sufficient ability to properly care for the money due him; and the exceptions of the defendant to the decision of court having been considered and dismissed, and the orphans' court of said county, upon petition for said purpose, having appointed C. C.

Jadwin guardian of said plaintiff, and upon due consideration thereof, it is now, July 14, 1902, ordered, adjudged, and decreed that the said Joseph Polt, defendant, be, and hereby is, declared a trustee of \$1,635, deposited in the Wayne County Savings Bank on September 4, 1900, to the credit of Joseph Polt, together with the accrued interest thereon, for the benefit of said John Polt, and the said Wayne County Savings Bank is hereby ordered and directed to pay the said sum of \$1,635, with the accrued interest thereon, to C. C. Jadwin, guardian of said John Polt, and that the costs of this proceeding, with reasonable counsel fees for plaintiff, be paid by said guardian from the said fund so to be received by him as aforesaid."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

H. Wilson and P. H. Hoff, for appellant. F. P. Kimble and E. C. Mumford, for appellee.

PER CURIAM. The plaintiff is an old man, of 80 years. He had on deposit in the Wayne County Savings Bank \$1,635. On September 4, 1900, he transferred to his son, Joseph Polt, this defendant, the full amount of this deposit. It constituted his entire estate. He had not a dollar left. Besides the son, he had a wife and daughter. The court below found, on ample evidence, that the old man at the date of the transfer lacked mental capacity to transact business, and did not comprehend the nature and consequences of his act. Besides the evidence of witnesses, the learned judge saw the father in court, and observed his appearance and conduct. In the interval between hearing and final decree, in proper proceedings, a guardian was appointed for the father, to take charge of his estate, and then the money was ordered paid to this guardian. It is probable that the orderly procedure would have been to have had the guardian appointed first, and then have instituted this proceeding in equity, but that is now unimportant.

The decree is affirmed on the findings of fact by the court below.

DEVINE v. FRANKFORD STEEL & FORGING CO. et al.

(Supreme Court of Pennsylvania. Feb. 11, 1903.)

CORPORATIONS—ACTION BY MINORITY STOCKHOLDER—SETTING ASIDE CONTRACT—RECEIVER.

1. A minority stockholder sued to set aside an alleged fraudulent contract between the corporation and another corporation, the majority stockholders in both companies being the same, and making parties defendant the two corporations and the majority stockholders. The bill stated that, because of certain representations made to the complainant, she was induced at a stockholders' meeting to vote in favor of the contract, and that the company in which she

was a stockholder had been deprived of profits for the benefit of the other company, and that it was proposed to transfer the business of her company to the second company. The court appointed a receiver, and enjoined the officers from removing the machinery of plaintiff's company, or changing its mode of operation, until final hearing of the bill. *Held*, that the appointment of the receiver should be reversed, but the decree affirmed in other respects, but so as not to prevent the officers of plaintiff's company from operating it, or removing such employees thereof as they deemed fit.

Appeal from Court of Common Pleas, Lawrence County; Wallace, Judge.

Bill by Annie M. Devine against the Frankford Steel & Forging Company and others. Decree for plaintiff, and defendants appeal. Modified.

The bill averred in substance that plaintiff was the owner of 205 shares of stock of the Frankford Steel & Forging Company, and that the defendants were the owners of a majority in interest of the capital stock of the Frankford Steel & Forging Company and the Tindel-Morris Company; that Tindel and Morris, through their control of the two corporations, fraudulently conspired to bring about an agreement between the two companies, by which the Tindel-Morris Company was to take over the business of the Frankford Steel & Forging Company in consideration of the guaranty by the Tindel-Morris Company of a dividend of 10 per cent. per annum upon the capital stock of the Frankford Steel & Forging Company; that plaintiff was induced to vote in favor of this agreement at a stockholders' meeting by reason of misrepresentations made to her by Tindel and Morris. The complaint charged that: "(7) Your oratrix is informed and believes, and so charges, that the consideration for said transfer by the Frankford Steel & Forging Company of its business to the Tindel-Morris Company was appropriated by said Tindel and Morris; that said transfer was made illegally, without proper warrant or authority, upon terms and conditions that were unfair, inequitable, and unjust to the Frankford Steel & Forging Company and its stockholders, and that said arrangement, contract, or agreement, in whatever form made, would never have been made except for the fact of the conspiracy, confederacy, and fraudulent intent of said Tindel and Morris as aforesaid, and could never have been effected except through the control of both of said companies by said Tindel and said Morris, who by specious promises lulled the suspicions of your oratrix, and induced her by protestations of friendship and interest in her and her children to consent to such transfer, she at the time having no sufficient knowledge or information in the premises to enable her to form any intelligent opinion upon the subject." The defendants, in their affidavits, denied that there had been any misrepresentation. The court granted a preliminary injunction enjoining the defendants Adam Tindel, L. I. Morris, and the Tindel-

Morris Company from in any manner interfering with the present operation of the Frankford Steel & Forging Company, and the said Tindel and Morris and other officers of the Frankford Steel & Forging Company from in any manner interfering with the present management and operation of said Frankford Steel & Forging Company, and from dismissing, discharging, or removing any of the managers, employes, or operatives of said Frankford Steel & Forging Company, except by and with the consent of its present superintendent and manager, Robert F. Devine; and that the said Tindel and Morris and the officers of said Frankford Steel & Forging Company be further inhibited and enjoined from discharging, dismissing, or removing until the further order of court said Robert F. Devine as manager and superintendent of said Frankford Steel & Forging Company; and the said Frankford Steel & Forging Company and its officers and managers are inhibited and enjoined from in any manner dismantling the plant, removing its machinery, transferring the same, or otherwise changing its present method of operation. Subsequently the court continued the injunction, and appointed receivers to take charge of the property, estate, and effects of the Frankford Steel & Forging Company, and to manage the same, make all contracts necessary to keep it in operation, conduct and manage its business, employ the necessary clerks, assistants, laborers, and workmen to carry on and conduct the business as heretofore conducted, etc., and to demand of Adam Tindel, L. I. Morris, and Tindel-Morris Company that they turn over to the said receivers all the orders received by them for the manufacture of products by the Frankford Steel & Forging Company, and all other orders for the manufacture of products hereafter coming into their possession for the use, benefit, and advantage of the said the Frankford Steel & Forging Company.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson and E. Hunn Hanson, for appellants. A. Leo Weil, Winternitz & McConaghy, and Charles M. Thorp, for appellee.

PER CURIAM. And now, to wit, February 11, 1903, this case having been argued and considered, it is adjudged and decreed that so much of the injunction as prohibits and enjoins the Tindel-Morris Company and the Frankford Steel & Forging Company and the officers thereof from in any manner dismantling the plant, removing its machinery, or otherwise materially changing its present method of operation until final hearing is affirmed. The rest of the injunction is reversed and dissolved, the appointment of receivers is revoked, and they are ordered forthwith to turn over the property to the officers of Frankford Steel & Forging Company, and file an account of their transactions.

Additional Opinion.

(Feb. 20, 1903.)

It appearing that question has arisen as to the extent of the decree of February 11, 1903, it is now further adjudged and decreed that the officers of the Frankford Steel & Forging Company are not enjoined from discharging or removing the superintendent and such of the managers, employes, and operatives of the said company, including Robert F. Devine, as they may deem expedient, and the said officers shall have full authority and control over all matters concerning the conduct of the works pursuant to the method of operation which was in existence at the time the special injunction issued.

In re LESIEUR'S ESTATE.

Appeal of JOLY.

(Supreme Court of Pennsylvania. Feb. 23, 1903.)

WILL—CONSTRUCTION—“LEGAL REPRESENTATIVES.”

1. Testator devised certain real estate in trust for his niece during life, with power of appointment by will of the principal, “or, in default of a will, to her legal representatives.” The niece died, leaving a husband and two children surviving. *Held*, that he could not take a share of the estate as a legal representative of his wife.

Appeal from Orphans' Court, Philadelphia County; Ashman, Judge.

In the matter of the estate of Louis Lesieur, deceased. From a decree dismissing exceptions to the adjudication, Charles Joly appeals. Affirmed.

An attachment sur judgment was presented as a claim against a debt alleged to be due by testator to the executor, John C. Springman, the accountant. The court found as follows: “Mr. Brightly offered in evidence a copy of an attachment sur judgment wherein Charles Joly is plaintiff, John C. Springman defendant, and John C. Springman, executor, is garnishee, issued March 15, 1899, from court of common pleas No. 3, to December term, 1894, No. 620; real debt, \$2,770.87. Interest from March 1, 1899, and costs, which was duly served upon said defendant, and as garnishee. By said writ, it appears, were attached, *inter alia*, ‘debts due to John C. Springman, which came into the hands of Louis Lesieur, executor of the last will and testament of Alfred Nicholas Verrier, deceased, and which became due the said John C. Springman by the said Louis Lesieur, executor as aforesaid, in his lifetime, and which has since come into the hands of the said John C. Springman as executor of the said Louis Lesieur, deceased, or which became due and owing the said John C. Springman by the said Louis Lesieur in his lifetime.’ Mr. Brightly also offered in evidence a copy of a will executed by A. N. Verrier on June 14, 1866, by which, *inter*

alla, he appointed said Louis Lesieur executor, and gave all his estate to his executor, in trust to pay one half the income of his estate to his (testator's) father for life, and to expend the other half part of the income for the use and benefit of testator's niece, Caroline Lesieur, and his nephew, Louis Lesieur, until his niece became twenty-one years of age, and his nephew twenty-five years of age. After his niece arrived at her twenty-first year, she was to receive her share of the income, free from her debts and control of any husband she may have or take. If she died before arriving at said age, leaving no issue, the principal sum or estate on which accrued her share of the profits to go to his nephew; but, if she died 'after arriving at said age, then said principal sum shall go to the nominee of her will, or in default of a will to her legal representatives.' It is thus gathered from the will the testator gave to his niece one-half the income and profits of his entire estate for her life, with a power of appointment by will of the principal from which the income was derived, and in default of such appointment then he bequeathed and devised said share to her legal representatives. From the statement of facts agreed upon by counsel, it seems the said testator, A. N. Verrier, was the owner of an undivided one-half interest in the real estate Nos. 119 and 121 South Seventh street, in this city, and his brother-in-law, Louis Lesieur, the present testator, was the owner of the other undivided half, and the father of Caroline and Louis Lesieur, niece and nephew of said testator. Said Caroline Lesieur survived her uncle, and married John C. Springman, but on December 16, 1879, she died intestate, leaving surviving her husband and two children, Louis Lesieur and Amelia G. Springman, the latter now Von Kleek. Said Louis Lesieur, at the date of his daughter's death in December, 1879, occupied a portion of said premises, and from that date until his own death, on March 2, 1899, and also during this period, collected the rents from the other portion of the real estate." The auditing judge disallowed the claim.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

P. K. Erdman and F. F. Brightly, for appellant. David N. Fell, Jr., and Henry Spalding, for appellee.

POTTER, J. By his last will and testament A. N. Verrier devised to his niece, Caroline L. Springman, the income from certain real estate for the term of her natural life. And in case of her death after arriving at the age of 21 years, the principal or estate from which the income was derived was to go to the nominee of her will, or, in default of a will, to her "legal representatives." She did die intestate, after attaining the age of 21 years, leaving to survive her a husband and two children. The question here for de-

termination is whether the husband is one of the "legal representatives" of his deceased wife, within the meaning of the term as employed in the will of A. N. Verrier.

If the gift had been of personalty, the answer would have been in the affirmative. Eby's Appeal, 84 Pa. 241. But this is a disposition of real estate, and it has been frequently determined that, when used in connection with a devise of realty, the words "legal representatives" are to be construed as equivalent to the word "heirs." *Duncan v. Walker*, 2 Dall. 205, 1 L. Ed. 350; *Ware's Lessee, v. Fisher*, 2 Yeates, 578; *Commonwealth v. Bryan*, 6 S. & R. 81. Neither at common law nor under our intestate act are husband and wife heir to each other, as concerns estate in real property. *Dodge's Appeal*, 106 Pa. 216, 51 Am. Rep. 519. In the present case we see nothing in the will which would warrant any broadening of the strict legal meaning of the words used, or justify their application in any other than their technical sense. "The husband is neither the heir nor the next of kin of his wife in the technical sense of those words." *Ivin's Appeal*, 106 Pa. 176, 51 Am. Rep. 516. The testator made specific provision against any control over the property on the part of the husband during the life of the wife, and no expressions are found in the will which indicate any intention that the husband should take any benefit from the devise in case of her death intestate. The children of Caroline L. Springman as her "heirs" must be considered as the true beneficiaries, under this portion of the will of A. N. Verrier. We concur entirely in the conclusion of the orphans' court that John C. Springman took no interest in the devise to his wife, and this appeal is dismissed, and the decree is affirmed, at the cost of appellant.

LORAINÉ v. PITTSBURG, J., E. & E. R. CO.

(Supreme Court of Pennsylvania. Feb. 23, 1903.)

MANDAMUS TO CARRIER—REFUSAL TO FURNISH CARS—PARTIES—VENUE.

1. After plaintiff has opened a coal mine on the line of an existing railroad, which furnishes him cars for a certain period, and then refuses to furnish them unless he sells his coal, at a rate much below the market price, to a company controlled by the president of the railroad company, plaintiff can bring mandamus to compel the railroad company to furnish him cars, without the intervention of the Attorney General.

2. In mandamus by a coal miner to compel a railroad company to furnish cars, which it had refused to do unless he sells his coal to a company controlled by the president of the railroad company, it is immaterial that other shippers were refused cars for the same reason.

3. Where a railroad company constructs and operates its railroad wholly within Clearfield county, where its operating officers dwell, but

¶ 1. See *Mandamus*, vol. 33, Cent. Dig. § 289.

it has its principal office in Philadelphia, mandamus proceedings may be instituted against the company in either county.

Appeal from Court of Common Pleas, Clearfield County.

Application by C. D. Loraine for writ of mandamus to the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company. From a judgment refusing the writ, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, MES-TREZAT, and POTTER, JJ.

David L. Krebs, and Murray & Smith, for appellant. Oscar Mitchell and Harry Boulton, for appellee.

DEAN, J. The defendant company was chartered some time before 1897 under the general railroad act of 1868, as the Altoona & Phillipsburg Connecting Railroad Company. In the year 1897 it was leased to the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company, the principal line of which last-named road extended beyond the boundaries of Clearfield county; but the Altoona & Phillipsburg, the lessor road, was wholly within that county. The lessee road was only a project—was never constructed, and existed only on paper. The lessor road was actually constructed for about 12 miles to connections with the Beech Creek and Pennsylvania Railroads, and was in operation between those points, carrying freight and passengers. It owned about 300 coal cars, for the transportation of coal upon its 12 miles of line to the through roads with which it connected. Along these 12 miles were several coal-mining plants in active production, which could reach the market in no other way than over this short railroad. Among them was plaintiff's, fully equipped and in active operation, mining and shipping coal to market. While in the active pursuit of his business, plaintiff avers that on November 19, 1902, by written communication from defendant company, through its superintendent, he was notified, in substance, that on and after the 20th of that month no more cars for shipment of his coal would be furnished him unless he sold it to the American Union Coal Company. This latter company at the time offered to pay him \$1.50 per ton for coal delivered on cars at his mine, while in the market it was worth \$3. This offer he declined. Since that time defendant has refused to furnish him cars. He therefore prayed the court of common pleas of Clearfield county for a mandamus on defendant, requiring it to place cars upon his siding for coal shipment as before November 19, 1902, as it is legally bound, as a common carrier, to do. On this petition the court awarded a writ of alternative mandamus, directed to defendant, which was served by the sheriff on defendant by delivering personally, within his bailiwick, to the superintendent company of defendant company, a copy of the writ.

No answer was made to the averment of facts in the petition by defendant. It moved, however, to quash the writ, mainly on two grounds: (1) Because the writ was prayed for in the name of a private individual, to enforce a public duty; and (2) because the defendant is not a corporation within the county of Clearfield, under the act of June 8, 1893, and therefore the court of Clearfield county had no jurisdiction to entertain the petition or to issue the writ. Thereupon the court dismissed the petition.

The facts as stated in the petition, in their full scope, must be taken as averred by plaintiff, for they are not denied by defendant. Therefore the first and main question is, can the plaintiff ask, on his own complaint, for the issue of the writ, without the intervention of the Attorney General? We concede that there is apparent conflict in the decisions—not, however, in the principle on which they are based, but in the application of the principle to the varying facts of different cases. The test of right of a private relator to the writ is not, as stated by appellee, whether the duty sought to be performed be a public one, but whether the complainant by breach of the public duty has suffered an injury special and peculiar to himself. The defendant, under the statute from which it derives its being, is a common carrier, and as such has imposed upon it certain public duties, such as to construct its road, to equip it with cars and locomotives, and employ hands to run them for all the public. This is a public duty. If it fail in performing it, it fails to carry out the very purpose of its charter, and the public, without distinction, suffers by the breach of duty. In such case, both at common law and under our statute of 1893, proceedings should be instituted by the commonwealth at the instance of the Attorney General. But it is held in England that, "In general, all those who are legally capable of bringing an action are also legally capable of applying to the court of king's bench for the writ of mandamus. This is true in all cases, it is believed, where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest." Tapping on Mandamus, p. 28. The right is distinctly recognized in this state in *Com. ex rel. Hamilton v. Pittsburg*, 34 Pa. 496, and in many cases following it. Nor, as argued by appellee's counsel, is it taken away by our mandamus act of June 8, 1893 (P. L. 345). True, the act directs that, when the writ is sought to procure the performance of a public duty only, the proceeding shall be in the name of the commonwealth at the relation of the Attorney General, or the district attorney of the proper county; but it also provides, in the third section, that it shall issue on the application of any person beneficially interested. While we have no doubt that these words would give standing to any one interested to make application to the Attorney General for his

intervention, they just as clearly save to each person the right, existing before the act, to sue out the writ when he seeks to protect an interest special to himself, as distinct from the general public. Had this plaintiff such special interest? The defendant constructed its railway and equipped it. Plaintiff then opened his coal mine, and constructed his sidings, chutes, and tipples, with a view to shipment on this road, and no other. Defendant up to November 19, 1902, furnished him with cars. Then it peremptorily refused to perform its duty to him unless he sold his coal to another coal company at a price much below what it was worth, this latter company being controlled by the president of the railroad company. If this was not a wrong special to plaintiff, as distinguished from the public, we are at a loss to conceive what would constitute such a wrong. It is not a refusal to supply cars and motive power on the road, or to keep the road in repair. It is a refusal to carry his coal because he will not sell it at a low price to the president's coal company. As the court below, in substance, says, it was iniquitous. It, in effect, if kept up, would completely destroy his plant, with the consequent loss of his invested capital; and even if now his wrong is, to some extent, remedied, he has lost months of active business. The public duty of defendant was to carry freight and passengers. Suppose it had refused to sell him a ticket as a passenger, and notified him that such refusal would be kept up unless he sold his coal to the president's coal company; the wrong would have been a violation of a duty which defendant owed to the general public as a common carrier of passengers, but it would also have been a wrong special to himself, distinct from the public of which he was one, and from which he alone specially suffered. It would have been a demand on him to do something having no connection with defendant's business of transportation, and, if he refused, to deprive him of a right which, under the most solemn forms, it had undertaken to accord to him. And it is wholly immaterial that the defendant treated some shippers of coal along its road in like manner. The injury in each case was special. The general public—all the inhabitants of a city or township—suffer by the neglect of a municipal corporation to keep in repair its highways and bridges. The loss to some individuals of the general public by the breach of duty is much greater than to others, but this does not give a right of action to the individual who merely suffers the greater loss. But if a horse break a leg by falling into a hole, or if a vehicle be wrecked from the same cause, the owner suffers an injury different in kind, and a loss special to himself, for which he can sue as an individual; and, if a dozen or more persons suffered like special injury, each has his remedy by personal action. We are of opinion

that on the particular facts of this case, not disputed by defendant, plaintiff's injury was different in kind, and special to himself, and that therefore he could properly seek the remedy by mandamus.

The argument that injustice may be done by the enforcement of this form of remedy is without force. If a railroad corporation, by reason of storms, floods, or other disaster, is unable to perform its duty to the public in supplying cars to shippers, or because of sudden demands, beyond what could have been anticipated by reasonable foresight and prudence, or by congestion of traffic beyond reasonable expectations, and shippers' demands cannot be immediately responded to, the court, in the exercise of a proper discretion, will refuse the writ, and leave the complaining party to his remedy at law or in equity. But here there was no room for the exercise of discretion, because the facts were undisputed, and clearly demonstrated the right of plaintiff to demand the writ.

The court below argues that, while relief in some form should be given plaintiff, it cannot be by mandamus, because the decree would necessarily be too indefinite to remedy the wrong. We do not think so. The duty and the measure of it owing by defendant to plaintiff was performed up to November 19, 1902. With its performance prior to that no complaint is made. We can see no obstacle in the way to framing a writ compelling defendant's continuance in the performance of that duty, and the court below has ample power to enforce its commands against defendant and its officers, and should see to it that its orders are obeyed.

The court below is further of the opinion that under the act of 1893 it is without jurisdiction. The words of the act give to the courts of common pleas of any county jurisdiction to issue writs of mandamus to corporations being or having their chief place of business within the county. Although defendant's charter limits extend beyond the boundaries of Clearfield county, it is constructed and operated wholly within Clearfield county, and its operating officers—the superintendent and others—are within that county. The words are, shall have jurisdiction as to "all corporations being or having their chief place of business within such county." In *Bailey v. Williamsport, etc., Railroad Company*, 174 Pa. 114, 34 Atl. 556, *Jensen v. Phila., etc., Railway Co.*, 201 Pa. 603, 51 Atl. 311, and in other cases, we endeavored to interpret these words, and held that a corporation might be subject to service in at least two places—one, within the territorial limits of the county where its roadbed and rails were laid, and where it did its carrying business; the other, where its general office was located, its books kept, and its corporate seal preserved. While it is true the words are almost a copy of those in the act of June 14, 1836, on which this court

passed in Whitemarsh Township v. Phila., etc., Railroad Co., 8 Watts & S. 865, decided in 1845, opinion by Justice Rogers, and where a somewhat narrower interpretation was given them, yet that decision must be taken in view of the conditions then existing. It will be noticed that in that case the road was located in but two counties—one of them, Philadelphia, where the general office and chief place of business was established, and where nearly all the business was transacted. The court says that the last words of the section, "chief place of business in the county," mean that where the road runs through more than one county, and has its chief place of business in but one of them, service must be had in that one. But the act of 1893 must be interpreted in view of conditions existing when it was passed, with carrying corporations and mining and manufacturing corporations located in the interior of the state, and to a large extent doing business there; still having a principal office located hundreds of miles distant, in Philadelphia. In this act the words mean that service can be had either where the office is located, or in the county where the corporation is located and has its being. In this case the plaintiff might have applied for his writ in Philadelphia, where defendant has its office, or he could do as he has done—commence proceedings in the courts of Clearfield, where the corporation is located.

The decree of the court below is therefore reversed, and it is directed that a mandamus issue from that court as prayed for by plaintiff.

BUCHANAN v. PIERIE et al.

(Supreme Court of Pennsylvania. Feb. 23, 1903.)

WILLS—TESTAMENTARY CAPACITY—SPIRITUALISM—EVIDENCE.

1. A will will not be set aside because testator is a believer in Spiritualism, unless it is shown that it was the offspring of such belief.

2. Because testator believed that he could, through mediums, communicate with the spirits of the departed, is no ground for setting aside his will, where he was not influenced in any way by spirits in its preparation.

3. Testator, after providing for his daughter and his housekeeper for life, in such a way as to consume the greater portion of the income of his estate, gave the remainder of his estate to an association of Spiritualists. There was no testimony as to his general sanity, or ability to conduct the ordinary transactions of life in a reasonable manner, nor that his belief in Spiritualism affected the making of his will. There was evidence that the daughter did not hesitate to express to her father her contempt for his belief, but, notwithstanding serious disagreements on such subject, the father and daughter continued to live together. There was evidence of strange conduct on the father's part, distributed through a period of nearly 30 years. None of it was connected with the execution of the will. *Held* insufficient to sustain a verdict setting aside the will.

Appeal from Court of Common Pleas, Philadelphia County; Davis, Judge.

Action by Martha Buchanan against George G. Pierie and others. Verdict for plaintiff, and defendant the First Association of Spiritualists of Philadelphia appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James Gay Gordon and W. H. R. Lukens, for appellant. John G. Johnson, for appellee.

POTTER, J. The will which is brought before us by the record in this case does not bear upon its face any indication that it is the product of an unbalanced mind. Upon the contrary, it shows throughout the impress of a rational mind, possessed of clear and definite knowledge of the character and extent of the estate, and of the persons upon whom it is bestowed. In its various provisions, nothing appears which offends the reason or shocks the moral sense. It speaks, rather, in terms of thoughtful and considerate kindness. In the bequest to his daughter, the testator carefully provides for her a home so long as she lives, and an annual income, payable in equal monthly payments, and, with rather minute attention to the details of her comfort, directs that, in addition, she shall be supplied with eight tons of coal annually, to be procured for her by his executors in the month of August of each year. He also provides that his burial lot in the cemetery shall be kept and used for the interment of himself and his daughter and her children. It is apparent from an inspection of the will that the testator was not unmindful of his parental relation, but that he made thoughtful and detailed provision for his daughter's welfare during her lifetime. In the same spirit, he provided a home and an annual income for the term of her life for his faithful servant and housekeeper, Mrs. Laubach, who had ministered to him for many years. After thus providing for his daughter and for his housekeeper during their lives, he gives his entire estate to the First Association of Spiritualists of Philadelphia, to be applied to the purchase of a lot, and the erection of a building thereon, to be known as "McIlroy Hall." In the event of the failure of the trustees of the association to act in this direction within three years after receiving the whole of his residuary estate, then the proceeds are to be applied to the establishment of a home for white Protestant orphan children, to be called the "McIlroy Institute." The First Association of Spiritualists of Philadelphia, thus referred to, is a corporation of Pennsylvania, duly incorporated by the court of common pleas of Philadelphia county. It appears from the evidence that the testator, Alexander McIlroy, executed this will upon July 20, 1880. He did not die until May 27, 1897, nearly 17 years afterwards; having in the meantime added five codicils, the last of which was made upon March 11, 1897. By it he ratified the will and the second and third codicils

thereof. The will and its several codicils were duly admitted to probate by the register of wills, but at the instance of Martha Buchanan, the only daughter of the testator, an appeal was taken to the orphans' court, and an issue was thereafter awarded, and sent to the common pleas for trial, wherein Martha Buchanan was plaintiff, and the executors and the remaining legatees under the will were defendants. The issue, as framed, involved an inquiry into the question of the general sanity of the testator, and also as to the exertion of undue influence in the making of the will upon the part of certain persons, called "Spiritualists." But no evidence was offered which tended to show that any undue influence was exercised upon the testator by any living person, and this portion of the inquiry was therefore narrowed to what was incidental to the allegation of mental incapacity. This, it was contended, existed as the result of a delusion under which the testator rested with regard to his daughter and her sons, which influenced him and prejudiced him against them in the making of his will. There was no testimony which questioned the general sanity of the testator, or which showed any lack of ability upon his part to conduct in an entirely rational and proper manner the ordinary transactions of life.

In order to justify the setting aside of the will upon the grounds submitted, there must be evidence not merely that the testator was the victim of a delusion, but that he was controlled by the delusion in the making of his will, and was led by it to improperly disregard his daughter and her sons. Does the record show that there was any such evidence in this case? The estate seems to have been modest in amount, and the provision made by the testator for the comfort of his daughter and his housekeeper during their lives would apparently consume a large portion of the income. The contestant does not, however, regard with disfavor these provisions of the will, nor does she seem to consider them as instigated by an insane delusion. It is the failure of the testator to give her the entire estate in fee which she testifies is, in her opinion, proof of his partial insanity. This court, in *Taylor v. Trich*, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679, after citing authorities defining "partial insanity," and discussing their application, said: "The question in any given case is, therefore, whether the act under investigation was done upon consideration of existing facts, or under the influence of a delusion that controlled the will of the doer, and destroyed his freedom of action." In the present case the question is whether Alexander McIlroy was, at the time he made his will, subject to a delusion, amounting to partial insanity, which controlled him and prevented the free exercise of his judgment; it being alleged that the particular delusion to which he was subject was an unfounded distrust

of his daughter, and a feeling of ill will against her and her sons. Unquestionably, he was a believer in Spiritualism. But there is abundance of authority for the proposition that mere belief in Spiritualism, ghosts, dreams, etc., is not proof of insanity. There are many cases holding that without proof that such a belief resulted in some insane delusion, which prompted the act sought to be set aside, the act is valid, however extreme or unreasonable the faith in Spiritualism or other like beliefs.

In the *Matter of Halbert's Will*, 15 Misc. Rep. 308, 37 N. Y. Supp. 757, Surrogate Collier says: "Some evidence was given in reference to the religious belief of decedent. For many years she had been a Spiritualist, and had done many things consistent with the teachings of Spiritualism. She visited the cemetery, and communed with the spirits of her deceased husbands; set apart a bedroom for them in order that they might have a place to rest when they visited her; placed at the table a sufficient number of plates for them; and did numerous other things attributable, from this evidence, to her belief. We are not to treat Spiritualism theologically, but legally, in its application to the testamentary capacity of the testatrix. It matters not what our individual opinion may be as to the facts, formalities, or claims of Spiritualism. That has nothing to do with this case. There is no evidence that decedent did things other than those which are understood to be the result of the teachings of Spiritualism. There was no delusion which was the result of her belief which entered into the execution or preparation of this instrument. It is well settled that believers in this faith, when testamentary capacity is in question, must be considered in the same light as those who take part in any other religious ceremony."

In the *Matter of Bohe's Will*, 22 Misc. Rep. 415, 50 N. Y. Supp. 392, says Surrogate Marcus, on page 418, 22 Misc. Rep., and on page 394, 50 N. Y. Supp.: "The testimony offered by the contestants relating to the Spiritualistic séances, when closely analyzed, seems to show nothing but the fact that the testatrix was a believer in Spiritism. There is an entire absence of testimony as to the influence of Spiritualism upon the particular disposition of her property as made by her. It must be conceded that the evidence proves conclusively that the testatrix was a believer in Spiritism, but it in no way shows that her visits amongst the people with whom she came in contact at the time the séances were held, or the messages received by her from interested or disinterested persons, affected by the same belief, in any way induced her to make any disposition of her property in any particular or specified way, or in any way. It may be that some influence, by means of these séances, was obtained over her, but by whom, and to what purpose, is not shown. It may be that all these Spiritualistic séances and

messages were a scheme of deception and fraud, but there is no proof in the case which ought to support a judgment that such was a fact. * * * The will of one who believes in Spiritism is not on that account void, nor is it evidence of mental unsoundness. It must be shown, in order to void a will on that account, that it was the offspring of such belief."

To the same effect is *Keeler v. Keeler*, 20 N. Y. St. Rep. 439, 3 N. Y. Supp. 629; and the cases are well summed up in *Middle-ditch v. Williams*, 45 N. J. Eq. 728, 17 Atl. 826, 4 L. R. A. 738, where the vice ordinary says (page 735, 45 N. J. Eq., page 830, 17 Atl., and 4 L. R. A. 738): "The testator's belief in spiritualism was not a morbid fancy, arising spontaneously in his mind, but a conviction produced by evidence. The proofs show that, when he first commenced attending what are called 'séances,' he was inclined to be skeptical; afterwards his mind seemed to be in an unstable condition—he sometimes believed, and at others doubted—and that it was not until the spirits gave an extraordinary exposition of their power * * * that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice Chancellor Gifford in *Lyon v. Home*, L. R. 6 Eq. 655, 682, when he called them 'mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious, and, on the other, to assist the projects of the needy and of the adventurer,' still it seems to me to be entirely clear that it cannot be said that a person who does believe in their reality is, because of such belief, of unsound mind or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in Spiritualism is not insanity. The court, in *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473, said: 'Belief in Spiritualism is not insanity, nor an insane delusion. * * * The term "delusion," as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist.' And in *Brown v. Ward*, 53 Md. 376, 398, 36 Am. Rep. 422, it was said: 'The court cannot say, as a matter of law, that a person is insane because he holds the belief that he can communicate with spirits [of the dead], and can be and is advised and directed by them in his business transactions and the disposition of his property.' Subsequently the same view was expressed in *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578, and also in the *Matter of Smith's Will*, 52 Wis. 548, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756. The utmost length to which any court has yet gone on this subject is to declare that a belief in Spiritualism may justify the setting aside of a will, when it is shown that the testator, through fear, dread, or reverence of the spir-

it with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and, in disposing of his property, followed implicitly the directions which he believed the spirit gave him; but in such case the will is set aside, not on the ground of insanity, but of undue influence."

Turning again to the present case, we find from the testimony that while the testator held firmly to the conviction that he could, through mediums, communicate with the spirits of the departed, and particularly with the spirit of his dead son, yet it does not appear that he believed or ever admitted that he was influenced in any way by the spirits in the preparation of his will. Neither at the time when the will was executed, in 1880, nor when the various codicils were added from time to time, during a period of 17 years thereafter, was there evidence that he claimed or admitted that he was guided or controlled by the advice or suggestion of his spirit friends in the disposition of his estate.

But while it is not urged upon behalf of the contestant that there is any direct evidence that any provision of the will was inserted at the instance of any one known as a "Spiritualist," or by reason of any communication to the testator from the spirit world, yet it is strongly urged that through his faith in the reality of such communications, and his daughter's contempt for any such belief, which excited his anger, the testator became imbued with an insane delusion concerning his daughter and her sons, which prejudiced him against them. But in so far as any such ill will existed, it can be accounted for upon perfectly natural grounds. The daughter admits frequent disagreements with her father upon the subject of Spiritualism, and says that she did not hesitate to express her contempt for his belief, and that she sought to convince him of his credulity. Few parents are willing to meekly accept reproof and admonition from a son or daughter. But whatever these differences of opinion may have been, they were not very serious, for the testator continued to show the genuineness of his affection in a most practical way, by providing a house for his daughter and her family to live in, and contributing for many years to their support.

The testimony does show that he was at times suspicious and irritable, and was subject to infirmities of temper. But the same may be said of many men who are not to be charged with partial insanity. In her evidence, Mrs. Buchanan passes in review some 30 years of the life of her father. She recalls and recites a number of instances of queer and whimsical conduct on his part during that long period of time. Told connectedly, and massed together, their effect is greatly heightened. But if it be remembered that in point of fact they were isolated instances, distributed through long years of a life indisputably sane and normal in its

everyday aspects, they lose much of their force. Many of them occurred years before the will was made. None of them are connected with its execution, and during all the time in which the contestant alleges that there was a display of ill feeling upon the part of her father towards herself and her sons, she was being sheltered in the home which he had provided for her and her children, and was being supported by his bounty. She testifies that for years he gave her an allowance of \$50 per month, and this out of the modest pay of a night watchman. With advancing years and increasing feebleness, and the loss of his own position, he was unable to maintain this allowance to her. But the terms of his will, and the careful provision he there made for her, are in total disaffirmance of the idea that he was under any delusion which induced any feeling of unkindness or ill will towards her. He had provided for her during the years while her children were growing up, and when he made his will she was a woman in middle life, with a family of grown-up sons and a daughter. Surely the testator may be pardoned if, under these circumstances, he felt that he had done his paternal duty. Nor is there occasion for wonder, if, after making further reasonable provision in his will for this same daughter and for his faithful housekeeper, he felt at liberty to indulge a desire to perpetuate his name through a bequest for the benefit of a belief from whose teachings, however mistaken he may have been, he undoubtedly felt that he had received much comfort and consolation. We find no ground for the assumption that the daughter was entitled to the whole of her father's estate in fee, and that his failure to give it to her was caused by an insane delusion which made her the object of his ill will.

While the various assignments of error to the charge of the court may not be specifically sustained, yet a careful consideration of the evidence has satisfied us that, as a whole, it falls short of sustaining the allegations either of testamentary incapacity or undue influence.

We think that, under all the evidence in the case, the defendants were entitled to binding instructions in their favor. The tenth assignment of error is therefore sustained, the judgment is reversed, and the issue is directed to be set aside; the costs to be paid by the appellee.

WHITE v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. Feb. 6, 1903.)

NEGLIGENCE—PERSONAL INJURY—RAILROAD COMPANY—TRANSPORTING DEFECTIVE CAR.

1. Plaintiff, while in the employ of a transportation company, in unloading a car, fell through a hole in the bottom of the car. The

loaded and sealed car was received by defendant from another railroad company, and transported to its destination at the wharf of plaintiff's employer, and there left in its control, to be unloaded. The car did not belong to defendant, or to the company from which it received it, and it had no knowledge of the condition of the floor of the car, or right to open the car to ascertain the condition, and it had no control of the car after leaving it at the wharf until it should be unloaded, and then only to remove it. *Held*, that defendant was not liable for such injury.

Action by James E. White against the New York, New Haven & Hartford Railroad Company. Heard on petition of plaintiff for new trial after a directed verdict for defendant. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

Tillinghast & Murdock and W. R. Bartlett, for plaintiff. David S. Baker, for defendant.

TILLINGHAST, J. The material facts in this case are as follows: The plaintiff was employed by the Merchants' & Miners' Transportation Company as a longshoreman and freight handler at its wharf in Providence. The defendant was in the habit of placing cars upon its tracks in the yard occupied by said transportation company for the purpose of having them unloaded. After delivering them in the yard, the defendant exercised no further control over them until they were unloaded, when it would remove them from the yard. On the day of the happening of the accident in question the plaintiff was unloading car No. 3,443 of the Delaware & Hudson Canal Company in said yard. This car had come from the Boston & Maine Railroad, and was delivered, fully loaded and duly sealed, to the defendant, at Concord Junction, and by the defendant was delivered in the yard aforesaid for the purpose of being unloaded. The plaintiff, with others, was sent into said car by the transportation company to unload it, and while thus employed he fell through or into a hole in the floor of the car, and was injured, whereupon he brought this action against the defendant to recover damages for said injury. At the trial of the case in the common pleas division, after the evidence was all in, a verdict was rendered for the defendant by direction of the court, and the case is now before us on the plaintiff's petition for a new trial on the ground that said direction was erroneous.

The plaintiff contends that, in view of the facts aforesaid, there was an implied invitation from the defendant to him to go upon the premises, which were controlled by the defendant, and hence that it was bound to exercise due care to the end that no harm should befall him while there by virtue of its invitation. We cannot assent to this contention. The plaintiff was not in the employ of the defendant. The car which he was unloading at the time he received the injury in question did not belong to the defendant, nor can it be said that he was on

said car by reason of an implied invitation from the defendant. The transportation company, according to the evidence, had full charge and control of the cars while in the yard, in so far, at any rate, as the unloading thereof was concerned; and the persons doing said work were under the sole control and direction of said transportation company. After the defendant had delivered the cars which it was hauling in said yard, it evidently had nothing further to do with them until they were unloaded by the transportation company. We fail to see, therefore, that the defendant owed any duty to the plaintiff in the premises, or that he was upon said car by reason of any invitation, either express or implied, from the defendant. Moreover, the car in question was not loaded by the defendant, nor did it have any knowledge or reasonable means of knowledge of the defective condition of the floor thereof. It was delivered in said yard in the same condition, so far as appears, as it was in when received by the defendant. In other words, defendant had nothing to do with the car except to receive it from one common carrier, namely, the Boston & Maine Railroad Company, and deliver it to another, namely, the Merchants' & Miners' Transportation Company, in said yard. And when this was done its liability in the premises ended. It had no right to open the doors of said car, except in case of emergency, but was bound to deliver it in the same condition in which it was at the time it was received. In view of these facts, we think it is clear that the defendant is not liable for the accident. It merely acted as a carrier or transporter of said car, and, under the circumstances, it owed, in respect to the defective condition of the floor of said car—of which it had no notice—no duty to any one.

"Common carriers," said the court in *A. T. & S. F. Ry. v. Bump*, 60 Ill. App. 444, "transport equally for all, new and old, sound and broken machinery, carriages, cars, and utensils, not necessarily or known to be dangerous to handle or use. In merely delivering goods in the condition in which they were received by them they make no warranty, express or implied, that it will be safe or prudent to handle or use such goods." See, also, *Sawyer v. Minn. & St. Louis Ry. Co.*, 38 Minn. 103, 35 N. W. 671, 8 Am. St. Rep. 648. The case at bar is quite different from what it would have been if it had appeared that the defendant had selected a defective car, and delivered it to said transportation company to unload the goods therefrom. In such a case it would be chargeable with having selected a car from which, to its knowledge, the goods were to be unloaded by the transportation company, and hence the duty of notifying the latter of the dangerous condition thereof would have arisen. See, in this connection, *Pa. Ry. Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700. But in the present case the defendant

had no power of selection as to the car in question, but merely transported the one which was delivered to it, nothing appearing in connection therewith to show that it was in any wise an unsuitable or dangerous car to haul or to deliver for the purpose of being unloaded.

We fail to see that the case of *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, cited by plaintiff, furnishes any support for the position taken by him. On the contrary, it seems to us to militate against him. Speaking by Stiness, C. J., in that case, this court said: "Cases which involve the liability of a defendant to those with whom he does not stand in privity of contract may be grouped into three classes: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the thing; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous." That the car in question was not a thing of a noxious or dangerous kind inherently, is evident. And that the defendant was under no duty to particularly inspect it as to its structural condition, in so far as to its being safe for others than its own employees to handle was concerned, requires no argument. The case, therefore, clearly does not fall within the first of the three classes above referred to, and it certainly cannot be claimed that it falls within either of the other two of said classes; for no fraud or deceit is alleged or claimed, and no negligence on the part of the defendant in the construction of the car.

The case of *Gottlieb v. N. Y., Lake Erie & Western R. R.*, 100 N. Y. 462, 3 N. E. 344, relied on by the plaintiff, also fails to sustain the position taken by him. In that case the plaintiff was in the employ of the defendant corporation, and was injured while in the discharge of his duties as a brakeman. He was attempting to couple two freight cars in the nighttime, and was crushed between them by reason of defective drawheads or bumpers. And the court held—and very properly—that the defendant was under obligation to its servants to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars, and machinery for the discharge of their duties; and also that it was responsible for the condition of the cars of other roads, taken onto its line, where the defect was an obvious one, and easily discoverable by ordinary inspection.

In the case at bar, as we have already seen, no contractual relation existed between the plaintiff and the defendant, and hence the law applicable to master and servant has no application.

As the evidence produced at the trial failed to show any liability on the part of the defendant for the injury sustained by the plaintiff, the presiding justice properly directed

a verdict for the defendant. The plaintiff's petition for new trial is therefore denied, and case remanded for judgment on the verdict.

In re PEIRCE.

(Supreme Court of Rhode Island. Feb. 9, 1903.)

WILLS—SPECIFIC LEGACY—ADEMPTION—EXCHANGE OF STOCK.

1. Testatrix bequeathed certain stock in a bank. Subsequently, but during her lifetime, the bank consolidated with other banks, the new concern taking over the liabilities and assets of the several banks without a formal liquidation, and their stockholders being entitled to exchange their stock for shares in the consolidated bank. Testatrix did so, making a small additional payment in cash. *Held*, that as the transfer was not a sale, but an exchange, there was no ademption of her legacy.

Case stated by Thomas Peirce for the construction of a will. Opinion rendered.

Argued before STINESS, C. J., and TIL-LINGHAST and DOUGLAS, JJ.

Thomas F. I. McDonnell, Charles F. Stearns, Frank L. Hinckley, and Arthur M. Allen, for parties.

PER CURIAM. The court is of opinion that the stock in the United National Bank goes to William C. Baker, trustee, under the bequest of the stock in the Rhode Island National Bank.

There was no ademption of the legacy of the stock in the Rhode Island National Bank, because, though in form a sale, the stock was not in fact sold, but exchanged. In *Soule* for an Opinion, Prov. Co. Eq. No. 5,861, it was held that stock in the Manufacturers' Trust Company passed under a legacy of stock in the Manufacturers' National Bank, for which it had been given in exchange, under a reorganization and a new charter. In that case one bank reorganized, and in this case four banks reorganized and consolidated. There is no essential difference in the cases. The fact of an exchange rather than a sale is evidenced by the terms of the offer, by which stockholders of each bank were entitled to stock in the new company by way of exchange. The units of value were different; still it was an exchange. Stockholders of the four banks had their rights to the new stock by virtue of ownership of the old stock. All the assets and liabilities of the four banks passed to the new corporation. Neither bank was wound up in the ordinary form, but its assets were to be liquidated by the United National Bank. The owners of stock in the Rhode Island National Bank were to have an additional amount over the nominal price at which their stock was taken, according to the liquidation of its assets—a fact which traces the ownership of stock into the new corporation. The offer made to stockholders of the four banks was to substitute their ownership of stock in those banks, according to its value, for stock in the new bank, or

to sell it for cash. The testatrix in this case chose the former. The transfer of stock under such circumstances cannot be treated as a sale, unless it was done under an acceptance of the cash offer therefor.

The small payment in cash, to equalize values between the several banks, did not change the character of the transaction.

HEALEY et al. v. KELLY.

(Supreme Court of Rhode Island. Jan. 9, 1903.)

PLAT—DEED—DESCRIPTION—LOT BOUNDING ON STREET—EASEMENT—OBSTRUCTION—ABANDONMENT—STREET—EXCLUSIVE POSSESSION.

1. A property owner platted a tract of land, showing streets and lots therein, and afterwards conveyed a lot not shown on the plat, but located on the south side of one of these streets, the deed describing the lot as bounding "northerly till it strikes the south line of F. street [the street in question], thence in the line of said street easterly," etc. His deed to lots on the north side carried title to the centre of the street. *Held* that, since the grantor retained title to the south half of the street, his deed carried title to the middle thereof, subject to the easement of a way.

2. The grantee and his assigns were entitled to an easement in the street to its full length, and not merely to that part of the street directly in front and between the lines of the lot.

3. The owners of a lot on one side of a street sued to enjoin the owner of lots on the opposite side from closing the street. Previous thereto complainants' grantor had been sued by respondent for maintaining an obstruction in the street, which he claimed was within his own line, the width of the street being disputed. *Held*, that this obstruction was not an abandonment of the easement in the street.

4. The maintenance of steps in a street for the more convenient use of the way in going from one street to another, where there is a bank, is not an exclusive possession of the way, as any one entitled to use the street could use the steps.

Bill in equity by James H. Healey and others against Alice Kelly for an injunction, etc. Decree for complainants.

In 1847 one Hewitt owned a tract of land in Providence. He caused a plat of a portion of it to be made and recorded showing streets and house lots. He conveyed to one McKenna a portion of this land, consisting of a lot on the south side of one of these streets, but not shown on said plat, bounding "northerly till it strikes the south line of Federal street [the street in question], thence in the line of said street easterly." By mesne conveyance this lot is now in the complainants. The defendant owns lots 13 and 14 on said plat, opposite the above-described lots, and has put steps in the street, has carted in sand, etc., and has closed the street, claiming that the complainants have no easement in the street as a whole, nor any title, beyond the line of their lot.

Argued before STINESS, C. J., and TIL-LINGHAST and ROGERS, JJ.

P. Henry Quinn, for complainants. Doran & Flanagan, for respondent.

PER CURIAM. The court is of opinion that the effect of the deed of Hewitt, in 1847, was to carry title to the middle of the way called Federal street to Michael McKenna, ancestor in title to the complainants, and hence to them. *Anthony v. Providence*, 18 R. I. 699, 28 Atl. 766; *Baker v. Barry*, 22 R. I. 471, 48 Atl. 795.

While the street was shown on a plat of land belonging to Hewitt, in which the lot in question was not included, he owned the lot abutting on said street, and, therefore, as his deed of lots on the north side carried title to the center of the street, he retained title also to the center, while he owned the lot in question on the south side, and it passed to his grantee and so on to the complainants, who have title subject to the easement of a way, not by reason of ownership on the plat, but by bounding on the street.

The respondent claims that the complainants' title in the street cannot extend beyond the line of their lot. This is true; but it does not establish the respondent's right to maintain the fence between Federal and Gesler streets, because the complainants are entitled to an easement in the street to its full length. It would be absurd to hold that an owner had an easement only between the lines of his lot, for he could then be shut off on both sides, and thus be deprived of the use of the street.

A previous obstruction of the way by the grantor to the complainants, for which the respondent brought suit (*Equity*, No. 3,189, April, 1891), does not amount to an abandonment of the way, if it would at all, when, as it appeared in that case, the width of the street was disputed, and the respondent claimed the obstruction to be within his own line.

The maintenance of steps by the respondent in the street was not an exclusive possession. They were for the more convenient use of the way in going from one street to the other, where there was a bank. Any one entitled to use the street could use the steps.

The complainant is entitled to the relief prayed for.

In re MARTIN et al.

(Supreme Court of Rhode Island. Feb. 2, 1903.)

WILLS—CONSTRUCTION—FUND FOR PAYMENT OF DEBTS—GENERAL AND SPECIFIC LEGACIES—ORDER OF APPLICATION—EXPENSES OF ADMINISTRATION—RESIDUARY BEQUESTS—ABATEMENT OF LEGACIES.

1. The general scheme of distribution of property provided for by testatrix in her will was to provide for her only son, and exclude his creditors from any benefit thereunder. Her property was much diminished, through various causes, between the time of the execution of her will and her death; and she had also become surety on certain obligations of her son, secured by a pledge of stock. About four years after the execution of the will she added a

codicil, in which she provided that her trustee should pay the obligation for which she had become surety, provided that the trustee received from the pledgee the stock held as collateral. Testatrix knew at the time she executed the codicil the condition of her estate, and that under the will, as it stood, her property would not be sufficient to pay her general pecuniary legacies. *Held*, that it was testatrix's intention that her estate should be subrogated to her son's rights in the pledged stock, and hence the debt secured thereby should be paid by a sale of the stock.

2. Where a codicil prescribed that the trustee under the will should pay a certain debt of the estate, and the trust fund was not charged with the debt, and the trustee was also executor, the debt should be paid by him as executor.

3. Under a will providing that the trustee should receive all the income arising from a certain farm, and, after paying necessary expenses and taxes, pay the residue of the income to testatrix's son, but further providing that the trustee should permit the son to live on the farm, and so discharge the trust, as to any income therefrom, so long as the son did not forfeit the same, the son, if living on the farm, should pay the taxes, repairs, and expenses.

4. Where several trust funds are created by a will, each should be separately taxed for the payment of its individual expenses of management and tax; but the common expenses of proving the will, paying debts, and transferring legacies should be paid from the estate as a whole.

5. Where a will shows no intention on the part of testatrix to exonerate the personal estate from liability for debts, the testatrix's personal estate is primarily liable. On the exhaustion of the personal estate, general legacies and devises, both standing on a footing of equal liability and ratable contribution, must be resorted to; and, after them, chattels specifically bequeathed, and real estate specifically devised, contributing pro rata according to their value at testatrix's death. Each class must be exhausted before resorting to the next.

6. A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate.

7. A specific legacy is a gift or bequest of some definite, specific thing, capable of being designated and identified.

8. Gifts of stated sums of money, without specifying any distinctive money, in contradistinction to any other money of like amount, are general legacies.

9. Where a will provided that testatrix's son should be permitted to live on a certain farm, in lieu of receiving the income thereof, and after his death the farm to be sold, and the proceeds to go to ulterior donees, the legacy is a specific one, notwithstanding its inclusion under the clause, "all the real estate of which I shall die seised, * * * excepting * * * my homestead."

10. Where a will provides that the trustee should sell testatrix's homestead, and invest the proceeds for the benefit of testatrix's son, and, after his death, pay the principal to ulterior donees, the bequest is specific.

11. A legacy of promissory notes is a specific legacy, subject to reduction by payments made prior to the death of testatrix.

12. A legacy of "my stock" in a certain bank is a specific legacy of all the stock standing in testatrix's name at the time of her death.

13. A legacy of 230 shares of stock in a designated corporation is specific.

14. No part of the income of funds or property specifically bequeathed can be used to pay debts of testatrix, if there was sufficient property not specifically bequeathed.

15. A residuary bequest is general, and not specific, though articles bequeathed are enumerated.

16. A residuary legatee cannot call upon either general or specific legacies or devisees to abate in his favor, even if the entire residue be exhausted.

Petition for an opinion on a case stated for the construction of a will by George A. Martin, executor and trustee of the will of Amey Mowry, deceased, and others. Opinion rendered.

Argued before STINESS, O. J., and TIL-LINGHAST and ROGERS, JJ.

Clarke H. Johnson, Walter S. Reynolds, Dexter B. Potter, Cooke & Angell, Arnold Green, John C. Pegram, Comstock & Gardner, Van Slyck & Mumford, and Barney & Lee, for various parties.

ROGERS, J. This is a petition in equity, under chapter 240, § 24, Gen. Laws R. I. 1896, for an opinion, preferred by George E. Martin, executor and trustee, and by Herbert Winsor Mowry, Walter Scott Mowry, and others, devisees or legatees, under the will of Amey Mowry, of Providence, deceased, for the construction of certain clauses thereof, and of the codicil thereto.

It appeared that the testatrix died at Providence, October 12, 1900, leaving a last will, dated September 25, 1894, and a codicil thereto, dated October 20, 1898, which said will and codicil were duly admitted to probate November 7, 1900, and said Martin was duly appointed as executor and trustee thereunder, and is now acting as such; that said Herbert Winsor Mowry and Walter Scott Mowry are father and son, and son and grandson, respectively, of the testatrix, and her sole lineal descendants living at the date of her will and at the time of her death; that said will contained a dozen separate devises and bequests, some being general and some specific. The residuary clause was as follows: "Fifteenth. All the rest and residue of my estate I give, devise and bequeath to my said son, to him, his heirs and assigns forever, including all my household furniture, ornaments, books, pictures and utensils." The bulk of the testatrix's property was given by a series of devises and legacies to said Martin in trust for her said son's benefit for life, and after his death to said son's children, or their lineal descendants, with ulterior gifts, in certain contingencies, over to certain persons or charitable institutions—mostly the latter. The only purpose apparent in breaking the aggregate amount of the legacies for the benefit of her son up into numerous separate trusts was to distribute the ulterior gifts, should they ever take effect, among a large number of objects—mostly charitable institutions.

The codicil directed the trustee, in the words thereof, "as soon as reasonably may be after my decease to pay the indebtedness which my son Herbert Winsor Mowry now owes, or may then owe to Jewett City Savings Bank, provided that said trustee and his successors receive from said bank the shares

of the capital stock of Slater Cotton Company of Pawtucket, Rhode Island, now or then held by said bank as collateral to said indebtedness."

It further appeared that on September 25, 1894, the time of the execution of said will, said testatrix was seised and possessed of no real estate other than the homestead estate and the farm in Cranston mentioned in said will, nor did she acquire any other real estate, but died seised and possessed of said homestead and said farm; that at the time of the execution of said will, in 1894, the testatrix was possessed of certain personal estate detailed in the petition, together with money and other personal property aside from that specifically bequeathed, to an amount probably sufficient to pay the pecuniary legacies named in the 4th, 5th, 6th, 7th, and 10th clauses of said will; that at the time of the execution of said will the testatrix was not possessed of property much, if any, in excess of the amount required for the general and specific devises and legacies of said will and to pay debts; that thereafter, on account of a prolonged illness, covering a period of years from the date of said will till the time of her decease, the property of the testatrix was materially reduced, so that at the time the codicil was executed, in October, 1898, said testatrix was possessed of considerably less than when said original will was executed, in September, 1894, and at the time of her death her said property had been still further reduced, and comprised, besides said homestead and farm, and certain personal property specifically bequeathed, other personal property not specifically mentioned in said will, to an amount somewhat in excess of that required to pay debts and funeral expenses, but not nearly enough to pay the general pecuniary legacies; that the testatrix knew the condition of her property at the time said will was executed, and also when said codicil was added thereto; that the indebtedness of Herbert Winsor Mowry to the Jewett City Savings Bank, mentioned in said codicil, had been incurred some years prior to October, 1898; that the capital stock of the Slater Cotton Company then and now held by the said bank as collateral security for the payment of the note of Herbert Winsor Mowry was at that time, and now is, the property of said Herbert Winsor Mowry, subject to the rights of said bank as pledgee, said stock having been acquired by him by will from his father, who died in 1889, and having been by said Herbert Winsor Mowry pledged as collateral as aforesaid; that said shares of stock stood on June 10, 1891, and have down to the present time stood, and now stand, upon the books of said Slater Cotton Company, in the name of the Jewett City Savings Bank, of Jewett City; that some time shortly prior to the time of the execution of said codicil said bank had demanded further security for the payment of said note of Herbert Winsor

Mowry, and that the testatrix, his mother, had indorsed said note, or guarantied the payment thereof, thereby rendering her and her estate liable for its payment; that for the trustee to pay said indebtedness of Herbert Winsor Mowry, as directed by said codicil, will take well towards one-half of the entire estate in his hands as trustee, and that the amount applicable to the general legacies would be entirely inadequate to pay said indebtedness, unless some or all the legacies given in paragraphs 9, 11, and 13, to be hereafter considered, shall be held to be general, and not specific; that at the time said will was executed, in 1894, said Herbert Winsor Mowry was quite heavily indebted, through recent business losses, but when said codicil was added, in 1898, a very large percentage, if not all, of these claims against him, outside of said claim of the Jewett City Savings Bank, had become nonenforceable through the operation of the statute of limitations.

The opinion of the court is sought upon several questions, some of which are involved with others relating to the marshaling of the decedent's estate for the payment of debts and the satisfaction of legacies. We shall therefore answer the questions deemed necessary to be answered, in such order as appears to us most logical and convenient.

The gist of the petitioners' first and second questions, stripped of some of their ramifications, to be considered later, practically amounts to this: Out of what funds is the indebtedness of Herbert Winsor Mowry to be paid, as directed in said codicil?

In our opinion, it should be paid out of the collateral, so far as the same will go. This seems to us to harmonize with the intention of the testatrix, gleaned not alone from the expressions used in the codicil, but also from the scheme of the whole will, and the circumstances existent at the time of the making of the codicil.

When the will was made, in 1894, the chief object of the testatrix's bounty was naturally her only son; but it is noticeable that that bounty was carefully restricted to the personal enjoyment of that son, and that his creditors were studiously excluded from any benefit thereunder, for the son's enjoyment was restricted to the income alone, except as to the residuum, the residuary amount of the estate under the will being little or nothing; and the son's interest in the income was to be forfeited in case of his alienation, incumbrance, or anticipation of said income, or any part thereof, or if by reason of his insolvency or bankruptcy, or by any attachment, levy, or other proceedings by creditors, or other cause whatever, said income, or any part thereof, should, or, but for the proviso now being mentioned, would, become vested in or payable and pass to or for the benefit of any person other than her said son. The testatrix at that time clearly intended that none of her estate should be applicable to the

payment of her son's debts. After making her will, and before making her codicil, she had put herself into different relations to her son's indebtedness, or a part thereof, by guarantying as further security the payment of his indebtedness to the Jewett City Savings Bank, for the payment of which indebtedness her son had already given the bank certain Slater Cotton Company stock as collateral security. Her son's debts to said bank had thus become her obligation, and, if he did not pay it, she would be obliged to do so. Knowing, as she did, that if her said son's note, thus guarantied by her, was not paid by him during her lifetime, it would be a liability upon her estate, which, like other debts and liabilities of her estate, would have to be liquidated before her estate could be settled, she took steps in her codicil to protect her estate, and to provide how that note should cease to be binding upon it. Her purpose in making her codicil was not to bestow more bounty upon her son, but, as far as possible, to protect her estate from the loss he had probably put upon it. The clear intent from the language of her codicil, reinforced by the scheme or structure of her whole will, was that the trustee, or, rather, the executor under her will (for the same person was both executor and trustee), should take up the note, receive the collateral, and apply it to reimbursing her estate, so far as sufficient. In other words, her estate was to be subrogated to the rights of the bank, for, though she was bound to pay the bank if her son did not do so, yet, as against her son, he would be her debtor, as she would succeed to the rights of the bank.

In *Dean v. Rounds*, 18 R. I. 436, 446, 27 Atl. 515, 28 Atl. 802, 803, this court said: "Subrogation applies where one party pays a debt for which another is primarily liable, and which, in equity and good conscience, should have been discharged by the latter." In *National Bank v. Cushing*, 53 Vt. 321, 326, the court said: "It is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, that a court of equity substitutes him in the place of the creditor as a matter of course, without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor's rights without an agreement to that effect." See, also, 24 Am. & Eng. Ency. of L. 194, note 5, and cases cited.

It has been urged that, to construe the codicil thus, much must be read into it that is not there; and it is contended that the debt must be paid by the trustee or by her estate, and that the Slater Cotton Company stock pledged as collateral must be surrendered to the son, to whom it would belong if the note was paid. We fail to see any reasonableness in such a view. Had the testatrix contemplated the delivery of the stock to her son, released from all claim by her estate by way of subrogation upon it, it would have

been very easy to have said so. Her not saying so, but providing that it should be received by her trustee, is a strong indication that her purpose was that it was to be received as any other guarantor paying the note would have received it, viz., by way of subrogation. Should her son have paid the note, he would have received the collateral upon such payment; and if her estate pays it out of the collateral, and a surplus thereof remained after such payment, the son would be entitled to such surplus. If the Slater Cotton Company stock is not sufficient to pay the bank in full, then the testatrix's estate must pay the balance due, the same as would have been the case had there been no collateral, for the testatrix was guarantor for the payment of her son's whole indebtedness to the bank.

While the consent of the son in reducing to money the collateral, to the surplus of which, over and above what is necessary to pay the note it secures, he would be entitled, would doubtless aid the trustee, yet the assent of the son is not necessary in effecting the subrogation.

The codicil provides that the trustee shall pay the debt of the son therein referred to, but there are at least eight different trust funds raised under said will, and, though one person is made trustee of the several trust funds, a different person with equal propriety might have been made trustee of each fund. No particular trust fund is charged with the payment of said indebtedness, and inasmuch as the person named as trustee of all the several trusts is also named as executor, whose duty it ordinarily would be to see to the payment of the debts of the estate, the words of Durfee, C. J., in Boardman, Petitioner, 16 R. I. 131, 142, 145, 13 Atl. 94, 97, are applicable here: "There is no stereotyped rule for administering testate estates. Every such estate should be so administered, if possible, consistently with the law, as to carry out the purposes of the testator, as those purposes appear from the will, interpreted as a whole, in the light of the circumstances in which it was made. The same persons are executors of the will and trustees under it, and it seems to us that its obscurity arises in part from the fact that the draftsman of the will has not always observed the distinction between their capacities, but has sometimes confused and intermixed them so that it is impossible to discern clearly where the functions of the executors were intended to end, and those of the trustees to begin. * * * It is the duty of a court, in construing a will, to bear in mind the circumstances under which it was made, so as to look at it, as far as possible, from the testator's point of view." There being no purpose that we can discover in having the trustee do what the executor is in a very much better position to do, we are of the opinion that the word "trustee" was inadvertently used instead of the word "executor," which was intended, and that there-

fore the word "trustee," as used in the codicil, must be construed as meaning the executor.

The foregoing seems to us to fully answer the first two questions propounded to us, unless, indeed, the collateral should be insufficient to pay the guaranteed indebtedness in full, and, inasmuch as the indebtedness not met by the collateral would be like any other debt of the testatrix, the fund from which it would be paid will be considered later on, when considering the marshaling of the decedent's estate for the payment of debts.

To the third question—as to whether the repairs and taxes on the Cranston farm shall be paid during the life of Herbert Winsor Mowry by the trustee under testatrix's will, or by said Herbert Winsor Mowry—we would say that in and by the second clause of said will, which disposes of said farm, it is expressly provided that "said trustee shall receive and collect all the income arising therefrom and after paying all sums necessary for taxes and expenses and all such other sums as may be required for the proper care and management of said trust property and for the execution of the trusts hereby created to pay over the residue of said income at reasonable periods to my son Herbert Winsor Mowry for his own use during the term of his natural life." Said second clause further provides that "said trustee may allow my said son to live on my farm in the town of Cranston and so discharge his trust as to any income therefrom so long as my said son has not lost or forfeited the same." The testatrix's directions seem to be very explicit that the taxes, etc., are to be paid out of the income of said farm, and that only the net income shall go to her son. The only question, therefore, that can possibly arise, is in case the son himself should live on the farm, as he is allowed to do. Even then, however, it seems to us, the son's living there is only to be in lieu of the net income, and that the son must pay taxes, repairs, etc., on said farm estate.

The son, under said clause, takes an equitable estate for life in said farm, subject in certain contingencies to forfeiture. Gen. Laws R. I. 1898, c. 48, § 8, provides that, "in case of a life estate, the interest of the tenant shall first be liable for the tax." That is a law for the protection of the state, but the testatrix could have made other interests first liable, as between the various interests in her estate, and the state would not have cared, provided the taxes were seasonably paid. The testatrix made no express provision that some other than the life estate should be first liable for taxes and repairs, and it is a well-settled principle of law that, as between life tenant and remainderman, the life tenant is liable for taxes and repairs. *Williams v. Herrick*, 18 R. I. 120, 123, 25 Atl. 1099, and cases cited. In the case of a tenant for life of land, it is the duty of the trustee to see that the equi-

table tenant for life, in rightful possession of the estate, pays all rates and taxes. 2 Perry on Trusts (4th Ed.) § 554.

Our opinion is that taxes and repairs on the Cranston farm are to be paid out of the gross income thereof, and, if said farm is occupied by said Herbert Winsor Mowry, they shall be paid by him, as a condition of such occupancy.

The ninth question propounded to us is so similar in character to the one just answered that we will consider it now. That question is as follows, viz.: "How are the taxes and expenses of administration of the various trust funds to be paid? Should each trust fund be taxed separately, and be charged with its proportion of the total cost of administration?"

In *Pearson v. Chace*, Ex'r, 10 R. L. 455, a testator gave to his wife the dividends and income of certain shares of bank stock during her natural life, or so long as she remained his widow, and in lieu of dower; the reversionary right being in his three daughters, who were also made his residuary legatees and devisees. It was held that the gift was one of income, and not an annuity, and that the wife, therefore, was liable to pay the taxes upon the stock so long as she received the income from it. The rule in case the gift constitutes an annuity is different. In the case last above cited, a gift of an annuity for life and a gift of the income of certain property for life were defined and distinguished; and we are clearly of the opinion that none of the trusts in the will of the testatrix in the case at bar constitute an annuity, in contradistinction to a gift of income.

In *Holcombe v. Holcombe*, 29 N. J. Eq. 597, where a fund was directed by a testator's will to be invested by executors, the interest payable annually to one for life, the court decided that the fund itself was taxable in the hands of the executors, and they have the right to retain the tax out of the interest. Van Syckel, J., in delivering the opinion of the court, after stating that, in the case of a tenant for life of land, it is the duty of the trustee to see that the equitable tenant for life, in rightful possession, pays all taxes and rates, and that it is a rule of general, if not of universal, application that it is incumbent upon a tenant for life to pay all taxes upon the lands, subject to the tenancy during his life (he being entitled to the enjoyment of it only during his lifetime, and being bound to transmit the estate as he received it), uses this language (page 601), viz.: "Upon principle, the same rule should be applicable to an investment by an executor, under the directions of a will, for the benefit of another for life. So long as the life tenant enjoys the entire produce of the fund, she should be required to keep down the taxes upon it; otherwise the fund itself must become impaired, and the entire burden thrown upon those who

take the fund at her death. If she had absolute ownership in the fund, she would have the taxes to pay, and there seems to be no reason why she should not pay the taxes during such period as she is entitled to the entire use and benefit of it." For a most copious collection of the authorities on this whole subject, see note to said case, page 597.

In answer to the ninth question, we are of the opinion that each trust fund should be taxed separately, and pay its own tax. In regard to the latter portion of the question, we think that the cost of general administration (that is, the expense of proving the will, paying the debts, and transferring the legacies, but not including legacy or succession taxes, if any, which come out of the respective devises or legacies) must be borne by the estate as a whole. After the executor has paid the trust funds over to the trustee, the executor, as such, has nothing more to do with the estate, his duties then ceasing. In this case, where the same person is both executor and trustee, when the trustee, as such, receives from the executor the respective trust funds, then it becomes the duty of the trustee thereafter to pay the expense of managing the respective trust funds out of the respective trust funds, each fund being kept as separate as though each fund had a different person for trustee.

As questions 4, 5, and 6 relate to the duty of the trustee in case of the death of persons still living, or of the happening of forfeitures under conditions that may never arise, we do not feel called upon to answer them until they cease to be academic, and become practical, questions. Should they ever become practical questions in the administration of the trusts under this will, application may then be made for their determination.

The seventh question propounded, is: "Out of what fund shall the debts be paid? Can any portion of the income from any of the funds or property specifically bequeathed in trust be used to pay debts, if the testatrix at death had enough property not specifically bequeathed to pay her debts?"

It is provided in Gen. Laws R. L. 1896, c. 218, §§ 1, 2, that the estate, real and personal, of every deceased person, shall be chargeable with the expense of administering the same, the funeral charges of the deceased, and the payment of his just debts; that the personal estate shall stand chargeable for such expenses, charges, and debts, in the first instance, and the real estate for all the same which the personal estate shall be insufficient to satisfy, excepting as thereafter provided, or unless the deceased has otherwise directed by his last will and testament. Under such statute provisions, the entire estate is liable for the payment of debts, if required, and will be applied, whatever the will, being designed for the benefit of creditors. Where, however, the whole estate is not required for the payment of

debts, it is competent for the testator to make the real estate, or parts of it, primarily liable in relief of the personalty. *Woonsocket Institution for Savings v. Ballou*, 16 R. I. 351, 353, 16 Atl. 144, 1 L. R. A. 555.

The first clause in the will at bar is as follows, viz.: "I direct that my just debts and funeral expenses be paid out of my estate." We fail to find in the will any indication of an intention on the testatrix's part to charge her real estate with the payment of debts in exoneration of the personal property therefrom, and it will be seen that under this will the debts of the testatrix are not expressly made chargeable upon any particular part of her estate. Although at the present day statutes in practically all jurisdictions where our system of jurisprudence obtains have had the effect of rendering all the estate of a deceased person assets for the payment of his debts, and liable at law to the claims of his creditors, yet courts of equity, in administering the estates of decedents, have worked out an order of liability of the different funds, which still obtains where the statutes do not expressly abrogate it, and which governs and regulates the relative rights of the representatives, heirs, legatees, and devisees of decedents. 19 Am. & Eng. Ency. of Law (2d Ed.) 1300. Our statute (Gen. Laws R. I. 1896, c. 203, §§ 25, 26), under the circumstances of the present case, do not abrogate that order; and that order of liability of the legatees and devisees, as amongst themselves, is what we understand the petitioners desire our instructions upon.

As the will in the case at bar, in our opinion, shows no intention on the part of the testatrix to exonerate the personal estate from liability for debts, the testatrix's personal estate, in contradistinction from her real estate, is primarily liable for the payment of her debts. *Potter v. Brown*, 11 R. I. 232, 234; *Calder v. Curry*, 17 R. I. 610, 616, 24 Atl. 103; *Gould v. Winthrop et al.*, 5 R. I. 319, 321. The general rule is that the general or residuary personal estate constitutes the natural and primary fund for the payment of the testatrix's debts. 19 Am. & Eng. Ency. of Law (2d Ed.) 1300.

The next class of property liable for the testatrix's debts in the case at bar comprises general legacies and general devisees; both standing on a footing of equal liability, and contributing ratably inter se. 19 Am. & Eng. Ency. of Law (2d Ed.) 1312, and cases cited.

Last in order of liability of property owned by the testatrix for the payment of debts are chattels specifically bequeathed and real estate specifically devised, without being subjected to a testamentary charge of debts. Devisees of specific real estate and legatees of specific chattels are generally considered as being in equal degree the object of their testator's bounty, and, conversely, the property given them is all equally liable for the testator's debts. Consequently, when it be-

comes necessary to resort to assets thus given, the general rule is that the specific legacies and devisees must contribute pro rata; the measure of liability being the value of the respective properties at the testator's death. *Farnum v. Bascom*, 122 Mass. 282, 285; 19 Am. & Eng. Ency. of Law (2d Ed.) 1313, and cases cited.

Of course each class of assets must be exhausted before resorting to the next class. Thus, the whole of the general or residuary personal estate must be exhausted before resorting to the general pecuniary legacies, and if the whole of that class is not required for the payment of debts, all of that class must contribute pro rata. If all of that class is insufficient to complete the payment of the debts in full, then resort will be had to specific legacies and specific devisees, both falling within the same class, and all specific legacies and specific devisees contributing pro rata.

To apply the above rules, it is necessary to define the character of the several gifts under the will, so as to determine to what class they respectively belong. All legacies other than that of the residuum are either general or specific. A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate. *Sch. Ex. & Ad.* (2d Ed.) § 461. "A specific legacy," said this court in *Dean v. Rounds*, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802, "as the term imports, is a gift or bequest of some definite, specific thing—something which is capable of being designated and identified."

The gifts in the 4th, 5th, 6th, 7th, and 10th clauses of this will are clearly general, or general pecuniary, legacies, as termed by some writers, being, respectively, gifts of stated sums of money, without specifying any distinctive money in contradistinction to any other money of like amount.

The real estate consists of the farm in Cranston, and the homestead, the devisees of both of which we think are specific. Should any question be made as to the description of the Cranston farm coming under the words "all the real estate of which I shall die seised, possessed or entitled and wherever situated (excepting however my homestead estate hereinafter mentioned)," in clause 2, it seems to us clear that the intent of the testatrix that her son was to have the use and income of the farm for life is manifested by the last sentence of clause 2, where the son may be allowed to live on that farm in lieu of having the income thereof, and after his death the farm is to be sold, and the proceeds to go to his lineal descendants, if any, and, if none, then to the ulterior donees. The intent of the testatrix is the prevailing consideration, and we are of the opinion that the devise of the farm was a specific devise.

The homestead is also a specific devise, or more properly, perhaps, a specific legacy, for

the trustee is directed to sell it as soon after the testatrix's death as reasonably and favorably may be done, and to invest the proceeds thereof for the benefit of her son, and to pay him the income thereof semiannually during his lifetime, and after his death to pay the principal to certain specified persons or institutions. What is practically given is the use and income of the homestead, or, rather, of the proceeds thereof. The property given is specifically designated and set forth, viz., the income of the proceeds of the homestead to her son, and the principal to the other donees indicated in the eighth clause of her will. "It is suggested," said Devens, J., in *Farnum v. Bascom*, 122 Mass. 282, 286, "that the use and improvement of a lot of land is a gift indefinite in amount, dependent on its value after many deductions, and therefore not specific. This is unimportant. All the money which may be in a bag described, or which may be to my credit at a certain bank, or which I may recover in a certain action at law, is a specific legacy, although the amount is uncertain." The contention that the homestead goes to Herbert Winsor Mowry, under the residuary clause, and as such is primarily liable for the payment of debts, does not seem to us to be well founded. The intent of the testatrix that the proceeds of the homestead shall be a specific legacy is clearly manifested, it seems to us, and therefore, in our opinion, is a specific legacy.

The ninth clause of the will is a legacy of three notes, of \$5,000 each, made by the Slater Cotton Company of Pawtucket; and the eleventh clause is a bequest of one note, of \$12,000, made by the Ashland Cotton Company. Though the testatrix at the time of making her will owned such notes, yet at the time of her death said notes had been reduced by payment to one-half or more of the original amounts, respectively. Under the circumstances of this case, we are of the opinion that the notes of the Slater Cotton Company and of the Ashland Cotton Company, held by the testatrix at her death, were specific legacies, but only for the amounts reduced by payments. The respective notes would belong to the respective legatees, even if they had been reduced by payment; but there would not be any claim, on account of such reduction, against the general estate. As long as they can be identified, the legatees may have them, but the legatees receive them in the condition in which they were when the gift takes effect by the death of the testatrix. The notes were the essential things. If the money due thereon had been collected and invested in a new form, the legacy would have been adeemed, as that which was given would have ceased to exist. *Farnum v. Bascom*, 122 Mass. 282, 286.

The legacy given in the twelfth clause of the will is 230 shares in the Ashland Cotton Company, and in the thirteenth clause the legacy is "my stock in the Phenix National Bank in said city," i. e., Providence. At the

time of making her will the testatrix owned 230 shares in the Ashland Cotton Company, and 95 shares in the Phenix National Bank, both of which amounts of said stock she continued to hold throughout the remainder of her life, and held at her death.

The description of the Phenix National Bank stock in the thirteenth clause, in our opinion, constitutes the testatrix's 95 shares in that bank a specific legacy. Had the testatrix said "all my stock in the Phenix National Bank," there could have been no question; but the word "my" clearly seems to us to indicate the testatrix's intent to designate all the stock in the Phenix National Bank standing in her name. See 1 Roper on Legacies, s. p. 204.

The legacy in the twelfth clause, of 230 shares in the Ashland Cotton Company, although not described by the testatrix as "my" [her] 230 shares, seems to us to be a specific legacy. It is true that the law does not favor specific legacies, and that where stocks, bonds, and other securities are disposed of by the will, but it does not designate them as composing a part of the testator's estate, and the legacy may be satisfied by delivering to the legatee any securities of the kind and the value or amount specified, a preponderance of authority favors its being a general legacy; though the testator owned securities of the kind specified, and corresponding exactly to the number of shares or amount bequeathed. 18 Am. & Eng. Ency. of Law (2d Ed.) 713. The authorities, however, are by no means uniform. 1 Roper on Legacies, s. p. 204-224. The cardinal rule in the construction of wills is to ascertain and follow the intent of the testator, and, inasmuch as wills vary so much in their surrounding circumstances, each will has to be judged largely by its own attendant circumstances. In *Pearce v. Billings*, 10 R. I. 102, the testator gave away of certain bank stocks largely in excess of what he owned at his death, or had ever owned, of such bank stocks. The court decided such legacies were general, and not specific, and that the number of shares given away merely furnished a standard of measurement of the amount of a pecuniary gift, which was to be fixed by the value of the stated number of shares at the time the legacies would become payable, viz., a year after the testator's decease; an appraisal then to be made. Undoubtedly the fact of the testatrix having an odd number of shares of the Ashland Cotton Company at the date of her death, exactly corresponding with the number given away, was a circumstance to be taken into account; and that, taken in connection with all the circumstances of this particular will, satisfies us that the testatrix intended that the legatee under the twelfth section was to have that particular stock. In our opinion, the legacy under the twelfth section was a specific one.

In regard to the second part of the seventh

question—whether any portion of the income from any of the funds or property specifically bequeathed in trust can be used to pay debts, if the testatrix at her death had enough property not specifically bequeathed to pay debts—our answer is in the negative.

In regard to property bequeathed under the fifteenth, or residuary clause, which reads as follows: "All the rest and residue of my estate I give, devise and bequeath to my said son to him, his heirs and assigns forever, including all my household furniture, ornaments, books, pictures and utensils"—it is contended that all the enumerated articles are specific, and not general, legacies. We do not think so. The general rule is that a residuary bequest is general, and not specific, and we think it applies in this case. Merely enumerating some of the articles contained in the residuary clause does not alter the character of the legacy. See *Le Rougetel v. Mann, Ex'r*, 63 N. H. 472, 3 Atl. 748. We discover no intent on the testatrix's part to make such enumerated articles specific legacies, and the language of the will militates against it.

To the eighth question, which alone has as yet remained unanswered, we would reply that, as a residuary legatee is entitled only to what remains after all the debts and paramount claims upon the testatrix's estate are satisfied, he cannot call upon either the general or specific legacies or devisees to abate in his favor, even if the entire residue be exhausted. If the residuary estate, therefore, is more than sufficient to pay the debts, the general pecuniary legacies, viz., those given in the 4th, 5th, 6th, 7th, and 10th clauses, are to be paid out of the residuary estate, if sufficient; and, if not sufficient to pay in whole, then it shall be applied to their payment ratably and in proportion, and the unpaid portions of such pecuniary legacies will abate. Neither the income, nor any portion thereof, accruing under clauses 2, 3, 8, 9, 11, and 13, relating to specific legacies, can, in our opinion, be applied towards the payment of the general legacies.

Some of the questions asked are extremely broad, and the limitations of the various classes of property in meeting the debts are not very clearly defined, but we have given all the instruction, as we understand, now necessary. Should any further instruction, however, become necessary in the administration of this estate, further application must be made.

BABCOCK v. WELLS et al.

(Supreme Court of Rhode Island. Feb. 6, 1903.)

DEEDS—QUITCLAIM TO SECURE DEBT—NOTICE OF OUTSTANDING EQUITY—NOTICE TO ONE OF TWO JOINT MORTGAGEES.

1. Where a party who loans money for the purchase of land takes a quitclaim from the seller as security, in lieu of a mortgage from

the purchasers, he becomes a trustee for the purchasers, charged with the duty of conveying to them on payment of the debt.

2. A third party held title to land under a quitclaim deed given to secure a debt which complainant and sister owed him. He conveyed by quitclaim to defendants, who paid no consideration, but took the deed on account of a debt, and gave a bond for reconveyance on payment of the same amount and rate of interest as the indebtedness from complainant to the third party. At the sale of the assets of the third party one of the defendants purchased the bond, shortly before it expired, and claimed he had acquired his grantor's equity of redemption. He offered to permit complainant to redeem on payment of a sum equal to complainant's indebtedness to the third party, together with interest. Complainant continued to collect the rent for the premises after defendants had acquired title, and testified to admissions by one of defendants as to knowledge of the original transactions, which testimony was corroborated by his sister. Held to sufficiently show that defendant took with knowledge of the equitable claim of complainant and his sister.

3. Mortgagees are not chargeable with notice of outstanding equities by the mere fact that the conveyance to the mortgagor was by a quitclaim deed.

4. When a mortgage is taken by two parties, notice to one of them of an outstanding equity does not affect the other.

Bill by John J. Babcock against William R. Wells and others to redeem certain property. Heard on bill, answers, and proofs. Continued for further evidence.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

A. B. Crafts, for complainant. Dexter B. Potter, for respondents.

STINESS, C. J. It appears from the pleadings that Jacob D. Babcock, deceased, left three children, John J. Babcock, Harriet E. B. Cundall, and Sarah A. Humphrey, who became tenants in common of the property involved in this suit, and so occupied it up to January 30, 1877. At that date a suit for partition brought by Mrs. Humphrey was pending. It is claimed that she was indebted to her brother and sister for repairs and other expenses, on account of which she agreed to transfer her third to them for the sum of \$2,500, said suit to be discontinued without costs; that Babcock applied to Thomas R. Wells for said sum, who agreed to furnish it upon a mortgage of the Humphrey share as security; that Wells went to Providence to meet Mrs. Humphrey, to arrange the matter, on January 30, 1877, and took a quitclaim deed from her to himself, representing that he took it as security for the \$2,500 paid to her, according to his arrangement with Babcock, because it was more convenient than to get a mortgage. The suit for partition was thereupon discontinued. This bill was filed December 9, 1881, and on December 10, 1881, a restraining order against alienating or incumbering the property was entered, which is still in force. In 1898, upon conveyance by Mrs. Cundall to John J. Babcock of all her interest in the property, a decree was entered to amend the bill by

making said Babcock sole complainant. This bill is brought to redeem the one-third share transferred from Mrs. Humphrey to Thomas R. Wells by the deed of January 30, 1877, upon the ground that it operated only as a mortgage, by reason of the trust under which said Wells took the title.

The title is too voluminous to refer to in detail, and, the question being one of fact, it is sufficient to say that, both from preponderance of testimony and corroboration in conduct of the parties, we find that the deed from Mrs. Humphrey to Thomas R. Wells was taken as security, in lieu of a mortgage, for the sum of \$2,500, as alleged in the bill. This being so, Thomas R. Wells held the one-third interest as trustee for Babcock and Mrs. Cundall, to be conveyed to them upon payment of the debt thereby secured. *Jenckes v. Cook*, 9 R. I. 526; *Aborn v. Padelford*, 17 R. I. 143, 20 Atl. 297; *Whiting v. Dyer*, 21 R. I. 86, 41 Atl. 895.

The complainant testifies that the arrangement was recognized as a loan of \$2,500, on which interest was to be paid at the rate of 7 per cent.

After the deed from Mrs. Humphrey to Thomas R. Wells, January 30, 1877, Babcock and his sister remained in possession of the property, as owners, and collected all that was paid for rents thereof, a portion of which was leased and occupied by firms of which Thomas R. Wells was a member; Wells neither demanding nor collecting rent for the one-third share which he held by said deed. August 1, 1877, Thomas R. Wells gave a quitclaim deed of the property conveyed to him by Mrs. Humphrey to Sylvia E. Salisbury and William R. Wells, to whom he was indebted, reciting a consideration of \$2,500, although no money was in fact paid; the deed being taken on account of the indebtedness. At the same time they gave a bond to said Wells to sell the property described in said deed to him on or before April 1, 1878, for the sum of \$2,500; Wells to occupy said property in the meantime, and to pay as rental therefor at the rate of 7 per cent. per annum on said sum. The firms occupying the property, in which said Wells was a partner, failed and made assignments January 12, 1878, and the assignee paid rent up to about April 1, 1878, to Babcock, after which time the premises were unoccupied. William R. Wells claims to have taken possession April 1, 1878; that being the time named in his bond for a reconveyance. As to William R. Wells and Sylvia E. Salisbury, the grantees under the quitclaim deed from Thomas R. Wells, the question of fact arises whether they took the conveyance with notice of the equitable title of Babcock, on the ground that the deed was held simply as security.

Upon this point Babcock testifies positively to admissions made by William R. Wells of his knowledge of the transaction. Mrs. Cundall testifies less positively to the language, but to a general admission of their right to

redeem. William R. Wells denies any such admissions, but says that, preferring the money to the property, he made a voluntary offer to allow them to redeem for the sum of \$2,500 and interest. Looking further to the conduct of the parties, it is quite significant, and, we think, corroborative of the complainant's testimony, that the bond was for the reconveyance upon payment of the same sum at the same rate of interest for which it is claimed as security, as though William R. Wells had knowledge of such fact. It would be a remarkable coincidence, if, taking the deed to settle up their own estate, they made it subject to exactly the same terms as to Thomas R. Wells that existed between said Wells and Babcock. It is also remarkable, if William was endeavoring to make a settlement and an end of the matter, he should have made the same offer to Babcock after he (William) supposed he had got an absolute title. His conduct is more compatible with the complainant's claim than with his own. Moreover, if he and his sister had an absolute title as against Babcock, they would have been entitled to a share of the rents, but they did not claim it. Still further, the assignee sold the assets of Thomas R. Wells on March 29, 1878, among which was this bond, with only two more days to run, according to its terms. William R. Wells bought the bond at the auction, and then claimed that he owned the equity of redemption under the deed from Thomas R. Wells. He therefore very clearly recognized his deed as an equitable mortgage as to Thomas, and, although the evidence is not so clear that he and his sister knew of the relation of Thomas to the complainant as it is that Thomas knew it, still we think it fairly shows that they knew of the complainant's equitable claim. Taking the deed with notice, the property was subject to redemption in the hands of William R. Wells and Mrs. Salisbury.

November 8, 1875, J. J. Babcock and Mr. and Mrs. Cundall executed a mortgage to Thomas R. Wells on their two-thirds interest in a part of the property in question, to secure a note for \$5,000 dated October 25, 1875, and a second mortgage, dated October 24, 1876, on the same interest in other parts of the property, to secure the same note; and on the same day they executed a similar mortgage on their two-thirds interest in the mill machinery to further secure the same note. These mortgages were assigned by Thomas R. Wells to Sylvia E. Salisbury and William R. Wells August 1, 1877, who claim to have foreclosed the personal property mortgage by taking possession April 1, 1878. Under the powers of attorney in the other two mortgages they advertised the real estate for sale, and sold it on August 1, 1878, to themselves, as purchasers. Passing by the alleged defects and irregularities of the sale, and assuming it to be valid, Sylvia E. Salisbury and William R. Wells were then the

apparent holders of the record title, with notice of the complainant's claim of equitable title to one-third of the property under the deed of Sarah A. Humphrey. On December 18, 1878, Sylvia E. Salisbury and William R. Wells gave two mortgages on the land in question—one to Oliver Langworthy and John D. Kenyon to secure their indorsements of notes of the mortgagors to an amount not exceeding \$2,500; and another, in similar terms, on the same with other land, to Oliver Langworthy, subject to the mortgage to said Langworthy and Kenyon. The title to the property stood in this way at the time of the filing of the bill, December 9, 1881. After the filing of the bill, the rule of *lis pendens* applied.

The complainant claims that, as the deed from Thomas R. Wells to Wm. R. Wells and Mrs. Salisbury was a quitclaim deed, the grantees cannot be held to be purchasers without notice; that a quitclaim deed, being a mere release, carries upon its face notice of a doubtful title. There are cases which have supported such a claim, but we do not see that they rest upon a sound principle. A transfer of one's right, title, and interest in land no more implies a defect of title than a deed of bargain and sale which has to be supported by a covenant of warranty. There is no question that a quitclaim deed will carry all the interest that the grantor has. A warranty deed, so far as the grant is concerned, can do no more. The stronger inference, if title is to depend upon that, would seem to be more favorable to the purchaser's belief of a good title in the case of a quitclaim deed than in the case of a warranty deed; for in the former case he is willing to take the grantor's interest as it stands, thereby implying satisfaction with it, while in the latter case the purchaser requires a warranty, implying a need of security to fall back upon, as though he had some doubt of the sufficiency of the title. It cannot be said that there is an implication of defect under a quitclaim, and not under a warranty deed. A warranty does not enlarge a grant. It is a covenant of indemnity for a disturbance of it. How can a court say, as a matter either of law or fact, that a quitclaim implies that the grantor has reason to believe his title is defective, because he does not warrant it, when an equally reasonable inference may be that he wants the purchaser to satisfy himself as to the title from the records or otherwise, and that he is unwilling to burden his estate, by covenants running into the future, against defects of which he has no more knowledge than the purchaser? A very large proportion of conveyances of real estate are by quitclaim deeds. Under the statute in force when this deed was given, one form was as effectual for delivery of seisin as another. Gen. St. 1872, c. 162, § 2. This is more largely stated in Gen. Laws 1896, c. 202, § 11—that any form of conveyance, duly executed, shall be operative to

convey to the grantee "all the possession, estate, title, and interest, claim, demand, or right of entry or action of the grantor, absolutely, in and to the land conveyed, unless otherwise expressly limited," and that, if duly recorded, it shall be operative as against third parties.

Doubtless it is true that quitclaim deeds are often obtained for speculative purposes, but the test of their effect is the fact of a purchase in good faith, without notice of a defect in title. As Mr. Justice Field said in *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350: "The character of a bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though we think inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty." In *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, Judge Story held that a quitclaim deed, where the circumstances showed that it was not intended to operate merely by way of passing a right or by way of extinguishment, was to be treated as a bargain and sale, or other lawful conveyance, saying: "It ordinarily affords very conclusive proof that the purchase is of the whole estate, and not of the mere right or title of the party, whatever it may be." See, also, *United States v. California Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; *Stark v. Boynton*, 167 Mass. 443, 45 N. E. 764; *Smith v. McClain*, 146 Ind. 77, 45 N. E. 41; *Bennett v. Davis*, 90 Me. 457, 38 Atl. 372; *Schott v. Dosh*, 49 Neb. 187, 68 N. W. 346, 59 Am. St. Rep. 531; *White v. McGarry* (C. C.) 47 Fed. 420. We think the better authority is with these cases, which fully sustain the views we have expressed.

If then, as we hold, the mortgagees are not chargeable with notice of the plaintiff's equitable estate by reason of the conveyance to the mortgagor by a quitclaim deed, it follows that they may be regarded as purchasers for value, unless actual notice to them is shown. The testimony shows that Oliver Langworthy had notice on February 11, 1878, of Babcock's claim that the one-third of the estate was taken by Thomas R. Wells simply as security for the money paid to purchase Sarah A. Humphrey's share, and that this notice was given ten months before the mortgage to said Langworthy and Kenyon. As to Kenyon, we are referred to no actual notice to him, prior to the taking of the mortgage. The question therefore arises, did notice to his co-mortgagee operate as notice to him? In *Snyder v. Sponable*, 1 Hill, 567, it was held that notice to a husband, at the time of receiving a conveyance to himself and wife, was not notice to the wife, of a prior unrecorded mortgage, so as to give the mortgage a preference in respect to her title, unless the consideration was paid by the husband, thus showing that she was not a purchaser for value. This deci-

sion was affirmed in 7 Hill, 427. In *Wait v. Smith*, 92 Ill. 385, it was held that joint purchasers who had notice of an incumbrance would hold their title subject to it, while those who had no notice would not. In *Burt v. Batavia*, 86 Ill. 66, it was held that notice of an incumbrance on property purchased by a corporation, to one of several incorporators, would not charge his associates, when he did not act as their agent in forming the company. To the same effect is *Ripetoe v. Dwyer*, 65 Tex. 703; *Wiswall v. McGown*, 2 Barb. 270. See, also, *Arnold v. Greene*, 15 R. I. 348, 5 Atl. 503; *Holland v. Citizens' Bank*, 17 R. I. 87, 20 Atl. 231. We think that the rule thus indicated is founded in reason and equity, and that it applies in this case. The mortgage, however, was simply one of indemnity to the mortgagees, Langworthy and Kenyon, for indorsement of the notes of the mortgagors, William R. Wells and Sylvia E. Salisbury. We are unable to find from the testimony whether Kenyon ever became entitled to indemnity under the mortgage, so as to give him a right to claim under it, and we leave the case open for evidence upon that point.

We decide that at the time of filing this bill the complainants had an equitable interest in one-third of the estate conveyed by the deed of Sarah A. Humphrey, subject to the payment of the consideration therefor, and subject also to the question above stated in regard to the mortgage to Kenyon and Langworthy.

BABCOCK et al. v. WELLS et al.

(Supreme Court of Rhode Island. Feb. 6, 1908.)

MORTGAGE — SALE — VALIDITY — INADEQUACY OF PRICE — SUFFICIENCY OF NOTICE — HARMLESS IRREGULARITY.

1. The mere fact that the assignees of a mortgage, in advertising the property for sale, signed the notice, "By order of the mortgagees," did not render the notice insufficient.

2. Three parcels of land covered by one mortgage were sold separately under the misapprehension that, as the notice stated the sale would be on the premises, it required a sale on each parcel. The mortgagee bid \$1 over and above the mortgage on each parcel; he and the auctioneer understanding that each bid was for the whole property, and that it all constituted but one sale. The mortgagor was present and made no objection, and charged it as one sale in his bill to redeem. Held that, while the proceedings were irregular, they were in no way detrimental to the mortgagor, and amounted to but one sale.

3. Foreclosure of mortgaged personal property without a sale is a satisfaction of the debt only to the amount of the value of the property taken.

4. Mere inadequacy of price is not enough to avoid a sale under a mortgage, but will be considered, in connection with other circumstances, to determine whether there was a fair sale.

5. Where debtors had given two mortgages on distinct pieces of real estate to secure the same debt, and the mortgagees took possession of per-

sonal property covered by another mortgage securing the same debt, without sale, and then bid in the property covered by one real estate mortgage at a sale for "one dollar over and above the amount due on the mortgages," without giving the debtors a requested statement of how much was due, the question of the fairness of this sale cannot be determined without knowledge of the value of the property taken under the foreclosure without sale.

Bill by John J. Babcock and others against William R. Wells and others. Decrees reserved for further determination.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

A. B. Crafts, for complainants. Dexter B. Potter, for respondents.

STINESS, C. J. This is a bill to redeem, after a mortgage sale of real estate, upon the ground that the sale was void. The original complainants gave two mortgages of their undivided two-thirds interest in certain real estate—the first, dated October 25, 1875, to secure a note of \$5,000, on what is called "Bethel Mill Property"; the second, on October 24, 1876, to secure the same note, on what is called "Bethel Plains." On the last date they also gave a mortgage on machinery in the mill to secure the same note. These three mortgages were given to Thomas R. Wells, and by him assigned to Sylvia E. Salisbury and William R. Wells, respondents. April 1, 1878, the assignees of the mortgage took possession of the personal property under the last-named mortgage, and on August 1, 1878, they sold the real estate under the two former mortgages.

The complainant claims that as the advertisement of the mortgage sale of the two-thirds interest, August 1, 1878, was signed, "By order of the mortgagees," and not by the assignees of the mortgagees, the sale was void. We do not think this is so. After transfer of a mortgage, an assignee is the mortgagee. In *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 75 Am. Dec. 681, notice of sale was signed in the same way after it had been assigned, but it was held that the notice was equally effective whether signed or not. *Woonsocket Ins. v. American Co.*, 13 R. I. 253, was a similar case, in which the notice was held to be sufficient. There was therefore no defect in the sale upon this ground. See, also, *Colgan v. McNamara*, 16 R. I. 554, 18 Atl. 157.

The complainant also claims that the sale of the whole property was invalid, upon other grounds.

The three parcels of land were sold separately, and the mortgagee bid \$1 over and above the mortgage on each parcel. The complainant claims that the mortgage was satisfied by the bid upon the first parcel, and hence that there was no authority to sell the other parcels. The testimony shows that the selling by parcels arose from the understanding that, as the notice stated that the sale would be "on the premises," a sale was

¶ 4 See *Mortgages*, vol. 35, Cent. Dig. § 1038.

required on each of the parcels described. It was so done, and the respondents, holders of the mortgages, bid \$1 over and above the amount due on the mortgages for each of said parcels. It is nevertheless apparent from the evidence that the making of bids in this way was neither intended nor understood to constitute separate sales, but one sale of all the property, under the notion that, because three parcels were described, each must be sold "on the premises." The auctioneer so understood it, as appears by his affidavit, and the complainant was present and made no objection to the mode of procedure. It is also evident that he understood that it was one sale, for this is the charge in his bill. While this mode of proceeding is somewhat irregular, we do not find that it was misleading, or in any way detrimental to the interests of the mortgagors.

It is further claimed that, as the mortgagees took possession of the personal property given to secure the same note, the retention of the property amounts to a satisfaction of the mortgage debt. The rule in this state is that foreclosure without sale is a satisfaction of the debt secured only to the amount of the value of the property taken in foreclosure. *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433. While there is testimony in this case as to the value of the personal property, it is not of such a character as to enable us to determine whether its value was sufficient to satisfy the debt, and this matter must be left to a special accounting.

The complainant also claims that the sale should be set aside for inadequacy of price. The rule stated in *Galvin v. Newton*, 19 R. I. 176, 36 Atl. 3, and *Nichols v. Flagg*, 24 R. I. 30, 51 Atl. 1039, is that, while mere inadequacy of price is not enough to avoid a fairly conducted sale under a power, it will be considered, in connection with other circumstances, to determine whether there has been a fair sale.

Among the objections urged against the fairness of the sale, we see but one that calls for attention. The complainant testifies that he asked Wells for a statement of the amount due on the mortgages, which was not given, and it appears that no such amount was stated at the sale. The respondent argues that this was not necessary, because the complainant knew what was due, and that purchasers would bid according to their opinions of the value of the property. This would have been true if the sale had been conducted in that way. The bid made by Wells was not a definite sum for the land, but "one dollar over and above the amount due on the mortgages." How could any one know what was due on the mortgages? They might know from the records, to which they had been referred in the notice of sale, that the face of the note was \$5,000; but they could not be expected to know how much interest was due on the note, nor how much was to be credited thereon for the per-

sonal property taken on account of it under the chattel mortgage. If the bids had been so much for the land, the amount due would have been immaterial, or if the amount due had been stated, the bid then would have been equivalent to a bid for the value of the land. As the case stands, the value of the machinery may have been small, leaving the amount due on the mortgage so much as to rebut the inference of an unfair sale, or it may have been enough to satisfy the debt. If a fair amount was realized, there would be no just cause of complaint. For this reason, we allow further testimony upon this matter, as well as upon the question of the right of Kenyon and Langworthy to sell under their mortgage as stated in a previous opinion between these parties; reserving decrees upon the merits of the case for further determination.

We do not consider the other objections urged against the sale as important.

PICK v. THURSTON.

(Supreme Court of Rhode Island. Feb. 10, 1903.)

HIGHWAYS—LAW OF THE ROAD—MEETING AND PASSING—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. In an action for personal injuries resulting from collision of plaintiff, while riding her bicycle, with defendant's carriage, evidence considered, and held to show that plaintiff was riding on the left side of the road.

2. Under Gen. Laws 1896, c. 74, § 1, providing that a person traveling with a vehicle on a highway shall seasonably turn to the right of the center of the traveled road on meeting any other person so traveling, a person injured by collision with a carriage while riding a bicycle on the left of the road must show a sufficient excuse for being there, to attribute negligence to the driver of the carriage.

3. Plaintiff was riding her bicycle immediately behind a wagon on the right-hand side of the street, going north. Defendant's carriage was approaching, also, on the right-hand side of the street, going south. Both teams and plaintiff were going slowly. Just as defendant's carriage was passing the wagon, plaintiff turned around the wagon, to the left of the road, in order to pass it, and was injured by collision with defendant's carriage. The street was but 23 feet wide. There was no reason for plaintiff trying to pass at the time she did. Her bicycle was incumbered with packages, which rendered its management difficult. There was no evidence that defendant's driver was careless, and his testimony was that he stopped and tried to draw up to the curb as soon as he saw plaintiff trying to pass. Held, that the preponderance of evidence showed that defendant was guilty of no negligence.

4. The preponderance of evidence showed contributory negligence in plaintiff.

Case, for negligence, by Alice D. Pick against Clark Thurston. Verdict for plaintiff, and defendant petitions for a new trial. Petition granted.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

James T. Egan, for plaintiff. Arnold Green, for defendant.

ROGERS, J. This is a petition for a new trial by the defendant after a verdict for the plaintiff in an action on the case for negligence. In brief, the reason assigned for a new trial is that the verdict is against the law and the evidence, and the weight thereof. According to the plaintiff's own testimony, she was riding a bicycle from Edgewood on her way to the railroad station in Providence, and had turned from Broad street into Fenner street, going north towards Westminster street. On Fenner street, which is 23½ feet wide from curb to curb, there was ahead of her, on the right-hand, or east, side of the street, a large two-horse team or express wagon, going the same way as herself, loaded with something long, that came out beyond the wagon behind. On the other side of the street from her, viz., on her left hand, or west side of Fenner street, was the defendant's carriage, going south from Westminster street towards Broad street. She admits she was behind and a little to the left of the team in front of her, intending to pass it on its left, which would bring her between the team and the carriage, should she try to pass the team ahead of her when it was abreast, or practically abreast, of the carriage, and she had started to so pass when the collision occurred which was the cause of this action. The plaintiff swore in regard to the location of the express wagon just ahead of her, and the carriage approaching her, as follows, viz.: "C. Q. 137. You were on the left of it? Ans. Yes, sir. C. Q. 138. You meant to pass it on the left? Ans. Yes; I would have to. C. Q. 139. The other team was coming? It was keeping to the right of the road? Ans. Yes, sir. C. Q. 140. The carriage, as it was driving, was keeping to the right of the road? Ans. Yes, sir." Albert B. Brown, the defendant's driver, and other witnesses, also swore that the defendant's carriage was on the right-hand or west side of the center of the street when the collision occurred.

This case, in a measure, involves the same principle on which *Angell v. Lewis*, 20 R. I. 391, 89 Atl. 521, 78 Am. St. Rep. 881, turned, except that in the latter case the plaintiff's wife was on the right side of the road, and the defendant was on the wrong side, whereas in the case at bar the defendant was on the right side of the road, and the plaintiff was on the wrong side. The two cases resembled each other in that the collision in both was caused by one's attempting to pass a vehicle in front of him or her going the same way, on its left, and, in pulling out to do so, colliding with a vehicle going the other way. In *Angell v. Lewis*, on page 393, 20 R. I., and page 521, 89 Atl., 78 Am. St. Rep. 881, this court, by Tillinghast, J., after reference to Gen. Laws R. I. 1896, c. 74, § 1, which provides that every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive

his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption, used this language: "The evidence shows that the plaintiff's wife complied with this requirement on meeting the two teams aforesaid, and that she was in the act of passing them safely when the defendant suddenly pulled his team to the left and collided with hers. In thus taking the wrong side of the road, the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the 'law of the road' by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road; and, if a collision takes place in such circumstances, the presumption is against the party who is on the wrong side. * * *

Of course, if plaintiff's wife had discovered the defendant's team in time to have avoided the collision, by stopping or otherwise, it would have been her duty to do so, notwithstanding the fact that defendant was guilty of negligence in violating the law of the road." To the same effect is *Winter v. Harris*, 23 R. I. 47, 54, 49 Atl. 398, 400, 54 L. R. A. 643, where the court says, in the words of *Brooks v. Hart*, 14 N. H. 307, 311: "It is legal negligence in any one to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause alone."

The plaintiff swore in answer to question 9 as follows: "I was on the right-hand side of the street, and came from Broad through Fenner until I saw a team going from me." Her testimony shows that as she neared the team in front of her she drew off to her left, to pass it on its left; and as she swore that the carriage approaching her was on its right, or the west, side of the street, with which statement the defendant's driver agrees, we have no hesitation in saying that the great preponderance of evidence shows that she was not on the side of the street prescribed by law.

As the plaintiff in the case at bar was violating the "law of the road," she must show some sufficient cause or excuse for being on the wrong side, to enable her to attribute negligence to the defendant. Her contention is that the defendant must have known that she desired to pass by the express wagon ahead of her on its left, and that the defendant might have given her more room by crowding to the curb on the extreme west side of the street. She swore that the team in front of her was going slowly; that she, also, was going slowly.

though faster than the team ahead of her; that the defendant's carriage was going slowly; and that it was 2 o'clock p. m. on October 20, 1900—so, of course, it was broad daylight. There was no exigency or necessity apparent for her to pass the team when it was opposite the carriage, and the driver of the defendant's carriage swore that he had no reason to anticipate her coming out from behind the other wagon and attempting to pass until she really did so, and then he pulled up close to the curbing and stopped. There is no evidence to show that Brown, the defendant's driver, was driving carelessly or recklessly, or on the wrong side of the street; and, unless the situation showed a probability of her trying to get by, he would not reasonably be expected to crowd against the curbstone. If she had waited a moment, until the team had passed the carriage, she would have had the whole width of the street in which to pass the carriage. Fenner street is 23½ feet wide from curb to curb, and, while there is no direct evidence as to how wide the two-horse team or express wagon in front of the plaintiff was, yet it is in evidence that the one-horse carriage of the defendant was 5 feet 5 inches wide; so it is quite within bounds to say that the two-horse team, at the least, took up 6 feet of room. As one-half of the middle of the street would be 11½ feet, if the team had been crowded close against the curbing there would have been less than 6 feet between the team and the center of the street; but, while the team was on the right of the center of the street, there is no testimony how far to the right of the center it was, and there are several witnesses who swore that the street had been torn up a few feet on the east side. Be that as it may, however, it is clear that the team could and did pass the defendant's carriage safely; that the defendant's carriage, going east, was on the right, or west, side of the street; and that the plaintiff's bicycle, in addition to the plaintiff herself, was loaded with several articles that, to say the least, did not add to ease of management when going slow and passing other vehicles under the circumstances the plaintiff was attempting to do, for she swore that, besides herself, she had on her wheel a Boston bag, 9 inches wide and 12 inches deep, just above her hand on the handle bar, between that and the bell, and she had a pasteboard box, perhaps 18 inches long, containing two dress waists, on the front of the wheel. In cross-examination, she swore she had a small parcel tied to the satchel, and a jacket on the outside of the box, and besides these she had an umbrella; all of these being extra parcels she was taking to Boston with her, where she was going, as her trunk had been sent on.

In the opinion of the court, a strong preponderance of evidence shows that the defendant's driver was guilty of no negligence, and that the accident was attributable to the

plaintiff's own act in attempting to ride her bicycle, loaded as it was, in a dangerous place, where she was without excuse in trying to go under the circumstances.

New trial granted, and case remitted to the common pleas division for further proceedings.

In re TEN-HOUR LAW FOR STREET RY. CORPORATIONS.

(Supreme Court of Rhode Island. June 27, 1902.)

STREET RAILWAY EMPLOYEES—HOURS OF EMPLOYMENT—LIMITATION—CONSTITUTIONALITY—CONSTRUCTION OF STATUTE.

1. Pub. Laws, c. 1004, enacted April 4, 1902, limiting the hours of labor of certain employes of street railway corporations to 10 hours a day, is within the police power of the Legislature.

2. The act is not unconstitutional, as infringing the right of contract.

3. The act is not unconstitutional, though it exempts from its operation cases of existing written contracts.

4. Pub. Laws, c. 1004, enacted April 4, 1902, § 1, forbids an officer of a street railway company to "exact" more than 10 hours' work from certain employes. Section 2 provides that "the true intent and purpose of this act is to limit the usual hours of labor of the employes of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours." *Held* illegal for a street railway company to make a contract with its employes to labor more than 10 hours a day, even if they make no objection.

Blodgett, J., dissenting.

Opinion to the Governor in the Matter of the Ten-Hour Law for Street Railway Corporations.

Providence, June 24, 1902.

To His Excellency, Charles Dean Kimball, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency the following questions, viz.:

"First. Are the provisions of chapter 1004 of the Public Laws, passed April 4, 1902, entitled 'An act to regulate the hours of labor of certain employes of street railway corporations,' or any of such provisions, in violation of the Constitution of the state of Rhode Island?"

"Second. If not, is there anything in the provisions of said chapter 1004 to make it illegal for a street railway corporation to make a contract with its employes to labor more than ten hours within the twenty-four hours of the natural day, and within twelve consecutive hours, except as provided in said chapter?"

In response to these questions, we have the honor to submit the following opinion:

Chapter 1004 of the Public Laws relates to the hours of labor on street railways. It therefore relates also to the exercise of public franchises upon public streets for public ac-

§ 2. See Constitutional Law, vol. 10, Cent. Dig. § 170.

commodation. When a law is made to affect corporations created by and subject to the legislative authority, it is held to be an amendment to the several charters and sustainable on that ground. A notable instance of this sort is found in the weekly payment law of 1891. The case of *State v. Brown & Sharpe Mfg. Co.*, 18 R. L. 16, 25 Atl. 246, 17 L. R. A. 856, so fully and carefully covered the scope and authority of such laws that we need not here repeat its reasoning. It was there decided that the law was not in violation of any of the constitutional provisions of the United States or of this state. The same reasoning is applicable to the statute in question, so far as it relates to corporations.

There is also a common assent that the Legislature has the right of control in all matters affecting public safety, health, and welfare, on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise; and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that account rendered invalid or unconstitutional. The first inquiry is whether the subject of the law is within the power; for, if it is, the Legislature has jurisdiction to enact it, and its terms are subject to a reasonable legislative discretion.

The constitutionality of the law under consideration may also be sustained as an exercise of the police power of the Legislature. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the Supreme Court of the United States held that a statute of Utah which limited the hours of labor in mines to eight hours per day, except in cases of emergency, was a valid exercise of the police power, and not in conflict with the fourteenth amendment to the Constitution of the United States. That decision goes much farther than the question here presented, because the law affected cases based primarily on private contracts. The law before us is more clearly within such power, for the triple reason that it deals with public corporations, the use of a public franchise, and a provision for public safety. It has been held, in many cases, that any one of these grounds is sufficient to sustain an exercise of the police power. In answering your question, therefore, we have to look to possible objections to the details of the law, rather than to the affirmative authority of its scope.

It may be objected that it infringes the right of contract; but that objection is answered, by the decision above quoted, on the ground that the police power stands above private rights in matters affecting the public welfare. Also, as stated by this court in *State v. Dalton*, 22 R. L. 77, 46 Atl. 234, 48

L. R. A. 775, 84 Am. St. Rep. 818: "This inalienable right is trespassed upon and impaired whenever the Legislature prohibits a man from carrying on his own business in his own way, provided always that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." The law in question is clearly within the latter proviso.

It may also be objected that this law is not a proper exercise of the power, because it exempts from its operation cases of existing written contracts. Granting that the Legislature has jurisdiction of the subject-matter, it must also be granted that it has reasonable discretion in acting upon it. All intendments will be made in favor of a law not obviously void upon its face. As said by Mr. Justice Brewer in *Atchison v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it had transcended its power." Both this court in *State v. Peckham*, 3 R. L. 289, and the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, have declared that the Legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it is to be presumed that it did exist. To the same effect is the statement of Chief Justice Durfee in *State v. Narragansett*, 16 R. L. 424, 16 Atl. 901, 3 L. R. A. 295: "The rule generally laid down is that statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained." Nevertheless, as held in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, a law may be invalid if it makes discriminations which are clearly unreasonable, arbitrary, oppressive, or partial.

If, however, intendments are presumed in favor of a law under the former rule, they can only be overcome under the latter rule when the vice of the law is apparent on its face. A law need not state its purpose, and it seldom does. Courts are usually able to see the purpose from the terms of the act itself, and so, also, to see therein its arbitrary or unlawful provisions, if such there be.

While there may be no obvious reason for exempting from the operation of the present statute cases of existing written contracts under which there might be as great danger to the public from the strain of excessive labor as in cases where there is no such contract, so, on the other hand, such exemption

is not obviously arbitrary, partial, or oppressive. Assuming knowledge of the facts on the part of the legislature, it may be that written contracts were so few, or held by men of such experience and skill, or applicable to such conditions of labor, as to make the exemption reasonable and proper so far as the public are concerned.

It is a general rule that a law must apply equally to all of the class affected by it, and this law applies to all contracts for labor on street railroads other than those under existing written contracts. It is prospective in its operation, and as the written contracts expire it will embrace all. The mere fact that one class is not embraced in a law when it might be is not enough of itself to render the law invalid. An example of this is found in *State v. Justus*, 88 N. W. 759, 56 L. R. A. 757, where the Supreme Court of Minnesota declared an act constitutional which forbade the blacklisting of discharged employees by corporations or partnerships. It was claimed that the law was unequal because it exempted individuals, and that the mischief of blacklisting by an individual was as great as that done by a corporation or partnership. But the court held that the act, being applicable to all members of the class, was not invalid because limited to that class.

It is a common thing for laws to take effect at a future date, when acts done before that date would be as great a menace to public safety as those done after it; but evidently that would not vitiate the law.

Statutes limiting the hours of labor for women and children have been very generally adopted in this country.

The statute relating to the practice of medicine exempts those who were honorably engaged in practice prior to January, 1892, from producing a diploma from a medical college or submitting to an examination, one of which forms of evidence of qualification is required from all others. Yet the constitutionality of the act has not been questioned on that ground.

Very many cases might be cited in which there has been considerable difference of opinion upon questions closely allied to that here presented, but we do not think it would serve a useful purpose to discuss them nor to point out differences which might tend to distinguish them. The general rules which we have quoted are sufficient to give the reasons for our conclusion, which is that the law in question does not violate any provision of the Constitution of this state or of the United States in its scope and character, nor by reason of violating rights of contract, nor by reason of an apparent and arbitrary exercise of power in the exception to which we have referred. If there is any other ground upon which it may be claimed to be unconstitutional, it does not now occur to us.

The second question calls for a construction of the act with reference to the right to contract under it.

The first section forbids an officer of a company to exact more than 10 hours' work, from which an inference might arise that it could accept it if rendered voluntarily, as by contract. The second section, however, rebuts such an inference, for in that section the intent is explained as follows: "The true intent and purpose of this act is to limit the usual hours of labor of the employees of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours." This express intention to limit the hours is quite inconsistent with an inference to permit it by contract. If such an inference could stand, it would be possible for parties to avoid the act by their simple consent, and thus to render it a nullity. The apparent purpose of the act is not to create a right in favor of the employees, which they might waive, so much as to guard the public safety from service too prolonged for alertness in the exercise of reasonable care. If this be so, the public safety cannot be made dependent upon private contracts.

We therefore reply to the second question of your excellency that it is illegal for a street railway company to make a contract with its employees to labor more than 10 hours within the 24 hours of the natural day, and within 12 hours, except as provided in said chapter.

Mr. Justice DOUGLAS, being interested in one of the companies to which the act applies, deems it proper that he should not express an opinion.

[Signed] JOHN H. STINESS.

PARDON E. TILLINGHAST.

GEORGE A. WILBUR.

HORATIO ROGERS.

EDWARD CHURCH DUBOIS.

BLODGETT, J. (dissenting).

To His Excellency, Charles Dean Kimball, Governor of the State of Rhode Island and Providence Plantations:

The request of your excellency for an opinion upon the constitutionality of chapter 1004 of the Public Laws, entitled "An act to regulate the hours of labor of certain employees of street railway corporations," calls for a critical examination of the provisions of a penal statute enacted on April 4, 1902, to take effect on June 1, 1902.

The corporations referred to in the act are quasi public corporations, and their property is in a large measure impressed with a public use. And it is indisputable, as a general proposition, that, where peculiar privileges are granted by the state, peculiar responsibilities supervene and special regulations may be prescribed; for the bestowal and reception of special privileges beget legitimately the right to impose special burdens. But the right to restrict is not an unlimited right. The restrictions must apply equally to all under the same conditions, since otherwise there is a denial of that equal protection of

the laws which is guarantied by the Constitution of the United States (article 14 of amendments, § 1), which, being by its own terms the supreme law of the land, is, in a sense, also incorporated into the Constitution of this state; for article 6 of the Constitution of the United States provides as follows: "This Constitution * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Upon the question of the right to restrict the liberty of contract in a lawful calling, as between employers and employes, the decisions of the courts of different states are in conflict. When these restrictions fall equally upon all in the same circumstances, there are authorities which sustain the right of the legislature to impose them. But even this right is not universally conceded. Judge Cooley, in his great work on Constitutional Limitations (6th Ed.) p. 484, says: "The doubt might also arise whether a regulation made for any one class of citizens entirely arbitrary in its character, and restricting their rights and privileges or legal capacity in a manner before unknown by the law, could be sustained notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some special lawful trade or employment should not have capacity to make contracts or to build such houses as others were allowed to erect, or in any other way make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative authority, even though no express constitutional provision could be pointed out with which it must come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large must be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor, instead of calling upon others to show how and where the authority is negatived." *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 43 Am. St. Rep. 315; *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; *Low v. Rees Printing Co.*, 41 Neb. 137, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670.

The act itself contains no explanation of the exigency for its passage, but it is contended that it is fully justified as a valid exercise of the police power of the state, and, if that contention be made good, the act must unquestionably be upheld. Two grounds only are urged, or, indeed, exist, in support of the act as a police regulation,

viz., the public safety and the somewhat more doubtful ground of the health of the employes; and if either or both of these are found upon examination to be the uniform and controlling objects to be subserved, and if its provisions bear alike under the same conditions upon all who are within its terms, and if, in its classifications, it includes all who are under the same conditions, and excludes none of those whose conditions or needs render such legislation necessary or appropriate to them as a class, sufficient justification for the enactment may be found.

But the validity or invalidity of such an act as this may, and often does, depend upon the facts disclosed in the particular case before the court. This not being an adversary proceeding, such facts only can be properly considered as are of common knowledge or of public record, or, it may be, such as have come to our notice in the course of judicial proceedings before us. Nor is precedent wanting for considering other matters than the express provisions of the act; for in the case of *Atchison, Topeka & Santa Fé Railroad Company v. Matthews*, decided in 1898 (174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909), the Supreme Court of the United States, approving *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, says: "In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and said that under the guise of regulations an arbitrary classification was intended and accomplished."

While the language of the act is not entirely clear in all its parts, it may fairly be said that it prohibits in its terms all officers and agents of street railway corporations from "exacting" from certain classes of their employes, viz., conductors, gripmen, and motormen, more than 10 hours' labor in 12 consecutive hours in any day of 24 hours, with certain exceptions. And it undoubtedly follows that, if the corporation cannot require, as of right, from the employe longer service than this, the employe cannot make a valid contract with the corporation for such longer service; for a contract must be mutually enforceable to be binding on the parties to it.

It will not be questioned that the act is to be strictly construed, since it is penal in its nature, and it is therefore to be noted:

First. That it is restricted in its application to and includes only street railway corporations and three classes of persons in their employ, namely, conductors, gripmen, and motormen. And thus our first inquiry is as to the necessity for thus restricting the natural liberty of contract between the employer and the man of full age whom he employs. This freedom of contract is still left unrestricted in the other avocations of our people, and this statute constitutes a unique ex-

ception to the otherwise universal rule. Has the policy hitherto pursued in this respect proved detrimental to the public welfare, or are these employes so many in point of numbers as to properly require special legislation as a class, or is the operation of street railways so related to the public safety that the dangers arising therefrom require, and therefore justify, these restrictions on the liberty of contract between these companies and their employes, or is the act found to be not justified by any of these considerations?

If evidence be desired of the prosperity which has resulted to our people under the relations which have heretofore existed between employer and employe, it may be found in the records of the United States census of 1900 (Bulletin 93, pp. 3, 5), summarized in these words: "In the percentage of the total population employed in manufacturing, in the variety and importance of products, * * * Rhode Island is not surpassed. * * * It is doubtful whether so large a share of the material wealth and resources of any other commonwealth can be attributed to the enterprise and skill of its citizens in the enlargement and extension of old and established industries and the development of new forms of productive industry." It therein appears (table 6) that out of the total population of 428,556 people of this state there were 64,508 wage-earning male employes over 16 years of age employed in the mechanical and manufacturing industries of the state alone, without reference to those employed in agricultural or other pursuits, to no one of whom does any law restricting his right to contract as to his hours of labor apply.

The act in question was passed on April 4, 1902, which was the last day of the January session of the General Assembly. The official report of the state railroad commissioner for the year 1901, concerning "the condition and proceedings of the several railroad corporations" of the state, which is required by chapter 809 of the Public Laws to be made to the General Assembly at its January session, had therefore been in its possession for the maximum period, and that body is chargeable with notice of its contents. It therefore becomes especially appropriate to consider that report, in order, if possible, that it may be seen in what manner and to what degree it may show that the public safety was endangered by the operation of the street railway companies in the state; for when actual knowledge is shown the legal presumption of knowledge no longer obtains. It there appears (page 74) that there are nine street railway companies, operating within the limits of the state 753 motor cars and 93 other cars (such as construction and sand cars, etc.), or 846 cars of all descriptions. The danger to public safety arising from the operating of street railways, and arising otherwise than from defective construction or repair of roadbed or equip-

ment, with which motormen, gripmen, and conductors are in no wise concerned, must, therefore, be caused by these 846 cars; and the total number of persons subject to the provisions of the act is the number required to operate them, which is evidently a very small percentage of the total population of the state. Now, if special and peculiar dangers affecting the public safety attend upon the operation of street railways, and these dangers will be remedied by restricting the liberty of contract between the companies and the three classes of employes above mentioned, in manner and form as contained in this act, such dangers will doubtless constitute sufficient justification for so doing; but otherwise the exigency for such special and class legislation is not apparent. Fortunately, exact statistics showing the degree of danger to the public safety are at hand; for on page 75 of this report it appears that there were transported in the year ending June 30, 1901, on all the street railroads in the state, the great number of 58,924,846 passengers, and that, in so doing (page 77), 12 persons were killed from all causes, and 204 were injured more or less seriously—these figures including employes, passengers, and the general public. Of those killed only 7, and of those injured only 147, were killed or injured, respectively, by collision or while crossing tracks; other deaths and injuries being caused by leaving or boarding the cars while in motion, derailments, and other causes, or a total of 154 persons in all. It is impossible to escape the conclusion that the greater or less degree of injury sustained by 147 persons and the loss of 7 lives, within the period of one year, while transporting 58,924,846 passengers on the 816 miles of track in this state (page 74) by the nine street railway corporations, constitutes the exact measure of danger to the public safety for one year which arises from the operation of all the street railway companies within the limits of the state.

Second. But the act is still further restricted in its application, in this: that it does not include all conductors and motormen generally, but applies to and includes only those who are employed in operating street railways. But there are others of these classes in the state who are not employed in operating street railways. In a recent hearing before the undersigned, it appeared from the testimony that the Providence, Warren & Bristol Railroad is now operated by the New York, New Haven & Hartford Railroad Company, a steam railroad company, by means of electricity supplied by the overhead trolley system, and it employs in its operation conductors and motormen whose duties are similar to the duties of the conductors and motormen engaged in operating street railways. But their cars run over their own roadbed, and not through the streets in the towns through which they pass; neither is the rate of speed of their

cars subject to local regulation; that 98 trains are operated on that road in a day of 18 hours, carrying on an average about 8,000 passengers per day, or at the rate of nearly 3,000,000 per annum—the number carried on July 4, 1901, being 57,000, and on Labor Day, 1901, over 65,000. But this act does not apply to conductors or motormen, or protect the passengers, on that road. And, while the danger of collision is less than on a street railway, the high and unlimited rate of speed which is maintained and the dangers and consequences thereof are far greater. So that it is not amiss to inquire the reason for neglecting to extend these provisions for the health of employes and the safety of passengers to this road also.

It is also a matter of common and general knowledge and public record, to which it does not seem improper to refer, that the Bristol Branch of the Rhode Island Suburban Railroad Company operates a parallel electric street railway from a point a few rods distant from the latter road in Providence, through the highways in the towns of East Providence, Barrington, and Warren, to a point a few rods distant at its Bristol terminus, and this road is undoubtedly within the provisions of this act. But it is also a matter of common and general knowledge and of public record that the same Rhode Island Suburban Railroad Company has recently extended its operations by the electric trolley system upon the tracks and roadbed of the former Warwick & Oakland Beach Railroad Company, and is undoubtedly not a street railway as to such branch, and its motormen and conductors and the public generally are not in the least affected by the act under consideration. Thus this anomaly is presented: that the same corporation is liable to the penalties prescribed in this act if it "exact" more than 10 hours' daily service on its road in the town of Bristol, but is not so liable on its road in the town of Warwick. Substantially similar conditions exist on the Sea View Railroad, running to Narragansett Pier, which is also operated by electricity in the same manner, and employs conductors and motormen, and operates its cars on its own roadbed, and not upon the public highways, except at occasional intervals and for very short distances, and which, according to the same report (page 90), transported 433,315 passengers in 1901.

Having thus described the existing conditions attendant upon the operation of the act, we are now better prepared to consider the language of the act itself.

And here another exception appears, for the act does not include in its provisions even all those conductors and motormen who are engaged in operating street railways; since, by the express proviso to section 1, "nothing herein contained shall affect existing contracts." That is to say, if a motorman or conductor in the employ of a street

railway company had a "written contract" with the company on June 1, 1902, for a greater number of hours of labor than 10 per day, it is still lawful for the company to "exact" more than 10 hours' labor per day from such persons; while in the case of a conductor or motorman operating on the same route, and it may be on the same car, but then having only an oral contract with the company, though made on the same day and calling for the same length of service, and made upon the same consideration, the company is liable to a fine of \$500.

This act was passed on April 4, 1902, and it is of course not known to us how many "written contracts" with employes were thereafter made or were in existence on June 1, 1902, and it is therefore not within our knowledge how many of these classes of employes who were originally required to operate the 846 cars aforesaid are still exempt from its operation. But to exempt from the operation of the act solely because of having a written contract with the corporation is wholly indefensible and is purely an arbitrary classification, for no reason germane to the public safety or the health of the employes; for nothing is more clearly settled than that a valid exercise of the police power is not subject to the constitutional provision prohibiting legislation which impairs the obligation of contracts, since all contracts are made, as all property is held, subject to the paramount requirements of the police power of the state. The Supreme Court of the United States in *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 672, 6 Sup. Ct. 264, 29 L. Ed. 516, says: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts." So that the question here presented is not as to the scope of the police power in general, but is limited to an inquiry, in the first place, as to whether existing conditions are such as to justify its exercise at all because of some sufficient danger to the public safety; and, if that be so, in the next place to an inquiry whether it can be exercised in manner and form as expressed in the provisions of the penal statute before us; or, in other words, is the act intended to protect the public safety, and, then, do its provisions accomplish that intent? Unless both these inquiries can be answered in the affirmative, the act falls of justification; for even if the danger to the public safety is shown to be a real and substantial danger, nevertheless, if the means adopted for its removal do not accomplish its removal, the public safety still remains impaired, society is not protected, and the real and effective power of the police power has not been effectively applied. But in what manner is the public safety preserved or the

health of the employes protected by these exceptions to the provisions of the act? Or will it be seriously contended that the obligation of the oral contract is not protected by the Constitution, while the obligation of a written contract is so protected?

Third. But these are not the only exceptions, since the act is periodically suspended in its application to even those motormen and conductors who have not been exempted from its terms by the exceptions already considered; for, in addition to cases of unexpected contingency which need not be further mentioned, it is provided "that on legal holidays * * * extra labor may be performed for extra compensation." Section 36 of chapter 809 of the Public Laws prescribes the legal holidays in this state, and includes, together with eight other days, "the first day of every week, commonly called Sunday," of which, of course, there are 52 in the year, thus leaving the act operative as to those motormen and conductors on only 305 days out of 365 days in the year. With the religious and moral issues involved in thus authorizing unlimited exactions of service to be made on that day we are not now concerned, for the legal question would be the same if the law were periodically inoperative by arbitrary enactment for one-sixth of the total number of weekdays in the year. But it is needless to say that neither the public safety nor the health of the employe is conserved thereby. And this is especially true when it is considered that the very days when the law does not apply are precisely those days when the largest crowds are upon the cars and upon the streets, and when the dangers of transportation and collision are at the maximum.

In *Atchison, Topeka & Santa Fé Railroad v. Matthews*, supra, the Supreme Court of the United States thus defines the limits of the police power: "It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens or liabilities which are not cast upon others similarly situated. * * * Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even when the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Says Mr. Justice Field in *Butchers' Union*

Company v. Crescent City Company, 111 U. S. 757, 4 Sup. Ct. 661, 28 L. Ed. 585, citing with approval Adam Smith's *Wealth of Nations*, book 1, cap. 10: "It has been well said 'that the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders one from working at what he thinks proper, so it hinders the others from employing whom they think proper.'"

Under the provisions of this act certain motormen and conductors, by virtue of the "written contracts" in existence on June 1, 1902, are permitted to contract without restriction for such hours of labor as they may see fit, while all others in the same class have unlimited freedom of contract in this behalf on only 60 days in the year, and are restricted for the remaining 305 days in the year.

In *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855, the court decided that a certain statute operated to deprive the plaintiff of property "contrary to the law of the land, or, as it is ordinarily said, without due process of law, and hence is in violation of article 1, § 10, of the Constitution of this state, and also of article 14 of the amendments to the Constitution of the United States." In *Mitchell v. People's Saving Bank*, 20 R. I. 507, 40 Atl. 505, the court construed the provisions of article 1, § 10, of the Constitution of this state, as follows: "That which the constitutional provision is intended to perpetuate is the substance of the individual right of property;" and to my mind this constitutional guaranty is directly broken by the act under consideration; and see *State v. Dalton*, 22 R. I. 79, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

Fourth. But the act not only restricts the hours of labor to 10 in a day of 24 hours, but it requires that those 10 hours of labor shall be performed within 12 consecutive hours. In the case of those cars which are operated at night, a motorman or conductor who begins his 10 hours of labor at 6 p. m. must therefore work all night until at the earliest 4 a. m., or at the latest until 6 a. m. In what way can it be said that the health of the employe is preserved by such a requirement, as against a schedule permitting the same employe to work for 5 hours from 6 p. m. to 11 p. m., and then resuming at 8 a. m., and working the remaining 5 hours until 1 p. m., thus affording 9 hours for sleep and morning meal, and ending in time for the midday meal? Or is the public safety in any

wise conserved by thus requiring a motorman to be on what is practically continuous duty throughout the darkness of every night without opportunity for enjoyment of the natural hours for rest and sleep? But to "exact" of the motorman under this act the latter schedule is made a penal offense, and is punishable under the act in precisely the same manner as it is punishable to "exact" more than a total of 10 hours' labor in a day of 24 hours, to wit, by a fine of from \$100 to \$500. If it be urged that the latter schedule does not provide for the operation of the car during the whole night, as is provided in the former schedule, it may be replied that the maximum car service possible is continuous operation day and night for 24 hours; that, under a requirement limiting the hours of labor of any one employé to 10 hours within such 24, three reliefs or changes of employés are obviously required. After deducting the 10 hours during which the first motorman was employed, this leaves the 14 hours remaining from 11 p. m. to 8 a. m. and from 1 p. m. to 6 p. m. to be divided between the two who succeed him, either 7 hours to each, or in any other manner not exceeding 10 hours in all to either one, in such manner as must necessarily afford opportunity for rest and sleep at night to both, and without detriment to their health or to the public safety. But if the motorman who has this opportunity for sleep until 11 p. m., when he comes on duty, should work for 10 hours, he would work 9 of those hours until 8 a. m., when the first motorman returns, and his tenth hour would be after 1 p. m., when the first motorman ceases. But since the second motorman began labor at 11 p. m. the night before, his 10 hours of labor would not have been "exact" within 12 consecutive hours, and the penalty of a fine of from \$100 to \$500 imposed in the act is a second time incurred. This would seem incredible if it were not literally true. To my mind such restrictions seem wholly arbitrary and unwarrantable by any considerations affecting the public safety or otherwise.

To restrict the right to labor to the 12 hours of day or night next succeeding the commencement of such labor is, in effect, to prescribe arbitrarily by law the hours of the day or night in which a man may work and those in which he may not do the same work. Under this act he can only contract for 10 hours' labor in 24, and he is thus restricted and deprived of the right to labor on any day, if he will, for 14 hours of the 24, or for more than half of his whole lifetime. But this last restriction makes it a penal offense if, having entered upon his 10 hours of labor, he rests for more than 2 hours before he is required to complete his day's work.

Again, the same hours of day or night are not prescribed for all; nor does this statutory work period necessarily recur daily on the same hours for the same man. To apply the

test to the motorman above supposed, this act prohibits the first, who begins labor at 6 p. m., from making a contract to labor after 6 a. m., and literally deprives him of the right to labor at his calling by day, and restricts his right to labor to the hours of the night; while his successor, who does not begin labor until 11 p. m., cannot labor after 11 a. m., and must labor partly by day and partly by night. Thus, under this act, it is clear that no valid contract can be made for even 10 hours' daily labor, unless those 10 hours are to fall within the period of 12 consecutive hours.

To impose restrictions such as these is clearly a deprivation both of liberty and of property, within the provisions of article 1, § 10, of the Constitution.

Fifth. But in the event that labor for the period supposed has been "exact" of the street railway motorman in question, he not having a "written contract" with the company on June 1, 1902, and the labor is "exact" on some day on which the law is in force, and not on Sunday or any other legal holiday, what is the penalty therefor provided by the act, and on whom does it fall?

Unquestionably this is a penal statute, and as such it must be construed strictly. It seeks to make a statutory offense out of an act not hitherto unlawful and not *malum in se*. It is elementary that statutory offenses are not to be enlarged by implication, and that, unless the terms of the statute specifically include the exact offense, there can be no violation of it.

The second clause of section 1 contains the only prohibition to be found in the act, and it is as follows: "No officer or agent of any corporation operating street cars of whatever motive power shall, on any day, exact from any of its employés more than the said ten hours' work within the twenty-four hours of the natural day, and within twelve consecutive hours. Provided," etc.

The expression "natural day," which is here used, is defined in Bouvier's Law Dict., sub nom., to be "the period of time elapsing between sunrise to sunset." Though the words are used in a penal statute, if it be assumed that they are intended to mean a period of 24 consecutive hours, whether beginning at midnight, as in the civil day, at sunrise, at noon, or at any other time (although the crime of burglary cannot be committed in the hours of the "natural day" as above defined by the authority cited), then the officers and agents of these companies are forbidden to exact labor contrary to the provisions of the statute. "Exact" labor, and "exact" labor only, is that which is prohibited. But what is it to "exact" labor? In a sense, labor cannot be "exact" of a free man. It at least and of necessity implies a demand and a compliance with that demand in some way, whether that demand be made lawfully or unlawfully, by virtue of the terms of an existing contract or by

superior force. But can it be said that that which a man freely volunteers, or, it may be, even desires, is, in any criminal sense, "exacted" from him? But, without further consideration of this point, it may be assumed that there has been an "exaction" of labor in any manner or by any act which the statute makes an exaction. What, then, is the consequence?

The only penalty therefor is contained in section 3, which is as follows: "Any street railway corporation violating the provisions of the preceding sections of this act shall be fined not less than \$100 nor more than \$500, one-half thereof to the use of the complainant and the other half to the use of the state." Pub. Laws, c. 1004.

It will be observed, first, that there is no penalty for the employé who works longer than the specified term; and, second, that there is no penalty imposed upon the "officer or agent" who "exact" the labor, the statute differing in this respect very materially from the Massachusetts statute (cap. 106, § 70, Rev. Laws 1902), on which the act in question is apparently modeled in part, and which is as follows: "Whoever violates a provision of this chapter for which no specific penalty is provided, shall be punished by a fine of not more than \$100." And the New Jersey act of 1887, upon the same subject, from which other parts of the act under consideration are evidently drawn, provides, in section 2 thereof, "that it shall be a misdemeanor for any officer or agent of any such corporation to exact," etc. Laws 1887, p. 145, c. 112.

Unquestionably, under either of these acts, the officer or agent could be personally punished; but in this act, while the officer or agent is prohibited, there is no penalty provided for the punishment of the individual who so violates the act, but the penalty is visited upon the corporation only.

If it be replied that a corporation acts only through its officers and agents, and that their acts are the acts of the corporation, it may be rejoined that such is the case only when they are clothed with corporate power, and are acting within the sphere of their authority, and not otherwise, and that they are not presumed to so act when the statute prohibits such act to be done. But this statute always imposes a penalty upon the corporation, and never upon the individual offender, whether he acts by, without, or against the corporate power and instruction. And this penalty is a fine which is to be paid by the corporation, and which, of course, deprives the stockholders therein of their property by that amount. In so far as this act thus visits a penalty upon the stockholders, it is unquestionably in contravention of article 1, § 10, of the Constitution. But inasmuch as no fine can, in any event, ever be imposed upon the agent or officer who violates the provisions of the act, the real offender always goes unpunished, and the real punishment

always falls on the stockholders, even when the act has been violated in contravention of their express authority.

To the constitutionality of such legislation I cannot assent, whether it is sought to be justified as a valid exercise of the police power or as an exercise of the reserved right to alter and amend the charters of incorporation of the several companies affected thereby.

Section 2 of the act provides "that it is the true intent and purpose of this act to limit the usual hours of labor of the employes of street railway corporations, as aforesaid, to ten hours' actual work a day, to be performed within a period of twelve consecutive hours, as aforesaid, whether such employes be employed by the trip, the job, the hour, the day, the week, or any other manner." Pub. Laws, c. 1004.

If the hours of labor in any lawful calling may be thus limited by law to ten in each day, beyond the power of either party to increase, if not to diminish, them, it follows that they may be limited to eight or to twelve, or to any other number of hours, in like manner and with like effect; thus substituting for the constitutional right of individual liberty of contract the transient and fluctuating will of a legislative majority, which, both plutocrat and demagogue, will unceasingly strive to control, and against which the individual will be powerless to defend—alike helpless, whether the legislative spoliation of the employer or the industrial servitude of the employé shall for the hour prevail.

And if the foregoing observations shall seem to have been directed less to the limits of the legislative power over quasi public corporations than to the limits of the same power over the citizen, it is sufficient to reply that the latter is the graver and higher question by as much as the man is above the dollar.

For the reasons above set forth, I am of the opinion that the act in question is unconstitutional in the particulars enumerated, and is wholly void. It follows from the unconstitutionality of the act, and as a necessary conclusion, that a street railway conductor, gripman, or motorman may freely contract for such hours of labor with his company as may be agreed upon between them.

JOHN TAGGARD BLODGETT.

HARTFORD STEAM BOILER INSPECTION & INS. CO. v. HENRY SON-NEBORN & CO.

(Court of Appeals of Maryland. March 31, 1908.)

INSURANCE—STEAM BOILERS—EXPLOSIONS—AUTOMATIC FIRE EXTINGUISHER—DAMAGE BY WATER—LIABILITY.

1. Defendant insured plaintiff against all immediate loss, except by fire, to assured's proper-

ty, caused by the explosion of steam boilers on plaintiff's premises. The building in which the boilers were located was equipped with an automatic sprinkler fire extinguishing system, and, on an explosion of a pipe attached to one of the boilers, large quantities of steam escaped into the cellar, which melted the heads of the sprinklers, from which large quantities of water escaped, injuring merchandise stored therein. *Held*, that the explosion of the pipe was the proximate cause of the loss sustained, and the insurer was liable therefor.

Appeal from Superior Court of Baltimore City; J. Upshur Dennis, Judge.

Action by Henry Sonneborn & Co. against the Hartford Steam Boiler Inspection & Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

John N. Steele and Albert O. Ritchie, for appellant. Leon Greenbaum, for appellees.

BRISCOE, J. This is an action on an insurance policy issued by the appellant company to the appellees to recover loss and damage to the property of the assured, contained in certain premises occupied by the appellees as a wholesale clothing house, at the corner of Eutaw and German streets, Baltimore, caused by the explosion of a steam boiler insured therein. The policy of insurance sued on is dated the 25th of August, 1890, and insured the appellees "against all immediate loss or damage, except by fire, to the property of the assured, or to property of others for which the assured may be liable, wherever located, caused by the explosion, collapse or rupture of either of two horizontal steam boilers, on the premises of the assured." The plaintiff alleges in the declaration, as the cause of the accident, that on the 4th day of April, 1902, while the policy was in force, the cast-iron elbow of the blowpipe of one of the two boilers which were insured, and which were in the cellar of the building, exploded, and in consequence thereof large quantities of heated steam escaped and damaged the property in the cellar of the building. It also states, as a further and immediate consequence of the escape of the steam, that the heads of certain sprinklers in the automatic sprinkler system in the cellar were melted, and large quantities of water escaped through these heads and damaged certain merchandise of the plaintiff, whereby loss and damage were incurred to the amount of \$2,140.85. By a bill of particulars filed by the plaintiff on demand, it appears that one-half of the loss was caused by the escape of heated steam from the blowpipe, and the remaining one-half by the escape of water through the heads of the automatic sprinkler system. The defendant in the case concedes its liability under the policy of insurance for loss directly caused by the steam, but resists payment for the

loss caused by water from the automatic sprinklers.

There were two questions submitted to the court below, and they were: First. What amount of damage was caused by steam, and what by water from the sprinklers? Second. Is the defendant liable at all, under the policy, for loss caused by the water?

The proof in the case, we think, was amply sufficient to sustain the conclusion reached by the court below upon the first question; but, being one of fact, it is not before us for review.

The second and controlling question depends for its solution upon the construction to be placed upon the words "immediate loss or damage," used in the policy of insurance, and is distinctly raised by the prayers in the case. The court ruled, by the plaintiff's prayer, that under the evidence the defendant was liable for the loss and damage caused by the contact of the steam and water from the boiler with the merchandise, and also for the damage by the water escaping from the sprinkler system. The defendant's prayer, which was rejected by the court, submitted the proposition that the plaintiff was not entitled to recover under the policy for the damage done by water from the sprinklers.

Now, it would extend this opinion beyond what is necessary to review in detail all of the evidence submitted in the case, and, in view of the well-settled decisions of this court, to go into an examination of those from other states cited in argument.

The undisputed facts show that the explosion of the boiler in the cellar was the direct and efficient cause of the damage and loss to the property. The escaped steam from this boiler, by reason of the heat, melted the solder on the sprinkler heads, and set in motion the water which caused the damage. The witness Sonneborn testified that there was in the basement of the building at the time he moved into it, and when the policy was effected, what is known as the automatic sprinkler system for the extinguishment of fire, and this system was almost indispensable in mercantile establishments. He described it as consisting of a series of pipes which run along the ceiling; that these pipes are charged with water, and are fitted out with iron jets, with glass heads on them; that the heads are soldered with a certain solution, which will melt at a certain degree of heat; that as soon as the solder is melted the glass heads fall off, thus opening the jet and permitting the water to come out and fall on merchandise below, protecting it from fire; and that escaping steam would be hot enough to melt the solder. And it is admitted that the damage to the property was occasioned in two ways: First, by the steam acting immediately upon the goods themselves; and, secondly, by acting immediately upon the sprinkler system.

While the appellant concedes its liability

for the loss caused by the explosion of the boiler, it is urged in argument that between the explosion of the boiler and the damage caused by water from the sprinklers there intervened a new and independent agency, to wit, the automatic sprinkler system, and the damage caused by the water was immediately and directly due to this independent agency, and only remotely to the explosion of the boiler. The appellant's position, under the facts and circumstances of the case at bar, we do not think is supported by the rules of construction applicable to policies of insurance containing a similar clause of indemnity, as stated by the cases and authorities. The word "immediate," used in reference to "loss and damage," in a policy of insurance, must be given a reasonable construction; and it is held to mean direct or proximate cause, as distinguished from a remote cause. *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *New York Express Co. v. Traders' Co.*, 132 Mass. 377, 42 Am. Rep. 440; *Ermentrout v. Girard Fire Ins. Co.*, 63 Minn. 308, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. The rule as to the determination of what is proximate and remote cause has been the cause of much legal refinement, and has frequently been applied in this court. It was expressly said in the case of *B. & P. R. Co. v. Reaney*, 42 Md. 117, that courts adopt the practical rule that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. In the case of *Transatlantic Fire Insurance Co. v. Dorsey*, 56 Md. 80, 40 Am. Rep. 403—a somewhat analogous case—where a suit was brought on a policy of insurance against loss by fire, and the policy contained an exemption from liability by explosion of any kind, unless fire ensues, and then for loss by fire alone, it was held that, upon reason and the established rules of construction, such loss should be regarded as within the risk assumed by the insurers. In such case the fire is the direct and efficient cause of the loss, and the explosion but the incident; and, if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms. The proof in that case showed that the fire originated in consequence of a violent tornado blowing the fire through the steam drum, and so bringing it in contact with escaping gases and air, causing by the fire an explosion. In the case at bar the existence of the automatic sprinkler in the cellar was known to the company at the time of the issuing of the policy of insurance, and the outpouring of the water from the sprinklers was the inevitable consequence of the explosion of the boiler. The active and efficient cause that put in motion the water was clearly the heat from the explosion, and not the intervention of any new and independent agency. The

explosion of the boiler was therefore the direct and proximate cause of the damage, and this cause being within the clause of the policy which insured against "all immediate loss and damage, except by fire," the appellant is liable for the risks assumed under the policy.

We find no such error in the rulings of the court on the bills of exceptions relating to the admissibility of evidence as would entitle the appellant to a reversal of the judgment, and for the reasons given it will be affirmed. Judgment affirmed, with costs.

STATE, to Use of MEIDLING et al., v. UNITED RYS. & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland. April 1, 1903.)

ELECTRIC RAILWAY—TRACKS IN OPEN COUNTRY—CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENT.

1. Though an electric railway is negligent in running a car at a higher rate of speed than allowable, and in failing to give signals, its negligence does not excuse that of one who, seeing a car approaching, drives across the track without again looking, relying on his own estimate that he can make the crossing in safety.

2. One about to cross the tracks of an electric railway in the nighttime, and in the open country, saw a car rapidly approaching from one-half to two or three blocks distant, and drove across the track without again looking. His vehicle was struck by the car, and he was killed. There was, at the time he looked, a signal at the nearest crossing, which, if obeyed by the operators of the car, would have required it to stop there, but there was no evidence that deceased saw the light, or knew what it meant. *Held*, that he was guilty of contributory negligence.

Appeal from Baltimore City Court; George N. Sharp, Judge.

Action by the state of Maryland, for the use of Annie Meidling and others, against the United Railways & Electric Company of Baltimore. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

William Colton and Wm. S. Bryan, Jr., for appellant. Fielder C. Slingluff and George Dobbin Penniman, for appellee.

FOWLER, J. This is an action to recover damages for the use of the widow and infant children of John Meidling, who was fatally injured by one of the cars of the United Railways & Electric Company of Baltimore at the intersection of First avenue and Fifteenth street. At the close of the plaintiff's testimony the court, at the instance of the defendant, withdrew the case from the jury on the ground that by the undisputed evidence in the cause the negligence of the deceased directly contributed to the accident which caused his death. The single question presented by this appeal is whether there was

error committed in giving the instruction just mentioned.

It appears from the evidence that the deceased, together with a companion, Mrs. Plitts, was, on the evening of the 7th February, 1901, after dark, between 7 and 8 o'clock, driving along First avenue, which is a public thoroughfare. They were driving west approaching Baltimore, and had reached Fifteenth street, on which the tracks of the defendant company are laid. At this crossing the view in both directions on Fifteenth street is unobstructed, and an approaching car could be seen by persons on First avenue before going upon the tracks of the railway. Indeed, the evidence is clear and uncontradicted that both the deceased and his companion saw the car before attempting to cross. Mrs. Plitts testified as follows: "I saw the car. It looked like it was squares away. We could see it plainly, which we did see, and we had plenty of time to cross, and we made no effort to hurry, or anything else, because it was time enough to cross, because the car was over two squares off. He got up, and looked out the sides of the wagon. It had no curtains on it. He raised himself, and looked both ways, and I looked myself." It also appears from the evidence that the railroad on Fifteenth street was a T-rail construction, and that the way called Fifteenth street runs through the open fields, and was not a thoroughfare. From the corner where the accident occurred there was a clear and unobstructed view for two blocks up Fifteenth street, from whence the car was approaching; and the headlight was burning full. There were only two other witnesses who saw the accident, and their testimony substantially agrees with that of Mrs. Plitts.

Can there be any doubt, under the state of case here presented, that the unfortunate man who was killed was guilty of gross contributory negligence under the decision of this court applicable to electric railroads in the open country? In *McNab v. United Rys. Co.*, 94 Md. 719, 51 Atl. 421, we said: "The construction out in the open country, where this accident happened, is altogether different from that upon the streets, where flat rails are used, and where no cross-ties are visible. The rate of speed at which cars run in the country is from twenty to twenty-five miles an hour, whilst that permitted in the city is very much less. The danger of collision with a car is more imminent when crossing these tracks in the country than it is when driving over or along street railway tracks in a city." Again: "The conditions as to construction, location, and speed, and the danger incident to crossing the tracks being precisely the same in this instance as they would have been had the motive power been steam, the legal principles defining contributory negligence cannot be different merely because the motive power was electricity." If we applied to the situation in the *McNab Case* the

rule which governs and defines the character of care which must be observed in approaching a steam railway, it would seem to follow that the same rule is applicable here. The conditions are substantially similar. Here, as there, we have an electric railway running through the open country, with a T-rail construction. It is evident from all the evidence that we have here, as there, a rapidly approaching car in the sight of the traveler, who, in spite of the fact that he saw it, drove leisurely on the track, and was run over and killed. It is conceded, of course, that the defendant was negligent in failing, perhaps, to give signals, and in running at a higher rate of speed than was allowable; but under all the authorities such negligence of the defendant does not palliate or excuse the negligence of the plaintiff. Thus, in *McNab's Case*, it is said: "No matter how negligent the company's servants may have been in failing to give signals or warnings of the approach of the car to the crossing, Mrs. McNab, after she saw the danger of leaving a place of safety, and of attempting to cross directly in front of the rapidly moving car, was, when she drove forward, equally guilty of negligence which immediately contributed to the infliction of the injury which she sustained; and that contributory negligence is a bar to a recovery on her part." The testimony is that when the deceased and his companion first saw the car it was from a half block to two or three or several blocks, or, as Mrs. Plitts said, "squares away," and it does not appear that they again looked before attempting to cross. This certainly, under the circumstances of this case, was negligence. It was held by the Supreme Court of Pennsylvania in *Keenan v. Union Traction Co.*, 202 Pa. 107, 51 Atl. 742, 58 L. R. A. 217, that it is contributory negligence, when attempting to drive across the tracks of an electric railroad, even in the country, where, at a distance of 35 feet from the track, one can look along the track 800 feet, and, seeing no car coming, walks his horse across the track without again looking for a car. It was held to be his duty to continue to look until the track is reached. In the course of the opinion Brown, J., said: "But his misfortune is that he was careful but for an instant, when he should have continued to be watchful until the track—the real point of danger—was reached. If he had continued to look, he could have seen the car, just as those within saw his team 100 feet in front of it, when the horse was on or approaching the track. It is not conceivable that the plaintiff could not have avoided the collision if he had continued to look." Now, if the injured person in the case just cited, who did not see the car when he looked, was guilty of negligence because he drove on the track without continuing to look, it seems to us for a still stronger reason must the deceased in this case be held negligent, for, with his eyes open, and

after seeing the car approaching, he attempted to cross, as described by the witnesses, in a slow trot, without in the least hastening his speed.

The danger of adopting a rule which permits the traveler, when he sees a car rapidly approaching, especially at night, to make a nice mathematical calculation as to whether he can with safety drive over the track before the car reaches the crossing, is illustrated by the facts of this case. One of the witnesses thought the car was squares away, and another only half a square distant, as the deceased and Mrs. Plitts approached the crossing. If the calculation made by the deceased had been correct, he would doubtless have crossed in safety; but his calculation, as often happens, when calculations are made in the dark, was fatally erroneous. The only safety, under such circumstances as we have in this case, is for the traveler to adhere to the rule which, as we have seen, was adopted by the Supreme Court of Pennsylvania in *Keenan v. Union Traction Co.*, supra, rather than that which was advocated by counsel for appellants, which allows the traveler to make a rapid calculation in the dark, and holds the railway company responsible for the damage resulting from errors committed by the calculator.

It was contended that the deceased had a right to suppose there was no danger in crossing, because there was a signal at First avenue, which, if obeyed by the employees of the defendant, would have required the car to stop there. But there is no evidence in the case that the deceased was misled by this light, or that, relying upon it, he believed he could cross in safety. Indeed, there is no evidence that he saw the red light signal, or knew what it meant. Mrs. Plitts says there was a big red light at the crossing, but what it signified she did not know, or, if she knew, she does not tell us. We cannot assume that the deceased saw this red light, and then assume that he knew what it signified, and further assume that he was thereby misled and deceived.

From what we have said it will be seen that we entirely agree with the ruling of the learned judge below in taking the case from the jury by reason of the contributory negligence of the deceased, John Meldling.

Judgment affirmed.

STATE v. BLAKENEY.

(Court of Appeals of Maryland. March 31, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—SEVERAL VIOLATIONS—INDICTMENT—JOINDER—DEMURRER—ELECTION.

1. An indictment for violation of a local option law, charging in several counts the sale of intoxicating liquors to one person, the giving away of such liquors to another, and the keep-

ing in possession by defendant of such liquors to be used by such other, and with allowing his place of business to be a depository for such liquors, was not demurrable on the ground that distinct and disconnected criminal charges were improperly joined.

2. Where an indictment in several counts alleged several distinct violations of a local option law, it was within the discretion of the trial court to require the state to elect as to which it would rely on, where defendant would be prejudiced by the allowance of a single trial on all the counts.

Appeal from Circuit Court, Kent County.

William A. Blakeney was indicted for violation of the local option law, and from an order sustaining a demurrer to the indictment the state appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, SCHMUCKER, and JONES, JJ.

Isidor Rayner, Atty. Gen., for the State. Richard D. Hynson, and Lewin W. Wickes, for appellee.

FOWLER, J. The traverser was indicted in the circuit court for Kent county for the violation of the local option law of that county. The indictment contains five counts. The first two counts charge sales of intoxicating liquors to one George Cadwalader, and the third the giving away of such liquors to Robert R. Calder. The fourth count alleges that the traverser kept and had in his possession spirituous and fermented liquors to be used by said Robert R. Calder, and the fifth that the traverser allowed his place of business to be a depository for such liquors. Each of these offenses is alleged to be in violation of the act of assembly known as the "Local Option Law of Kent County." The traverser demurred to the whole indictment, and his demurrer, which was sustained by the trial court, is based upon the proposition that he cannot be called on under one indictment to answer three distinct criminal charges entirely disconnected.

The proposition, as thus stated, cannot be maintained. The general rule is thus expressed in 10 Encyl. Pl. & Pr. ("Indictments") p. 546: "While it is said that the defendant ought not to be charged with different felonies in different counts of the same indictment, as such a course might interfere with his full defense, the joinder of different offenses in the same indictment in separate counts is not necessarily fatal to the pleading itself, as appears from the various adjudications holding that such joinder is not ground for demurrer or arrest of judgment, but that the court may, in its discretion, quash the indictment, or compel the prosecutor to elect upon which count he will proceed." Among the cases cited in the notes to sustain the text is the case of *State v. McNally*, 55 Md. 562. The indictment in the case just cited contains three counts charging the traversers with the larceny of a quantity of wheat. In each count it was alleged the wheat was the property of a dif-

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. §§ 419, 420.

ferent owner, and it was contended in support of a motion to quash that the ownership of the property alleged in the indictment to have been stolen could not properly be charged in the same indictment as being in different persons, and that it was, in effect, holding the defendants to answer upon several and distinct charges. It was held (Bartol, C. J.) that, even if the indictment did, as alleged, contain several distinct charges of felony against the defendants it was settled that this would not be a cause of demurrer, or a ground for a motion in arrest after verdict. "Where several distinct felonies are charged in the same indictment, the rule in England is, as stated by Chitty (1 Cr. L. 449m), 'that the only mode of objecting to such a joinder of offenses is by an application to the court to quash the indictment or to require the prosecutor to elect.' * * * This rule of the common law," said this court in *State v. McNally*, "exists in Maryland, and in a case where there are several counts in the indictment charging the defendant with more than one distinct and separate felony it is competent for the court, in its discretion, either to compel the prosecutor to elect upon which he will proceed, or, in a clear case, to quash the indictment. * * * Such a case," continued the court, "does not fall within the provisions of Code 1860, art. 80, § 82 [Code 1888, art. 27, § 286], because it is well settled 'that in point of law it is no objection that two or more offenses of the same nature, and upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. It, therefore, forms no ground for a motion in arrest; neither can it be objected to by way of demurrer.'" Having thus fully considered the case upon the assumption that the indictment in its several counts charged the traverser with distinct and separate offenses, the court proceeds to point out that the error committed by the lower court was in so construing the indictment, whereas it was said to be obvious on the face of the indictment "that the several counts relate to the same transaction, and that the variation of the form in which the offense is charged in the different counts is done with a view to meet the evidence."

If this well-settled rule applies to felonies, a fortiori will it apply to indictments charging misdemeanors. Thus, in section 452, p. 279, 1 Bishop's New Crim. Procedure, it is said: "By the practice everywhere distinct misdemeanors may be joined in separate counts of one indictment to be followed by one trial for all and by conviction for each, the same as though all were charged in separate indictments, subject to practical limitations by judicial discretion." And the author states, in paragraph 3 of the section just cited, that, when liquor selling is made a misdemeanor by statute, punishable by fine, several counts for distinct sales may be combined in one indictment, and the accumulated

penalty imposed. This, as we believe, is the practice in this state in similar prosecutions in Baltimore City, and in some, at least, of the circuits. The same general rule, namely, that in prosecutions for misdemeanors several distinct offenses of the same kind requiring punishments of like nature may be joined in separate counts in the same indictment, is stated in 10 Encyl. Pl. & Prac. p. 549, and sustained by numerous authorities, both American and English.

All of the offenses charged in the indictment now before us are admitted to have been violations of the Kent county liquor law, and if, for any good reason, the traverser did not wish or was unable to meet them all in one trial, and before the same jury, he should have made his application to the court to compel the state to elect. It is not every application of this kind that will be granted by the trial court. The application is founded on the supposition that the case extends to more than one charge (*State v. Bell*, 27 Md. 675, '92 Am. Dec. 658), and therefore, where it appears from the face of the indictment, as it did in *State v. McNally*, supra, that all the counts are based upon the same transaction, the prosecutor will not be required to elect. It does not necessarily follow, however, that, if it appears from the face of the indictment that several distinct and separate misdemeanors are charged in several counts, the traverser is entitled, as matter of right, to ask that the state be compelled to elect. While it has been held in this state that such an application may be made by the traverser at any time during the trial, yet it is addressed to the discretion of the court, and the ruling thereon is not reviewable by appeal. *State v. Bell*, supra. This being so, the trial court will, therefore, be all the more careful not to exercise or refuse to exercise this most important function without the most careful consideration. In the second paragraph of section 453, p. 288, of 1 Bishop's New Crim. Procedure, it is said that: "The joining in proper cases of distinct misdemeanors in one indictment, and their trial at one hearing before the petit jury, are essential to the administration of real justice; in some cases essential as protecting the accused from the overburden of needless trials, in others as saving the courts from being blocked by them, to the utter suspension of public justice. So plain is all this," continues the author, "that by many judges even the authority to compel an election of counts in misdemeanors is denied, while others say that in practice it is never done. The better view, however, evidently is that the authority exists, yet it should be exercised cautiously, and only in those special cases, wherein otherwise some right or interest will be put in peril."

We believe the practice in this state is well settled which allows the traverser to ask, and authorizes the court to require, an election in misdemeanors; but, as we have

said, this authority should be exercised with caution, and only in cases in which it is clear some right of the traverser will be put in peril by its refusal. It follows that the rulings of the court below sustaining the demurrer will be reversed.

Rulings reversed, and cause remanded.

GEESEY v. GEESEY et al.

(Court of Appeals of Maryland. March 31, 1908.)

ADMINISTRATOR—ACCOUNTING—ALLOWANCE OF COUNSEL FEES—OPENING ACCOUNT.

1. Where an administrator has paid an attorney for his services in behalf of the estate, and the amount so paid has been included in an account allowed by the court, and both the administrator and the attorney have acted in good faith, the account should not be reopened to reduce the attorney's fees, unless it clearly appears that they were unreasonable.

Appeal from Orphans' Court, Frederick County; Russell E. Lighter and Roger M. Neighbours, Judges.

Proceedings by Amelia M. Geesey, administratrix, and another, against Augustus M. Geesey, administrator, to set aside an allowance of the administrator's account. From an order reopening the account, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, SCHMUCKER, PEARCE, and BOYD, JJ.

Frank L. Stoner, for appellant. Charles O. Waters and Jacob Rohrback, for appellees.

BOYD, J. This is the second time this controversy has been before us; the report of the case on the former appeal being found in 94 Md. 371, 51 Atl. 38. The orphans' court of Frederick county passed an order rescinding its order of ratification of an account which had been stated by the appellant and ratified by that court, without giving him an opportunity to prove the value of the services of his counsel, and the propriety of the allowance of fees paid by him for which he had been credited in that account. The items objected to were for fees paid by the administrator in four cases, amounting to \$195, which had been included in the account under the term "costs," and were not specifically brought to the attention of the orphans' court. We said in that case, and repeat now, after an examination of this record, that there is nothing to justify the charge or insinuation that Mr. Heagey attempted to impose on the court, or the deputy register of wills who stated the account. He signed a receipt for his fee in each of the four cases on the statements filed by the administrator, and although the chief judge of the orphans' court testified that it was not the custom of that court to examine all vouchers, as we said in the former opinion, "Mr. Heagey

might well have assumed that they would be examined by the court before the account was ratified," or we might add that the deputy register of wills, who stated the account, would necessarily do so in the discharge of his duties. Of course, it is possible for the court, in examining an account of this kind before ratifying it, to overlook some items which it would not allow if its attention had been specially directed to them, and mistakes may occur; but we did not in the former opinion, and do not now, refer to this by way of criticism of the court below, but to show that, in our opinion, there is no reason to impute improper motives to the administrator or to his attorney by reason of the manner in which the receipts for these fees were given and filed. As we said in the former appeal, the orphans' court has the power to reopen accounts of executors and administrators and correct errors therein, and we remanded the case so that the matter could be properly investigated and acted on by the court. The administrator had paid the attorney the fees allowed in the account, and, as we are satisfied that both of them acted in good faith, the account as stated should not be disturbed unless there was manifest error in these allowances. The chief judge of the orphans' court was of the opinion that the fees in the first account were to include services rendered and to be rendered, but the other two members of the court, who sat below, have allowed in the order appealed from \$75 in addition to the fees in the first account; thereby recognizing that something additional should be allowed. The testimony on both sides is unsatisfactory in some respects, but it cannot be said, from an examination of this record, that the fees paid to Mr. Heagey are so out of proportion to the services rendered by him as to justify the court in setting aside the account already ratified by it. The administrator testified that he thought they were reasonable, and he and Mr. Heagey ought to know more about the character of the services rendered than others would. It is not possible to accurately determine the real value of the services of an attorney by the amount involved, or by what appears of record in the case, as a great deal of the labor of a careful attorney is performed in the preparation of the case outside of the courthouse. If administrators and executors who act in good faith in paying counsel fees in cases in which they ought to be represented by attorneys are to be subjected to personal loss simply because the members of the orphans' court, or some person interested in the estate, deem the fees paid too high, there would be great danger in some instances of their not being properly represented, as it would be difficult to get competent attorneys if their compensation is to depend wholly upon the views of the judges of the orphans' courts or distributees. It is undoubtedly the duty of an administrator to defend a suit for a claim against his decedent.

which he has reason to believe is unjust, and when he employs counsel for that purpose he ought to be allowed a reasonable amount as compensation for him; and when he has paid him, and the amount is not shown to be unreasonable, he ought to receive credit for it out of the estate. When, therefore, as in this case, he has paid the attorney for his services, and has been allowed for the amount so paid in his account, that account ought not to be reopened for the purpose of reducing the amount unless it clearly appears that it was unreasonable. The testimony in this record is very conflicting on that subject, and as we are satisfied there was no attempt or intention to impose on the court by the method adopted, and as the petitioners have not clearly established that the charges were unreasonable, we think the petition filed by them ought to have been dismissed, and that the account should not have been disturbed. The order appealed from will therefore be reversed, and the petition dismissed.

Order reversed and petition dismissed, the appellees to pay the costs.

CITIZENS' TRUST & DEPOSIT CO. OF BALTIMORE CITY v. TOMPKINS.

(Court of Appeals of Maryland. April 2, 1903.)

CORPORATIONS — OFFICERS — PRESIDENT — ENGAGING IN COMPETING BUSINESS — EMOLUMENTS — ACCOUNTING — BY-LAWS — CONSTRUCTION — RECEIVERS — APPOINTMENT — FEES — CONTRACT TO ACCOUNT — CONSIDERATION.

1. Where a trust company under a corporate deed of trust had power to nominate a receiver for the grantor in the event of a foreclosure thereof, and in pursuance thereof nominated its president, who was appointed, such nomination did not affect the receiver's status as an officer of the court, nor render him liable to account to the trust company for his fees received as such receiver.

2. A resolution of a trust company, which was trustee under a deed of trust, instructing its counsel, in a certain event, to apply for a receiver for the grantor in the deed, and ask the court to appoint T. "a receiver on behalf of this company," was a direction for the appointment of T. as an individual, and not as an official of the trust company.

3. Where the by-laws of a trust company, which was itself authorized to act as receiver, prescribing the duties of its president, made no reference to his duties as a receiver, and such president was appointed receiver for a corporation as an individual, he was not bound to account to the corporation for his fees received in the performance of such office, on the ground that, since he was paid a salary as president of the corporation, the corporation was entitled to the benefit of his services as receiver.

4. A by-law of a trust company providing that no trusteeship or office of receiver shall be accepted by its president, without the approval of the executive committee, should be construed only to prevent the president from binding the trust company by the acceptance of a trust which it was authorized to execute without the approval of the executive committee, and did not restrain the president from accepting a personal appointment as receiver for a corporation.

5. Where a trust company was authorized to nominate a receiver for a corporation, but had no vested right either to act as receiver itself, or to require the appointment of its nominee by

the court, the trust company's nomination of its president as such receiver was no sufficient consideration for the president's agreement to act as such if appointed, and pay to the trust company all compensation received by him in such employment.

6. In an action against the president of a corporation to recover fees earned by him as receiver of a corporation, the declaration alleged that plaintiff, with defendant's consent, agreed to foreclose a deed of trust without charge, provided defendant was appointed receiver, and that defendant was appointed with the understanding and agreement that he was to act on plaintiff's behalf, and pay plaintiff such compensation as he was allowed for so acting. *Held*, that in the absence of an allegation that plaintiff, as trustee, had any right to make such foreclosure sale, or to charge for making it, the declaration failed to state any consideration for the president's agreement.

Appeal from Superior Court of Baltimore City.

Action by the Citizens' Trust & Deposit Company of Baltimore City against John A. Tompkins. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Fielder C. Slingluff and T. Wallis Blake-stone, for appellant. Bernard Carter and D. K. Este Fisher, for appellee.

PEARCE, J. The plaintiff in this case is a corporation created by chapter 374, p. 981, of the Acts of 1898, under the name of the Citizens' Trust & Deposit Company of Baltimore, and was given power to accept and execute trusts of any and every description, and to act as receiver when duly appointed by any court of this state. The defendant was its president, and, while holding that office, he, in his individual character and capacity, was appointed by one of the courts of this state, having the power to make such appointment, receiver of the Maryland Brewing Company of Baltimore City, and was allowed by the court a large sum of money as compensation for his services as such receiver; and this suit was instituted to recover from the defendant the amount so allowed him, which the plaintiff alleges it was his duty, as its president, to account for and pay over to it, but which he refused to do. The declaration originally contained eight counts, but the six common counts were stricken out by the plaintiff, leaving only the two special counts—the seventh and eighth—to each of which the defendant demurred. This demurrer was sustained, with leave to plaintiff to amend, but this leave was declined, and judgment was entered on the demurrer for defendant for costs.

The seventh count alleges, in substance, that the Maryland Brewing Company of Baltimore City executed to the plaintiff a mortgage deed of trust to secure certain bonds issued by said brewing company, and that said deed of trust gave authority to the plaintiff, in certain contingencies, to apply for a receiver of said brewing company, and vest

ed in the plaintiff, as matter of strict right, the power to nominate such receiver to the court; that these contingencies had arisen, and the plaintiff had applied to the proper court, and had nominated the defendant as such receiver, and he had been duly appointed; that the defendant was at that time president of the plaintiff, and continued to be such during the receivership, and received a large salary for the performance of his duties as president; that, under the by-laws of the plaintiff, it was the duty of the defendant, as its president, to accept the position of such receiver when so nominated and appointed, and to account to the plaintiff for the compensation received by him as such receiver; that he had received such compensation, and had been requested to pay over the same to the plaintiff, but had refused so to do. By agreement of counsel, certain extracts from the minutes and by-laws of the plaintiff were made part of the case on the consideration of the demurrer. Among these are the following: Resolution of executive committee. February 25, 1901, unanimously passed: "Resolved, that the company's counsel be instructed to take all necessary steps to protect our interests in event of any one applying for a receiver for the Maryland Brewing Company, and, should said brewing company fail to meet their coupons maturing March 1st next, that the counsel be instructed to at once apply for a receiver for the brewing company, and ask the court to appoint Col. John A. Tompkins a receiver on behalf of this company." Also resolution of the executive committee March 4, 1901 (present, Messrs. Tompkins, Adler, Hilles, and Hamilton): "Resolved, that the president be instructed to inform the bondholders' committee of the Maryland Brewing Company that this company would, as trustee under the mortgage, make the sale of foreclosure without charge, provided he was appointed receiver." Section 12 of the by-laws prescribes the duties of the president and vice presidents in the usual general terms; providing, among other things, that the president shall "perform all acts incident to the office of president," and that, in the absence or disability of the president, his duties shall devolve upon the first, second, and third vice presidents, in the order named, and, in the absence or disability of all these, upon the chairman of the executive committee. Section 13 of the by-laws declares, "No trustee-ship, or office of executor, administrator, guardian, receiver, or committee, shall be accepted by the president, without the approval of the committee." Section 15 provides that "the treasurer shall endorse all checks and drafts, sign receipts and acknowledgments for all money and other property of the corporation, and property of any description, belonging to other persons, in the possession of the company, and disburse the same under the directions and regulations of the executive committee."

The seventh count, as we have set it out herein, has been framed with much ingenuity and skill, for the presentation of a theory apparently novel; but, when subjected to careful and serious examination, the objections to its soundness appear to us to be both numerous and convincing. It is quite true that defendant's appointment as receiver did originate in his nomination by the plaintiff, but the same is true of every receiver; the parties in interest always recommending to the court those whom they desire, and such recommendations always receiving from the court such consideration as they may deserve. But the right of nomination conferred in this case by the bondholders upon the plaintiff could neither impair the power nor control the discretion of the court, nor could it bind any of the parties interested, except themselves. But even if it could be seriously contended that the defendant's appointment was the concession by the court of an absolute right in the plaintiff to designate a receiver (and we did not understand the plaintiff's contention to go beyond the right to nominate), its significance would end with the appointment. Such supposed right could in no case affect the rights or liabilities of a receiver so appointed, and in the present case could neither of itself, nor in connection with any other of the matters alleged in this count, have any greater effect to create the liability here claimed than would the appointment of a receiver in the ordinary case, made upon the recommendation of a party in interest, whether with or without contest as to the appointment. There is no magic either in the source, the urgency, or the merit of such a nomination; and when an appointment is made, no matter upon what consideration, the receiver is the representative of the court alone; owing no one anything in respect of his appointment, but owing to the court, for the common good of all concerned, his utmost skill and fidelity in the discharge of his duties. Pursuing the complex theory of implied obligation upon which this count is founded, the plaintiff would have us infer from the resolution of February 25, 1901, that the defendant's appointment was asked as president of the company, and in order that he might act as receiver "in its behalf"; in other words, as its agent or subordinate. But we are not able to discover anything which can give color to this contention. On the contrary, the language of the resolution seems to us to preclude it. As we read it, it plainly asks for the appointment of Col. Tompkins the individual, not Col. Tompkins the official. The collocation of the words "on behalf of this company", can make no difference in this respect; and their transposition so as to read, "to ask the court, on behalf of this company, to appoint Col. John A. Tompkins, a receiver," would not only make the grammatical structure correct, but would indicate with absolute precision what we understand to be the true meaning of the words.

If its phraseology had been, "to appoint the president of this company, Col. John A. Tompkins, a receiver to act in the place of the company," the contention now made as to the meaning of the words would be more plausible. But the sufficient answer would be then, as it is now, that, as the company itself was authorized to act as receiver, such a nomination would have been in effect a nomination of the company itself, and would necessarily have been so regarded by the court; resulting either in the appointment of the company, or some other applicant properly recommended. The fallacy of this branch of the contention is that the sole reason for asking the defendant's appointment was to secure for the company the receiver's commissions by this means, although there were ample reasons other than that for seeking the appointment of some one associated with the company, who would administer the trust through its agency, and bring to it the many obvious incidental advantages, which need not be mentioned here.

The next successive position taken by the plaintiff is that as he was the president of the company, and his appointment as receiver was approved by the executive committee, it was his duty, as president, under section 13 of the by-laws, to accept the receivership, and that, acceptance of the position being thus made an official duty, the position itself became part of his official position as president, and his acts as receiver were "acts incident to the office of president," and, as a corollary to this proposition, that, as his duties as president were paid for by the salary of that office, the compensation allowed for his services as receiver rightfully belonged to the company, which paid him his salary for performing these very services. The by-laws prescribing the duties of the president make no reference to the duties of a receiver, and it would have been remarkable, indeed, if they had done so, since every receiver, however appointed, is entirely subject to the control of the court, and his duties are such as are prescribed by the decree appointing him. The duties of the receiver in this case relate exclusively to the property and affairs of the Maryland Brewing Company, and can in no event require the performance of any duty assigned to the president of the Citizens' Trust & Deposit Company. How, then, can it be possible that any acts done as such receiver, under the direction of the court, can be acts incident to the office of president? The statement of such a proposition is its own refutation. Moreover, it is impossible to attribute to by-law No. 13 the meaning contended for by the plaintiff. It cannot be doubted that its sole purpose was to prevent the president from binding the company, without the approval of its executive committee, to the acceptance of any trust which it was authorized to execute. It would doubtless have been competent to forbid the

acceptance of such trusts by the president in his individual capacity, but only by clear and unambiguous language. Such prohibition, if made, would presumably be obeyed by the president, and respected by the courts if brought to their notice in due season. Its disobedience might perhaps warrant the removal of the president from his office; but it does not follow that it would in any manner affect his appointment as receiver, or his right to retain the commissions allowed. There are many obvious additional considerations which would make it impossible to accept the theory upon which this count is framed, but it is unnecessary to prolong this opinion by detailing them.

The eighth count sets out the inducements as was done in the seventh, and then alleges that the plaintiff, with the consent of the defendant, agreed to foreclose the deed of trust without charge, provided the defendant, who was then its president, was appointed receiver; that he was so appointed with the understanding and agreement that he was to act on behalf of the plaintiff, and was to pay it such compensation as he was allowed for so acting; that he had been allowed compensation, but had refused to pay it to the plaintiff. The cause of action here stated is an express contract, resting for its consideration either upon the several matters alleged in the seventh and repeated in this count, or upon the agreement of the plaintiff, with the consent of the defendant, to make the foreclosure sale without charge, provided the defendant was appointed receiver. What we have said in reference to the seventh count is sufficient to indicate that the first of these supposed considerations is in fact no consideration whatever, in our judgment. The plaintiff had no vested right to be receiver, nor any power of appointing a receiver, such power being exclusively in the court; and as the appointment of Col. Tompkins was no damage to the plaintiff, nor forbearance or suspension of any right it had, it can afford no support for any promise made to the plaintiff. *Folck v. Smith*, 13 Md. 90, 91; *Hopkins v. Hinkley & Tieck*, 61 Md. 584. Had the plaintiff possessed a vested right to be receiver, the renunciation of this right would have been a sufficient consideration to support an agreement for the payment of some part of the compensation to be allowed. *Ohlendorf v. Kanne*, 66 Md. 495, 8 Atl. 351.

Turning now to the consideration of the agreement to make the foreclosure sale without charge, it must be recalled that a legal consideration imperatively imports either some benefit to the promisor, or some loss or detriment to the promisee. Brantly on Contracts, pp. 56, 57. The adequacy of the consideration will not be ordinarily inquired into, but it must be something real—something of value in the eye of the law. *Forster v. Ulman*, 64 Md. 526, 3 Atl. 113. In the present case the alleged contract on the part

of the defendant is to pay to the plaintiff all the compensation allowed him as receiver. When it is remembered that as receiver he is obliged to give, and pay the cost of, a large bond at his own expense, to discharge numerous and exacting duties requiring the aid of agents and subordinates, and embracing the operating of the brewery company, if required by the court, and to incur heavy liabilities arising out of possible errors of judgment of his own, or derelictions of his subordinates, without any indemnity from the plaintiff, so far as is disclosed by the record, it is impossible to discover any benefit resulting to the defendant—anything real or of value in the eye of the law—for all is given, and nothing is received. Nor are we able to perceive that any loss or detriment has been or will be suffered by the plaintiff in consequence of the alleged agreement. There is no averment that, as trustee under the deed of trust, the plaintiff had any right to make said foreclosure sale, or to charge for making it, and we cannot assume fundamental matters not averred. When the court took jurisdiction and control, through its receiver, of the property and affairs of the brewing company, it was for the court to determine (conceding for the moment that the deed gave the power of sale to the plaintiff in the absence of a receiver) whether, in the exigency of the situation then existing, a foreclosure sale should be made by the plaintiff, or in some other manner deemed by the court more conducive to the interests of all concerned; and, unless the plaintiff had such right at that time, it surrendered nothing real or of value in the eye of the law, and therefore has suffered no loss or detriment. Moreover, the fruits of the charge which it was agreed should be relinquished could only have been realized through a foreclosure actually made, and there is no averment that any foreclosure was made; and, without such foreclosure, there could be no valid foundation for a claim against the defendant, even upon the theory of this count. Again, if the foreclosure sale was made by the plaintiff, yet, if the plaintiff did not relinquish the charge, but claimed and received the same, the foundation of its claim against the defendant would equally fail; and without an averment that the sale was made by the plaintiff, and made without charge, in accordance with the agreement, this count fails to state a sufficient consideration for the defendant's promise. The plaintiff did aver that the defendant had acted as receiver, and had actually received compensation for his services as receiver; and it was equally necessary to aver that the plaintiff had made the foreclosure sale, and had not made any charge or received any compensation therefor. There was thus upon the face of this count an entire failure of the only remaining consideration upon which the promise of the defendant could be supported, and a promise without legal consider-

ation cannot be enforced, however much we may commend the example of him

"Who, though he promise to his hurt,
Yet makes his promise good."

The question of public policy was argued by the plaintiff's counsel in a very interesting manner, with special reference to the exercise of fiduciary relations by modern corporations known as "trust companies," but, in view of our conclusion that the want of consideration is fatal to the claim of the plaintiff, it is unnecessary to consider that question.

Judgment affirmed, with costs above and below.

LEVERING v. ORRICK et al. THOM v. SAME. BASH v. SAME. LAMB v. SAME.

(Court of Appeals of Maryland. April 2, 1903.)

WILLS—CONSTRUCTION—LIFE ESTATES—DIVISION OF REMAINDER.

1. Testator bequeathed the residue of his estate in trust to apply the income to his three daughters for life, and declared that at the death of his said daughters, or any of them, her share should pass to "her issue, children or descendants forever," but, in case any of his said daughters should die without issue living at her death, her share should pass to her surviving sisters and their descendants; it being testator's intention that the entire estate should vest in the descendants of his daughters, or any of them who should leave descendants, in which case distribution should be made among such descendants per capita, and not per stirpes, and that such descendants should be considered as purchasers, and be entitled to the principal of the property from the time their rights vested. Held that, on the death of the last surviving daughter without children or descendants living at her death, her share should be divided per capita among all the descendants of the other two deceased sisters living at the time of distribution.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Action by Martha B. Orrick and others against Elise W. Levering and others for the construction of a will and for partition. From a decree in favor of plaintiffs, Elise W. Levering, De Coursey W. Thom, Edward L. Bash, as guardian of Anne G. Thom and another, and F. Emerson Lamb, as guardian of Isabel R. Thom and Ella L. Thom, prosecute separate appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Archibald H. Taylor, for appellant De Coursey W. Thom. John William Marshall, for appellant Elise W. Levering. J. Pembroke Thom and J. Wilson Leakin, for appellant F. Emerson Lamb. John Pierce Bruns, for appellant Edward L. Bash. Thomas Foley Hisky, for appellee Pauline M. Levering. John Hinkley, for appellees Martha B. Orrick and husband.

PEARCE, J. In this case the construction of the will of William H. De C. Wright, de-

ceased, which was before this court in *Thomas v. Levering*, 73 Md. 451, 21 Atl. 307, 23 Atl. 3, is again brought up for review. In the former case the questions decided were, first, whether the will was revoked by the codicils thereto, and, if not, what was the true construction of the will and codicils, standing together, so far as they related to the disposition of the share of Mrs. Victoria L. Levering, a daughter of the testator, who died in September, 1889, leaving both children and grandchildren surviving her. The clause of the will which gave rise to that controversy, and which occasions the present controversy, is in the following words: "I will and bequeathe all the rest and residue of my estate, wherever situated, and whatever it may consist of, real, personal or mixed, to my executors hereinafter named and the survivor of them upon the following trusts, that is to say, to apply the income thereof, to the sole and separate use of my daughters during their natural lives, share and share alike, and at the death of my said daughters or any of them, her share to pass to her issue, children or descendants forever, but in case any of my said daughters shall die without issue living at her death, then her share shall pass to her surviving sisters and their descendants, it being my express will that none of my daughters shall be entitled to more than a life estate to their sole and separate use, but the whole of the shares thus bequeathed shall ultimately vest in the descendants of my daughters or any of them who shall leave descendants, in which case the distribution shall be made among such descendants per capita and not per stirpes, and the descendants of my daughters aforesaid are to be considered as purchasers, and as such entitled to the principal or property itself from the time their rights respectively vest." It was determined in the former case that the codicils did not revoke the will, that each of the testator's three daughters took an equitable life estate in one-third of the testator's estate, and that upon the death of Mrs. Levering, leaving surviving her both children and grandchildren, her share should be equally distributed among her children (all of whom survived her) to the exclusion of her grandchildren. Mrs. Thom had died before the testator; her only descendants being two sons, who had received her share of the estate without question. Mrs. Thomas, the third daughter, died in 1902, leaving no children or descendants living at her death, and the question here is as to the distribution of her share. It appears from the testimony that at the time of Mrs. Thomas' death the descendants of Mrs. Thom were as follows: A son, Wm. H. De C. Thom, still living, and his two children, Annie Gordon Thom and Mary Gordon Thom, both infants; also Isabel R. Thom and Ella L. Thom, both infants, children of a deceased son, Pembroke Lea Thom; and that the descendants of Mrs. Levering at the time of Mrs. Thomas' death were as fol-

lows: Three daughters, namely, Miss Ellise W. Levering, Mrs. Martha B. Orrick, and Mrs. Pauline M. Levering; and the following grandchildren: Louisa Wright Orrick, Johnson Orrick, Harry A. Orrick, Jr., and Wm. H. De Coursey Orrick, children of Martha B. Orrick, all infants; also Annie Lively Levering, Paul Johnson Levering, Pauline Dorothy Levering, and Elsie Wright Levering, children of Pauline M. Levering, all infants; there being thus, in all, 16 descendants of Mrs. Thom and Mrs. Levering. Upon a petition filed in the original cause (decided in 73 Md., 21 Atl., 23 Atl. supra) by Mrs. Orrick for the construction of the will as to the disposition of Mrs. Thomas' share, the circuit court of Baltimore City passed a decree on the 23d day of December, 1902, declaring that, by the true construction of said will, the share of Mrs. Thomas should now be divided per capita among all the 16 descendants above named of Mrs. Levering and Mrs. Thom—that is to say, one-sixteenth part thereof to each of said 16 descendants—free, clear, and discharged of the trust under which said share had been held during the life of Mrs. Thomas, and appointed commissioners to make partition accordingly. From this decree four appeals have been taken, all of which are embraced in this record.

At the time of Mrs. Thom's death, her only living descendants were her two sons above named, and at the time of Mrs. Victoria Levering's death her only living descendants were her three daughters above named; Louisa Orrick and Johnson Orrick, the two oldest children of Mrs. Orrick; and Victoria Levering, Louis Levering, Annie Levering, Paul Johnson Levering, and Pauline Dorothy Levering, five of the children of Pauline M. Levering. Ella Lea Levering, the first child of Pauline M. Levering, died before Mrs. Victoria Levering, and Victoria Levering and Louis Levering died afterwards, and before the death of Mrs. Thomas.

The first of these appeals is by Ellise W. Levering, whose contention is that the two sons of Mrs. Thom living at her death, and the three daughters and seven grandchildren of Mrs. Victoria Levering living at her death, constitute, to the exclusion of other descendants of Mrs. Thom and Mrs. Levering, the class contemplated by the testator as entitled to take per capita the share of Mrs. Thomas, and that therefore that share is now vested equally in the 12 persons above mentioned. This contention rests upon the theory that the descendants of Mrs. Thom were to be ascertained at her death, and those of Mrs. Levering at her death, and that, when so ascertained, their respective interests vested accordingly.

The second appeal is that of Wm. H. De C. W. Thom, whose contention is that the share of Mrs. Thomas "is now divisible per stirpes, and not per capita, among all the descendants of Mrs. Levering and Mrs. Thom living at the death of Mrs. Thomas, and that

he is therefore entitled to have distributed to him one fourth part of said share"; and, in order to assert the claim to a distribution per stirpes, the position taken is that the phrase "per capita" was only intended to apply to the case of one daughter only dying and leaving descendants, and the other two daughters dying without descendants, in which case the shares of these two were intended to be divided per capita among the descendants of the one leaving such descendants.

The third appeal was taken by the guardian of Anne G. Thom and Mary G. Thom, infant children of Wm. H. De C. W. Thom, whose contention is that Mrs. Thomas' share is now divisible per capita, one-half among all the descendants of Mrs. Victoria Levering living at the death of Mrs. Thomas, and one-half among all the descendants of Mrs. Thom living at the death of Mrs. Thomas, and that therefore each of these infants is entitled to a one-tenth part of said share. This contention rests upon the theory that the descendants of Mrs. Thom and Mrs. Levering who were to take Mrs. Thomas' share were to be such as answered that description at Mrs. Thomas' death, but that the descendants of each were to constitute separate classes for the per capita distribution directed.

The fourth appeal is by the guardian of Isabel R. Thom and Ella L. Thom, infant children of Pembroke Lea Thom, deceased, whose contention is that the share of Mrs. Thomas "was distributable at her death one-half to the descendants of Victoria L. Levering, and one-half to the descendants of Ella L. Thom, and that these infants are therefore entitled to one-tenth of the fund." Mrs. Thom having died in the lifetime of the testator, the argument in behalf of these infants is that at the testator's death Mrs. Thom's two sons took a remainder in one-half of Mrs. Thomas' share, subject to let in after-born descendants of their mother who came into being before the death of Mrs. Thomas, while Mrs. Levering's descendants would take nothing until her death and the death of Mrs. Thomas.

We have stated heretofore the only questions which were decided on the former appeal, notwithstanding the explicit expression of opinion by the court as to the ultimate disposition of Mrs. Thomas' share; and the counsel for the appellees, with commendable frankness, have conceded that the question now presented was not thereby rendered *res adjudicata*. We have therefore given to it as full and unbiased consideration as if it had not been argued in the former appeal. In discharging this duty, we have not only carefully read all the elaborate briefs filed in these appeals, and examined the authorities there cited, but we have also read the briefs filed in the former appeal, and consulted the authorities then presented to the court; and our conclusion is that the court was entirely correct in saying, as it

said in 73 Md. 459, 21 Atl. 370, 23 Atl. 3, "that Mrs. Thomas' share at her death without issue then living would, according to the terms of the will itself, be divided per capita among all the descendants of Mrs. Levering and Mrs. Thom living at the time of the distribution of such share." The testator, in providing for the case of any of his daughters dying without issue living at her death, directs that "her share shall pass to her surviving sisters and their descendants * * * in which case the distribution shall be made per capita and not per stirpes, and the descendants of my daughters aforesaid are to be considered as purchasers, and as such entitled to the principal or property itself from the time their rights respectively vest." In Williams on Executors, vol. 2 (7th Am. Ed.) p. *976, under the word "Descendants," it is said: "Under this description is comprised every individual proceeding from the stock or family referred to by the testator." In 2 Jarman on Wills, 632: "Descendants are issue of every degree." See, also, O'Hara on Interpretation of Wills, 307; Theobald on Wills, 157. In bequests to descendants equally, or to all the descendants of any person, or to the descendants simply, the rule is that all take per capita unless a contrary intention appears. 2 Redfield on Wills, 36, 74; 1 Roper on Legacies, 126. The following are instances of the application of the rule. "£4,000 to the descendants of Frances Ince." Held, that great-grandchildren were entitled to share with grandchildren. *Crossley v. Clare*, Ambler, 397. "Legacy to the descendants of A. and B. equally." Children and grandchildren take per capita. *Butler v. Stratton*, 3 Brown's Ch. 367. "Under the provisions of a will that the residue of an estate is to be equally divided between my brothers Edwin and Charles' children," the distribution is to be made per capita. *McIntire v. McIntire*, 14 App. D. C. 339. In the present case, Mrs. Thomas being the last of the sisters, her share cannot pass to her surviving sisters, and can only pass to their descendants, in which case the rule of law is that the distribution must be per capita, unless a contrary intention appears; and here a per capita distribution is expressly ordered, and such descendants are declared to be purchasers, taking directly from the testator, and not by limitation.

It was urged upon us that the predominant idea of the testator was that each of the daughters should have a life estate in their own share and in the accrued share of a sister dying without issue, and that at the death of a daughter, leaving issue, her descendants should have precisely the interest she had; and the case of *Slingluff v. Johns*, 87 Md. 273, 39 Atl. 872, was cited to show that such predominant idea must be gratified, even if it should require the sacrifice of a particular conflicting intent. That case is *sui generis* in its facts, and in the

language of the will, though quite within the rules of construction applied to it. But here there is no such conflict of intent, and the predominant idea is that of ultimate bounty to "descendants," which word, as was said in *Ralph v. Carrick*, 11 Ch. Div. 873, is less flexible than "issue," and requires a stronger context to restrict its meaning. In *Allender v. Keplinger*, 62 Md. 12, where an attempt was made by counsel to divide the testator's children into classes, the court said: "The issue of all his children are spoken of collectively, and are regarded as composing one undivided body of persons, and the property is to be divided equally among the individuals who make up this body. This being the intention of the testator, as expressed by the words of his will, we do not know that we can derive much aid from the consideration of the words of other wills which have been construed by the courts." In *Farmer v. Kimball*, 46 N. H. 440, 88 Am. Dec. 219, there was a devise "to my cousins and to the children of my mother's cousins, to be equally divided among them"; and it was held the devisees took per capita, the court saying, "The inference of an intention to divide the residue by classes is merely conjectural, and quite too uncertain to prevent the application of the general rule;" and that case was cited with approval in *Brittain v. Carson*, 46 Md. 189, in declining to yield to a similar argument for a per capita distribution among classes. In *Baker v. Baker*, 8 Gray, 121, the court tersely said, in deciding a similar case, "Descendants are all those persons answering the description at the time fixed by the will for distribution," and therefore held posthumous children to be included.

If we were at liberty to speculate as to the intent of the testator, and to bind the letter of the will to such intent, there would be much plausibility in the argument of counsel for the infant children of *Pembroke Lea Thom* that the word "respective" should be supplied between the words "their descendants," so as to read "their respective descendants"; or if we shared his opinion that the word "respectively," in the expression "from the time their rights respectively vest," can only be gratified and given its full meaning by supplying the word "respective," as above suggested, we might hesitate before rejecting his construction. But we are not at liberty to indulge in speculation as to the testator's intent, and we do not perceive any difficulty arising from the use of the word "respectively." Mrs. Thom having died first, leaving descendants, if Mrs. Levering had died without descendants, as Mrs. Thomas did, the rights of Mrs. Thom's descendants would have vested at the dates, respectively, of the death of Mrs. Levering and of Mrs. Thom, and it would not be material that the full right as to one-half of one of these shares might be deferred in

actual possession until the death of the survivor of Mrs. Levering and Mrs. Thomas. The danger of departing from the literal meaning of the testator's language, when the court is satisfied that the literal meaning is the true meaning, is well illustrated in the present case, where the ingenuity and research of counsel has enabled them, by resort to hypothetical reasoning and to conjectural situations, to present so many different methods of distribution, and to sustain each of them by interesting and able argument. But having reached the conclusion we have stated, it would be an idle task to attempt a review of positions to which we cannot assent.

The decree of the circuit court will be affirmed; the costs above and below to be paid out of the fund.

**BALTIMORE SHIPBUILDING & DRY
DOCK CO. OF BALTIMORE CITY v.
MAYOR, ETC., OF BALTIMORE et al.**

(Court of Appeals of Maryland. April 2, 1903.)

TAXATION—PUBLIC LAND—CONVEYANCE—INTEREST OF GRANTEE—EXEMPTIONS—GOVERNMENT AGENCIES.

1. Where the United States conveyed certain land to petitioner on condition that the grantee should construct and maintain thereon a dry dock, and accord to the United States the right to use the same forever and at any time, free of charge, for docking, and provided that if at any time the property should be diverted to any other use, or if the dry dock should be unfit for use for a period of six months, the property should revert to the United States, the grantee acquired a valuable interest in the land, which, though less than a fee, constituted property, within Code Pub. Gen. Laws, art. 81, § 2, and as such was subject to state and city taxation.

2. The taxation of such property was not objectionable, as depriving the grantee of its power to serve the government.

3. Where property belonging to the United States was conveyed to petitioner for the purpose of constructing a dry dock thereon, to be subject to the use of the United States without charge, the grantee was not entitled to exemption from state taxation on its interest in the land and improvements thereon, on the ground that the grantee was an agency of the government.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Application by the Baltimore Shipbuilding & Dry Dock Company of Baltimore City for the cancellation of a tax assessment. From an order confirming the assessment, petitioner appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Leon E. Greenbaum and E. P. Keech, Jr., for appellant. Charles W. Field, for appellees.

SCHMUCKER, J. This is an appeal from an order of the Baltimore City Court confirming the action of the Appeal Tax Court of Baltimore City in assessing for taxation the lot of ground and dry dock of the appellant,

situated at Locust Point, in said city. The lot of ground on which the dock is constructed, with its water front, forms part of the property acquired and held by the United States, and known as Fort McHenry. The appellant holds the lot under a conditional grant from the United States as a site for a dry dock, and the sole question presented by the record is whether the interest in the land and dock thus held by it are taxable by the state.

It is conceded that lands held by the United States are not taxable by the state within whose boundaries they lie, and that this disability remains effective until the government sells the lands, when it terminates. Nor is there any dispute in the present case that the land in question forms part of the Fort McHenry tract, which was purchased many years ago by the United States with the assent of the state of Maryland, and that it was thereby made exempt from taxation by the state so long as it continued to be held by the United States. The only question in the case is whether the transaction between the United States and the appellant, under which the latter is now in possession and enjoyment of the land, was such as to terminate its exemption from taxation.

It therefore becomes necessary for us to consider what character of alienation by the United States of lands held by it for public purposes will prove effective to terminate or destroy their exemption from state taxation. The question, in the precise form in which it is now presented, is, we believe, a new one, but some of the principles underlying it have received judicial consideration in other cases.

It has been repeatedly held that where a donee or purchaser of lands from the United States has fully complied with all of the conditions upon which he is entitled to a deed or patent for them and to their use he becomes the beneficial owner of them, and they are subject to state taxation as his property, although no deed or patent may have been executed and delivered to him; but so long as anything remains to be done or paid by the purchaser to perfect his right to the deed or patent the land remains exempt from taxation. *Kansas Pac. R. R. Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *North. Pac. R. R. Co. v. Trall County*, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477; *Union Pac. R. R. Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. 253, 41 L. Ed. 664.

In *Central Pac. R. R. Co. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057, and *North. Pac. R. R. Co. v. Patterson*, 154 U. S. 130, 14 Sup. Ct. 977, 38 L. Ed. 934, it was held that the possessory claim of the railroad company to government lands lying within a state was subject to taxation by the state, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and for that reason excluded from the operation of the grant from the United

States to the railroad company. And in *Maish v. Arizona*, 164 U. S. 597, 17 Sup. Ct. 193, 41 L. Ed. 567, a party in possession of lands under an unconfirmed Mexican land grant was held to have a valuable equitable right, which was subject to taxation by the state in which the lands were located, although it might thereafter be adjudged that the lands in fact belonged to the United States. In *North. Pac. R. R. Co. v. Patterson*, supra, the court quoted with approbation from *Wisconsin R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, the statement "that he who has the right to property and is not excluded from its enjoyment shall not be permitted to use the legal title of the government to avoid his just share of state taxation."

In the present case the appellant is in possession and enjoyment of the land in question under a conveyance from the Secretary of War made in pursuance of an act of Congress approved June 19, 1878, 20 Stat. 167, c. 310, which provided "that the Secretary of War be, and he is hereby, directed to convey to the Baltimore Dry Dock Company of Baltimore City, a body corporate, created under the laws of the state of Maryland, for the consideration hereinafter described, so much of the land belonging to the United States, in said city, known as the Fort McHenry tract, as lies between the northwestern boundary line of the said tract and a line parallel thereto and distant four hundred and fifty feet therefrom, and between a line two hundred and fifty feet from the northern side of Fort avenue (a street or avenue of said city extended), and parallel thereto, and the North West Branch of the Patapsco river. Sec. 2. That in consideration of the said conveyance, and as the condition upon which the same is made, the said dry dock company shall be required to construct, upon the land conveyed as aforesaid, within two years from the date of the conveyance, an efficient 'Simpson's improved dry dock,' four hundred and fifty feet in length, and to accord to the United States the right to the use forever of the said dry dock, at any time, for the prompt examination and repair of vessels belonging to the United States, free from charge for docking; and if at any time said property hereby conveyed shall be diverted to any other use than that herein named, or if the said dry dock shall be at any time unfit for use for a period of six months, or more, the property hereby conveyed with all its privileges and appurtenances shall revert to, and become the absolute property of the United States."

The deed followed the terms of the act of Congress, and conveyed the land to the appellant upon the conditions therein set forth. Under this conveyance the appellant did not acquire the absolute fee-simple title to the land, but took only an estate therein limited to a particular use under special conditions, and liable to be defeated upon a misuser or nonuser, yet it did take a valuable

interest in the land, of which it has been in full possession and enjoyment ever since. The deed to the appellant contains no restraint upon the alienation of the estate conveyed by it, which partakes of all of the essential features of property. The fact that the United States retains, and may at some future time exercise, the right to retake possession of the land upon a breach of the conditions of the grant, ought not, when no such breach is alleged, to enable the appellant to escape its just share of state taxation. If the land should ever revert to the United States under the terms of the grant the taxable interest in it would be destroyed, and in that event the assessment of it should be stricken off the books of the tax department. Or if the United States should, in the exercise of its reserved right, use the dock on the land for its own vessels continuously, or to such an extent as to materially deprive the appellant of its possession and enjoyment, that circumstance would form proper ground for a suitable abatement for the time being of the assessment of the property for the purpose of state taxation.

Another ground on which the appellant rests its claim for the exemption of this property from taxation is that the dock, with its equipment, is, in effect, an agency of the government for the docking of its ships, and therefore false within the operation of the well-recognized principle that the instruments and agencies used by the federal government to execute its sovereign powers are not taxable by the states in which they are located. It is settled, however, that this principle does not apply to the property of individuals or corporations which is not in the exclusive use or under the exclusive control of the government, although the latter may have a fixed right to a preference in the use of such property when occasion may require.

It was held in *Thomson v. Union Pac. R. R. Co.*, 9 Wall. 579, 19 L. Ed. 792, that the property of the Union Pacific Railroad Company was liable to state taxation, although it was admitted that the road formed part of a system of roads constructed under the direction and authority of Congress, and that it was bound to perform certain duties for the government, and ultimately to pay to it a fixed percentage of its revenue, and that its property was mortgaged to the United States. And in *Union Pac. R. R. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787, it was again held that the property of the railroad company was liable to state taxation, although the road was to some extent an agent of the general government, designed to be employed and actually employed in the legitimate service of the government, both military and postal. The court in that case said: "It is therefore manifest that exemption of federal agencies from state taxation is not dependent upon the nature of the agents, or upon the mode of their constitution, or

upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect."

Tested by the propositions thus laid down, it is apparent that the tax now under consideration does not deprive the appellant of the power to serve the government as it was intended to serve it, and its payment cannot be escaped on the ground that it is an agency of the government.

Of course, if it should ever become necessary for the state or city to sell this property of the appellant for the nonpayment of taxes, nothing more could be sold than its conditional estate in the land, and the permanent improvements thereon, subject to all of the rights of the United States therein.

It has been the custom and policy of this state, when it became necessary to sell for nonpayment of taxes land in which several parties held different estates, all of which were subject to assessment and taxation, to sell the fee-simple estate in exercise of its sovereign power (*Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Textor v. Shipley*, 86 Md. 424, 38 Atl. 932); but it is manifest that the sovereign power of the state does not embrace within its operation the right or estate of the federal government in the land now in question.

We hold that the conditional interest or estate of the appellant in this land, subject to the rights of the United States therein, constitutes property, within the meaning of section 2 of article 81 of the Code of Public General Laws, and is taxable by the state and the city of Baltimore. In view of the fact that the situation of the title to the land is such that the absolute fee therein cannot be taxed, and therefore could not be sold for nonpayment of taxes, the assessment books should be so modified as to show that the estate assessed is subject to the right and interests of the United States in the land and improvements.

The order appealed from will be affirmed. Order affirmed, with costs.

KING v. HAMILL.

(Court of Appeals of Maryland. April 2, 1903.)

NUISANCES—STABLES—CONSTRUCTION—CITY ORDINANCES—VIOLATION—INJUNCTION—IRREPARABLE INJURY.

1. The construction of a private horse stable on the building line of a city street is not a nuisance per se.

2. Where, in a suit to enjoin the construction of a private stable on the building line of a city street in violation of a city ordinance providing that such stable should not be erected within 20 feet of any street in the city, the

¶ 1. See *Nuisance*, vol. 37, Cent. Dig. § 17.

stable, as located, was over 68 feet from plaintiff's residence, and it did not appear that its erection in its present location would work special or irreparable injury to plaintiff, or that when erected it would be an actual nuisance, an injunction would not be granted to restrain such erection, though it constituted a violation of the ordinance.

Appeal from Circuit Court, Garrett County; Ferdinand Williams, Judge.

Suit by Mary L. King against Moses R. Hamill. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Thomas J. Peddicord, for appellant. Edward H. Sincell and Norman S. Heindel, for appellee.

BOYD, J. The appellant filed a bill in equity against the appellee, praying that an injunction be issued, restraining him from building a stable on the line of Center street, in the town of Oakland, or within 20 feet thereof. The bill alleges that, under and by virtue of its charter, that municipal corporation had enacted certain ordinances to prevent nuisances in the town, and that among those so enacted and now in force is section 14, c. 10, tit. "Nuisances," which prohibits the erection of "any privy, hog pen or stable, or other enclosures designed for the keeping, confinement or stabling of any horses, cattle, swine, sheep, goats or other animal or animals producing offensive smells within twenty feet of any street of said town, under a penalty" therein named; that the appellant owned a dwelling house which is located on a lot fronting on Center street, which is one of the public streets of the town, in which she and her family live. It is further alleged that the appellee owns a lot on the opposite side of Center street, directly in front of the plaintiff's house, upon which he "has commenced and is now erecting a stable designed for the keeping and confinement or stabling of horses and cattle, or other animals which produce offensive smells," and that the said stable is being built on Center street, instead of 20 feet therefrom, as required by said ordinance. It also charges "that the building of said stable on the line of said street is a violation of law, and, if it should be completed, will be a nuisance, and the offensive smells arising therefrom will render the plaintiff's house almost uninhabitable, and will cause irreparable injury to the plaintiff's said house and home." It states that the plaintiff makes the complaint as a citizen and taxpayer, as well as in her individual right as a property owner. A preliminary injunction was granted. The defendant filed an answer to the bill, in which he denied that the ordinance was validly passed, alleging that the mayor and town council of Oakland did not have the authority to pass an ordinance in

1892, when this was enacted, regulating the location of stables within the limits of the town, and that their action in the premises was absolutely null and void. He admits that he has commenced the erection of a stable on his lot, in which he proposes to keep a horse, but denies that he is doing so in violation of law, or that the horse to be kept in said stable will produce offensive smells. The answer also denies that the stable, when completed, will become a nuisance, or that the odors will render plaintiff's house almost uninhabitable, or cause irreparable injury to her house and home. It alleges that he obtained permission from the mayor and town council of Oakland to build the stable, and he filed a written permit. The case was submitted to the court below "for final decision and determination" upon an agreed statement of facts, and, after hearing, a decree was passed dissolving the injunction and dismissing the bill. From that decree this appeal was taken.

It was agreed that the town had enacted certain ordinances, and, among others, section 14 of chapter 15 (referred to in the bill as chapter 10), which were codified in 1892. It was admitted that the ordinance and penalty have not been amended or repealed, but remain as they were enacted and codified. Center street is 50 feet wide. Mrs. King's house is 18 feet and 5 inches from the street, and the stable was being built on the building line of Center street, on Mr. Hamill's lot, 68 feet and 5 inches from Mrs. King's residence, and closer to Mr. Hamill's own dwelling. Among other things, the agreed statement says "that the said Hamill was building said stable at the time he was enjoined in this case; that it was his purpose to keep but one horse in said stable, when completed, and that no offensive smells would arise from said stable, except such as naturally arise from a horse stable in which a horse is kept; and that said stable would only be a nuisance, if at all, in so far as it is declared to be a nuisance by said ordinances of the town, providing the court finds said ordinance to be a valid and legal ordinance."

It is not necessary to cite authorities outside of this state to show that a stable is not per se a nuisance. In *Met. Savings Bank v. Manion*, 87 Md. 68, 39 Atl. 90, this court so declared in reference to a livery stable. On page 81, 87 Md., and on page 92, 39 Atl., it was said: "The authorities which hold that a livery stable in a city is not per se a nuisance are so numerous that it would serve no useful purpose to repeat them. It may, however, be taken as a concession that such is the well-established rule of law, about which no controversy can be reasonably expected to arise. And whilst this is unquestionably true, it is equally clear that a stable, whether used for livery purposes or for private convenience, may sometimes become a very great nuisance and source of discomfort, [against which] the courts would not

fail to grant relief. But the fact just noted, that a livery stable is not necessarily *prima facie* a nuisance, suggests caution in dealing with the rights of the owners or occupants of livery stable property." If a livery stable in a city like Baltimore is not a nuisance *per se*, surely a private stable in Oakland, in which one horse is to be kept, cannot be said to be. The agreed statement says "that said stable would only be a nuisance, if at all, in so far as it is declared to be a nuisance by said ordinances of the town." It would be giving this ordinance a meaning much broader than the language used in it would seem to justify, to say that it was intended to declare a stable built within 20 feet of a street a nuisance, merely because in the code of ordinances it is one of over forty sections under chapter 15, which is headed "Nuisances." To say that a stable within 20 feet of a street is a nuisance, while one 20 feet and 1 inch from the same street is not, would be going very far; and, if a town council intends to make such distinction, it ought to do so in a more certain way than by codifying such an ordinance under the general head of "Nuisances."

But if it be conceded that it was intended to declare a stable, situated as this is, a nuisance, and that the mayor and town council of Oakland had power to pass the ordinance, or it was subsequently ratified by the Legislature, would a court of equity be justified in restraining the erection of it under the evidence in this record? In *St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671, the court said: "The erection of a wooden building within the limits of a city or village is not, in and of itself, a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance." In *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446, that court thus announces the doctrine: "The defendant was not about to erect a nuisance. If it is unlawful for him to erect the building in question, it is made so by the ordinance alone. Without the ordinance, no one can successfully dispute his right to do so. The question is, therefore, will a court of equity enjoin an act which would otherwise be lawful, but which is made unlawful by a village ordinance or by-law? We find the principle stated in several very respectable authorities that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*." See, also, *High on Injunctions*, § 788; *Mayor, etc., of Hudson v. Thorne*, 7 Paige, 261; *Mayor, etc., of Manchester v. Smyth*, 64 N. H. 380, 10 Atl. 700. Certainly an individual cannot complain of the erection of a building contrary to an ordinance of a town unless he shows that the erection will work special and irreparable injury to him and his property, and

the appellant has not shown that this stable will work irreparable injury to her and her property. It may be that it would be more agreeable to her not to have a stable opposite to her house or very near to it, but we cannot assume, and the record utterly fails to show, that the one being erected by the appellee will so injure the appellant as to justify the court in granting an injunction to prevent anticipated damage. If every stable within 68 feet of a residence works irreparable injury, there must be many such sufferers in cities and towns. Residents of cities and towns are necessarily subjected to some discomforts that those living in the country can avoid, and while a stable may be so used as to make it a nuisance, and hence cause damage to those living near it, it cannot be presumed that one being erected will be so used; and it cannot be contended that, merely because the owner is violating an ordinance in the erection of it (if that be conceded), any citizen can enjoin him, without regard to whether such citizen suffers any special and irreparable injury.

An injunction will not ordinarily be granted against an anticipated nuisance unless the facts alleged and proven are sufficient to show it will be a nuisance *per se*. This court said in *Adams v. Michael*, 38 Md. 129, 17 Am. Rep. 516, that "the general rule is that an injunction will only be granted to restrain an actual existing nuisance; but where it can be plainly seen that acts which, when completed, will certainly constitute or result in a grievous nuisance, or where a party threatens, or begins to do, or insists upon his right to do certain acts, the court will interfere, though no nuisance may have been actually committed, if the circumstances of the case enable the court to form an opinion as to the illegality of the acts complained of, and the irreparable injury which will ensue." As this record wholly fails to show that the appellant will sustain such injury, the learned judge who sat below was right in dissolving the injunction and dismissing the bill.

We do not deem it necessary to determine whether this ordinance is a valid one, either under the powers granted the mayor and council in the charter in force when it was passed, or by virtue of the Acts of 1896, p. 203, c. 123, which provided in section 1951 that "all ordinances now in force and operation in said town shall remain and be in full force and effect until regularly repealed." Of course, there can be no doubt, under the decisions of this court, that the Legislature can validate an ordinance which was passed when the municipal corporation had no such authority; but whether, by a general provision such as this, an invalid ordinance can be made valid, is another question, especially when it only undertook to provide for "ordinances now in force and operation." In 21 Ency. of Law (2d Ed.) 995, the subject of legislative ratification of invalid ordinances is considered; and it is there said, after

fully recognizing the right of the Legislature to ratify invalid ordinances, that "certainly a general provision continuing in force ordinances that were in force at the time of its passage, or theretofore made, cannot operate as a ratification or validation of a void ordinance previously passed." If it were necessary for us to decide the question, we would have no hesitation in adopting that as the general rule, but, as it is not necessary for the decision of this cause to determine whether the ordinance is valid, we will not do so, as it would require us to discuss at length the powers that the corporation did have. We will affirm the decree, because the appellant has not shown she is entitled to relief under this bill, even if the ordinance be conceded to be valid.

Decree affirmed, appellant to pay the costs.

DUNDALK, S. P. & N. P. RY. CO. OF BALTIMORE COUNTY v. SMITH et al.

(Court of Appeals of Maryland. April 2, 1903.)
RAILROADS—RIGHT TO BRIDGE NAVIGABLE WATERS—CONSENT OF LEGISLATURE—STATUTE—REPEAL.

1. Code Pub. Gen. Laws, art. 23, § 92, which provides that no bridge shall be erected on a navigable river, unless authorized by an act of the General Assembly, though codified under the head of "Companies for the Erection of Bridges," applies also to railroad corporations; and hence the incorporation of a railroad does not in itself confer on it the right to cross navigable waters of the state without the consent of the Legislature.

2. Such section was not repealed by section 177 of the same article, relating to the submission of the plans of railroad bridges crossing navigable waters to the board of public works for approval.

Appeal from Superior Court of Baltimore City; Henry Stockbridge, Judge.

Mandamus by the Dundalk, Sparrows Point & North Point Railway Company of Baltimore County against John Walter Smith and others, composing the Board of Public Works of the State of Maryland. From an order dismissing the petition, petitioner appeals. Affirmed.

Argued before FOWLER, SCHMUCKER, BRISCOE, BOYD, PEARCE, and JONES, JJ.

Fielder C. Slingluff and Geo. Dobbin Penniman, for appellant. Atty. Gen. Rayner, for appellees.

SCHMUCKER, J. The main question presented by this appeal is whether the incorporation of a railroad company under the general incorporation laws of this state confers upon it the right to cross the navigable waters of the state without the consent of the Legislature. The appellant filed a petition in the superior court of Baltimore city for a mandamus requiring the Board of Public Works to take action upon and either approve or disapprove the plans submitted to them by it under section 177 of article 23, Code Pub. Gen. Laws, for the construction

of bridges across three navigable creeks in Baltimore county. The Board of Public Works demurred to the petition, and the superior court, by its order of January 5, 1903, sustained the demurrer and dismissed the petition. From that order the present appeal was taken.

The petition alleges that the appellant, having become duly incorporated, under the general incorporation laws of the state, to construct and operate a railroad between the towns of Dundalk and North Point, in Baltimore county, found it necessary, in order to complete the road, to construct it across the three creeks already mentioned, which are alleged to be navigable streams; that, being ready to construct its railroad, it filed with and submitted to the Board of Public Works the plans and specifications of the bridges and other fixtures it proposed to erect to cross the said streams; and that it fully complied in every respect with all of the provisions of section 177 of article 23 of the Code, and all other laws of the state, as well as with the rules and regulations of the Board of Public Works relative thereto, but that the said board decline and refuse to take any action on the plans and specifications so filed with them, for the alleged reason that the appellant has not shown proper authority to construct its bridges over these navigable streams; and they assert that the consent of the Legislature to the erection of the bridges must be obtained before they can take any action on the plans and specifications. The petition insists that the appellant acquired by its incorporation, and especially by section 177 of article 23 of the Code, the power and authority to bridge the streams in question without first securing the consent of the Legislature, and that it is entitled to have its plans acted on by the board, and it prays for a mandamus to compel such action.

We think the learned judge below was right in sustaining the demurrer to this petition. In ascertaining the nature and extent of the powers conferred upon the appellant by its incorporation in reference to the navigable waters of the state, we must keep in view all of the provisions of the Code bearing upon that subject, and construe them in the light of the principles of the common law applicable to all grants of power from the state. There is no express grant of power to railroad companies to cross navigable waters found in the general law under which the appellant was incorporated. The state is undoubtedly the owner of the navigable waters within its boundaries, and can make a valid grant of privileges or interests in or over them, subject to the public rights of navigation and fishery. *Browne v. Kennedy*, 5 Har. & J. 195, 9 Am. Dec. 503; *Wilson's Lessee v. Inloes*, 11 Gill & J. 359; *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654. It is, however, a familiar proposition of the common law that, in a grant by the state, nothing passes by implication. The grantee takes

only that which is given to him by express terms. This is true of grants by legislative action. Broom's Legal Maxims (5th Ed.) p. 607; Jones v. Tatham, 20 Pa. 411; State v. Kinne, 41 N. H. 239. Some recent cases have in so far modified the strictness of this doctrine as to hold that the granting by the state of a charter to a railroad company to build a road between specified points implies an authority to bridge such navigable streams as must necessarily be crossed in order to construct the railroad between its chartered termini. This has been held upon the ground that the courts should give such a construction to the charter as to effectuate all of the powers and privileges conferred by it which are necessary to carry into full effect its purposes and objects. Works v. Junction R. R., 5 McLean, 425, Fed. Cas. No. 18,046; Springfield v. Conn. R. R. Co., 4 Cush. 63; Elliott on Railways, vol. 3, § 966; Gould on Waters, § 137. In Works v. Junction R. R., supra, the court put this construction upon a section of the general railroad law of Ohio which is quite similar to section 177 of article 23 of our Code, and held that it conferred upon the company the power to bridge navigable streams when necessary to do so in order to build its line between the points named in its charter. The present case differs from those last referred to, all of which arose under the laws of other states, in this important particular: Section 92 of article 23 of the Code, which contains the general law of this state for the creation of various kinds of corporations, including railroad companies, plainly declares, "No bridge shall be erected on a navigable river unless authorized by an act of the General Assembly." It is true that this section, which constituted part of the general incorporation law of 1868, now appears, as codified, under the head of "Companies for the Erection of Bridges," but its application is not thereby necessarily confined to corporations of that class. As was said by our predecessors in State v. Popp, 45 Md. 437: "In arriving at the true construction of any particular section of the Code, very little reliance can, we think, be placed upon the heading under which it may be found. * * * In short, the only satisfactory and safe rule of construction to be adopted is to read and construe together all sections of the Code relating to the same subject-matter, without reference to the particular article or heading under which they may be placed." There is certainly no reason why the state should be more willing to give to a railroad company than to a bridge company the right to cross navigable waters at will. The considerations of public policy which would lead the state to restrict the power of the one class of corporations in that respect apply with equal force to the other class.

Nor do we think that section 177 of that article, which was enacted in 1876, operated to repeal section 92. The obvious purpose of section 177 was not to grant the power or

authority to railroad companies to bridge navigable streams, but to regulate the method of bridging them by such railroad companies as possess the right to do so. Its provisions relate solely to the plan of the proposed bridge and the place of its location, which are both put by the law under the supervision and control of the Board of Public Works. The board are given the power to approve or disapprove the plans, with the right of an appeal by the railroad company to the circuit court in the event of a disapproval of its plans by the board. There is no express repeal of section 92 by the railroad act of 1876, which enacted section 177; and, as the two sections under consideration are not inconsistent with each other, they must both stand, and, being in pari materia, must be construed together, although passed at different times. Canal Co. v. Railroad Co., 4 Gill & J. 1; State v. R. Co., 44 Md. 167; Appeal Tax Court v. Railroad Co., 50 Md. 297.

The streams involved in the present suit—Jones creek, North Point creek, and Shallow creek—are said to be unimportant ones; but the principle involved is an important one to a state like ours, which has much navigable water within its boundaries. The future development and progress of the commerce of the state may be largely influenced by the judicious management and control of this navigable water, and it is therefore important to strictly maintain the doctrine that no grant by the Legislature of any right in or control over any portion of it will be upheld which rests upon mere implication or construction, or anything short of a clear and direct expression of the legislative will.

The decree appealed from will be affirmed. Decree affirmed, with costs.

WILSON et al. v. BULL et al.

(Court of Appeals of Maryland. April 2, 1908.)

WILLS—CONSTRUCTION—SURVIVORSHIP— TIME—INTENTION OF TESTA- TOR—EVIDENCE.

1. Testator devised his ground rents to his wife for life, and after her death gave a life estate in one undivided sixth of such rents to each of his six children by name, and declared that immediately after the death of his six children, respectively, one equal undivided sixth of such rents should go to their child or children absolutely, as tenants in common, to be equally divided between them and the issue of any deceased grandchild per stirpes. He then declared that, if any of his grandchildren so provided for died under age, and without issue living at their death, the share of any one so dying should go to his or their surviving brothers or sisters, or their heirs, etc., absolutely, but that, in case either of testator's children died without leaving a child, children, descendant, or descendants living at his or her death respectively, the part of the child so dying should become the property of testator's surviving child or children, or his or their heirs, absolutely. Held, that the words "surviving child or children," as used in the last clause, were limited to the surviving child or children of the testator, and did not include the descendants of any deceased child, and hence, on the death of testator's son with-

out issue, his interest passed to his sole surviving sister.

2. The survivorship of the children of the testator was to be determined as of the date of the death of the children, and not as of the date of the death of the widow or of the testator.

3. In a suit for the construction of a will, evidence to show that certain of testator's children and grandchildren were favorites was irrelevant, since the construction of the will must be determined from its provisions.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Louisa J. Wilson and others against Benjamin H. D. Bull and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Argued before FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

S. S. Field, for appellants. William J. O'Brien, Jr., and Edgar H. Gans, for appellees.

FOWLER, J. This is an action of ejectment brought by the plaintiffs against the defendant Sarah J. Bull to recover a two-thirds interest in certain ground rents in Baltimore City. During the course of the trial the defendant reserved several exceptions, eight of which refer to the rulings on the admissibility of testimony, and one—the ninth—to the ruling upon the prayers. But the only important question presented by this appeal arises upon the granting of the defendant's first prayer, by which the jury were instructed that no evidence had been offered legally sufficient to entitle the plaintiffs to recover the property mentioned in the declaration, and directing a verdict for the defendant. The verdict and judgment being against the plaintiffs, they have appealed.

The propriety of this action, of the trial court in taking the case from the jury depends upon the question as to what is the true construction of the will of the late John Berry, of Baltimore City. Before proceeding to construe the will, or the third item thereof, which is the only part of the will involved in this controversy, it may conduce to a clearer understanding of the questions presented if we state the facts showing something of the family history of the testator and his children.

It appears, then, that at the time he executed his will, and at the time of his death, the situation had not been changed in this respect: The testator had six children—five daughters, Harriet E. Berry, Susan L. Hurst, Juliet A. Turner, Eliza E. Berry, Sarah J. Bull, and one son, John S. Berry. The testator died in 1856, and his widow, Sarah D. Berry, survived him about three years, having died in 1859, at which time all of the children were living. One of the daughters of the testator—Harriet E.—died without issue in 1873. Mrs. Hurst, another daughter, died in 1880, leaving two children, Mary

E. B., now Mrs. Purnell, and Sarah B., now Mrs. Morgan. Mrs. Turner died in 1886 leaving two children, James H. and Louisa J., now Mrs. Wilson. The remaining daughter, Eliza E. Berry, and the only son, John S. Berry, died respectively in 1890 and 1891, without issue. Sarah J. Bull, the original sole defendant in this action, died since it was brought, and her children and the children of her deceased children are made parties defendant in her place.

It appears that in March, 1884, a bill of complaint was filed in the circuit court of Baltimore City by the then four surviving children of the testator against Mary E. B. Purnell and Sarah B. Morgan, the two children of Susan L. Hurst, and their respective husbands, and on the 4th of April, 1884, after appropriate proceedings were taken for that purpose, the ground rents, which form the subject-matter of this suit, were, according to the contention of the defendants, divided in accordance with the construction of the will of John Berry which is now sought to be established by the defendants.

It was urged on the part of the defendants that, inasmuch as the decree in the equity cause we have just mentioned provided in clear and express terms that the rents were to go to the "then" surviving children of the testator, the plaintiffs in this case, who were either parties to the equity cause or claim through those who were, are estopped to set up a construction of the will different from that adopted in the decree relied on. The court below, in granting the plaintiffs' second prayer, ruled against this contention of the defendant, and held that the plaintiffs were not estopped to maintain this suit by anything done by them or by the court in the former suit.

This brings us to a consideration of the provisions of the will on which this controversy hinges, and we will proceed to construe it and determine the rights of the parties without regard to the question of estoppel or res adjudicata based upon the decree and proceedings in the equity suit of 1884 in the circuit court of Baltimore City.

In the first place, it may be stated that the only interest here involved is the one-sixth interest of the testator's son, John S. Berry, who died in 1901 without issue. It appears that upon his death the actual possession of this one-sixth passed to the then only surviving child of the testator, namely, Sarah J. Bull, to the exclusion of the children of her deceased sisters. The contention of the latter, who are plaintiffs, is that this one-sixth of the rents which John S. Berry had for life under his father's will, under a proper construction of that will, goes, one-third to Mrs. Bull, the defendant, and the remaining two-thirds to the plaintiffs; while the proposition on which the defendant's claim is based is that the rents in question, that is, the one-sixth interest of John S. Berry, on

his death without issue, properly passed to her in 1901, on his death, as her absolute property under her father's will.

As we have already stated, the learned court below, in granting the defendant's first prayer and withdrawing the case from the jury, adopted the views of the defendant. In order to determine whether the construction thus given by the learned judge is the correct one, we must ascertain what is the intention of the testator as declared in the will. And, in order that we may have his language before us, we here transcribe it. It is as follows:

"Item. All my annuities or ground rents and the fee and reversion of and in the grounds and premises out of which any and all of the said annuities or ground rents now issue and are payable, and all the annuities or ground rents I may hereafter own or in any manner be possessed of at the time of my decease, I give and devise to my beloved wife, Sarah D. Berry, to hold for and during the term of her natural life, so as to enjoy the said estate and property and the rents, issues, income and profits thereof, to receive and apply to her own use and benefit, and from and immediately after the death of my said wife, each one of my six children, John S. Berry, Eliza E. Berry, Susan L. Hurst, Harriet E. Berry, Juliet A. Turner, and Sarah J. Bull, shall respectively during their natural lives use and enjoy one equal undivided sixth part of the estate and property devised by this section of my will and the rents and profits arising therefrom, take and apply to their sole and separate use and benefit, and the receipts of my said six children respectively alone shall be good and sufficient receipts and acquittances therefor, and from and immediately after the decease of my said six children respectively, then one equal undivided sixth part of the estate and property devised by this section of my will shall go to and become the property of their child and children respectively, his, her, or their heirs, executors, administrators and assigns, absolutely, if more than one, as tenants in common, to be equally divided between them, share and share alike, the issue of any deceased child of my said son or of my said five daughters respectively, if any such issue there should be living, to have and take the part or share to which the parent of such issue respectively would if living be entitled. And in the event of the decease of any of the children of my said son or of my said five daughters, respectively, under age and without issue living at the time of his, her or their respective deaths, the part or share of him, her or them so dying shall go to his, her or their surviving brothers or brother and sisters or sister, his, her, or their heirs, executors, administrators and assigns, absolutely. And in case it shall so happen that either my said son or any or either of my said daughters should depart this life without leaving a child, chil-

dren, descendant or descendants of the same living at his death or her death respectively, then the part or share of the said son, daughter or daughters so dying shall go to and become the property of my surviving child or children, his, her or their heirs, executors, administrators and assigns absolutely."

It seems to us that, if there ever was a will which upon its face may be said to be plain and free from ambiguities, such language may be applied to this one. Men are so constituted, however, that they do not all look at things from the same point of view, and experience teaches us that different conclusions will be reached, especially in will cases, not only by counsel, who may be expected naturally, and not improperly, to be swayed by a conviction that their clients are right, but also by judges, who, without favor or partiality for either side, try only to reach a just conclusion, justified by the language of the testator. The main object, then, indeed it may be said the only object, should be to discover the intention of the testator, and, having ascertained his wishes, they must control our conclusion, unless they are contrary to some settled rule of law or of property, or of some well defined rule of public policy. *Mis. Soc. v. Mitchell*, 93 Md. 202, 48 Atl. 787, 53 L. R. A. 711; *Abell v. Abell*, 75 Md. 44, 23 Atl. 71, 25 Atl. 389. It should not be forgotten, however, that the intention of the testator which is to govern is the intention he has expressed in his will. With great industry, counsel for the appellants have collected, discussed, and applied in their voluminous brief about 100 authorities to sustain their views in regard to the construction of the will and the question of *res adjudicata*. Some 12 or 15 authorities only are cited by the appellees, most of them being among those cited by the appellants. It seems to us, as we have already said, that the intention of the testator is very clearly expressed, and hence a statement of our views without much elaboration will be sufficient.

It will be observed that the first thing which demands the attention of the testator is a provision for his wife. All the ground rents he owned at the time of making his will, and all that he might thereafter own or be possessed of at the time of his death, he gives, in the first place, to his wife during her life; and, secondly, after her death, he gives a life estate in one undivided sixth of said rents to each of his six children. He mentions his children by name. First he names his son, John S. Berry, then his five daughters; and he declares that they shall respectively, during their lives, use and enjoy one equal undivided sixth part of said rents, and the income and profits therefrom. Thirdly, he provides that, immediately after the decease of his six children respectively, one equal undivided sixth part of said rents shall go to their child or children respectively, absolutely, if more than one, as tenants in common, to be equally divided between them, the

issue of any deceased child of his said son or of his said daughters respectively, if any such issue there should be living, to take the share to which the parent of such issue, respectively, would, if living, be entitled. Provision is then made for the case of the death of any of the children of his son or of his daughters respectively dying under age and without issue living at the time of his, her, or their respective deaths—providing that the part or share of him, her, or them so dying shall go to his, her or their surviving brothers or brother and sisters or sister, his, her or their heirs, etc., absolutely. Then follows the concluding part of the paragraph of the will, which gives rise to this controversy. Having provided for his wife during her life, and having made a similar provision for his six children respectively, he provided that after the death of his children, respectively, his grandchildren should take per stirpes an absolute title to the one-sixth devised to their respective parents. It is significant, we think, that, having arrived at this point in directing how his estate should devolve upon his descendants, he declares that the issue of any deceased child of his children—that is to say, his great-grandchildren, if any—should take per stirpes the share to which their respective parents would, if living, be entitled. That is to say, he declares in most unmistakable terms that the one-sixth of his ground rents devised to his children, respectively, should be enjoyed by them and by their children, and by their children's children, if any living, to be taken per stirpes; and in this sense there was uniformity and equality observed by the testator in the disposition of the one-sixth, in case his son or either of his daughters should leave a child or children surviving him or her. But when he comes to consider the contingency of his son or either of his daughters dying without a child or children living at his or her death respectively, his language is entirely different, and, in the place of the necessarily long provision for the obvious contingencies of his grandchildren and great-grandchildren dying with or without child or children, he simply declares that, in case his son or either of his daughters should die without leaving a child or descendant at his or her death, the share, that is to say, his or her undivided sixth, should go to the testator's surviving child or children absolutely.

What more just disposition of his valuable property could the testator have made than that which the language of his will on its face indicates? In case any of his children should leave a child or children surviving him or her, such child or children should have the whole of their respective parent's share; but, in case any child of the testator should die without issue living at his or her death, the share of such child so dying shall go to his or her surviving brother and sisters. That is to say, having already provided that his children in the first place

should take each one-sixth, and the children of his children in the second place should take by representation the share which their respective parents had enjoyed during life, he now provides for a new and entirely different devolution in case one of his own children should die without issue. In other words, he simply declares that, in case a child of his dies leaving issue or descendants of issue, such issue or descendant shall take by representation. But, in case it shall so happen that any child of his should die leaving no child or descendants, it was his will that there should be no representation, but that the share of his child so dying should go to his living child or children. The inference seems to us irresistible that, if he had intended the same rule to be observed in both cases, he would have so declared.

The learned counsel for the appellants earnestly contended that the words in this will, "surviving child or children," should be construed so as to mean the "other" children of the testator. But this contention certainly does not give the words their ordinary meaning. Nor have we been able to find anything in the will before us to convince us that the testator used these words in any other than their usual sense. In the case of *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937, the testator, as here, in the first place gave his wife a life estate. At her death he provided that his real estate should go to his eight children, naming them; and then declared: "In case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors." It was contended that the issue of the predeceased children of the testator would take a proportional part of the share of the ones so dying without issue, and the court below so held, but on appeal this court said (Page, J., delivering the opinion): "If the word 'survivor' is to be taken in its ordinary meaning, it is obvious that no one can take but one who answers the description of the parties named as devisees, viz., the survivor or survivors of the testator's eight children." The opinion proceeds to state that in order to meet this difficulty, and to show that the word "survivor" should not be given its usual meaning, it was contended, as it is here, that it should be regarded in that case as synonymous with "other." In regard to this contention, it is said: "It is undoubtedly true that in order to carry out the intention of the testator this has sometimes been done. 'But,' says Redfield, in his treatise on Wills, vol. 2, p. 272 (3d Ed.) 'it seems to be now established by numerous decisions that the same rule of construction will be applied to the word 'survivors' as to any other. It will be received in its natural and literal import, unless there is something in the context or attending circumstances tending to a different conclusion.'" Again, it is said: "All the cases to which we have been referred in which 'survivor' has been

construed as equivalent to 'other' appear to have been so decided because there was something in the will to make it clear that the testator intended the issue of predeceased children to take, or that some other clearly expressed intention would otherwise be rendered inoperative." A number of English cases are then cited, among which will be found several relied on by the appellants to sustain their contention as to the meaning of the word "survivor." In the case of *Turner v. Withers*, 23 Md. 41, cited and commented on in 84 Md. 261, 35 Atl. 937, the testator devised his real and personal estate to his wife and five children, to each one-sixth part for life, and, in case either died without children or descendants alive at his or her death, the part of the one so dying to be divided among the remaining children for their lives; in case of death with children, then to the children, per stirpes and not per capita. One of the children died in 1852, leaving children, and in 1860 another died, without children. The question was whether, under the will, the issue of the child who died in 1852 were entitled to a share of the estate of the child who died in 1860. In commenting upon the case of *Turner v. Withers*, supra, in 84 Md. 261, 35 Atl. 937, we said: "Here, then, were many of the conditions upon which the English courts have construed the devise to create cross-remainders between the stirpes as well as between the children." But this court held, in 23 Md. 41, and again in 84 Md. 261, 35 Atl. 937, that the children of predeceased children did not take, because they did not answer the description of the parties as devisees; in the one case the devise being to "remaining children," and in the other to "surviving child or children."

But, finally, the appellants urged that the survivorship of the children of the testator is to be referred to the time of the death of the widow or of the testator himself, and not to the death of the life tenant, John S. Berry. And we may say here, in regard to this construction suggested by the appellants, as we have said in relation to others, that there is nothing, so far as we have been able to ascertain from an examination of the will itself, or of the circumstances surrounding the testator, which would induce us to hold that his intention was other than that which appears upon the face of the will. If he had intended that those he named as "the survivor or survivors of his children" should be ascertained and fixed at any particular time, is it not almost certain he would have so provided? He failed, however, to make any express provision to this effect. He could have said that the share of a child dying without issue shall go "to my children who are surviving at my death," or "at the death of my widow." But, not having made any such provision, we may conclude he intended that, whenever one of his children should die leaving no child or children surviving, then his re-

maining children or his surviving children should take the share of the child so dying. Thus, in 29 Encyl. of Law, p. 504 ("Wills"), it is said: "It may be laid down as a general rule of construction that, where the context is silent, words referring to the death of a prior devisee or legatee, in connection with some collateral event, apply to the contingency happening at any time, as well after as before the death of the testator." In this case, of course, the contingency of the life tenant dying without children happened long after the death of the testator. In 2 Jarman on Wills, star page 1569 (6th Ed.), under the head, "Rule where the Gift is Future," the author says that, where there is another point of time than the death of the testator to which the death of a preceding devisee may be referred, "as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the devisee dying in the interval between the testator's decease and the period of vesting in possession." In *Hutchins v. Pearce*, 80 Md. 445, 31 Atl. 501, it is declared that the words "die without issue" are to be construed to mean a want or failure of issue at the death of the life tenant. Applying this rule to the case before us, the result would be that Mrs. Bull, the only surviving child of the testator, would take upon the death of John S. Berry, the life tenant, who died without children. And, as was said in the case just cited, "we are of opinion that this construction effectuates the intention of the testator, as gathered from a fair examination of the whole instrument, when taken in connection with his [the testator's] surroundings and the objects of his bounty." See, also, *Reiff v. Strite*, etc., 54 Md. 303, and *Weybright v. Powell*, 86 Md. 573, 39 Atl. 421.

It only remains briefly to dispose of the questions relating to the exceptions taken to the rulings upon the testimony. The first, third, fourth, and fifth exceptions relate to the rejection of testimony to show that certain of the testator's children and grandchildren were favorites. We do not think such testimony was relevant; but, even if admitted, it could not alter our view of the true construction of the will. The second and eighth exceptions were taken to the exclusion of a certain written memorandum dated and signed by the testator January 1, 1856, prior to the date of the will. This testimony, also, we think is entirely irrelevant. Assuming that the paper expressed the wishes and intention of the testator, it cannot be received to control, alter, or modify in any respect his intentions, which, we have said, were clearly expressed in his will. The sixth and seventh are to the refusal of the court to allow one of the plaintiffs to express her opinion as to whether her aunt, one of the children of the testator, was capable of bearing children. Without discussing this exception, it is suffi-

cient to say that the question asked the witness, even if relevant, was one which she did not show herself by her testimony qualified to answer.

The views we have expressed in regard to the construction of the will control the decision of the case, and therefore, without reference to the question of the binding force of the decree of the circuit court of Baltimore City, dated 27th of March, 1884, it follows that the judgment appealed from must be affirmed.

Judgment affirmed.

SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCER CO.

(Court of Appeals of Maryland. April 1, 1903.)

SALES—CONSTRUCTION OF CONTRACT—CASH SALE—PLACE OF DELIVERY—EVIDENCE OF COLLATERAL CIRCUMSTANCES—CUSTOMARY EVIDENCE.

1. A contract for the sale of goods, "Terms cash, less one and one-half per cent.," is an agreement for a cash sale at a specified price, and not an agreement for a credit sale, subject to a discount for cash.

2. Under a contract for the cash sale of goods, providing, "Buyer to give shipping instructions when requested by seller. * * * F. O. B. Baltimore"—payment is due on the delivery of the goods on board cars at Baltimore, although the contract states the residence of the buyer to be New Orleans.

3. Where a contract of sale, in terms free from doubt, prescribes the place of delivery of the goods, it must govern the rights of the parties, and collateral circumstances will not be considered to arrive at a different construction.

4. Under a contract providing for the cash sale of goods f. o. b. at the place of manufacture, the fact, if contended, that the buyer had the right to inspect the goods before acceptance, would not govern the express provisions of the contract as to place of delivery and payment, and postpone the obligation of payment until delivery at the residence of the buyer.

5. The usual custom of collecting the purchase money of goods, under a contract of sale between parties resident in different cities by draft, will not govern the express provisions of the contract fixing a mode of payment.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Albert Mackie Grocer Company against Samuel M. Lawder & Sons Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Edward I. Koontz, for appellant. Calvin Chesnut and S. Stewart Janney, for appellee.

BOYD, J. The appellee sued the appellant for breach of a contract, which is set out in the declaration as follows:

"Baltimore, May 24, 1901.

"Bought of Samuel M. Lawder & Sons Company, Baltimore, Maryland, for account of Albert Mackie Grocer Company, Limited, New Orleans, La., seven hundred (700) cases,

two pound, Quail Tomatoes, at fifty-two and one-half cents per dozen. Terms cash, less one and one-half per cent. Buyer to give shipping instructions when requested by seller. To be delivered as packed during season of 1901. F. O. B. Baltimore. Brokers Thompson & Fowler, New Orleans, La.

"Accepted.

"Samuel M. Lawder & Sons Co.

"Percy M. Lawder, Pres."

The defendant filed, in addition to the general issue pleas, two that were marked 3 and 4, which were demurred to. The demurrer was sustained, and, the other pleas having been withdrawn, judgment was entered in favor of the plaintiff for the amount of its claim, and from that judgment this appeal was taken. The third plea alleges that the tomatoes referred to were purchased from the defendant on the terms and conditions contained in the contract set out in the declaration, and, as was known to the plaintiff, the defendant had then and still has its canning factory and place of business in Baltimore; that the defendant had canned and packed the tomatoes for account of said contract; and on November 5, 1901, in accordance with the precedent request of the plaintiff to make shipment of them, the defendant notified the plaintiff of its readiness to make delivery of said tomatoes free on board at Baltimore, which, as plaintiff was then informed, were loaded on a car ready to go forward simultaneously with payment in cash therefor at Baltimore; and the defendant requested the plaintiff to remit the purchase price thereof, to which request the plaintiff replied, "Will not pay for the tomatoes until the goods reach us." It then alleges that the plaintiff failed and refused to make payment concurrently with such proposed delivery of tomatoes, and failed and refused to accept delivery of said tomatoes free on board at Baltimore for cash to be then and there paid. The other plea was, in substance, to the same effect.

It is contended on the part of the appellee that this contract means that the sale was made at 52½ cents per dozen, if paid for at the expiration of the customary period of credit for such goods, but if cash be paid there was to be a discount or rebate of 1½ per cent.; but we cannot accept that as a proper construction of the contract. The price of the tomatoes is stated to be "at fifty-two and one half cents per dozen," and the terms mentioned are "cash, less one and one-half per cent." There is not only no time fixed for payment on credit, but the contract itself fixes the payment as cash, and the addition of "less one and one-half per cent." clearly means that, as the terms had been arranged for cash, the vendor had allowed that discount. We are not at liberty to read into the contract, "If cash be paid a discount of one and one-half per cent. will be allowed." If we did, when would the

credit expire if the buyer elect not to pay cash? It will not do to say that that would be regulated by the custom of the trade, for, in the first place, the parties themselves have undertaken to fix the terms, and, moreover, there is nothing in the record from which we can infer, much less know, that there was any such custom. If there be such, and the parties did not want to be governed by it, how could they more clearly express their intention than by the use of the expression, "terms cash"? When contracting parties thus undertake to set out the terms of their contract, and in stating when the payment shall be made simply say "terms cash," it excludes all idea of credit, and when they add to that expression, "less one and one-half per cent.," upon what principle can the latter clause be construed to indicate an intention to give credit at the option of the purchaser? It is not difficult to understand what that expression means, if it be true that such goods are frequently or usually sold on credit. Brokers, of course, are kept informed as to the market price of goods they deal in. These brokers from New Orleans prepared this memorandum by which they proposed to buy of the appellant, for account of the appellee, the tomatoes at 52½ cents per dozen, and if they had stopped there, and it was proven that by the custom of the trade the purchaser was entitled to a credit of say 30 days, then presumably it would have meant that the sale was at that figure, payable at the expiration of that time. But the proposition of the brokers did not leave that to custom or usage, and named the terms. That was submitted to the appellant, and was accepted by it, and the contract thus made first named the price of the tomatoes, which we presume was the market price, and then proceeded to agree upon the terms of payment which were to govern this particular transaction, stating that they were "cash," and they then agreed upon the discount, which was doubtless allowed by reason of the cash payment being agreed upon. If the contract had said "at fifty-two and one-half cents per dozen, less one and one-half per cent. for cash," the contention of the appellee might have some foundation; but when the terms mentioned are "cash," and no suggestion of anything else, it would be striking down all the safeguards of a contract in writing to give the effect to the expression, "less one and one-half per cent.," contended for by the appellee. Even if it be possible to read into this written contract any usage or custom which might change its ordinary meaning, no such usage or custom is alleged in the pleadings, and we are only to pass on them as they are found in the record. The case of *Foley v. Mason*, 6 Md. 37, to say the least, would have made evidence of a custom on that subject very doubtful, if it had been offered. See, also, *Gibney v. Curtis*, 61 Md. 201; *Susquehanna Fertilizer Co. v. White*, 66 Md.

456, 7 Atl. 802, 59 Am. Rep. 186; *Balt. Baseball Club v. Pickett*, 73 Md. 387, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304. As the case is now presented, it seems clear to us that the buyer did not have the option of either paying cash at fifty-two and one-half cents per dozen, less one and one-half per cent., or having credit, without getting the benefit of the discount.

But it is contended that, conceding that the appellant had the right to require the payment in cash, it could only be demanded after the tomatoes reached New Orleans. We are, however, again confronted with the terms of the contract, in passing on that question. It provides: "Buyer to give shipping instructions when requested by seller. To be delivered as packed during season of 1901. F. O. B. Baltimore." There is nothing in that language which would justify us in saying that the cash was not to be paid until the tomatoes reached New Orleans. Indeed, there is no express provision in the contract for shipping them to that city. It may be said that it states the residence of the buyer to be at New Orleans, and hence the presumption is that they were to be shipped there. In the absence of some instruction to the contrary from the buyer, it may be that the contract should be construed to mean that they were to be shipped to that city; but as the seller was only required to deliver them "F. O. B. Baltimore," and the contract provided for the "buyer to give shipping instructions when requested by seller," there would be no reason why the seller should not ship them to some other point, if so instructed by the buyer, unless such shipment would impose a greater burden on the seller than shipping them to New Orleans would have done. If, for example, the buyer had sold those tomatoes in bulk to some one in Richmond, there could be no valid reason for the seller sending them to New Orleans, and thus require the buyer to pay the freight to that place, and then reship them to Richmond. It would seem, therefore, to be possible that the tomatoes might never have gone to New Orleans, under the terms of the contract, and hence it is difficult to see how it can be said that the cash was not to be paid until they reached that city.

But if it be conceded that the contract contemplated that the shipment should be to New Orleans, and not elsewhere, it cannot be denied that if the appellant had placed the tomatoes purchased, in proper condition, on board the cars at Baltimore, with correct shipping instructions, its responsibility would have been at an end. The carrier would then have been the agent of the buyer, and the seller would have had no redress against the carrier in case of loss. If the goods had been destroyed or injured, the buyer, and not the seller, could have held the carrier responsible, so far as there was any responsibility; and, if there was none, the buyer would have been compelled to sustain the

loss. The seller would not even have had a lien on the goods for the purchase money, and no right but that of stoppage in transitu, if circumstances arose that justified the exercise of that right. When, then, the contract provides for payment of cash, and only requires the seller to deliver the goods free on board at Baltimore, why should the seller be required to wait until they arrive at New Orleans before it is entitled to its money? While the terms "F. O. B. Baltimore" required the seller to place, at its own expense, the goods on board in Baltimore, the buyer was required to pay the freight to the carrier, and the goods were then at his risk. This contract not only uses the term "F. O. B. Baltimore," but it says, "To be delivered as packed during season of 1901. F. O. B. Baltimore." In the record there is a period after "1901," but the expression "To be delivered," etc., unquestionably refers to and is connected with "F. O. B. Baltimore," and hence shows that the delivery was intended to be there. Although the sale was for cash, a delivery made unconditionally and without fraud or mistake would have vested the title to the goods in the appellee (*Foley v. Mason*, supra), and hence such a delivery in Baltimore would have had that effect, and a delivery elsewhere would not have been in accordance with the contract. It seems clear to us then that by the terms of the contract the payment was to be made in Baltimore upon delivery of the tomatoes on board the car; and the appellee having refused, as alleged in the pleas, to make such payment, it cannot sustain this action, without in some way meeting the allegations of the pleas. Any other construction would be placing the appellant in a position not contemplated by the contract.

It was conceded by the appellee that a cash sale means a sale for cash to be paid on delivery of the goods, and that as a general rule the place of delivery is the place where the goods are being manufactured; but it is said this rule is not invariable, and may be affected by the situation of the parties, the nature and subject-matter of the contract, and other collateral circumstances which show a different intention, to which the courts give effect, and that there is a distinction noted in the authorities between the rules governing deliveries in sales of specific and ascertained chattels and those of goods not in existence, but to be manufactured by the seller to correspond with the description in the contract of sale. It is true that such a distinction is made in the absence of stipulations in the contract which govern the parties, but when the contract itself prescribes the terms, and those terms are free from doubt, they must be the guide for courts in passing on the rights of the parties.

Great stress was placed on the right of the appellee to inspect the goods before acceptance. If it be conceded that it had such

right, as it may be, the further question arises as to where, under this contract, it could be exercised. The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business, but, if the contract provides for delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short, a contract to deliver at one place cannot be said to mean delivery at another place, because the buyer lives there, and has the right to inspect the goods, and there is no such uncertainty as to the place of delivery in this contract as would justify the court in holding that it was at New Orleans, because the appellee had its place of business there. An inspection of canned goods at any place away from the canning establishment must be attended with some difficulties. Every can that is opened is doubtless injured for the ordinary purposes of trade; for unless it is speedily sold the fruit or vegetables must soon become worthless. There is nothing in the record to show what the custom is as to inspection, and the parties made no special provision in the contract for it, but it is manifest that there could not be an inspection of every can in 700 cases at the place to which they were to be shipped. But whatever inspection was to be made could be done as well at the place from which the goods were shipped as at the point of destination, and it is mainly a question of convenience to the respective parties as to where it shall be made. If they determine that by their contract it must control, and if it is silent as to inspection, but is as clear as this is as to delivery, any inspection that is desired before payment must be made before or at the time of delivery, when the terms are cash.

It was said on behalf of the appellee that the usual method of collecting the purchase money for such goods is for the vendor to draw on the vendee, and not deliver the bill of lading until the draft is paid; but a sufficient answer to that is that it was not the method adopted in this contract. The standing of these parties is not known to us, and we do not mean to reflect upon either of them; but, if a vendor wants to relieve himself of all risk of loss or unfair dealing by a vendee residing at a distance, he has the undoubted right to require payment at the place where the goods are to be shipped from, and not subject himself to the risk of loss or inconvenience by the vendee declining to accept the goods at the place of destination; and when the contract provides for that, as we think this does, the contracting parties are bound by it.

So, without deeming it necessary to further prolong this opinion by considering such warranties as may be implied in sales of this kind, or other matters affecting the rights of

the respective parties, we are of the opinion that the court below erred in sustaining the demurrer to these pleas, and the judgment must be reversed.

Judgment reversed, and a new trial awarded, the costs to be paid by the appellee.

**BAUERNSCHMIDT et al. v. BAUERN-
SCHMIDT et al.**

**BALTIMORE TRUST & GUARANTEE CO.
v. SAME.**

(Court of Appeals of Maryland. April 1, 1903.)

**TESTAMENTARY POWER—SCOPE—GIFT INTER-
VIVOS—WHAT CONSTITUTES—CORPORATION—
TRANSFER OF ASSETS—FORMER STOCK-
HOLDERS—VALIDITY OF CORPORATE ACT—
TRUST DEED—PARTIAL INVALIDITY—EF-
FECT—PERSONAL PROPERTY—LIFE TENANT—
ASSIGNMENT OF INTEREST BEFORE ADMIN-
ISTRATION.**

1. A will devised all testator's property (between one and two millions) to his wife for life, with full power to transfer and due conveyance make in her sole name, and in any manner to dispose of and deal with the said property for her sole benefit and at her sole discretion, "as fully as I could do." After the wife's death, and payment of her debts and funeral expenses, he devised, "all the rest, residue and remainder of my said estate then being" unto trustees, to divide among his children, whereupon the trust should determine. Shortly before making the will, testator gave each of his children \$150,000. *Held*, that the wife had no power to convey the property in trust for the children for life, remainder to their children, until they reached maturity, when the trust should terminate and the property be distributed.

2. The owner of a brewery organized, for business convenience, a corporation, dividing a portion of the stock gratuitously among his children. One son dying, he gave his portion to the others. He gave 30 shares to his wife, and later canceled the certificate, and issued one for 140 shares to himself and her as tenants by the entirety. He was treated by all as the owner of the 140 shares, voted them, and on a sale of the property transferred them to the purchaser, and exercised exclusive control over the proceeds. *Held*, that there was no completed gift to the wife.

3. A husband's transfer to a purchaser of corporate stock held by himself and wife as tenants by the entirety (the wife's interest having come from him as a gratuity) will be presumed to have been rightful, negating the idea of a completed gift to the wife.

4. Stockholders in a brewing company, consisting of a husband, wife, and children—the business actually belonging to the husband—signed a resolution releasing the husband and the company from all claims on account of dividends earned. Previously a resolution had been adopted declaring that all money, before drawn by the husband for investment, should be "canceled and wrote off the company's books for which value received," etc. In pursuance of the first resolution, all the company's securities representing surplus profits were transferred to the husband. *Held*, that they became his individual property.

5. A husband, owning securities, rented a safety deposit box in his own and his wife's names, to be entered severally; the agreement reciting that they held as "joint tenants, the survivor * * * to have access thereto in case of the death of either." He deposited the securities therein, and gave one key to his wife, saying, "Here is your key to the safe deposit box," and retained the other. *Held* not a completed gift to the wife.

6. Mere declarations of a husband that whoever lives the longer of himself and wife shall have everything do not constitute a gift.

7. The owner of a brewery organized a corporation, distributing a portion of the stock gratuitously among his wife and children. The plant was purchased by a syndicate, and all the stock was transferred to the purchaser. Afterwards, and after the owner's death, the wife and children held a stockholders' meeting, and transferred to the wife and another certain securities of the company which had not been bought by the syndicate. *Held* that, as they had ceased to be stockholders, their action was void.

8. A trust deed purporting to be executed under a power given by a will, but in reality in excess thereof, will nevertheless convey the grantor's interest in the property, though it assumes to confer an absolute title; and it is also effective as to the grantor's individual property included therein.

9. A life tenant may assign her inchoate title to securities bequeathed by a will, though administration is necessary to perfect her title.

Appeal from Circuit Court of Baltimore City; Pere L. Wickes, Judge.

Bill for administration of an estate, and to set aside a trust deed, by Frederick Bauernschmidt and another against Margaretha Bauernschmidt, as administratrix of the estate of George Bauernschmidt, deceased, and others. Decree for plaintiffs, and Margaretha Bauernschmidt and the Baltimore Trust & Guarantee Company appeal. Modified.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Thomas C. Weeks, for appellant Margaretha Bauernschmidt. John N. Steele, for appellant Baltimore Trust & Guarantee Co. William S. Bryan, Jr., Louis P. Hennigshausen, and Edgar H. Gans, for appellees.

McSHERRY, C. J. George Bauernschmidt had been engaged in the brewery business for some years, and had amassed considerable property. His family consisted of himself, his wife, and seven children. In 1889 he determined to conduct his business through and in the name of a corporation, and accordingly he procured a certificate of incorporation, creating the George Bauernschmidt Brewing Company. All the stockholders were members of his family. The property and business taken over by the corporation were his individually, the other incorporators having no interest in that property or that business, and it is not pretended that they gave any value whatever for the shares of stock which were issued to them. Upon the organization of the company, certificates of stock were issued, representing a total of 200 shares—the number fixed in the articles of incorporation. Of those 200 shares, he retained 196 and gave 1 to each of four of his children. Subsequently there was a new and different division made of the shares; and later on, one of the children having died, the distribution of the shares was again rearranged, and new certificates were issued. Under this last arrangement 140 shares were

issued to George Bauernschmidt and Margaretha Bauernschmidt, his wife, as joint tenants, and 10 shares to each of their six surviving children. In 1898 the Maryland Brewing Company was incorporated to take over and consolidate all the brewery business in Baltimore City. The George Bauernschmidt Company sold certain of its property and its whole business to the syndicate which organized the Maryland Brewing Company, and the price agreed to be paid was \$1,000,000 in cash and \$1,000,000 in stock of the new corporation—preferred and common in equal amounts. Before that sale could be consummated, the purchasers required the stockholders of the George Bauernschmidt Company to transfer in blank, and to deliver to Sperry, Jones & Co., who were promoting the new enterprise, all the certificates of the capital stock of the Bauernschmidt Company; and this was done on March 1, 1899. Frederick Bauernschmidt, one of the sons, who held a certificate for 10 shares, was opposed to the scheme of selling to the Maryland Brewing Company. Without going into the details, because it is unnecessary to do so, it is enough to say that, after some delay, George Bauernschmidt agreed to give Frederick the sum of \$150,000, and thereupon Frederick transferred to his father the certificate which the former held for 10 shares of the Bauernschmidt Company's stock. On the 1st of March, 1899, the sale to the Maryland Brewing Company was completed, and a conveyance was duly executed. George Bauernschmidt then gave to each of his other five children a like sum of \$150,000, though some of them did not receive the money until after his death. He had for some years rented from several of the trust and security companies of Baltimore safe deposit boxes, in which his own and the Bauernschmidt Brewing Company's investments were kept, but he always retained the keys himself. After the consummation of the deal with the Maryland Brewing Company, and on March 13, 1899, one of the boxes (viz., box No. 4,392 in the Mercantile Trust & Deposit Company, which had stood in the name of the Bauernschmidt Brewing Company) was surrendered, and was then re-rented to George and Margaretha Bauernschmidt, to be entered severally under the following agreement: "We agree to hire and hold safe No. 4,392, or any safe for which it might be exchanged, as joint tenants, the survivor or survivors to have access thereto in case of the death of either." George Bauernschmidt gave to his wife one of the two keys to the box, and retained the other; saying to her, "Here is your key to the safe deposit box." On December 30, 1898, whilst negotiations were pending for the sale of the Bauernschmidt brewery to the Maryland Brewing Company, George Bauernschmidt, with three of his children and one of his employes, organized a corporation called the Baltimore Realty Company,

whose chief object was to acquire and hold all the property of the Bauernschmidt Brewery Company which was not to be included in the sale to the Maryland Brewing Company. The capital stock was fixed at \$100,000, divided into 1,000 shares, of the par value of \$100 per share. The stock was issued as follows: 980 shares to George and Margaretha Bauernschmidt as joint tenants, and 5 shares to each of four of his children; the two who were excluded being those who filed the bill of complaint by which the pending proceedings were begun. On the 1st of March, 1899, the Bauernschmidt Brewery Company conveyed considerable property to the realty company, and assigned to the latter sundry mortgages, which property and mortgages it was agreed should be received in payment for the entire issue of stock of the realty company. None of these conveyances or assignments embraced bonds, stocks, or other like securities, except some judgments.

On April 4, 1899, George Bauernschmidt, then being quite ill, made his last will and testament, and on the 12th of the same month he died. By his will he gave to his widow a life estate in all his property, coupled with certain powers, which will be stated and considered later on. After the expiration of the life estate, he directed "the rest, residue and remainder of" his "said estate then being" to be equally divided amongst his six children; the share of one of them, who was afflicted, being placed in trust. On July 26, 1899, or a little more than three months after the death of George Bauernschmidt, Mrs Bauernschmidt executed a deed of trust to the Baltimore Trust & Guarantee Company, conveying, upon certain trusts, \$650,000 of securities. This sum of \$650,000 was made up of the following items: \$326,000 in bonds, which were in box No. 4,392 of the Mercantile Trust Company (that box stood, as has been stated already, in the names of George and Margaretha Bauernschmidt, as joint tenants); \$117,000 in bonds, which the evidence shows had been purchased by Mrs. Bauernschmidt; \$7,000 in Baltimore City stock, held by the Bauernschmidt Brewery Company, but transferred to Mrs. Bauernschmidt on May 11, 1899; \$60,000 in stocks and bonds transferred by the realty company to Mrs. Bauernschmidt on August 28, 1899; \$90,000 in bonds, of which \$85,500 were registered in the name of George Bauernschmidt, and are accounted for in the inventory filed by his executrix; and \$50,000 in City & Suburban Railway bonds, which were the sole property of Elizabeth Bauernschmidt, the afflicted daughter. These latter were purchased with part of the \$150,000 given to Elizabeth by her father when he paid Frederick the like sum for his 10 shares of stock. On September 7, 1899, Mrs. Bauernschmidt conveyed to the Baltimore Realty Company certain mortgages which had been executed to George Bauernschmidt; and the conveyance purports to have been made in

accordance with, and by virtue of, the powers conferred upon her by the will of her husband. On September fifth of the same year, Mrs. Bauernschmidt stated her first account as executrix in the orphans' court of Baltimore City. In that account none of the securities conveyed by the deed of trust, except the \$85,500 above mentioned, and none of the mortgages transferred to the realty company by the conveyance of September 7th, are dealt with or mentioned.

Two of the sons (Frederick and William) insist that the deed of trust, if sustained, will dispose of the property sought to be transferred by it upon limitations different from those authorized by the will of their father, and that it is therefore an unauthorized and illegal instrument; and they further contend that the assignment of the mortgages to the realty company is likewise unwarranted. They therefore filed a bill in circuit court No. 2 of Baltimore City against Mrs. Bauernschmidt individually and as executrix, and against the other four children, the realty company, and the Baltimore Trust & Guarantee Company, in which bill they prayed that the court would take jurisdiction over the administration of the estate of George Bauernschmidt, and would vacate and set aside the deed of trust and the conveyance of the mortgages, so that the securities mentioned in the deed of trust and in the conveyance may be accounted for as part of the assets of George Bauernschmidt's estate. To this bill, answers were filed by all the defendants, and quite a volume of testimony was taken. Without going into a minute recital of the averments of the bill or the statements of the answers, it will suffice to say that the questions which are now before us for solution may be reduced to two, viz.: First. Is the deed of trust dated July 26th valid? Secondly. Is the conveyance of September 7th, transferring the mortgages to the realty company, effective? The first question is divisible into two inquiries, viz.: First. Assuming that the securities mentioned in the deed of trust belonged to George Bauernschmidt at the time of his death, does his will empower his executrix to make the disposition of them which has been made by the deed? Secondly. Did those securities belong to the estate of George Bauernschmidt, and did any of them which had been his become the property of Mrs. Bauernschmidt, either by reason of her being named as joint tenant with her husband in the certificate for 140 shares of the Bauernschmidt Brewery Company's stock, or by virtue of a gift of them to her by her husband, as evidenced by his declarations, and by the method adopted in placing them in the safe deposit box of the Mercantile Trust Company, as hereinbefore stated?

The circuit court declared by paragraph "d" of its decree that the deed of trust was void, and that all the property and securities covered thereby, and the proceeds thereof, be accounted for before the auditor as a part

of the estate of the late George Bauernschmidt. By paragraph "e" it was adjudged that the conveyance of September 7th, assigning the mortgages to the realty company, was also null, and the decree directed the proceeds to be accounted for as part of the estate of George Bauernschmidt. And by paragraph "f" it was determined that the alleged gifts of the securities which were in the safe deposit boxes were ineffectual, because there was no sufficient delivery of the securities to pass title thereto, and they were required to be treated as belonging to George Bauernschmidt's estate. From that decree two appeals have been taken—one by Margaretha Bauernschmidt, executrix, and others, and one by the Baltimore Trust & Guarantee Company, trustee. We will now proceed to dispose of the questions presented as concisely as the nature of the inquiries will permit.

1. Is the deed of trust valid? Assuming that the securities, or any of them, were the property of George Bauernschmidt at the time of his death, do the provisions of his will authorize his executrix to deal with them as she has done by the deed of trust? We will first see what the provisions of the will are, then ascertain what they mean, then contrast therewith the dispositions made by the deed of trust, and finally we will determine whether those dispositions are in accordance or in conflict with the scheme, the intention, and the terms of the will.

Without pausing to note the preliminary clauses of the will, or the particular devices of certain real estate made to his wife "for the full term of her natural life," we quote the following items, inasmuch as they are the controlling and important ones:

"Item. I give, devise and bequeath unto my wife, Margaretha Bauernschmidt, all the rest, residue and remainder of my estate, of which I shall die possessed or be entitled to, of every kind and wherever situated, for the full term of her natural life, with full power to her hereby granted, to sell, mortgage, lease, transfer and due conveyance make of said property or of any part thereof, in her sole name, and to invest and reinvest the said property and the rents, profits and revenues thereof, and otherwise in any manner to change, dispose of, use and deal, with the said property and the rents, profits and revenues thereof, for her sole benefit and at her sole discretion as fully as I could do. * * *

"Item. At and upon the death of my said wife, and after the payment of her just debts and funeral expenses out of any part of the estate which shall come into the hands of the trustees hereinafter named, then and on the happening of that event, I give, devise and bequeath all the rest, residue and remainder of my said estate, then being, unto John Bauernschmidt and Sarah Bauernschmidt, and the survivors of them in trust and confidence nevertheless, for the following trust uses and purposes to wit:

"First: In trust and confidence immediately upon the death of my said wife, to take the said property into possession and after the payment of all necessary and proper expenses connected with said property and the administration of the trust hereby created, to divide the whole of said property remaining into six equal parts, and to immediately pay over, convey and distribute five of said equal parts in the manner following that is to say:

"One equal sixth part each, to my children, namely, John, Frederick, William and Sarah Bauernschmidt and Emilie Wehr, née Bauernschmidt, and in the event of either of my said children being then dead and issue surviving, then and in such event, his, her or their child or children shall take the parent's share, equally, share and share alike, and in the event of either of my said children being then dead and no issue of his, her or their body or bodies surviving, then, and in such event, in trust, to pay over and distribute his, her or their respective one-sixth share or shares, in equal parts, equally, share and share alike, to and among the surviving children of my body, the child or children of any deceased child or children of my body to take the parent's share, per stirpes.

"Whereupon the trust hereby created in said property shall cease and be determined."

As to the remaining sixth part a trust is provided for the benefit of the daughter Elizabeth for life, with remainder to her children, should she have any; and, in default of issue living at her death, that share is given over to the testator's "legal heirs and representatives."

It is obvious at a glance that the interest given to the widow in the residuum was limited to "the full term of her natural life," unless the superadded powers converted what was expressly declared to be a life estate into an absolute estate, or, what, in effect, is equivalent, gave her the right to divert the remainder into a totally different channel, so as to defeat the subsequent limitations to the children after the termination of the life estate. The view that the power converted the life estate into a fee is repudiated by the appellants, who concede that the will does not vest in the widow a fee simple estate at all; but they contend that it gives to her full power over the entire estate, to dispose of it in any manner she may deem proper, and that it limits and vests a remainder only in such property as may be left undisposed of by her at the time of her death. Whether this view is sound depends altogether upon whether it was the intention of the testator that his widow should be clothed with power to defeat the provisions made in subsequent clauses of the will in behalf of his children. That intention must be gathered from the face of the will, and from the circumstances that surrounded the testator at the time he executed it. This is not the case

of the remainder annexed, as in *Benesch v. Clark & Bramble*, Adm'r, 49 Md. 497. But it is a distinct gift of a life estate, with equally distinct gifts over in remainder to other persons, and the question is, does the superadded power authorize the life tenant to cut down or extinguish or change altogether the remainders created by the will, or is the power restricted to the management and conservation of the estate so that it may be kept in its integrity for the remainder-men, without holding the life tenant accountable for waste? It is manifest that a predominant object of the testator was to make ample provision for his widow during her life. He had but recently before the date of his will given to each of his six children \$150,000, and he was apparently solicitous that his widow should enjoy during the remainder of her days the entire income of the estate which he possessed. But this was not all. He was none the less concerned with respect to the claims of his children, and therefore he made an equal division of the residuum between them after the termination of the life estate. The bulk of his wealth seems to have been invested in stocks and bonds, whose values constantly fluctuate in the market; and it was eminently wise to make some adequate and liberal provision by which the life tenant would be clothed with ample power to change those and other investments and property as fully as the testator himself might have done, whenever and as often as the occasion should require it. Nor does the phrase that the life tenant might "dispose of, use and deal with the said property, and the rents, profits and revenues thereof, for her sole benefit and at her sole discretion as fully as" the testator could have done, indicate an intention to confer upon her a power to disregard and cancel the later clauses of the will. If the scope of the power is as broad as the contention of the appellants would make it, then the life tenant could strike down the whole scheme and structure of the will, and, by gift or deed of trust, transfer the entire property to total strangers. She could cut off every child, or such of them as she saw fit, or as caprice or prejudice might prompt, notwithstanding the careful provision in the will for an equal division amongst all of them. It cannot be supposed, and certainly it cannot be read on the face of the will, that the testator meant to give the life tenant such an unrestricted and complete dominion over his property; and yet to that length the contention must go if it be valid to the extent to which it has been carried by the deed of trust. By the will, after the death of the widow five of the children will take their interests in the remainder absolutely; the share of the sixth being placed in trust. By the deed, the same five will take merely an equitable life estate, with remainders over in trust to their respective children until the youngest of those children attains the age of 21 years, at which time,

but not before, the trust is to terminate and the property is to be distributed. Thus the vesting of the remainders is postponed for more than a generation, and they are then made to vest in totally different individuals from those named in the will. If such a change may be made in the dispositions contained in the will, then why may not a more radical one, of the kind above suggested, be also carried into effect? Not only is the interpretation insisted on by the appellants at variance with the whole scheme of the will, but it is in conflict with adjudged cases, as will be seen in a moment. In order to maintain in its integrity the entire will, to keep its chief and most important provisions in harmony, and to give effect to the testator's obvious intention to preserve an exact equality amongst his children in the distribution of his large estate, the superadded power must be construed to be coextensive with the life estate, and to be no wider; and therefore it must be held that it conferred upon the life tenant authority to dispose of the life estate given to her, and this, and this only, she was authorized to do as fully as the testator could have done.

In the recent case of *Russell v. Werntz*, 88 Md. 210, 44 Atl. 219, the clause in a will then under examination was in these words: "I bequeath unto my present wife, Virginia Russell, all the residue of my estate, including all my property, both real, personal or mixed, to have and to hold and dispose off [sic] as she may see fit, while she remains single, and at her death or marriage, the remaining property is to be equally divided between my two daughters, Grace A. Russell and Jessie V. Russell." It was contended that, the power of disposition being without limitation, the widow took a fee, or else, if she took but a life estate, the full exercise of the power would be effectual to convey a fee-simple title in the remainder. But this contention did not prevail. In the course of the judgment it was said: "It also seems clear to us that he [the testator] desired his children to take the estate after the interest of the widow had terminated by marriage or death. * * * Can it be entertained for an instant that he intended to modify the whole plan by conferring upon his widow a power of disposition of the reversion, whereby she could defeat the rights of her daughters, appropriate the estate to her own use, bequeath or devise it at will, and defy the wish of her husband that she should retain the estate only so long as she remained unmarried? The possession of such a power would be inconsistent with and would defeat every intent expressed in or to be gathered from the will. * * * All the clauses and every word in a will should receive such a construction as that, while effect is given to each, they are all made to harmonize with each other, so as to reach the general plan or scope of the entire will. If, however, the clause in question be construed so as to confer on the wid-

ow only the right to dispose of the estate to the extent of the interest she takes in the estate, it will harmonize with all the provisions of the will, and all the intents to be gathered therefrom." Stress was laid by the appellant in that case upon the use of the words "the remaining property," as stress is laid upon the use of the words "property remaining," as indicating the testator's intention that the life tenant should have the right to diminish the corpus of the estate, and as denoting his purpose, when creating the remainders, to dispose of only that which might be left after such diminution. But it was said in the case just cited: "The property that passed under the second item [the item we have quoted from *Russell's will*] comprehended both realty and personalty. All of it was liable to waste or decay. Some portions of it, doubtless, would deteriorate by its use, and other articles were of such nature that their use was their consumption. In view of the general and particular intents of the will, it is not straining the construction of these words to regard them as indicating the intention of the testator that his widow should not be accountable for such loss or waste as might result from her personal enjoyment of the property." The principle applied in deciding the case of *Russell v. Werntz* is thus clearly stated (page 215, 88 Md., page 221, 44 Atl.): "The principle we now apply is that where a testator has given, in express terms, an estate for life, with a power of disposition annexed, with remainder over, the words conferring the power, though absolute, may be qualified by restraining words connected with and explaining them, so as to confer only such absolute disposal as a tenant for life may make. In such case a power to dispose of the reversion, and thereby deprive the remainderman of his interest, would be wholly inconsistent with the intent to grant an estate not to endure beyond life; and it should be so held, unless there is a clear purpose manifested in the will, that the power shall extend to the disposal of the reversion." See, also, *Smith v. Bell*, 6 Pet. 78, 8 L. Ed. 322, approved in *Dorsey v. Dorsey*, 9 Md. 33; *Brant v. Va. Co.*, 93 U. S. 333, 23 L. Ed. 927.

We have said that much stress was laid upon the words "then being," and upon the words "property remaining," as indicating that the power of disposal was broad enough to include the right to convey away to strangers the corpus of the estate, and as denoting an intention to include in the residuum only such portion of the property as had not been disposed of by the life tenant. But a correct reading of the will does not justify the contention. By a clause which has been quoted, and which precedes the one that creates the remainders, the testator directed his wife's debts and funeral expenses to be paid out of his estate, and then he gave the rest and residue "then being" to two trustees. By the next clause the trustees were required to

take the property into possession, and after paying the expenses connected therewith, and with the administration of the trust, they were instructed "to divide the whole of said property remaining" into six equal parts. By the phrase "then being," the testator obviously meant that which the trustees would hold after the payment of the wife's debts and funeral expenses, and by the phrase the "said property remaining" he clearly intended that which remained after the expenses of the property and of administering the trust had been deducted; and he did not mean to imply that the life tenant could, at her mere whim or pleasure, cut down the remainders or divert the corpus of his estate, because such a power "would be wholly inconsistent with the intent to grant an estate not to endure beyond life." *Russell v. Werntz*, supra.

For the reasons we have assigned, we are of opinion that Mrs. Bauernschmidt derived no authority, under the power contained in the will of her husband, to convey by the deed of trust the securities which belonged to his estate, further than such conveyance would operate upon and transfer her life estate in them.

Now as to the second subdivision of the first question, viz., did the securities conveyed by the deed of trust belong to the estate of George Bauernschmidt, and did any of them which had been his become the property of Mrs. Bauernschmidt by reason of her being named as joint tenant with her husband in the certificate for 140 shares of the Bauernschmidt Brewery Company's stock, or by virtue of a gift of them to her by her husband, as evidenced by the method adopted in placing them in the safe deposit boxes?

It is proper to say at the threshold of this branch of the subject that, according to the evidence in the record, \$117,000 of the securities covered by the deed of trust, and consisting of 112 Mobile City bonds, two Georgia & Carolina bonds, and three Atchison & Santa Fé bonds, belong to Mrs. Bauernschmidt, as they were bought by her, and it has not been shown that she purchased them with assets of the estate. It is also clear and undisputed that \$50,000 worth of securities covered by the deed of trust, and consisting of 50 City & Suburban Railway bonds, are the property of Miss Elizabeth Bauernschmidt, and not part of the assets of the estate. With respect to these securities, aggregating \$167,000, the decree adjudging them to be part of the testator's estate, and requiring them to be accounted for as such, is obviously wrong, and must be reversed. Of the remaining \$483,000 of securities, \$80,000, consisting of \$20,000 of Baltimore City stock and \$40,000 of Baltimore City Passenger Railway bonds, were transferred to Mrs. Bauernschmidt by the realty company on August 28, 1899, as heretofore stated, and they will be dealt with later on. Deducting the \$80,000 just named, there remain \$423,000 of securities.

Of those \$90,000 were registered in the name of George Bauernschmidt. \$85,500, part of the \$90,000, were accounted for in the inventory filed by the executrix, and they still belong to the estate, though included in the deed of trust. They belong to the estate because the only authority which Mrs. Bauernschmidt had to dispose of them in the way she did was under the power contained in the will, and that power was ineffectual to accomplish what she undertook, except as respects her life interest in them. Deducting the \$90,000 just named, and there are left \$333,000; and subtracting from them the \$7,000 of Baltimore City stock which was held by the Bauernschmidt Brewery Company, and was transferred to Mrs. Bauernschmidt on May 11, 1899, and will be spoken of later on, and there remain \$326,000 in securities which were taken from box No. 4,392 of the Mercantile Trust Company. The investments making up this last-named sum are those claimed by Mrs. Bauernschmidt in the double aspect mentioned, viz., as surviving joint tenant of the Bauernschmidt Brewery Company's stock, and as the donee under a gift from her husband.

It is true that 140 shares of the capital stock of Bauernschmidt Brewery Company stood in the name of the husband and wife as joint tenants—that is, tenants by entireties—and, if there had been no change made, perhaps a different situation would have been presented. But it must be borne in mind that on December 30, 1898, when the resolution was adopted to sell to the Maryland Brewery Company, the stockholders of the Bauernschmidt Brewery Company accepted the requirement of the purchaser that the stock of the vendor company should be turned over to the new concern, or to its projectors, and that, in accordance therewith, George Bauernschmidt assigned in blank the certificate for 140 shares of stock, whereby the muniment of whatever title Mrs. Bauernschmidt had wholly ceased to exist. When it is remembered that the whole of the property originally belonged to George Bauernschmidt; that the corporation which he formed, and which took over that property, was obviously created for mere convenience in the transaction of the business; that neither his wife nor children invested a dollar in the stock; that he voluntarily placed the name of his wife in the certificate as a joint tenant after having canceled one that had been previously issued to her in her own name for 30 shares; that he was treated by all the others as the real owner of the 140 shares, as the minutes of the meeting of December 30, 1898, show; and that he then surrendered to Sperry, Jones & Co. the certificate for 140 shares, and himself received and exercised exclusive control over the entire cash proceeds of the sale—it can scarcely be contended that Mrs. Bauernschmidt still continued to be a share-

holder in the Bauernschmidt Brewery Company, or retained, if she ever had, any interest in the purchase money paid for the property which had actually belonged to her husband alone. There can be no perfected gift where there has been no complete surrender of dominion over the thing given. Now, George Bauernschmidt never did surrender control over the stock of the Bauernschmidt Brewery Company, even after the stock had been issued. He first put none in the name of his wife. Afterwards he gave her 30 shares, and then he canceled that certificate and others, and issued the one for 140 shares. He was not only president of the company, but in fact the owner of all its property. He issued and canceled certificates, seemingly, as he pleased. When one of his sons died, in whose name 10 shares stood in two certificates, there was no administration on his estate; but the real and dominant owner simply canceled the certificates, and made a new distribution of the stock, incorporating his deceased son's 10 shares in the 140-share certificate. He, and he alone, voted the 140 shares, and his final assertion of control over the certificate representing those shares was manifested when he transferred it in blank and delivered it to Sperry, Jones & Co. His dealing with the stock, and her acquiescence in what he did, and the fact that he could, and did, as the actual owner of all the property which the company possessed, exercise complete control over those 140 shares, show that he had never surrendered dominion over them, or put it out of his power to revoke the gift of them. In making the transfer of the certificate, George Bauernschmidt must be treated as having acted rightfully, because the legal presumption is against his having acted wrongfully. *Corner v. Pendleton*, 8 Md. 337.

It comes, then, to the question whether there was a valid and perfected gift by the husband to the wife in any other way. The only other way that has been suggested or relied on is the re-renting of safe deposit box No. 4,392 of the Mercantile Trust Company, under the contract set forth in an earlier part of this opinion. It is insisted that, in virtue of what was then done, George Bauernschmidt created a tenancy by the entireties in himself and his wife in respect of the securities contained in that box. Of course, such a tenancy may exist, and one of its incidents is that the survivor becomes entitled, upon the death of the other, to the property thus jointly held by husband and wife. It may have its origin in a voluntary gift by the husband, but, like any other gift, to be valid and effective, it must possess certain well-defined and essential qualities. There can be no gift which the law will recognize where there is reserved to the donor, either expressly or as a result of the circumstances and conditions attending the transaction, a power of revocation or a do-

minion over the subject of the gift. There must be no locus penitentiae, and there is always a locus penitentiae when the supposed donor may at any moment undo what he has done. *Brewer v. Bowersox*, 92 Md. 570, 48 Atl. 1080; *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208. If the donor retains dominion over the thing given, precisely as he had control of it before the alleged gift was made, there is obviously no perfected gift, because there has been no change of possession, and there is still an opportunity to recant. The application of this principle to the facts in the record is not difficult. The securities which were in box No. 4,392 on March 13, 1899, when that box was re-rented in the names of George and Margaretha Bauernschmidt as "joint tenants," undoubtedly belonged to George Bauernschmidt individually. That there may be no mistake about this statement, allusion will be made quite briefly to some of the evidence by which it is established: On January 20, 1897, the stockholders of the Bauernschmidt Brewery Company, including Mrs. Bauernschmidt, signed a resolution whereby they forever acquitted, discharged, and released George Bauernschmidt, his heirs, personal representatives, and assigns, and also the brewery company, its successors and assigns, "from all claims and demands whatsoever on account of any dividends heretofore earned or that may have been earned" on its capital stock. Five days previously a resolution had been unanimously adopted by the stockholders of the same company declaring that "all money heretofore drawn by the president [George Bauernschmidt] for investment," etc., "shall be canceled and wrote off the company's books for which [sic] value received," etc. In pursuance of the first of the above resolutions, as is shown by the testimony of Frederick Bauernschmidt, who was at that time the secretary of the company, all the securities which had been held by the George Bauernschmidt Brewing Company, and which represented surplus profits, were transferred to George Bauernschmidt, as his individual property. It is not pretended that these investments were made with money which came from any other source than surplus profits of the company's business, and that business was, in point of fact, the business of George Bauernschmidt.

Did George Bauernschmidt on March 13, 1899, part with dominion or control over his securities? If he did not do so on that day, he certainly never did afterwards. By the terms of the renting, box 4,392 could have been entered by husband and wife severally, and upon the death of either the survivor was entitled to have access to it. This arrangement wrought no change in the dominion which George Bauernschmidt previously had over the property. He could have taken every bond and certificate of stock out of the box without the assent, or even against the protest, of his wife, and could have disposed

of them just as he pleased. The fact that the wife had a key to the box did not place any restriction on the husband's control over the property contained in the box, and it cannot be asserted, as a legal postulate, that a mere right of access to the box on the part of the wife during the husband's life changed the title to the contents of the box. Conceding that he designed to make a gift to his wife of the securities then in the box, still if he was free after March 13, 1899, to do what he pleased with those securities, notwithstanding the terms of the renting, then there was a locus penitentiae reserved, and consequently there was no perfected gift, even though, in point of fact, he did not attempt to exercise the dominion which he retained. It is the existence, and not the exercise, of the locus penitentiae, which defeats a gift inter vivos. "There is no case which decides that the donor may resume the possession and the donation continue." *Bunn v. Markham*, 7 Taunt. 224. If he had phrased the contract of renting so that neither he nor his wife could during the lives of both enter the box without the presence or consent of the other, his control over the things in the box would have been much more restricted. The title must pass out of the donor in his lifetime, or it can never reach the donee. *Walsh's Appeal*, 122 Pa. 177, 15 Atl. 470, 1 L. R. A. 535, 9 Am. St. Rep. 83.

There is a clear distinction between the case at bar and *Brewer v. Bowersox*, supra, and *Estate of Parry*, 188 Pa. 83, 41 Atl. 448, 40 L. R. A. 444, 68 Am. St. Rep. 847, which last-named case was relied on by this court in *Brewer v. Bowersox*. In *Brewer v. Bowersox* the certificate of deposit that created the tenancy by the entireties was made payable to the husband and wife jointly. Neither of them during the lives of both could have drawn the fund from the bank which issued the certificate, without the indorsement of the other, and consequently the original owner of the fund parted with or was deprived of the dominion over it which he formerly had. It required something more than his act and his volition to repossess himself of the money. The wife's co-operation by indorsement of the certificate, or at least by a distinct acquiescence in its surrender, was necessary to restore the fund to his control. Besides, the certificate was issued by a corporation which was not under the dominion of either the husband or the wife. In *Parry's Case*, supra, the evidence of the surviving wife's ownership consisted of two letters of credit issued, the one by a firm of bankers, and the other by a national bank, and both letters were payable to the husband and wife jointly. The letters could not have been cashed without the signatures of both husband and wife to the drafts. In the case at bar, however, as has been stated, the husband was just as free to do what he pleased with the securities after the re-renting of the box on March 13th as he had been before,

and consequently he did not put it out of his power to dispossess his wife of any interest in them which she claims he intended to give her.

It was proved that George Bauernschmidt repeatedly said, when speaking of himself and his wife, that "whoever lived the longest should have everything that was left—securities and everything." * * * He said, as he had to pay Fred. \$150,000, he would pay the balance the same, and whatever was left belonged to him and his wife, and whoever lived the longest should have everything." But those and similar declarations cannot constitute a gift. "A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel, completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed, and therefore irrevocable, contract." *Walsh's Appeal*, supra. There was no such delivery in the case before us now.

The \$40,000 of Baltimore City Railway bonds and the \$20,000 of city of Richmond stock, and the \$7,000 of Baltimore City 3½ per cent. stock were in box No. 4,392. Part of these stood in the name of the Bauernschmidt Brewery Company, and the \$40,000 of bonds are indicated on a list of securities made up by John Bauernschmidt, one of the defendants, as the private property of George Bauernschmidt. Neither the realty company nor the Bauernschmidt Brewery Company could, by transfer or otherwise, divert from the estate of George Bauernschmidt those securities, or vest them, or title to them, in Mrs. Bauernschmidt, because, as respects the realty company, it did not own the securities it undertook to transfer; and, as respects the brewery company, the property which had not been conveyed or assigned by it to the realty company during the life of George Bauernschmidt belonged to George Bauernschmidt, as the real, substantial owner of everything which stood in the name of the brewery company. The situation that existed after the death of George Bauernschmidt was peculiar. All of the shares of the capital stock of the Bauernschmidt Brewery Company had been transferred to the syndicate, or to the new corporation which the syndicate formed, and not one of the original shareholders retained a single share of the stock. They were then no longer stockholders of the Bauernschmidt Brewery Company. How could they have been, after every share of the authorized capital was held by other individuals? Notwithstanding the fact that the original stockholders of the Bauernschmidt Brewery Company were no longer stockholders, and could therefore exercise no corporate act at all, they met and turned over to the realty company some of the securities standing in the name of the brewery company, and they directed others of the same kind to be

delivered to Mrs. Bauernschmidt. This is the origin of her title to the \$67,000 of securities we are now concerned with, and it requires no discussion to demonstrate the conclusion that a title thus acquired is no title at all. Conceding that the stockholders of the Bauernschmidt Brewery Company could give away assets standing in the company's name, but actually owned by George Bauernschmidt's estate, it is obvious that, when the persons who had been stockholders ceased to be stockholders, they were powerless to act as stockholders, and that what they did in the capacity of stockholders when they were in fact not stockholders was simply void.

2. Is the assignment of the 7th of September, 1899, conveying the mortgages to the realty company, valid? Those mortgages stood in the name of George Bauernschmidt. Mrs. Bauernschmidt asserted the right to transfer them under the power in the will of her husband. It does not appear that she did this by way of changing an investment, but she did it for the purpose of putting the title in the realty company, of which she claimed, by right of survivorship, to be the largest shareholder. As we have already pointed out, the will conferred upon her no power to give away the assets of the estate. Without further discussion, we hold the assignment invalid.

After the \$650,000 of securities covered by the deed of trust had been taken out of the safe deposit box of the Mercantile Trust Company, there remained there \$318,000 of bonds. Mrs. Bauernschmidt then rented six boxes—one for each of her children—and divided these \$318,000 of bonds into six lots, of \$53,000 each, and placed one lot in each box. Over and above the \$53,000 of bonds placed in each box, Mrs. Bauernschmidt added \$42,000 in bonds, making the contents of each box aggregate \$95,000 in bonds. The \$252,000 of bonds so distributed in amounts of \$42,000 were purchased by Mrs. Bauernschmidt with funds derived from two sources, viz., \$242,000 realized by her from the sale of the stock of the Maryland Brewery Company that had been issued in part payment for the purchase of the George Bauernschmidt Brewery Company, and with a portion of the cash purchase money which had been received by George Bauernschmidt, in his lifetime, from the Maryland Brewery Company, when the latter company bought the property, the capital stock, and the business of the former. It is clear that all of these securities which Mrs. Bauernschmidt thus attempted to deal with as her own formed part of the assets of her husband's estate, because she has no other title to them than the one we have held to be insufficient to vest in her an ownership of the other securities contained in box No. 4,392.

Inasmuch as part of the property transferred by the deed of trust was the individual property of the grantor, according to the evi-

dence in the record, the deed is clearly valid as respects the bonds which were hers; and, if the \$50,000 of bonds which belonged to the daughter were included in the deed with the daughter's consent, the deed is also effective to transfer those bonds to the trustee. A deed may be good in part. When it purports to convey that which the grantor had no authority to convey, as well as to transfer that which he could transfer, it will be good as to the latter, though inoperative as to the former. *Butler v. Rahm*, 46 Md. 547. Though the deed purports to be absolute, and though it cannot be effective as an absolute transfer of the property which belongs to the estate of George Bauernschmidt, yet it can operate to the extent of Mrs. Bauernschmidt's interest in that property. She had the right to convey away her life estate, and to that extent, in addition to the transfer of her own and the daughter's individual property, it may be upheld. "Such interest as the grantor has will pass, although the deed purports to convey an absolute title." 9 Am. & Eng. Ency. L. (2d Ed.) 127-128, and note 1; *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627. Whilst, in order to perfect the title of the life tenant to the securities and money not included in her account as executrix, it is necessary that they should pass through a due course of administration, still she had an inchoate title, which it was competent for her to assign. *Cecil, Adm'r. v. Rose*, 17 Md. 102; *Cecil v. Clarke*, Id. 520; *Rockwell v. Young*, 60 Md. 566.

The ultimate conclusions which we have reached are as follows: First, that paragraph "a" of the decree, by which the exceptions filed by the defendants to some of the testimony are sustained, is affirmed; second, that paragraph "b," by which the exceptions filed by the plaintiffs to certain questions and answers in the testimony of Mrs. Bauernschmidt were upheld, is affirmed; third, that paragraph "c," overruling all other exceptions to the testimony, is affirmed; fourth, that paragraph "d," striking down the deed of trust as an entirety, and declaring that all the securities covered thereby belong to the estate of George Bauernschmidt, is reversed; fifth, that paragraph "e," vacating the transfer of the mortgages to the realty company, is affirmed; sixth, that paragraph "f," determining that the alleged gift of the securities by the husband to the wife was ineffectual, is affirmed; and, seventh, that paragraph "g," in so far as it directs an account to be stated in accordance with paragraph "d," is reversed. The case will be remanded, that a new decree may be signed in accordance with this judgment, and that an account may be stated pursuant to the views herein expressed.

Decree affirmed in part and reversed in part, the costs above and below to be paid out of the estate, and cause remanded.

MAYOR, ETC., OF CITY OF BALTIMORE
et al. v. **JOHNSTON.**

(Court of Appeals of Maryland. April 1, 1908.)
TAXATION — TAXABLE PROPERTY — SEAT IN STOCK EXCHANGE — BILL OF RIGHTS — REVENUE STATUTES.

1. Bill of Rights, art. 15, declares that every person holding property in the state should contribute to the public taxes according to his actual worth in real or personal property. Poe's Supp. Code Pub. Gen. Laws 1900, art. 81, § 2, enumerates various kinds of property to be assessed, and provides that "all other property of every kind, nature and description within this state, shall be" assessed at its full cash value, without looking to a forced sale. This section was passed in 1896, but the same language was used when the Code of 1888 was adopted, and has been since October, 1874. Prior to 1874 the statute did not use so many words, but in Code 1860, art. 81, § 2, it read, "and all other property of every description whatsoever, shall be liable to assessment and tax," and those terms were used at least since the year 1852. A stock exchange was organized in 1844, and the record disclosed that the value of seats therein was constantly varying; ranging from \$60 to \$10,000. It was not incorporated, declared no dividends, and a member could not dispose of his membership unless the proposed transferee was selected by the governing committee. No attempt was made to assess seats in the exchange as property until 1901. *Held*, that a seat in such stock exchange was not "property" subject to taxation, within the meaning of the term as used in article 15 of the Bill of Rights, or of the revenue statutes of the state.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Proceeding to assess for taxation a seat in the Baltimore Stock Exchange held by Bartlett S. Johnston. From an order of the Baltimore city court vacating an assessment of such seat made by the appeal tax court of Baltimore City, the mayor and city council of Baltimore appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Olin Bryan, for appellants. W. Burns Trundle, for appellee.

BOYD, J. The appeal tax court of Baltimore City assessed for taxation a seat in the Baltimore Stock Exchange held by the appellee at the sum of \$7,000 for the year 1903. In pursuance of the statute he appealed to the Baltimore city court, which passed an order by which the assessment was vacated and annulled, and from that order this appeal was taken.

It is contended on the part of the appellee that a previous determination of this question, in reference to an attempted assessment against him for the years 1901 and 1902, precludes the appellants in this proceeding, as it is *res adjudicata*; but it will not be necessary for us to pass on that branch of the case, by reason of the conclusion we have reached on the main question, which may be thus stated: "Is a seat in the Baltimore Stock Exchange property within the meaning of that term as used in ar-

title 15 of the Bill of Rights, and in the revenue statutes of this state?"

It would be useless to undertake to reconcile the decisions of the various courts which have been called upon to determine how far a seat in an exchange of this character can be said to be property, or to point out in what particulars they have differed. The learned judge below correctly determined that, by the great weight of authority, it cannot be said to be merely a personal privilege, but must be regarded as property, although in a limited and qualified sense. Among the cases in which such an interest in an exchange has been held to be property for some purposes are *Platt v. Jones*, 96 N. Y. 29; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; and *Page v. Edmunds* (decided by the Supreme Court of the United States in January of this year) 23 Sup. Ct. 200, 47 L. Ed.

—. The question has generally been considered in cases in which it was claimed that the interest of the holder of the seat passed to his assignee or trustee in bankruptcy, or where it was sought in some way to subject such interest to the payment of debts. In the one last mentioned the Supreme Court held that, under the provision in section 70 of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) that the trustee shall be vested with the title of the bankrupt in "property which prior to the filing of the petition he could by any means have transferred," the power of the bankrupt to transfer it was sufficient to vest it in his trustee. As that case arose in Pennsylvania, the court reviewed at length *Thompson v. Adams*, 93 Pa. 55, and *Pancoast v. Gowen*, Id. 66, in both of which it was said that a seat in an exchange could not be seized under an execution. The Supreme Court did not deem it necessary to determine that question, but said, in speaking of the opinion in *Thompson v. Adams*, that, if the court meant to say that the seat was not property at all, they could not concur. In *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, and *Lowenberg v. Grenebaum*, 99 Cal. 162, 33 Pac. 794, 21 L. R. A. 399, 37 Am. St. Rep. 42, it was also held that such seats were not property subject to judicial sales.

Although counsel for both sides showed commendable zeal in the preparation of this case, and cited many authorities which seemed to them to reflect on some of the questions involved, we have not been referred to a single decision in which a seat in an exchange of this kind has been taxed. In *Re Hellman's Estate* (Sup. Ct. N. Y., App. Div., decided in 1902) 79 N. Y. Supp. 201, the court said: "That a seat in this exchange is property, and that the Legislature would have power to impose a tax upon the transfer of such property, is conceded; but the Legislature, in defining personal property which is taxable under the tax law, has not included a right to a seat in the exchange as property

that shall be taxable, and for that reason the court below had no authority to impose the tax." And in *People v. Feitner*, 187 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698, the Court of Appeals held that a seat in the New York Stock Exchange was not personal property, within the meaning of the tax laws of that state. In *San Francisco v. Anderson*, 103 Cal. 69, 38 Pac. 1034, 42 Am. St. Rep. 98, it was held that "a seat in the San Francisco Stock and Exchange Board is not taxable." The court said: "It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give the purchaser the right to occupy said seat. It is too impalpable to go into any category of taxable property." In *Board of Commissioners v. Rocky Mountain News Company* (Colo. App.) 61 Pac. 494, it was held that a contract of membership in an associated press was not property subject to taxation, within the intention of the laws and Constitution of Colorado, although in that case the interest was first valued at \$25,000, and reduced by the lower court to \$20,000. In *Hart v. Smith*, 64 N. E. 661, 58 L. R. A. 949, the Supreme Court of Indiana held that the good will that attaches to the business of conducting a newspaper belonging to a copartnership is not, in and of itself, property, within the constitutional provision that the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation. In *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826, it was held that taxation of paid-up, or nonforfeitable and partly paid up, life insurance policies, was not provided for by statute, although there was a provision (*Burns' Rev. St.* 1901, § 8410) that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation"; and, after specifying what should be embraced in the schedules of property for taxation, it provided that "all other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except properties specifically exempted from taxation," should be included. In *People v. Roberts*, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126, copyrights and patent rights were held to be exempt; but the good will of a corporation, which was the result of carrying on business in that state, was said to be taxable. We might continue at great length citations of cases illustrating the views taken by the courts on such questions, but those we have cited are sufficient to show that, as a rule, the courts in this country have held that such a right as that now being considered is property, but of such a nature that the terms usually found in tax laws do not embrace it. In the absence of some determination by this court directly

bearing on the question, we have thought it proper to give the trend of the decisions of other courts before discussing the provisions of our own laws, which we will now do.

The learned counsel for the appellants relies on the provision in the declaration of rights that "every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property," and especially on the language used by the statute. Section 2, art. 81 ("Revenue and Taxes") *Poe's Supp. Code Pub. Gen. Laws 1900*, after enumerating various kinds of property to be assessed, contains the clause so much relied on, which is: "All other property of every kind, nature and description within this state, except as provided by the fourth section of this article, shall be valued and assessed for the purposes of state, county and municipal taxation to the respective owners thereof in the manner prescribed by this article." That section, as now in force, was passed in 1896; but the same language was used when the Code of 1888 was adopted, and has been since the act of 1874. Prior to 1874 the statute did not use so many words, but in the Code of 1860, art. 81, § 2, it read "and all other property of every description whatsoever, shall be liable to assessment and tax"; and those terms were used at least since the year 1852, back of which we have not deemed it necessary to look. There is therefore no material difference between the language now used and that which was adopted as early as 1852.

The Baltimore Stock Board was organized on the 29th of January, 1844, and on the 14th of May, 1881, its name was changed to the Baltimore Stock Exchange. This case was argued in this court on the fifty-ninth anniversary of its organization, and yet there was never any attempt to assess seats in this exchange until the assessments for 1901 and 1902 were made. That is not necessarily conclusive of the question, but it is an important circumstance, when we remember that the language now relied on is, in substance, the same that has been in the statutes for so many years. The value of a seat may change from year to year, but, if it is property now, within the meaning of our tax laws, it has been during all those years. If it was, not only have the owners of those seats been placed in a position, by the construction put on the law by the tax officers, by which they omitted them from their schedules of personal property, as provided for in section 173 of article 81, *Poe's Supp. Code Pub. Gen. Laws 1900*, although each swore that his schedule contained "a true, full, and complete list of all real and personal property held or belonging to me," etc., but the tax officers themselves have failed to discharge their duties. Not only the original assessors were required to add any

property omitted from the schedules, but the appeal tax court, and assessors appointed by them, are required to take steps to place unassessed property on the books. It cannot be assumed that during these many years all the tax officers of the city were in ignorance of the fact that the Baltimore Stock Exchange and other such exchanges were in existence, or that the seats were not taxed. We certainly can assume that all of the holders of such seats would not intentionally have violated the law in making up their schedules, and we are equally positive that the tax officers throughout all those years would not have willfully failed to discharge their duties. In view of the fact that the testimony shows that such seats had never been assessed before 1901, and knowing, as every intelligent person who reads newspapers must know, that such persons as are qualified to fill such positions as judges of the appeal tax court of Baltimore City could not during all these years be ignorant of the existence of those seats, we must assume that they have not heretofore been attempted to be assessed because the law officers and officials of the tax department of the city have not deemed them to be taxable under existing laws. During these years the Legislature has frequently had questions of taxation before it, and has passed many laws in relation thereto. When the last general assessment law was passed (1896) this exchange had been in existence over 50 years, and the rights of the members therein had never been taxed. Property intended to be taxed was designated with more particularity than had been previously done, and the effort to reach property which had escaped taxation, and which was intended to be taxed, is manifest from the statute itself. Our present tax laws have gone into considerable detail as to the method of taxing shares in incorporated companies, and collecting the taxes levied thereon. And although the members of the Legislature and the city and state tax officers may be presumed to know that these seats have not been assessed, the Legislature has not attempted, in terms, to have them taxed; and, as we have seen, the construction placed on the tax laws during this great length of time seems to have been that they were not taxable. It was said in *Hays v. Richardson*, 1 Gill & J. 366, in speaking of the construction of a statute, "This contemporaneous unvarying construction of the act of Assembly for sixty years ought not to be disregarded, but upon the most imperious and conclusive grounds." See, also, *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115; *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, 38 L. Ed. 869. When, therefore, the language of the statute relied on is not now more comprehensive than it has been for half a century, and the thing sought to be taxed has been in existence during all that time, but has never been taxed, there ought

to be some valid and substantial reason assigned, before the new construction of the statute, now contended for, should be adopted. Has that been done?

It cannot be said that the value of a seat in this exchange has now become so fixed that it can be more readily ascertained. This record discloses that as late as 1897 a seat was sold for \$80, and, in the attempt of the appeal tax court to tax them, they assessed them for 1901 at \$3,500, for 1902 at \$10,000, and for 1903 at \$7,000; and one of the witnesses who was examined testified that he thought his seat would bring, if sold at that time, \$5,000. It is manifest that their value is not only constantly varying, and, perhaps, to do full justice to all parties, would have to be revalued every year, but it must depend upon the number of vacancies there happen to be, and the demand for admission. We do not find in the record any provision in the constitution or by-laws fixing the number of seats that the exchange can have, but in answer to the question, "How many seats have you?" one of the witnesses said: "86 or 87. That includes alternates. Probably there are half a dozen alternate members." And he also said, "They are not sold, as a rule, unless a man retires from business." The exchange is not incorporated, declares no dividends, "and was formed for the purpose of affording to its members—being stockbrokers—facilities for the transaction of business; by providing them with a convenient exchange or salesroom rented for that purpose, in which room its meetings are held." A member cannot voluntarily dispose of his membership unless the proposed transferee is elected by the governing committee. No transfer is permitted until all dues to the exchange are paid in full, and, if the owner is indebted to any member, "he cannot transfer his membership until he pays such indebtedness, if a protest is filed. In case of death the seat is disposed of by the committee on membership, and, after paying the claims of the members, it pays the balance to the legal representatives of the deceased. The member does not even hold a certificate of membership, and there is no evidence at all of it, beyond being enrolled as a member. Stockbrokers are licensed by the state, for which they pay a license tax. It is thus apparent that while a membership in the exchange is, in a sense, property, it is qualified and limited, and lacks one of the most valuable and usual characteristics of property—the right of disposing of it as the owner deems proper, so long as he violates no law.

But section 2 of article 81 states how "all other property of every kind, nature and description within this state, except," etc., shall be valued and assessed; that is to say, "in the manner prescribed by this article." How is this seat in this exchange to be valued and assessed under that provision? It is not tangible personal property, and hence can hard-

ly be said to be assessable as that is—"at its full cash value, without looking to a forced sale." If the exchange was incorporated, and stock was issued, the state tax commissioner would assess it. By section 194 certificates of indebtedness issued by any individual or firm are assessed and valued according to the rate of interest stipulated to be paid. If they bear 6 per cent., they are assessed at 50 per cent. of their face value; if 5 per cent., at 41 $\frac{2}{3}$ per cent. of their face value; and so on as to other rates; and the section concludes that "such upon which no interest shall be actually paid, shall not be valued and assessed at all." Then section 201 provides for valuation and assessment of bonds, certificates of indebtedness, or evidences of debt, in whatever form made or issued by public or private corporations, or by a state (other than Maryland), territory, etc., at their actual market value, upon which the regular rate of taxation for state purposes is to be paid, and 30 cents (and no more) on each \$100 for county, city, and municipal taxation, but "such upon which no interest shall be actually paid shall not be valued at all." Other illustrations might be given, such as the tax on mortgages, on stock of foreign corporations, etc., to show not only how the assessments of personal property vary as "prescribed by this article"; but, as reflecting upon the intention of the Legislature in the use of the language relied on, in determining whether such property as a seat in this exchange was intended to be included, these and similar provisions throw much light on the subject. Can it be supposed that the Legislature intended to tax such a membership in an exchange as this is shown to be at what it cost the member, or at what he could get for it, when it has provided that on bonds, etc., issued by corporations or some other state or country, only 30 cents on each \$100, on a valuation fixed by its market value, shall be paid for county, city, and municipal taxation, and those upon which no interest is paid are not to be valued at all? Or that it intended such tax as is claimed in this case, when it provided for the assessment of certificates of indebtedness issued by individuals or firms at the rates provided for by section 194? If so, then it would require a broker to pay taxes on the amount of money he has invested in order to acquire proper privileges for the conduct of his business, from which money he receives no income whatever—and that, too, when he does not even have a certificate of membership, or any evidence of his ownership, excepting that he is enrolled as a member—at a much higher rate than it has fixed for other incorporeal property. He may own \$100,000 of bonds or shares of stock in foreign corporations, on which he receives interest or dividends, and can only be required to pay the city of Baltimore 30 cents on each \$100 thereof; but if he has a seat in this exchange, for which, according to the evidence, he might get from \$80 to

\$10,000, depending upon whether there are vacancies or a demand for admission, he must pay the regular rate of taxation on its value, under the theory of the appellants, notwithstanding he pays the state a license fee for carrying on his business.

The learned judge below, as reflecting upon the question whether the Legislature intended to impose a tax on this property, pointed out in his opinion the difficulties that would be in the way of enforcing payment under the existing tax laws; but, although there is force in his suggestions, we will not stop to discuss those provisions. Seeing what has been the uniform and unvarying construction placed on the statutes providing for taxation in this state for over 50 years by the tax officers of the state and the city of Baltimore, and apparently by the Legislature itself, and having before us such statutes as we have referred to, which provide different methods of taxation of property much nearer akin to that under consideration than tangible personal property is, we are forced to the conclusion that the Legislature did not, by the statute now in force, intend to tax seats in this exchange, and, if it did, it is utterly uncertain as to what rate it intended they should be taxed, although it has established rates for other incorporeal property. That there can be no justification in taxing them in the method attempted seems to be perfectly clear, when the provisions for other property such as we have mentioned are considered; and it would be impossible to place them in the category of bonds, stock, evidences of indebtedness, etc., for the purpose of taxation under existing laws, as they are not embraced by any of them. We are therefore of the opinion that, notwithstanding the broad language of the statute, the Legislature has not only not made provision as to how property such as this should be taxed, but as yet has expressed no intention of taxing it.

It is not necessary to discuss at length the meaning of the fifteenth article of the Declaration of Rights, which has so frequently been before us. It is well settled that there may be "property" in the state which is not covered by that provision. In *State v. P. W. & B. R. Co.*, 45 Md. 379, 24 Am. Rep. 511, we said: "A franchise is a special privilege conferred by the state on certain persons, and which does not belong to them of common right; and although the franchises of a company may be considered, in one sense, property, and valuable property, yet they are not property in the meaning of that term as used in the Bill of Rights." In some of the statutes above cited we have seen that what is undoubtedly property is exempt from taxation, when no interest or dividends are paid, and different rates of valuation, as well as exemptions, are provided for, and have been sustained by this court. *Faust v. Building Association*, 84 Md. 186, 35 Atl. 890; *Allen v. Bank*, 92 Md. 509, 48 Atl. 78, 52 L. R. A. 760,

84 Am. St. Rep. 517; *Frederick County v. Frederick City*, 88 Md. 654, 42 Atl. 218; *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714; and other cases that might be cited.

Order affirmed; the appellants to pay the costs.

**FARMERS' & MECHANICS' NAT. BANK
OF WESTMINSTER v. HUNTER.**

(Court of Appeals of Maryland. April 1, 1903.)

**ACTION ON NOTE—DENIAL OF SIGNATURE—
DEFENSE OF FORGERY—WAIVER OF PROPER
PLEA—EVIDENCE ADMISSIBLE UNDER
GENERAL ISSUE.**

1. In an action on a note, brought under Acts 1890, c. 136, § 16g, providing that in any suit in the circuit court of Carroll county, if there shall be filed with the declaration any paper purporting to be signed by defendant, the genuineness of such signature shall be deemed admitted unless the affidavit shall further state that the affiant knows or has good reason to believe that such signature was not written by, or by the authority of, the person whose signature it purports to be, an affidavit to the plea, expressly stating that defendant knew that the note was not signed by him or by his authority, was a sufficient denial of the signature to admit the defense of forgery, though Code Pub. Gen. Laws, art. 75, § 23, subsec. 108, provides that, whenever the execution of any written instrument filed in the case is alleged in the pleadings, the same shall be taken as admitted, unless denied by the next succeeding pleading of the opposite party.

2. Plaintiff in an action on a note, by joining issue on defendant's pleas, and electing to go to trial on the issues thus made up, waived the right to move for judgment for the want of a proper plea.

3. In an action on a note, evidence that the signature thereto was a forgery, was admissible under the general issue.

Appeal from Circuit Court, Carroll County; Wm. H. Thomas, Judge.

Action on a note by the Farmers' & Mechanics' National Bank of Westminster against Daniel Hunter. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

James A. C. Bond and F. Neal Parke, for appellant. J. Guy W. Steele, for appellee.

BRISCOE, J. The material question in this case relates to the proper construction of a local law for Carroll county (section 16g of chapter 136 of the Acts of 1890), known as the "Local Practice Act" for that county. The plaintiff below, who is the appellant here, brought a suit in the circuit court for Carroll county against the defendants Jesse B. Powder, Clara B. Powder, and the appellee, Daniel W. Hunter, upon a promissory note dated the 2d day of July, 1901, and payable six months after date to the plaintiff, for the sum of \$350, payable at its banking house in Westminster, Md., and purporting to be signed by the defendants with the following indorsement thereon:

"Feb. 26th, 1902. By cash on account \$50.00 and interest paid to July 2nd, 1902." Two of the defendants were returned non est, and the case was tried against the defendant Hunter before the court sitting as a jury, and on the 13th day of December, 1902, a judgment was entered in favor of the defendant, from which the plaintiff has appealed.

It appears from the record that the plaintiff's declaration was filed under the local act (Acts 1890, c. 136) applicable to Carroll county, and contained the usual counts, and a count upon the promissory note, and the affidavit, as required by the act. Hunter, the defendant, appeared on the 12th day of August, and pleaded, first, that he never was indebted as alleged; second, that he never promised, as alleged. To these pleas he made the following affidavit: That each of them was true as pleaded; that no amount of the plaintiff's claim or demand was admitted to be due or owing; that the whole amount of the claim or demand, and each and every part thereof, was disputed; and he knows that the paper or promissory note filed with the declaration was not signed by him or by his authority, and that the signature or name thereto purporting to be his was not written by him or by his authority. The plaintiff, at the trial of the case, to maintain the issue joined, offered the note in evidence, which, upon objection, was admitted, subject to exception, and closed its case. The uncontradicted evidence upon the part of the defendant as to the signature to the note was admitted subject to exception. The defendant testified that he never signed the note or any other note, for Jesse Powder, except one five years ago for \$20, and the signature to the note was not in his handwriting. This testimony as to the signature to the note was stricken out at the close of the case upon motion of the plaintiff, but a motion to strike out the note as evidence on the part of the defendant was denied by the court. There was no exception to the action of the court upon this ruling, but, as the question is directly presented on the exceptions to the prayers, and as its determination disposes of this case, we shall consider it here.

The ground of the action of the court in striking out the evidence of the appellee as to the denial of the signature is stated to be because the signature of the note was not denied by the defendant's plea, and was, therefore, admitted under subsection 108, § 23, art. 75, Code Pub. Gen. Laws, which provides that whenever the execution of any written instrument filed in the case is alleged in the pleadings in any action or matter of law, the same shall be taken as admitted for the purposes of the action or matter, unless the same shall be denied by the next succeeding pleading of the opposite party. But it will be seen by reference to the declaration that the suit in this case

¶ 2. See Pleading, vol. 39, Cent. Dig. §§ 1376, 1378.

was brought under section 16g, c. 138, of the Acts of 1890, *supra*, which provides that in any suit in the circuit court for Carroll county, if there shall be filed with the declaration in the cause any paper purporting to be signed by any defendant therein, the fact of the genuineness of such signature shall be deemed to be admitted for the purposes of the cause, unless the affidavit shall further state that the affiant knows, or has good reason to believe, that such signature was not written by, or by the authority of, the person whose signature it purports to be. The effect of this act is to permit the defendant, in suits brought under the act, to deny in the affidavit to the plea the genuineness of the signature of any paper purporting to be signed by the defendant, and, if this is done, the signature thereto will be put in issue, and not be deemed as admitted for the purpose of the suit. The affidavit to the plea in this case expressly states that the defendant knows that the paper or promissory note filed with the declaration in said cause was not signed by him, or by his authority, and that the signature or name thereto purporting to be his was not written by him or by his authority. We are of the opinion that this was a sufficient denial of the signature to admit the defense of forgery relied upon by the defendant, and was in accordance with the express terms of the act.

The case of *Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888, cited by the appellant, is unlike this. There the court held that the defendant's affidavit was defective, and the case stood for trial as if the rule day act had no existence. But, aside from this, the plaintiff joined issue upon the defendant's pleas, and elected to go to trial upon the issue thus made up. This was a clear waiver of the right to move for judgment for the want of a proper plea, and the evidence was admissible under the general issue. *Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888; *Hutton v. Marx*, 69 Md. 252, 14 Atl. 684; *McSherry v. Brooks and Barton*, 46 Md. 103; *Traber v. Traber*, 50 Md. 1.

The effect of the ruling of the court as made in the exclusion of the defendant's evidence was to admit the signature of the note, when in fact it was denied by the affidavit, and when the evidence showed the signature was a forgery.

There were two exceptions reserved during the course of the trial to the ruling of the court—the first to the overruling of a special exception to the granting of the defendant's third prayer, as modified by the court; and, second, to the rejection of the plaintiff's seven prayers, and to the granting of the defendant's third prayer as modified by the court. There was error in granting the defendant's fifth prayer, and the plaintiff's exception thereto should have been sustained. There was no evidence upon which such a prayer could be based, even if the

legal proposition submitted thereby should be conceded to be correct. In fact, the exclusion of the evidence offered upon the part of the defendant to establish the defense of forgery practically left the case without evidence at all to support the finding of the court for the defendant and the judgment entered thereon. The plaintiff's prayers were properly rejected.

For the errors indicated, the judgment will be reversed, and a new trial awarded. Judgment reversed, and new trial awarded, with costs.

SHRIVER v. HERING, State Comptroller.
(Court of Appeals of Maryland. April 1, 1908.)

STATE SCHOOL TAX—DISTRIBUTION—STATUTES—CONSTRUCTION.

1. Code Pub. Gen. Laws, art. 77, § 98, provides: "The Comptroller shall apportion the sum appropriated for the support of the colored schools of the several counties and the city of Baltimore in proportion to their respective population between the ages of five and twenty years; said apportionment to be made at the time he apportions the levy for the white schools." Section 102 provides that when the Comptroller shall have received from the city of Baltimore and the several counties returns of the state school tax levied in each county and the city of Baltimore, he shall apportion the amount "to the several counties and the city of Baltimore in proportion to their respective population between the ages of five and twenty years." *Held*, that the word "their," which in each section precedes the words "respective populations," relates to their immediate antecedents "the several counties and the city of Baltimore," and that, though it had been the Comptroller's practice to make the distribution under section 98, according to the "colored" population, the court would not compel him to make the distribution under section 102, according to the "white" population.

Appeal from Circuit Court, Anne Arundel County; *I. Thomas Jones and Wm. H. Thomas*, Judges.

Mandamus by Robert Shriver against Joshua W. Hering, State Comptroller. From an order refusing the writ, petitioner appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

A. A. Doub, for appellant. Atty. Gen. Rayner, for appellee.

PEARCE, J. Robert Shriver, a citizen and taxpayer of Alleghany county, on May 15, 1902, filed a petition in the circuit court for Anne Arundel county against Joshua W. Hering, Comptroller of the State of Maryland, praying for a writ of mandamus commanding said Comptroller, in the distribution to be made December 15, 1902, and at each succeeding quarterly distribution, to apportion the state school tax levied in each county and in the city of Baltimore for the support of public schools, therein in proportion to their respective white population between the ages

of 5 and 20 years, instead of apportioning the same according to their respective entire population between said ages, as had always been the method of apportionment since the institution of the public school system in 1865. The defendant answered, alleging that the method of apportionment pursued was that required by the statute regulating the same, and that he proposed to observe the statute as heretofore. The petitioner demurred to this answer. Issue was joined on the demurrer, and after argument the writ was refused, and the petition dismissed, from which order this appeal was taken.

The case was very earnestly and zealously argued in behalf of the petitioner, but we do not think there should be any hesitation in affirming the order of the circuit court. Counsel upon both sides unite in stating that the question at issue is simply the construction of sections 98 and 102 of article 77 of the Code of Public General Laws, which are as follows:

"Sec. 98. The Comptroller shall apportion the sum appropriated for the support of the colored schools of the several counties and the city of Baltimore, in proportion to their respective population between the ages of five and twenty years; said apportionment to be made at the time he apportions the levy for the white schools."

"Sec. 102. As soon as the Comptroller shall have received from the city of Baltimore and the several counties, returns of the amount of the state school tax, levied in each county and the city of Baltimore, he shall immediately thereafter apportion the amount of the whole levy to the several counties and the city of Baltimore, in proportion to their respective population between the ages of five and twenty years."

The petitioner's counsel was explicit in his oral argument in declaring that these sections of the law are valid and constitutional enactments, and in his brief says they "are word for word the same, and the plaintiff merely asks that they be given the same construction." The construction for which the petitioner thus asks we must understand to be purely a judicial construction, since that is the only one we have the power to make, and such construction must be made upon the language of these sections, and not upon the practice which may have been pursued by the Comptroller in the absence of a previous judicial construction. Now, looking to the language of these two sections as they stand, it cannot be doubted that they should and must receive the same construction, and that the only construction that can be placed upon them by a court, which is precluded from the exercise of legislative power, is that placed by the Comptroller upon section 102. The word "their," which in each of these sections precedes the words "respective population," grammatically and logically can only relate to their immediate antecedents "the several counties and the city of Baltimore."

No sound argument to the contrary can be based upon anything to be deduced from either of these sections, and accordingly the petitioner has been forced to resort to what he regards as equitable grounds for a different construction of section 102, based upon alleged unequal and unfair results from the method of distribution directed therein. But, however his proposition may be disguised in the fervor or argument, it resolves itself, when analyzed, into this: that the court should read the word "white" into section 102, and this we cannot do. The petition alleges, and the answer admits, that in distributing the sum appropriated to colored schools it has been the Comptroller's practice to make the apportionment to the respective colored population of the several counties and the city of Baltimore between the ages of 5 and 20. This the petition does not ask us to change, and, if we should grant the writ prayed for here, we should be compelled, in order to give the same construction to the same language in both sections; to read into section 98 the word "colored," and thus to impose an erroneous judicial construction upon both these sections, because another department of government, possessing no power to make a judicial construction, had adopted, in its administration of its functions, an erroneous construction of one of these sections. The answer to the whole argument of the petitioner is that the question argued by him is a question of policy, while the question we have to decide is one of construction of the law as it stands. An examination of the legislation of this state upon the subject will render it clear, moreover, that the Legislature meant exactly what it has said in these two sections.

Acts 1865, p. 298, c. 160, for the first time established a uniform system of free public schools in Maryland. It provided that the state school tax should be distributed "to the boards of school commissioners of the city of Baltimore and of the several counties in proportion to their respective population between the ages of five and twenty years," conforming thus to the requirement of section 5 of article 8 of the Constitution of 1864; and that language has remained unchanged in both the repealing and re-enacting acts since that time, viz., Acts 1868, p. 766, c. 407, and Acts 1872, p. 651, c. 377. As respects colored schools, Acts 1865, c. 160, provided that "the total amount of taxes paid for school purposes by the colored people of any county and the city of Baltimore, together with any donations that may be made, shall be set aside for the purpose of founding schools for colored children, to be established under the direction of the school commissioners"; and the law to-day requires that these sources of income "shall be devoted to the maintenance of schools for colored children." The Acts 1872, p. 650, c. 377, provided for the establishment of one or more public schools in each election district for colored children, and di-

rected the sum appropriated for colored schools to be apportioned according to their respective colored population. The first appropriation for that purpose was made by chapter 252, p. 421, of Acts 1872, the amount being \$50,000, which has been increased from time to time until it is now \$150,000. The original apportionment of the amount appropriated for colored schools was, therefore, correctly made according to the respective colored population, though the distribution of the residue of the state tax was still required to be apportioned according to the entire respective school population of the several counties and of the city of Baltimore, thus emphasizing the intention there to provide different modes of apportionment. When the Code of 1888 was framed and adopted, the word "colored" was omitted in providing for the apportionment of the amount appropriated to colored schools, thus making the mode of apportionment uniform. Whether this was deliberate or inadvertent we do not know in fact, but the legal presumption is it was deliberate, and, in any event, the adoption of the Code is conclusive upon the court. The adherence by the different Comptrollers to the former mode of distribution among the colored schools may have been from inadvertence, or it may have been due to tender consideration of the comparative poverty of that race. Certain it is, however, that no effort has been made to disturb this arrangement by any one, while it was conceded at the argument that repeated fruitless efforts had been made to induce the Legislature to make the change now sought to be effected by mandamus. Elaborate tables were filed with the petition, to show the alleged injustice done by this method of apportionment to the counties having small colored population, but with these considerations our judgment is not concerned.

There are, however, obvious difficulties in adopting any method of distribution which will produce equality of burden and participation while insuring a system of approximate uniform excellence throughout the state. Counties are separate organizations established for public political purposes, connected with the administration of government, chiefly for purposes strictly local in character and interest; but the youth of all the counties are the wards of the state, and it is for the Legislature to determine how its bounty, extended for this paramount purpose, shall be apportioned so as to work the greatest good to the greatest number, irrespective of locality. Speaking of the rights of counties in the case of the State, *Use of Washington County, v. B. & O. R. R. Company*, 12 Gill & J. 436, 38 Am. Dec. 319, the court said: "She [Washington county], as a member of the political family, has a right to participate in the legislative councils of the country; but the will of the majority, when expressed according to the forms of the Constitution, is binding and obligatory upon her, and to that

will, as the rule of her conduct, she is bound to submit with becoming deference and respect."

Order affirmed, with costs above and below.

SCHWAB v. SCHWAB.

(Court of Appeals of Maryland. March 31, 1903.)

DIVORCE—ADULTERY—ACTS SUBSEQUENT TO SUIT—SUPPLEMENTAL BILL.

1. In a suit for divorce for adultery, a supplemental bill setting up, as a ground for relief, acts of adultery occurring subsequent to the institution of the suit, and with persons not specified in the original bill, is improperly allowed.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Bill by Flora O. Schwab against Leon H. Schwab. From an order striking from the files plaintiff's supplemental bill, she appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Isidor Rayner and Lewis Putzell, for appellant. M. R. Walter and L. J. Cohen, for appellee.

SCHMUCKER, J. The appellant on August 5, 1901, filed a bill in the circuit court of Baltimore City against the appellee for a divorce a vinculo upon the ground of adultery. The bill, as originally filed, did not name the person or persons with whom the adultery was alleged to have been committed; but it was afterwards amended, by leave of the court, so as to name the participant in the alleged offense, as well as the times and places of its commission. The appellee answered the bill categorically, denying that he had committed the adultery with which he was charged in the bill, or that he had ever committed that offense. Issue was joined, and the appellant took some testimony, which does not appear in the record, in support of her case, and then, on October 3, 1902, filed a petition averring that she had just discovered that the appellee had committed repeated acts of adultery since the filing of the bill, and asking leave to file a supplemental bill in order to offer evidence of those recently discovered acts. The court granted the leave asked for, and the appellant filed a supplemental bill charging the appellee with committing adultery at different dates since the filing of the bill, with two women other than the one named as the participant in the acts charged in the original bill. The appellant thereupon moved the court to rescind the order granting leave to file the supplemental bill, and to strike that bill from the files, and to quash the writ of subpoena issued thereunder because the alleged acts of adultery set up in that bill were therein charged to have been committed after the institu-

¶ 1. See *Divorce*, vol. 17, Cent. Dig. §§ 330, 335.

tion of the suit, and that they therefore constituted in themselves new and distinct causes of action, having no relation to or connection with those set up in the original bill. The court passed an order sustaining this motion, and rescinding the leave theretofore granted to file the supplemental bill, and striking that bill from the files, and quashing the subpoena issued under it. From that order the present appeal was taken.

It is apparent from what we have said that the question raised by this appeal is whether a plaintiff who has filed a bill in equity for a divorce a vinculo, charging the defendant with the commission of adultery with one person, should be permitted to file a supplemental bill in the same suit charging him with the commission of the same offense with other persons after the filing of the original bill. The nature and function of a supplemental bill in equity were recently stated by us in our opinion in the case of *Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414, when the parties to the present record were before us in a suit for a divorce a mensa et thoro upon the ground of cruelty and abandonment. It is not necessary to repeat in full what we there said upon that subject. It is sufficient to say that, a supplemental bill being an addition to the original bill, its allegations must have relation to the original cause of action, and must be supplemental in their nature, and not independent and subsequent, and must not be such as would, when considered separately, be sufficient in themselves to constitute an independent cause of action. It may set up transactions which happened before the filing of the original bill, but were not discovered by the plaintiff until afterwards, or those which have occurred *pendente lite*, if their nature be such as to affect the form of relief to which the plaintiff is entitled under his original cause of action, or to render it necessary to bring new parties into the suit.

We do not understand the appellant to question the conclusions reached by us in her former case, or to ask us to reverse or modify them. She admits the general rule regulating the use of supplemental bills to be as stated by us; but she contends that suits for divorce upon the ground of adultery constitute an exception to the general rule, in so far that in such cases the plaintiff is not confined to the allegations of the original bill, but may set up by supplemental bill further acts of adultery committed after the bringing of the suit, and may obtain a decree for divorce upon such subsequent acts. She relies in support of her contention upon the practice formerly prevailing in the English ecclesiastical courts in divorce suits, and also upon a few cases in which American courts have followed the English precedents. The practice in the ecclesiastical courts in such cases was very flexible. Either party

could obtain relief against the other, and either could set up by supplemental proceedings acts of adultery committed by the other pending the litigation, and a decree might be obtained thereon. *Middleton v. Middleton*, 2 Hag. Supp. 184; *Webb v. Webb*, 3 Eng. Ecc. R. 152; *Barrett v. Barrett*, 3 Eng. Ecc. R. 16. But later English divorce cases seem to observe a much less liberal rule. *Ashley v. Ashley*, 2 Swab. & T. 388; *Lapington v. Lapington*, L. R. 14 P. D. 21; *Borham v. Borham*, L. R. 2 P. & D. 193. None of the American courts have, as far as we are aware, followed the precedents of the ecclesiastical courts to the extent of allowing the defendant in divorce suits to obtain a decree against the plaintiff for a divorce, although a few of our courts have permitted the plaintiff to introduce proof of subsequent acts of adultery under a supplemental bill, or an amendment of the original one, and obtain relief thereon. *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *Irwin v. Irwin* (Ky.) 49 S. W. 432; *Adams v. Adams*, 20 N. H. 301, 302, 51 Am. Dec. 219; *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930; *Davis v. Davis*, 19 Ill. 334. But see *Embree v. Embree*, 53 Ill. 394. The majority, however, of the American courts which have had occasion to pass upon the question, apply the principles of equity practice to divorce cases, and refuse to permit subsequent acts of adultery by the defendant to be set up by the plaintiff, except as hereinafter stated, and never allow such subsequent acts to form the ground of relief. *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Milner v. Milner*, 2 Edw. Ch. 114; *Faass v. Faass*, 57 App. Div. 611, 68 N. Y. Supp. 509; *Steele v. Steele*, 35 Conn. 48; *Lutz v. Lutz*, 52 N. J. Eq. 241, 28 Atl. 315; *Hill v. Hill*, 10 Ala. 527. The exception to which we have referred is this: When the defendant has been guilty of subsequent acts of adultery with the same person who is named as *particeps criminis* in the bill, the subsequent acts may be shown, as tending to explain or corroborate evidence already taken in reference to the acts originally charged, as was the case in *Thayer v. Thayer*, *supra*. Or where a condonation of the adultery alleged in the bill had been set up in defense of the action, when acts of adultery committed by the defendant *pendente lite* were permitted to be set up by supplemental bill because they operated to revive the original cause of action, as was the case in *Lutz v. Lutz*, *supra*. But this exception does not go to the extent of permitting a decree for divorce to be founded upon the subsequent acts set up by the supplemental bill. The prevailing doctrine and practice of the American courts on this subject is well stated in *Browne on Divorce and Alimony*, pp. 57-8, where, after stating that testimony as to acts of adultery by the defendant after suit brought is inadmissible, the author says: "This rule cannot, in most states, be evaded by amendment or supple-

mental bill. No ingrafting of this new cause can be made upon the original action. To make it evidence, the existing suit for divorce must usually be discontinued by the consent of the court, and an entirely new action instituted." He recognizes the fact that an exception exists where the later acts are alleged to have been committed with the paramour named in the original bill, and says in that connection: "In such cases the evidence is competent simply and solely to show the nature of the intercourse between the parties at the time when the adultery is alleged in the libel to have been committed. It is in the nature of cumulative evidence to strengthen the circumstantial evidence of the alleged previous acts. The rule is inflexible which bars a decree of divorce founded upon acts of adultery committed subsequent to the filing of the bill." We think the law as thus stated by Browne is supported by the weight of authority, and that it should control the disposition of the present case. In *J. G. v. H. G.*, 33 Md. 407, 3 Am. Rep. 183, our predecessors said that the decisions of the English ecclesiastical courts have been uniformly cited and relied on as safe and authoritative guides for the courts of this state in disposing of divorce cases. And in *Childs v. Childs*, 49 Md. 514, it was held that the principles of the canon and civil law, to the extent that they controlled the jurisdiction of the ecclesiastical courts over matrimonial cases, had been adopted by the Declaration of Rights and Constitution as part of the law of this state. But we do not understand from these decisions that in matters of procedure in such cases we are not at liberty to depart in so far from the methods formerly prevailing in those courts which have now passed out of existence as to make our practice conform to the weight of modern authority.

The supplemental bill in the present case avers that, about a year after the institution of the suit, the appellant committed adultery with persons and at places other than the persons and places mentioned in the original bill in connection with the adultery therein charged. It is not alleged that these recent acts of adultery had any connection with, or relation to, or dependence upon those set up in the original bill. Under these circumstances, the proof of the recent acts could not corroborate or explain the testimony as to the commission of the earlier ones. We therefore think, upon the face of the record, that the learned judge below should have refused the appellant leave to file the supplemental bill, and that he committed no error in passing the order appealed from, striking it from the files.

There is a general allegation in the original bill in this case that the appellee had committed adultery with other persons and at other times and places, which were unknown to the appellant, and she had taken some testimony in support of the allegations of her

original bill when she asked leave to file the supplemental one. This testimony does not appear in the record, and we do not know its purport. If it tended to prove that the appellee had committed adultery, prior to the institution of the suit, with any of the persons named as particeps criminis in the supplemental bill, and such fact had been averred in the petition for leave to file that bill, the court below would have been justified in permitting it to be filed, although the subsequent acts charged in it would not have afforded the appellant ground for relief.

As it does not appear from the record that the evidence already taken by the appellant justified the granting of leave to file the supplemental bill, the order appealed from must be affirmed. Order affirmed, with costs, and cause remanded for further proceedings.

DALE v. BRUMBLY et al.

(Court of Appeals of Maryland. March 31, 1903.)

FRATERNAL INSURANCE—POLICY—ASSIGNMENT TO CREDITOR—VALIDITY.

1. Where the constitution and laws of a fraternal insurance order provided that no policy should be made payable to a creditor, nor be assigned; that, in order to change a beneficiary, an old policy should be surrendered for a new one; and that those who could be named as beneficiaries are the family and dependents of the insured—assignment of a policy to a creditor as security for a debt by writings entered on the policy and signed by the insured gave the creditor no rights to the insurance fund on the death of the insured.

2. Under Acts 1894, p. 404, c. 295, providing that a benefit certificate in a fraternal insurance order shall not be assignable, except to those named in the act, among whom a creditor is not included, and that the fund shall not be liable for the payment of any debt of the certificate holder, an assignment of such certificate or policy to a creditor by a writing entered thereon and signed by the policy holder does not entitle the creditor to the benefit fund on the death of the policy holder.

3. Where a benefit certificate in a fraternal insurance order was payable to the "estate" of the assured, and the rules of the order provide that, if the designation fails, the benefits shall be distributed as in case of intestacy, the fund would be distributed to the wife and children of the assured, whether the designation of the "estate" as beneficiary was illegal or not.

Appeal from Circuit Court, Wicomico County, in Equity; Henry Page and Charles F. Holland, Judges.

Bill of interpleader by the Improved Order of Heptasophs against H. P. Dale, administrator of the estate of P. W. Dale, and Huldah J. Brumbly, administratrix of the estate of William Brumbly, and others, to determine the ownership of a fund. From a decree for Huldah J. Brumbly and others, H. P. Dale, administrator, appeals. Affirmed.

§ 1. See Insurance, vol. 22, Cent. Dig. § 1875.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

James E. Ellegood, for appellant. Robert P. Graham, for appellees.

BRISCOE, J. This is an interpleader proceeding, instituted on the 5th day of August, 1901, in the circuit court for Wilcomico county, to establish the ownership of a certain fund due and owing by the Supreme Conclave Improved Order of Heptasophs, a fraternal insurance company, and a body corporate of the state, on account of a benefit certificate, in the nature of a life insurance policy, amounting to \$3,000, and issued to William Brumbly, (now deceased), of Wilcomico county. The order disclaims any interest in or claim to the fund, and has paid the same into court, to be distributed to the parties who are entitled to receive it.

The material facts of the case, as disclosed by the pleadings, appear to be these: The Improved Order of Heptasophs issued to William Brumbly on the 22d of September, 1881, an endowment certificate for \$1,000, payable at his death to his children, Louisa, Ida, Clara, and William. This certificate was surrendered, and another was issued on the 17th of March, 1882, for \$5,000, payable to the four children above named, "and all his surviving children." Subsequently the last-named certificate was released and canceled, and on the 17th of January, 1889, a new certificate was issued by the order for \$3,000, and the benefits were made payable "to his estate." It further appears from an indorsement on the back of "the last-named certificate that it was assigned in writing under seal by William Brumbly on the 18th of July, 1890, to Peter Dale, "as collateral security." On the 9th day of September, 1895, Peter Dale having died, assignment in writing was entered upon the certificate as follows: "I hereby assign, transfer and set over to Harry P. Dale and Jane D. Dale, administrators of the estate of Peter W. Dale, all my right, title and interest in and to the within certificate absolutely, and the said order or its duly authorized officer is hereby authorized and empowered to pay the same to the said administrators at any time and their receipt shall be a sufficient discharge and acquittance for all liability to me or to my estate on account of the same, witness my hand and seal this 9th day of September, 1895. William Brumbly. [Seal.] Witnesses: James E. Ellegood, E. H. Walton." The fund now in court is claimed, first, by the administrators of Dale, under the two assignments; secondly, by the administrators of Brumbly, as representatives of his personal estate, under the designation, "estate," contained in the certificate of insurance; and, lastly, by the wife and children of the intestate, in their individual capacity, as beneficiaries under the certificate.

The object and purpose of this order and society is to do a fraternal insurance business,

by providing for the sick and distressed members in their lifetime, and to create a benefit fund, to be paid, on the death of the member, upon certain conditions, to his beneficiary. Its constitution and laws prescribe who can be designated as beneficiaries, and no certificate shall be made payable "to a creditor nor be assigned, nor be held in whole or in part to secure any debt." Section 3 of law 3 provides who can be named as such beneficiaries, and they are the family and dependents of the member. A member may surrender his certificate, and have a new one issued, changing the beneficiaries; but the surrender and direction must be made in writing, and signed by the archon and secretary of the conclave, and attached. It is quite clear, then, that the attempted assignment of the policy on the 18th of July, 1890, to Peter W. Dale, as collateral security, and the further assignment on the 9th of September, 1895, on the death of Dale, to his administrators, conferred no rights to the fund, because, under the laws of the order, it did not contain a valid designation of a beneficiary. Nor did the assured surrender the certificate and obtain a new one, as required by the association, but both assignments were made without the consent of the company. In the case of Condon v. The Mutual Reserve Association, 89 Md. 123, 42 Atl. 950, 44 L. R. A. 149, 73 Am. St. Rep. 169, it is said: "We are called upon to interpret the contract as set forth in the certificate of membership in connection with the constitution and laws. The constitution and by-laws form part of the agreement of insurance, whether mentioned or not." In the case of Thomas v. Cockran, 89 Md. 390, 43 Atl. 792, 46 L. R. A. 160, it is held that the executor was not entitled to a fund in court, because his testator had no property in the policy or its proceeds, but only a power to designate, and from time to time to change, in the manner prescribed by the by-laws of the association, the person entitled to receive such proceeds when due. Md. Mut. Association v. Clendinen, 44 Md. 429, 22 Am. Rep. 52. The Acts of 1894, p. 404, c. 295, which was in force at the date of the last-named assignment, declares that such associations are organized and carried on for the sole benefit of their members and their beneficiaries, and not for profit. It provides that a benefit shall not be assignable, except to those named in the act (a creditor is not included among those thus named), and then only by the consent of the association. It also provides that the fund or benefit shall not be liable to be applied by any legal process or by operation of law to pay any debt or liability of a certificate holder, etc. The association would have no power, then, under its constitution or the laws of the state, to pay the fund to a creditor of the deceased.

We come, then, to the meaning and construction to be placed upon the word "estate," as designated by the assured in the certificate of January 17, 1890. In the view we take of

this case, it becomes immaterial whether we hold that the fund shall be paid to the administrators of the assured, Brumbly, and distributed according to the laws of the state, or whether we declare that the word "estate" was an illegal designation. In either case the fund would be distributed to the same persons. The 284th section of the constitution of the order provides that if the designation fails, for illegality or otherwise, the amount of the benefit shall be paid to those to whom distribution would be made of his personal estate in case of intestacy, as provided by the laws of the state. The decree of the lower court directed the fund to be paid to the wife and children of the assured, as the persons entitled, free and clear of the claims of creditors; and, for the reasons given, we affirm the decree appealed from.

Decree affirmed; costs in this court and the court below to be paid out of the fund.

HENKEL v. MILLARD et al.

(Court of Appeals of Maryland. April 1, 1903.)

BOARD OF PHARMACY—DUTIES—REGISTRATION OF PHARMACISTS—MANDATORY INJUNCTION.

1. Acts 1902, p. 276, c. 179, creating a board of pharmacy, provides in section 8 "that any person who at the passage of this act is actively engaged as owner or manager, or is and has been so engaged as clerk for five years or more, and has reached the age of twenty-one years, in compounding drugs and dispensing physicians' prescriptions in one of the counties of this state, and who shall on or before" a day named forward to the board an affidavit to that effect, together with a fee of \$1, shall be entitled to registration as pharmacist, and to a certificate of such registration. Other sections provide for the appointment of "skilled and competent pharmacists who are themselves" actively engaged in the retail drug business to the board of pharmacy. No appeal is provided for. *Held*, that the duties imposed on the board by section 8 are not strictly ministerial, but involve the exercise of judgment and discretion, and, there being no intimation of fraud, a mandatory injunction cannot issue to compel the board to reject an application.

Appeal from Circuit Court, Anne Arundel County; I. Thomas Jones, Jas. Revell, and Wm. H. Thomas, Judges.

Bill by Charles B. Henkel against David R. Millard and others. Decree dismissing the bill, and complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PEARCE, and SCHMUCKER, JJ.

Isaac Lobe Straus, for appellant. Reuben C. Foster and J. Wirt Randall, for appellees.

SCHMUCKER, J. The appeal in this case is from a decree of the circuit court for Anne Arundel county sustaining a demurrer to and dismissing a bill in equity filed by the appellant. The purpose of the bill is to procure a mandatory and prohibitory injunction against the Maryland Board of Pharmacy, to require them to rescind and cancel their proceed-

ings under Acts 1902, p. 276, c. 179, in registering Charles G. Feldmeyer as a pharmacist, and granting him a certificate of such registration, and to prohibit them from hereafter so registering him or granting him any such certificate. The bill also prays that the registration and certificate already granted to him be decreed by the court to be illegal and void. The appellant is himself a member of the board of pharmacy, and he filed his bill in that capacity, and also as a resident of Annapolis, against the other four members of the board and Feldmeyer.

In order to make clearer the discussion of the issue before us, we will first call attention to the material portions of the act of 1902 creating the Maryland Board of Pharmacy, and prescribing its powers and duties. This act is one of a comparatively recent class of statutes regulating the conditions upon which persons shall be permitted to pursue certain occupations. Its title declares its purpose to be to regulate the practice of pharmacy in Maryland. To carry out this legislative purpose the act creates a board of skilled pharmacists, and requires all persons, whether then in that business, or intending to enter it, to apply to the board for registration as pharmacists, and such registration is made a condition precedent to the right to practice pharmacy in Maryland. Section 2 of the act provides that no person on or after July 1, 1902, shall open, conduct, or keep a pharmacy in this state, either as principal or agent, unless he shall have obtained a pharmacist's certificate as in the act provided, and declares a violation of the act to be a misdemeanor, and prescribes a penalty therefor. Section 3 declares what species of stores shall be considered pharmacies, among which are retail drug stores. Section 4 of the act directs the Governor to appoint "five persons who are skilled and competent pharmacists, who have had ten years' active pharmaceutical experience, are actively engaged in the retail drug business and not connected with any school of pharmacy or medicine * * * to constitute the Maryland Board of Pharmacy," and directs them to qualify by taking an oath for the faithful discharge of the duties conferred upon them by the act. Section 5 directs the board to organize, to fix the times and places for the examination of applicants for registration, and to give 10 days' public notice of the same, and provides that "it shall be the duty of the board to receive all applications for examination and registration submitted in proper form, to grant certificates to such persons as may be entitled to the same under this act," etc. Section 8 provides "that any person who at the passage of this act is actively engaged as owner or manager, or is and has been so engaged as clerk for five years or more, and has reached the age of twenty-one years, in compounding drugs and dispensing physicians' prescriptions in one of the counties of this state, and who shall on or before the first day of July next

following the passage of this act forward to the Maryland Board of Pharmacy an affidavit to that effect, together with a fee of one dollar, shall be entitled to registration as pharmacist and to a certificate of such registration." The subsequent sections of the act provide that certain other persons therein described, "who after examination by the Maryland Board of Pharmacy shall be by it deemed competent," shall also be registered as pharmacists, and given certificates of such registration.

It is thus apparent that the act authorizes the board of pharmacy to grant registration and certificates to two classes of persons, and upon different terms, and imposes upon the board slightly different duties with reference to the respective classes of applicants. They are required to grant the registration and certificate to an applicant answering to the description contained in section 8, when they have ascertained that he was at the passage of the act 21 years of age, and actively engaged, as owner or manager, in compounding drugs, etc., and that he has forwarded to them an affidavit to that effect, without any examination of him as to his professional competency. The law gives to that class of applicants the benefit of the presumption of professional competency arising from the fact that they are already in business as pharmacists. It, however, imposes upon the board of pharmacy the duty of determining that the applicant in fact answers to the description contained in section 8, because it does not authorize or direct them to grant him the registration and certificate merely upon his making the affidavit "to that effect." The board are not required to grant the registration and certificate to any person of the other class unless, after an examination of him, they regard him as competent. The examination spoken of in that connection in the act is manifestly intended to relate to his technical fitness to practice pharmacy. The act does not authorize the board to cancel or revoke a registration or certificate that has once been granted by them, nor does it provide for an appeal from their action or decision to any other body of persons or tribunal. The apparent purpose of the Legislature in that respect was to create in the board itself an agency composed of persons possessing the technical skill and experience requisite to the discharge of the duties committed to them, and to let their action conclude the matters confided to them by the law.

The bill of complaint in the record now before us alleges the appointment and qualification of the appellant and his associates as the board of pharmacy, quotes certain portions of the act of 1902 pertinent to the issue, and then avers that on August 14, 1902, the four appellee members of the board of pharmacy, "constituting, acting, and proceeding as said board," registered Feldmeyer as a pharmacist, and granted him a certificate thereof, without subjecting him to any ex-

amination or test as to his qualifications, against the protest and objection of the appellant. The bill charges that this action of the board was in violation of their powers and duties, and therefore void, because Feldmeyer, although a partner in the drug business of Feldmeyer Bros., conducted in the city of Annapolis, and financially interested therein, was not at the passage of the act of 1902, and never has been, actively engaged, as owner or manager, in compounding drugs and dispensing physicians' prescriptions, and was therefore "not eligible to be registered or awarded a certificate as pharmacist under said act of 1902." The bill abounds in charges that Feldmeyer is not acquainted with the nature and operation of noxious and poisonous drugs, and is without education or skill as a pharmacist, and sets out in strong terms the dangers to which the citizens of Annapolis would be exposed if he were permitted to conduct a pharmacy at that place. We do not deem it necessary to further discuss the allegations of that kind contained in the bill, because it is apparent on the face of the act of 1902 that it does not require persons who were at its passage already engaged in the drug business in the manner described in section 8 to submit to any examination as to their technical knowledge or skill to entitle them to registration and a certificate. As we have already said, the act gives to such persons the benefit of the presumption of the possession of the requisite qualifications for continuing in the business. The Legislature may also have considered the recognition of that presumption as but a reasonable concession to those persons who had already embarked their labor or capital in the occupation of pharmacists when the act was passed. According to the allegations of the bill, Feldmeyer forwarded to the board of pharmacy prior to July 1, 1902, a written application, signed by him and verified by his oath, in the following form: "Maryland Board of Pharmacy—Gentlemen: I wish to make application for registration under sections 8 and 10, chapter 179, Gen. Laws 1902. I am engaged as a pharmacist at Annapolis, Maryland, and have been so engaged for 12 years. Am 48 years old. Enclosed find fee \$1.00." He afterwards, on August 4, 1902, furnished to the board—at whose suggestion it is not alleged—a further sworn statement to the effect that he was, at the passage of the act of 1902, part owner of the drug store conducted at Annapolis under the firm name of Feldmeyer Bros., and that he was, and had been, and still is, actively engaged in compounding drugs and dispensing physicians' prescriptions in said city of Annapolis. Subsequently, at a meeting held on August 14, 1902, the board registered Feldmeyer, and issued his certificate, without, as the bill alleges, subjecting him to any examination or test as to his qualifications. The bill nowhere alleges, or even intimates, that this

action of the board was fraudulent or corrupt, or that it proceeded from improper motives of any kind, or that the board neglected to consider and pass upon the fact that Feldmeyer answered to the description contained in section 8 of the act, and had complied with its conditions. In fact, the bill inferentially alleges that they did actively consider and pass upon his qualifications, because it avers that the appellant always opposed and protested against his registration.

Without pausing to inquire whether, upon the case presented by the bill, the appellant was entitled to institute this suit to contest the validity of Feldmeyer's registration, we pass to the consideration of the vital question whether the action of the board of pharmacy in his case, as set out in the bill, was reviewable at all by the circuit court. Although this is not a proceeding at law for a mandamus to compel the board of pharmacy to reverse its action in Feldmeyer's case, and reject his application for registration as a pharmacist, it is an application in equity for a mandatory injunction to accomplish that purpose. We therefore think we should be governed by the former decisions of this court upon applications to it to control, either by mandamus or injunction, the action of public officers or boards.

It is well settled in this state that although the courts will, in a proper case, exercise their mandatory power to require a public official to perform a strictly ministerial act, or to exercise a discretion conferred upon him by the law, they will not interfere with or control the method of the exercise of such discretion, or of the performance of any duty requiring the exercise of judgment or discretion, nor will they correct errors of judgment or discretion which have been honestly made in the discharge of such duty. *Brown v. Bragunier*, 79 Md. 236, 29 Atl. 7; *State v. Latrobe*, 81 Md. 233, 31 Atl. 788; *Wallis v. Smith*, 76 Md. 477, 25 Atl. 922; *Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337; *Wiley v. School Com'rs*, 51 Md. 404; *Alberger v. Mayor*, etc., 64 Md. 8, 20 Atl. 988. In *Wallis v. Smith*, supra, the court, after again announcing the principle that the courts will exercise their mandatory powers only to enforce the performance of a strictly ministerial duty, go on to say: "And by 'ministerial' we mean where one is intrusted with the performance of an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment. As, for instance, where a specific sum of money is appropriated by law for the payment of a certain defined service rendered the state, no one questions that in such a case the payment for such services by the proper officer may be enforced by mandamus. Where, however, the duty is one which necessarily requires the exercise of discretion and judgment, it is well settled that mandamus will not lie to

control or reverse the decision of one to whom the discharge of such duty is confided." Then, after referring to the conflict of opinion appearing in the cases as to what is a ministerial duty, as distinguished from a discretionary one, the court further say: "Be that as it may, we take it to be settled by the best-considered cases that where the duty is such as necessarily requires the examination of evidence, and the decision of questions of law and fact, such a duty is not ministerial, and, not being ministerial, the decision of a public officer to whom the discharge of such duty has been confided cannot be reviewed or reversed in a mandamus proceeding. In the leading case of *United States v. Seaman*, 17 How. 230, 15 L. Ed. 220, where the relator, a printer to the United States Senate, applied for a mandamus to compel the Superintendent of Public Printing to deliver to him certain public documents, the printing of which he claimed to be entitled to under an act of Congress, Mr. Chief Justice Taney said: 'Now, it is evident that this case is not one which the superintendent had nothing to do but to obey the order of a superior authority. * * * He was therefore obliged to examine evidence and form his judgment before he acted, and, whenever that is to be done, it is not a case for a mandamus.' And the rule thus laid down was approved and adopted by this court in *Green v. Purnell*, 12 Md. 329, where it was laid down that 'the Comptroller, having the exclusive power, under the Constitution, of adjusting and settling public accounts, was not a mere ministerial officer, and could not, therefore, be compelled by mandamus to perform any act in the discharge of his duties which involved the exercise of discretion and judgment.'"

Applying the principles thus laid down to the present case we are forced to the conclusion that the action of the board of pharmacy in Feldmeyer's case was not purely ministerial, but that it required such use of judgment and discretion as to bring it within the category of the transactions which, when honestly made, are not reviewable by the courts. Section 8 of the act of 1902, under which the board evidently acted in this case, requires that the applicant shall be an adult, and shall have been at the date of its passage actively engaged, as owner or manager, in compounding drugs, etc., and that he shall make an affidavit "to that effect," before he is entitled to registration and a certificate. Other sections of the act provide for the appointment of a board of "skilled and competent pharmacists," who are themselves "actively engaged in the retail drug business," to pass upon the fact of the applicant's answering to the description contained in section 8, and of his having made an affidavit to that effect. Surely the duties thus imposed upon the board are not strictly ministerial. Their discharge necessarily requires the examination into evidence,

and the exercise of judgment and discretion.

As it was neither alleged nor contended that the action of the board had not been taken in entire good faith, the learned judges below properly sustained the demurrer and dismissed the bill, and their decree must be affirmed. Decree affirmed, with costs.

CONSOLIDATED GAS CO. OF BALTIMORE CITY v. GETTY.

(Court of Appeals of Maryland. March 31, 1903.)

GAS—EXPLOSION—DAMAGE TO VACANT PREMISES—APPEAL—WAIVER OF EXCEPTION—NEGLIGENCE OF GAS COMPANY—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—PROXIMATE CAUSE—MEASURE OF DAMAGES.

1. Where, after reserving exception to the rejection of a prayer questioning the sufficiency of plaintiff's evidence, the defendant introduces evidence, the exception is waived.

2. Evidence in an action against a gas company for damages occasioned a vacant house by a leak and consequent explosion held to render for the jury the question of the company's negligence in failing by proper inspection to discover the leak.

3. It is not negligence contributing to the injury to a vacant house by a leakage and consequent explosion of gas, that the owner and his agent left the premises without inspection for almost a month.

4. Where vacant premises are injured by leakage and consequent explosion of gas, the explosion being immediately occasioned by a policeman, in searching for the leak, presenting a lighted candle at a cellar opening, the leakage is the efficient and predominant cause of the injury, so as to charge the gas company.

5. Where a policeman is called by a neighbor to discover a gas leak, and in his hunt presents a lighted candle at a cellar opening in vacant adjoining premises, thereby occasioning an explosion, any negligence of the policeman is not imputable to the owner of the vacant house.

6. In an action against a gas company for injuries to a vacant house by the explosion of gas, the measure of damages is the fair and reasonable cost of restoring the house to its condition before the explosion.

Appeal from Court of Common Pleas, Henry D. Harlan, Judge.

Action by James Getty against the Consolidated Gas Company of Baltimore City. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

John W. Marshall and D. K. Este Fisher, for appellant. John Hinkley, for appellee.

McSHERRY, C. J. The facts of this case are few, and the legal questions involved are all raised on the prayers. On the night of November 25, 1900, house No. 517, situated on West Lombard street, in the city of Baltimore, and owned by the appellee, was badly damaged by an explosion of artificial illuminating gas in the cellar. The house was unoccupied at the time, and had been vacant for a considerable period, and was in

the hands of a real estate agent for sale. On the 29th of the preceding month the gas meter had been removed from the premises by the employes of the appellant company at the request of the owner, and the flow of gas was then turned off by closing a stopcock in the riser that joined the service pipe to the meter. After the explosion had occurred, it was discovered that this riser had been wrenched from the service pipe, but when, or how, or by whom it had been done does not appear, though some conjecture is to be found in the record that a thief had entered the premises and torn it away to secure the brass stopcock attached thereto. Five or six days before the explosion, Mrs. Clark, who occupied the adjoining premises, No. 519, as a boarding house, and many of her boarders, were alarmed because of the strong odor of gas throughout that building; and they all supposed there was a leak there. A policeman was called late one evening, and he opened the cellar of No. 519, and Mrs. Clark requested him to notify the appellant company of the situation. The following morning the same odor, though not so strong, was still apparent, and Mrs. Clark requested one of her boarders, as he went down town, also to notify the gas company. One or the other of those notices certainly reached the company, because on the morning after the policeman had been asked to inform the appellant of the escape of gas, an agent or inspector of the company called at No. 519 to locate the leak and to close it. He made an inspection of premises No. 519. He went into the cellar, and smelled at the meter, and at all the joints of the pipe. He went to the floor above, and smelled in the closets and elsewhere, but declared that he could not detect the odor of gas anywhere. Mrs. Clark, however, at that very time stated to him, and she so testified, that she could smell the gas, especially in the closets, which were in the east wall of her house, and therefore immediately against the west wall of the appellee's house. The inspector, failing to find any odor of gas, went to the next house on the west, which was still further away from the house of the appellee than was Mrs. Clark's, and made inquiry whether gas was escaping there, and, being told that none was noticed, he went to a nearby lamp-post, climbed it, and tried to discover whether the leak came from that source. Not discovering any leak there, he crossed the street, and tried another lamp-post, with the same result. He then noticed that a pane of glass in one of the cellar windows of the appellee's house was broken, though the wire screen was intact. He went to that opening, and smelled there, but found no odor of gas. He then reported to his superior that he had failed to discover any leak. He requested Mrs. Clark to notify the company if the presence of escaping gas again manifested itself. It was also shown that the smell of gas was distinctly observable in the street when one

stood on the front steps of Mrs. Clark's house, which immediately adjoined the steps of the appellee's house. Notwithstanding the inability of the inspector to discover the presence of escaping gas, the smell still continued, and was perceptible on the street. On Sunday night, November 25th, the odor was strong on the street. Two of the boarders at Mrs. Clark's house called the attention of a policeman to the fact, and he proceeded to make an investigation. He went into an alley on the east side of the appellee's house, and examined all the doors and windows, and found them intact on the ground floor and on the second story. He then returned, and the same two boarders procured a candle, and suggested that the policeman continue his investigation. The candle was lighted, and the three men re-entered the alley, and when they reached a point where the pipe which supplied the gas to the upper floor was carried through the outer wall and up its exterior face from the basement to the story above they paused, and the policeman, with the lighted candle in his hand, looked into the hole through which the pipe was run, and instantly the gas escaping from the cellar came in contact with the lighted candle, and the explosion followed. The damage done was extensive. When the employés of the gas company reached the scene and entered the cellar, they found the gas pouring out of the service pipe into the cellar at the point where the riser had been wrenched off. They temporarily closed the leak with putty, and the next day put a cap on the end of the pipe. This suit was brought to recover the damages sustained by the appellee by reason of the explosion occasioned in the way just explained.

Out of the above facts the four legal questions which are presented for decision arise, and they are these: First. Was there any legally sufficient evidence in the case to show that the appellant company had been guilty of negligence? This question is presented by the appellant's first prayer in the second bill of exceptions. The same prayer had been previously offered at the conclusion of the plaintiff's case, and had been rejected, whereupon the first exception was reserved. Inasmuch, however, as the appellant then proceeded to offer evidence the first exception must, as has often been held, be treated as waived. The second question arises on the rejection of the appellant's third prayer and on the granting of the appellee's second instruction. By the latter the jury were told that there was no legally sufficient evidence of the want of due care on the part of the appellee contributing to the happening of the explosion. The appellant's rejected third prayer left it to the jury to find whether there was such contributory negligence. The third question as presented by the appellant's fourth prayer and the appellee's third instruction as modified by the trial court raises the inquiry of proximate and remote cause—

as to whether the escape of gas or the candle carried by the policeman was the proximate cause of the explosion. The fourth question relates to the measure of damages laid down in the appellee's fifth instruction. These questions will be disposed of in the order named.

First. Was there legally sufficient evidence to go to the jury to charge the appellant company with actionable negligence? There was no negligence in the act of shutting off the gas by merely turning the stopcock in the riser (*Brady v. Gas Co.*, 85 Md. 642, 37 Atl. 263), and the whole question comes down to this: When the company confessedly received notice that there was a serious leak in the vicinity of the house that was afterwards damaged, did it use due and reasonable diligence to locate it? If it did not, then it was guilty of negligence; if it did, then it was not guilty of negligence. Whether it did or did not use due and reasonable diligence to locate the leak was a question of fact for the jury in the circumstances of this case, if there was any evidence before them tending to prove the negative. The instruction granted at the instance of the appellant, and numbered 2, was framed upon the distinct theory that the appellant was bound to use due and reasonable diligence to locate the leak, and therefore implicitly conceded that there was some evidence from which a jury might properly find the absence of such care and diligence. But, aside from this, it was fairly for the jury to say as a matter of fact, and therefore not for the court to determine as a matter of law, whether an inspection which failed to discover what other persons in the same situation as was the inspector were aware of was a due and reasonable inspection. There was obviously and notoriously an escape of gas in large quantities both before and after the company's inspection of Mrs. Clark's premises was made. About that there can be no doubt. The company knew that it was claimed there was a leak in No. 519—the house occupied by Mrs. Clark. It is not now pretended that the gas came from any other place than the appellee's house. Though the odor could be plainly noticed on the pavement, the inspector failed to detect it, even when he placed his face to the broken pane of glass in the cellar window. Why? Was it because there was no escaping gas in the cellar? The court could not say that, because, if anything is plain and free from doubt in this case, it is indisputable that in the cellar of the appellee's house was just the place, and the only place, where the gas was escaping. Then why did the inspector fail to discover it? That was a question obviously for the jury to answer. In answering it it was for them to say whether the inspection as made was a reasonable one or not, and it would have been error had the court taken the finding of that fact away from them.

The second question relates to contribu-

tory negligence. The contention is that the failure of the appellee and the real estate agent in whose hands the house was put for sale to inspect the premises between October 29th, the day the meter was removed, and November 25th, the day of the explosion, was contributory negligence barring the right to recover, because, had such inspection been made, the escape of the gas "would have been discovered in time to have averted the explosion." But the appellee and his agent were under no obligation to assume or anticipate that there would be an escape of gas, and there was consequently no duty incumbent upon them to see that there was in fact no leak. There was, therefore, no negligence in their not doing that which it was not incumbent on them to do. How often would they be required to make such an inspection in order to repel the charge of contributory negligence? Until a definite answer can be given to that question, it cannot be said that a failure to inspect between the dates named was any evidence of such negligence; and the court was clearly right in granting the appellee's second instruction and in rejecting the appellant's third prayer.

Now, as to the third question. The appellant's fourth prayer asserts the proposition that, even though the company was negligent in not finding the leak after being notified that it existed, and was, therefore, responsible for the escape of the gas, still it is not answerable if the explosion occurred in consequence of a lighted candle having been brought by the policeman in contact with the gas. And this is supposed to be so on two grounds, viz.: First because, the escape of gas was not, but the lighted candle was, the proximate cause of the explosion; and, secondly, because it was contributory negligence on the part of the policeman to carry the candle where the gas was escaping, with which contributory negligence the appellee was chargeable. The appellee's third instruction, as modified by the court, asserts the converse of the second proposition. We need not go into a discussion of the abstruse and subtle question as to what is and what is not a proximate or a remote cause. As a mere metaphysical inquiry, it presents a wide and interesting field for speculation and theory, but we are not called on to enter that field in this controversy. "The law is a practical science," said this court in *B. & Po. R. R. Co. v. Reaney*, 42 Md. 136, "and courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned. * * *

But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has ac-

tually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act." In the last analysis much must depend on the facts of each particular case. 7 Am. & Eng. Ency. L. (2d Ed.) 381. That the escape of the gas was the efficient cause of the explosion cannot reasonably be disputed. If there had been no escape of gas, there could have been no explosion. The escape of gas, if negligent, was a wrongful act, and it occasioned the use of the candle; it was the wrongful act which put into operation the other cause, and was, consequently, the efficient and predominant cause of the injury. In most of the cases where negligence is the ground of action the question of proximate and remote cause has relation to and is involved in the inquiry whether there was contributory negligence. If the escape of the gas was due to negligence on the part of the appellant, then the appellant would be liable, unless relieved by the contributory negligence of the appellee, or of some third party. It has long been a settled doctrine of the common law that for injuries negligently inflicted upon one person by another there can be no recovery of damages if the injured person by his own negligence, or by the negligence of another legally imputable to him, proximately contributed to the injury. This doctrine, which was obviously borrowed from the Roman law, was, it is said, first clearly and distinctly applied by Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60, and numerous illustrations of its subsequent application are to be found in our own Reports. It must, however, be observed that the contributory negligence which will defeat the right to recover is the negligence either of the injured party himself or of some other individual whose negligence may be legally imputable to the injured party. Now, there is no pretense that the appellee was guilty of negligence in taking the lighted candle to the place where the explosion occurred, because he was not there; and it comes to the question whether, conceding that the policeman was negligent, that negligence can be imputed to the appellee, so as to defeat his action. The police officer was not the agent, the servant, or the employe of the appellee, and, of course, therefore, the appellee was not in any way responsible for his actions. The negligence of a third party who is an entire stranger to the individual injured cannot legally be imputed to the latter. *L. N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Henry v. Dennis*, 93 Ind. 455, 47 Am. Rep. 378; *Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Car. & P. 190; *Northern Penna. R. Co. v. Mahoney*, 37 Pa. 192; *J. T. Key West R. Co. v. P. L. T. & M. Co.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, with copious notes. There was no

error in granting the appellee's third instruction as modified, or in rejecting the appellant's fourth prayer.

The fourth and last question relates to the measure of damages. The court instructed the jury that the measure of damages was what would have been the fair and reasonable cost of restoring the house to its condition as it stood before the explosion. This was clearly right. *Brown v. Werner*, 40 Md. 15.

Finding no errors in the rulings excepted to, the judgment will be affirmed. Judgment affirmed, with costs above and below.

DE GRANGE v. DE GRANGE et al.

(Court of Appeals of Maryland. March 31, 1903.)

TENANTS IN COMMON — DEATH OF CO-TENANT—REPAIRS—LIABILITY OF ESTATE —NOTES—GIFTS—VALIDITY.

1. A tenant in common can have no claim against the estate of a deceased co-tenant for repairs made after the latter's death, but his claim is against the decedent's heirs.

2. A promissory note given by the maker therein to the payee, to whom he is not indebted at the time, cannot be enforced, as against the maker's estate, after his death.

McSherry, C. J., dissenting.

Appeal from Orphans' Court, Frederick County; G. Blanchard Philpot, Russell E. Lighter, and Roger M. Neighbours, Judges.

Petition by Henry Clay De Grange and others to open the account of Garrett S. De Grange, administrator of Charles A. De Grange, deceased, and to have a new account stated, disallowing three claims in the administrator's own favor. On the hearing, two of the claims were wholly disallowed, and the third one in part, and the administrator appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

H. Dorsey Etchison, for appellant. Wm. P. Mauleby, Jr., and John S. Newman, for appellees.

SCHMUCKER, J. Charles A. De Grange, late of Frederick county, died intestate on August 6, 1899, leaving a personal estate consisting of \$1,304.13 in cash, and seized of an undivided half interest in a parcel of real estate. Letters of administration were granted on his personal estate to his brother Garrett S. De Grange, the appellant, who was also the owner of the other one-half interest in the parcel of real estate. On September 25, 1900, the appellant, as administrator, stated an ex parte administration account in the orphans' court of Frederick county. By this account the money of which the estate consisted was applied first to the payment of the costs of adminis-

tration, and the balance, \$1,072.50, was allowed pro rata to the intestate's creditors, to whom it yielded a dividend of 74% per cent. of their claims, leaving nothing for distribution to the next of kin. Among the claims on which this dividend was allowed were three held by the administrator himself. Two of these were upon promissory notes, for \$500 each, drawn by the intestate to the order of the appellant, dated, respectively, May 11, 1898, and July 5, 1898, and payable six months after date. The other claim was an open account, amounting to \$111.94, for one-half of certain expenditures made by the appellant upon the parcel of real estate of which he and the intestate had been tenants in common. After the filing of this account, the appellees, who are two of the next of kin of the intestate, filed a petition in the orphans' court, asking to have the account reopened, and a new one stated, disallowing the three claims set up against the estate by the appellant, the administrator, in his own favor. The grounds set forth in the petition were that the intestate never was indebted in his lifetime to the appellant; that the two promissory notes, for \$500 each, were never given by the intestate to the appellant as his own property, or with the intent to create an obligation to him on the part of the intestate, and that the intestate at the respective dates of the two notes did not possess sufficient mental capacity to intelligently dispose of his property; and that, if the notes had been in fact procured by the appellant from the intestate in his lifetime, they were procured by undue influence practiced by the appellant on the intestate when he was too feeble to resist it. The appellant answered this petition, admitting that the intestate never was indebted to him in his lifetime upon the two notes, but insisting that they had been voluntarily delivered to him as and for his own property by the intestate on their respective dates "as a gift," and that the intestate by such delivery, under the circumstances (which are not set out in the answer) surrounding the making of the notes, "created an obligation on the part of the intestate; that he intended the gift of the amounts mentioned in said notes or single bills should pass to the said Garrett S. De Grange." The answer further averred that the open account was just and true, and was for labor and material furnished in the lifetime of the intestate, with his knowledge and consent. It also denied the allegation of the petition that the intestate had not been in the full possession of all of his mental faculties, and of sound and disposing mind, when he made the gift of the two notes to the appellant.

A variety of proceedings in the orphans' court, including an order requiring the appellant to produce full proof of his claims against the estate, followed the filing of the petition and answer. Much testimony was

1. 2. See Gifts, vol. 24, Cent. Dig. §§ 7, 64.

taken, including the production of the two notes, which were ordinary promissory notes, not under seal, and the evidence of witnesses as to the mental condition of the intestate when the notes were made, and also as to services rendered to him during his last sickness by the appellant. It appeared from this testimony that all of the \$111.94 charged in the open account for expenditures made by the appellant on the real estate held in common by him and the intestate, except the sum of \$11.57, was for repairs thereon made after the death of the latter. When the issue made by the petition and answer finally reached a hearing, the orphans' court, by the order from which the present appeal was taken, rejected and disallowed entirely the claims of the appellant on the two promissory notes, and rejected and disallowed his claim to be reimbursed one-half of his expenditures for repairs on the real estate, except as to the \$11.57 paid for repairs made during the lifetime of the intestate.

We think that by this order the orphans' court correctly disposed of the issue before it. It is perfectly clear that the appellant had no claim upon the personal estate of his intestate for any part of the repairs made to the real estate after the death of the latter. The sole foundation of that claim was the fact that the repairs inured equally to the benefit of both tenants in common of the real estate, but after the death of the intestate his heirs at law, and not he, were the tenants in common with the appellant. If he has any claim to be reimbursed a portion of the money spent for those repairs, it is against the heirs at law, and not the personal estate of his deceased co-tenant, and it cannot be asserted in this proceeding.

There is evidence in the record tending to show that the appellant from time to time rendered to the intestate such services as one brother might naturally be expected to perform for another, but the evidence does not connect the giving of the notes with those services, or show that the former formed the consideration for the latter. The appellant, in his sworn answer to the petition, asking to have his claim against the estate on the two promissory notes disallowed, admits that the intestate was not indebted to him in his lifetime on the notes, and distinctly claims title to them as having been voluntarily delivered to him by the intestate, with the intention of making him a gift of the amount of money mentioned in them. This answer was signed by counsel, and was evidently deliberately drawn, and no application has ever been made to withdraw it, or to amend or modify its statements.

We are thus brought to the consideration of the question whether the voluntary delivery of a promissory note by its maker as a gift to the payee therein named, to whom he is not indebted at the time, constitutes a

perfected gift of the note, so as to enable the donee to collect the amount of it from the estate of the donor after his death. No Maryland case bearing directly on this point has been cited to us, but the almost unanimous voice of the authorities elsewhere answers the question in the negative. "Things in action in which the donor himself is the debtor party cannot be the subject-matter of a valid gift. The reason is that, whatever be their form, these gifts would amount to nothing more than the donor's naked executory promise to pay at some future day, without any consideration to support it; and such a voluntary promise cannot be enforced against the donor, nor against his executors or administrators." *Pomeroy's Equity*, § 1148, and note. The same proposition, with but slightly varying forms of expression, has been asserted in the following cases: *In re Bartlett*, 163 Mass. 509, 40 N. E. 899; *Holmes v. Roper*, 141 N. Y. 64, 36 N. E. 180; *Kern's Estate*, *Griffin's Appeal*, 171 Pa. 55, 33 Atl. 129; *Smith v. Smith*, 30 N. J. Eq. 564; *Raymond v. Sellick*, 10 Conn. 480; *Tracey v. Alvord*, 118 Cal. 654, 50 Pac. 757; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 403.

The cases relied upon by the appellant to support his claim rest upon special circumstances not found in the present one, and are not inconsistent with the doctrine asserted by those which we have cited. In *Feeser v. Feeser*, 93 Md. 716, 50 Atl. 406, the obligation in question was a duebill under seal, which imported a consideration; and it was held by the court to amount, in form, to an admission by the intestate of an existing indebtedness from him to the party to whom he gave it. In *Ross' Appeal*, 127 Pa. 10, 17 Atl. 682, the obligation was also under seal, and was held, for that reason, to import a consideration, and not to be a mere voluntary promise. In *Worth v. Case*, 42 N. Y. 362, and *Root v. Strang*, 77 Hun, 14, 23 N. Y. Supp. 273, the obligations under consideration stated on their faces that they had been given in return for valuable services, the nature of which was set forth in the instrument. Although this court has not heretofore determined the specific question whether a promissory note, which has passed purely as a gift from its maker to the payee named in it, can be enforced by the latter against the estate of the former after his death, it has several times had occasion to pass upon the rights of a donee of personal property or choses in action, of other persons than the donor, against the estate of the donor after his death. In such cases it has uniformly been held that unless the gift was perfected, and the subject-matter of it passed out of the dominion of the donor and into that of the donee in the lifetime of the donor, the gift was not perfected, and the donee could not recover it from the estate of the donor. *Pennington v. Glittings*, 2 Gill & J. 208; *Balto. Retort & Firebrick Co. v. Mali*, 65 Md. 97, 3 Atl. 286, 57 Am. Rep.

304. The necessity for a delivery of the subject of the donation, in such manner as to amount to a parting absolutely with the dominion over the thing given, by the donor in his lifetime, in order to make a valid gift, has been especially emphasized by this court in the cases of attempted gifts of money of the donor deposited in savings banks. In *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368, the donor, who had money deposited in a savings bank, gave to the donee an order on the bank for the payment to him of the money. A memorandum was added, "The book must be sent with this order." At the same time the donor gave to the donee a written order on the custodian of the bankbook for its delivery to him. The donor died before the donee had procured actual possession of the bankbook. The gift of the money was held not to have been perfected, and the donee was not allowed to recover it. The same principle, under slightly differing facts, was upheld in *Murray v. Cannon*, 41 Md. 466, and *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486. In *Whalen v. Milholland*, 89 Md. 212, 43 Atl. 45, 44 L. R. A. 208, a woman deposited money in a savings bank in her name, "in trust for herself and M., joint owners, subject to the order of either, the balance at the death of either to belong to the survivor"; and the court held that the making of the deposit in that manner constituted a complete and irrevocable trust of the money, which was valid and enforceable by M. after the donor's death, although the latter had retained possession of the bankbook containing the entry of the deposit. In other cases referred to in *Milholland's Case*, similar trusts of money in savings banks were upheld, but those decisions do not affect the doctrine as applied to attempted gifts of money unaccompanied by a trust.

As was said in the cases cited in the earlier part of this opinion, a promissory note given without consideration to a donee is but the voluntary promise of the donor to pay the money therein mentioned at a future date. The donor does not part with the dominion over the money which is the real subject of the attempted, or rather the promised, gift. The principle controlling the decisions of this court in reference to attempted but imperfect gifts of money in savings banks, when applied to the facts of the present case, would require us, apart from the many cases we have cited from other courts, to hold that the notes of the intestate in the hands of the administrator, who was the payee named in them, were properly disallowed by the orphans' court when the attempt was made to set them up as valid claims against the estate of their deceased maker.

The order appealed from will be affirmed. Order affirmed, with costs.

McSHERRY, C. J., dissenting.

CLEAVELAND v. MULLIN.

(Court of Appeals of Maryland. March 31, 1903.)

CORPORATIONS—PAYMENT OF BONUS TAX—CONDITION PRECEDENT TO ACCEPTANCE OF SUBSCRIPTIONS—SUBSEQUENT PAYMENT—EFFECT.

1. Acts Assem. 1898, p. 1173, c. 504, providing that certain individuals and subscribers to the stock "of the corporation hereby created * * * be and they are hereby created a body corporate," and declaring in section 11 that such corporation "shall be subject at all times to all general laws applicable to associations of a similar character," does not limit or restrict the force and application of Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88f, requiring such corporations to pay a bonus tax, and providing that "no company which shall be incorporated * * * shall have or exercise any corporate powers until said bonus has been paid."

2. Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88i, providing that a default in payment of the tax for two years shall constitute a forfeiture of the charter, does not mean that a corporation which during that period has neglected to pay the tax still has a legal existence, but that the charter is suspended for two years, during which time, by paying the tax, it may clothe itself with the powers named in its charter.

3. A corporation which had not paid such tax had no power to accept an offer to subscribe to its stock, and an offer made and accepted under such conditions was not binding on the subscriber.

4. The subscription was not made binding on the subscriber by a subsequent payment of the bonus tax.

Appeal from Baltimore City Court; J. Upshur Dennis, Judge.

Action by Michael A. Mullin, receiver of the Atlantic Trust & Deposit Company of Baltimore, against Edwin R. Cleaveland, Jr. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Wm. S. Bryan, Jr., and Bernard Carter, for appellant. Alfred S. Niles and Wm. L. Marbury, for appellee.

McSHERRY, C. J. This suit was instituted by the receiver of the Atlantic Trust & Deposit Company of Baltimore against the appellant to recover the amount of an alleged subscription by the latter to the capital stock of the company. The declaration contains the usual money counts, and a special count which sets forth the contract sued on. Eleven pleas were filed. Upon some issues were joined and to others demurrers were interposed. The demurrers were sustained, and the case went to trial on the issues of fact made by the other pleas. During the progress of the trial eight exceptions were reserved. Seven of them concern the admissibility of evidence, and the eighth relates to the instructions granted and to the prayers for instructions which were rejected by the court.

There are several interesting questions presented on the record, but there is one raised

by the ruling on the demurrer to the appellant's ninth plea, and by the rejection of the appellant's tenth prayer, which we regard as decisive of the case, and consequently to the consideration of that question this judgment will be limited.

By Acts Assem. 1898, p. 1173, c. 504, approved April 9, 1898, it was provided that 11 named individuals, "and the subscribers to the stock of the corporation hereby created and their successors and assigns, be and they are hereby created a body corporate by the name of the Atlantic Trust and Deposit Company of Baltimore, and by that name shall have perpetual succession, and shall be competent to sue and be sued in any court of law or equity whatever," etc. By the fourth section of the act it was enacted "that the capital stock of said company shall consist of ten thousand shares of the par value of fifty dollars each, and when the amount of two hundred thousand dollars shall have been subscribed and fully paid in, the said corporation shall be entitled to all the powers, privileges and franchises conferred by this act," etc.

On the 25th of May, 1899, the appellant addressed the following letter to the president and board of directors of the Atlantic Trust & Deposit Company of Baltimore: "Gentlemen: I hereby apply for 25 shares of the capital stock of the Atlantic Trust and Deposit Company of Baltimore at one hundred dollars per share. If any of said shares are allotted to me, I do hereby agree to make payment therefor as and when called upon so to do by said company." On June 10th of the same year the following reply was mailed to the appellant: "You are hereby notified that you have been allotted 25 shares of the capital stock of the Atlantic Trust and Deposit Company of Baltimore, under the terms of your letter of subscription. A call of twenty-five per cent. of the capital and surplus has been made, payable at the office of the company in the Atlantic Trust Building, on or before the 20th day of June, 1899. * * *" Six days afterwards, or on June 16th, the appellant wrote a letter to the president of the company in these words: "When I subscribed for 25 shares of stock in your company I did it for investment, expecting to receive some money (which has failed to materialize) to pay for it when due, but find it will be impossible, so I ask you as a personal favor to cancel my subscription. While this step is necessary I regret very much to have to do it," etc.

By Code Pub. Gen. Laws (Poe's Supp.) art. 81, § 88f, it is declared: "Every corporation incorporated after the twenty-first day of March, 1894, under any general or special law of this state, except cemetery companies, companies created for purely benevolent and charitable purposes, railroad companies and building or homestead associations incorporated under article 28 of the Code of Public General Laws, title 'Corporations' sub-title

'Provisions for the Formation of Corporations' section 18 (class five), shall pay to the State Treasurer for the use of the state a bonus of one-eighth of one per centum upon the amount of capital stock which said company is authorized to have, * * * said bonus upon the original capital stock shall be due and payable upon the incorporation of said company, * * * and no company as aforesaid which shall be incorporated after the twenty-first day of March, 1894, shall have or exercise any corporate powers until said bonus has been paid to the State Treasurer." By section 88g it is provided that, if any company shall fail or neglect for the space of two months to pay the bonus tax, the Comptroller shall cause suit to be instituted therefor; and by section 88i it is declared that if, after suit brought and judgment rendered for the amount of the bonus due, the company shall remain in default for the space of two years, "such failure and neglect shall be deemed to amount to and shall constitute a forfeiture of the charter of such corporation, and said charter shall be decreed to be so forfeited and annulled ipso facto."

Without pausing to inquire into the causes which led to that result, it is sufficient to say the Atlantic Trust & Deposit Company became insolvent, and upon a bill being filed in equity against it the appellee was, on January 12, 1901, appointed receiver to take possession of its books and assets, and on March 12th the receiver was directed by an order of circuit court No. 2 to institute suits for the collection of the unpaid subscriptions to the company's capital stock. Under the last-named order the pending suit was brought.

The appellant's ninth plea avers that the bonus tax required by law to be paid by the Atlantic Trust & Deposit Company was not paid until the 12th day of April, 1900, and that no act was done and no proceedings taken by the Atlantic Trust & Deposit Company after the payment of said bonus tax to accept the appellant's alleged subscription, or to allot the shares in the appellant's said alleged contract mentioned to the appellant. The demurrer to that plea admitted those averments to be true, and the demurrer was sustained. The appellant's tenth prayer reads: "That the plaintiff [the receiver] is not entitled to recover because the Atlantic Trust & Deposit Company did not pay the bonus on capital stock required of it under the provisions of section 88f, art. 81. Code Pub. Gen. Laws (Poe's Supp.), until the 17th day of April, 1900, and no act to accept the defendant's subscription or to allot him any shares of the capital stock of the Atlantic Trust & Deposit Company was done by the said corporation after the payment of the said tax." That prayer was rejected.

The precise question presented by the demurrer to the ninth plea and by the appellant's rejected tenth prayer is this: Was

the Atlantic Trust & Deposit Company, at the time the appellant offered to subscribe to its capital stock, capable in law of making any valid contract because of the nonpayment of the bonus tax, and did it, after the payment of that tax, accept the appellant's proposal to subscribe?

Now, it is obvious at a glance—it is self-evident—that the appellant's letter of May 25, 1899, hereinbefore transcribed, was a mere offer to subscribe to the capital stock. It was not, and in the nature of things it could not be, a definite, unqualified subscription to 25 shares of stock; for the subscription was, as offered to be made, wholly dependent on an acceptance and allotment before it could become an actual subscription at all. Without an acceptance and an allotment by the company there was, and there could have been, no binding contract to subscribe. An acceptance of the offer and an allotment of the shares, to be valid, could only have been made by some one capable in law to accept and to allot. In a word, there must have been two parties competent to contract before there could be a contract. Was the Atlantic Trust and Deposit Company capable in law of accepting the appellant's offer and of allotting the shares on June 10, 1899, the date when it is alleged the allotment was made? The answer to that question must be sought in the provisions of the statutes to which reference has already been made.

Whatever may be the terms employed in the act of 1898, p. 1173, c. 504, under which the Atlantic Trust Company was organized, they are to be read and interpreted as subordinate to, and not as a repeal or modification of, the broad and comprehensive provisions of section 88f et seq. of article 81 of the Code. And this is so because the Legislature has declared that it should be so; and because, even if there were a doubt as to whether or not there existed a conflict between the company's charter and the general law, that doubt would be resolved against the corporation according to the familiar principle that a surrender of the power of the Legislature in any matter of public concern can never be presumed from uncertain or equivocal expressions. *L. & N. R. R. Co. v. Com. of Ky.*, 161 U. S. 685, 16 Sup. Ct. 714, 40 L. Ed. 849.

"Every corporation," says section 88f, "incorporated under any general or special law of this state," except those enumerated, shall pay the bonus tax, "and no company which shall be incorporated * * * shall have or exercise any corporate powers until said bonus has been paid to the State Treasurer." Consequently when, without attempting to repeal or modify this comprehensive provision, the General Assembly adopted Act 1898, p. 1173, c. 504, wherein it spoke of the "corporation hereby created," and wherein it declared that the persons named in the act and their successors and assigns "are hereby created a body corporate," it must be under-

stood that section 88f and the others heretofore cited, are to be read into the act of 1898, and that the terms of the latter must be qualified and narrowed by the words and the intent of the former. This must be so unless the settled policy of the state to prohibit any corporation from having or exercising any corporate powers until the bonus tax is paid was designed to be suspended or repealed as to the Atlantic Trust Company by the phrases quoted from its charter. But the act of 1898 distinctly negatives the existence of such a design, because in its eleventh section it is declared that the Atlantic Trust Company shall be subject at all times to all general laws applicable to associations of a similar character. It is clear, then, that nothing contained in the charter of the trust company can be taken to limit or restrict the force and the application of the general provisions of article 81 of the Code. To those provisions attention must now be directed.

Looking alone to sections 88f, 88g, 88h, and 88i, and the terms used therein, there ought not to be any reasonable doubt as to their meaning and effect. Section 88f imposes the tax, and prohibits the company liable to pay it from having or exercising any corporate powers until the bonus has been paid to the State Treasurer. Section 88g makes it the duty of the Comptroller to sue for the tax after the company is in default for two months; and section 88i declares that a failure to pay the tax for two years shall constitute a forfeiture of the charter. Section 88f prescribes the payment of the bonus as a condition precedent to the possession or the exercise by any corporation, other than the excepted classes, of any corporate powers. No company "shall have"—that is, possess "or exercise," that is, use—"any corporate powers until said bonus has been paid." It would be difficult to frame a more emphatic or sweeping condition precedent. The fact that the company may be sued by the state for the tax does not render the condition less efficacious, because that provision was inserted for the benefit of the state, and not to relieve the company from the antecedent prohibition. Nor does section 88i neutralize or modify section 88f. The declaration in section 88i that a default for two years shall be deemed to amount to and shall constitute a forfeiture of the charter does not mean that a corporation which during that period has neglected to pay the tax still had a legal existence, or that it had or could have exercised any corporate powers. The effect of the section is to hold the charter suspended for two years, during which time, by paying the tax, the company could clothe itself with the corporate powers named in its charter, but after the lapse of which period every right to organize under the charter should cease and be at an end. Nothing in any of the sections of article 81 of the Code qualifies the imperative condition imposed by section 88f.

That section 88f imposes a condition precedent is no longer an open question in this state. *Md. Tube Works v. West End Imp. Co.*, 87 Md. 215, 39 Atl. 623, 39 L. R. A. 810: "There is certainly no doubt that where a corporation is created by statute, or under a general statute, * * * which requires certain acts to be done before it can be considered in esse, there those acts must appear to have been done in order to establish the corporate existence." *Lord v. Essex Bldg. Ass'n*, 37 Md. 325. No less emphatic is the case of *The Franklin Fire Ins. Co. v. Hart*, 31 Md. 59. By the charter of the insurance company it was provided that 10 named persons, "and the subscribers to the stock of the company and their successors, shall be, and they are hereby, declared to be a body corporate, by the name," etc., yet because by a subsequent section it was declared that as soon as 3,000 shares are subscribed and paid, or secured to be paid, the company shall be competent to transact all kinds of business for which it was established, it was held that the manifest design of the charter was not simply that the company should not commence its business, but that the corporation should not come into existence until 3,000 shares of the capital stock had been subscribed and paid or secured to be paid, and that until that condition was complied with the company had no legal being. See *Taggart v. W. Md. R. R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Plank Road Co. v. Hoffman*, 9 Md. 569; *Bonaparte v. Lake Roland Co.*, 75 Md. 347, 23 Atl. 784.

Inasmuch, then, as the payment of the bonus tax was a condition precedent to the possession and the exercise of any corporate powers, and inasmuch as the acceptance of an offer to subscribe to the company's capital stock and the allotment of the stock among the proposed subscribers were essentially corporate acts, because both were necessary to the consummation of a contract between the subscriber and the company, it is obvious that prior to the payment of the bonus tax, on April 12, 1900, the Atlantic Trust Company was without authority to accept a proffered subscription or to make an allotment of stock amongst persons offering to subscribe therefor; and the attempted acceptance and allotment on June 10, 1899, 10 months before the tax was paid, and therefore 10 months before the company came into legal existence, was a sheer nullity. Being a nullity no contractual obligation arose, and the appellant was in no way bound to pay for the 25 shares of stock for which in his letter of May the 25th he offered to subscribe, unless after the payment of the bonus tax, and therefore after the corporation actually became a legal entity and was clothed with corporate powers, including the power to accept offers to subscribe to its stock, the appellant had by his own acts or conduct recognized himself as, or asserted that he was, a stockholder, and the trust company

had dealt with or treated him as such. But this alternative is out of the case; for not only is there no evidence to sustain it, but the clear and uncontroverted fact is distinctly to the contrary. It affirmatively appears that no action was ever taken by the officers or directors of the trust company looking to an acceptance of the appellant's offer to subscribe, other than the action of June 10, 1899, when the company had no authority to make any contract at all; and it also appears that appellant's letter of June the 16th, canceling his offer to subscribe, was in the possession of the company and was attached to the notice of allotment, and that upon the latter was indorsed the word "Returned." And this is the situation which existed when the receiver was appointed. No effort had been made to collect from the appellant any installment of his alleged subscription after the return of the notice of June the 10th or after the date of his letter of June the 16th. In the face of these undisputed facts, it has not even been suggested, much less could it be successfully contended, that after the corporation became a legal entity by the payment of the bonus tax in April, 1900, there was any act done by it which converted the appellant's withdrawn offer to subscribe into a binding contract of subscription.

It is, however, objected that inasmuch as before this suit was brought the bonus tax had been paid, whereby what was prior thereto not a corporation became a corporation, the subscriptions to the capital stock antecedently made ripened into binding obligations when the corporation did come into existence. This proposition is stated in the appellee's brief in these words: "And, however it may be as to contracts or attempted contracts with third parties, it is well settled in this state that a subscription to the capital stock of a corporation, made prior to the coming into existence of the corporation, will become binding when the corporation does come into existence, and that action may be maintained by the corporation upon such subscription." To sustain this the case of *Hughes v. An. Mfg. Co.*, 34 Md. 325, was cited. But it will be observed that there is a clear distinction between the proposition stated in the brief and the one which must be upheld before this suit can be maintained. A subscription to stock to be valid must be a contract between parties competent to contract. If invalid when made by reason of the want of competent parties to make it, it cannot become valid or binding by the mere subsequent creation of a party which, when created, would be competent to contract. The contention in the case at bar tacitly concedes the invalidity of the subscription when made, but asserts that the formation of the corporation afterwards converted what was originally invalid into a binding obligation. It is true that when subscribers are made to form a corporation and to take stock therein the contract is made by the sub-

scribers with each other, the consideration of which is the right to a given number of shares upon the incorporation of the company, and the subscriptions constitute a continuing offer to the proposed corporation, that ultimately ripens, upon acceptance after an incorporation is perfected, into a consummated contract. It is because such subscriptions—that is, those made in anticipation and for the purpose of forming a corporation—are binding between the co-subscribers that one or more of the co-subscribers cannot be discharged therefrom without the assent of the others. *Ang. & Ames on Corps. § 523.* In the case of *Hughes v. An. Mfg. Co.*, supra, it appeared that articles of incorporation were framed under the general incorporation law, and appended to the certificate were the subscriptions of Hughes and the other projectors of the company. Those subscriptions were thus made prior to, but in contemplation of, becoming incorporated. In an action brought by the company after its incorporation to compel Hughes to pay for the shares subscribed for before the incorporation of the company, it was contended that the subscription was not binding, because the law under which the company was formed did not require or contemplate any subscriptions prior to the factum of incorporation, and because a subscription thus made stood on a different footing from one made under an act passed by the Legislature wherein provision was made for the taking of subscriptions by commissioners or persons named in the statute. This court proceeded to show that there was no difference between subscriptions made in contemplation of an incorporation under the general law and those made in contemplation of the granting of a charter by the General Assembly. "In each case," it was said, "the contract is made by the subscribers with each other, the consideration of which is the right to a given number of shares upon the incorporation of the company, whether it be under a special or a general act of the Legislature. And hence in the several states where this question has arisen upon subscriptions to a certificate or articles of association, formed for the purpose of being incorporated under a general corporation law, it has been held that such subscriptions are binding and may be enforced after the organization of the company." 34 Md. 325. The ruling thus made, whilst undoubtedly sound and in accord with well-considered precedents, has no application to this case, for the very obvious reason that the subscriptions and the offers to subscribe to the stock of the Atlantic Trust Company were not made either in contemplation of a charter being granted by the General Assembly or in contemplation of an incorporation under the general law; but all were made, or the offers to subscribe were based, upon the distinct assumption or theory that there was then in existence a created, subsisting body corporate, itself capable

of entering into valid contracts with subscribers to its capital stock. There was no contract by the subscribers with each other; but there were attempts to make separate contracts between the company and each subscriber, though under the positive provisions of the Code the company did not have and could not exercise any corporate power whatever, and was not legally in existence as a corporation at the time.

Entertaining these views, it of course follows that there was error committed in sustaining the demurrer to the ninth plea, and in refusing to grant the appellant's tenth prayer, as well as in granting the appellee's first instruction, which wholly ignored this question. The judgment will be reversed because of the errors indicated, and, as no recovery can be had against the appellant, a new trial will not be awarded.

Judgment reversed, with costs above and below, without awarding a new trial.

WEST VIRGINIA CENT. & P. RY. CO. v. STATE, to Use of FULLER.

(Court of Appeals of Maryland. March 31. 1903.)

RAILROADS—PERSONAL INJURIES—CARS RUNNING OFF RIGHT OF WAY—LIABILITY—INSTRUCTIONS.

1. Where the rear cars of a train break loose while the train is proceeding up a grade, and come back down the grade at a high rate of speed, and strike a car of another train, which has started to pull out from a siding onto the main track, derailing it and driving it beyond the railroad's right of way into the yard of an adjoining owner, killing a boy who is lawfully standing there, the railroad is liable, it not appearing that an unavoidable accident was the cause of the injury.

2. A prayer is properly refused if the theory advanced by it is covered by other prayers which are granted.

3. The failure of a railroad company to keep its cars on its right of way is itself negligence, and one injured need not show that there has been antecedent negligence producing the ultimate negligent act.

4. An instruction that if the jury find from the evidence that on or about a certain day M., under the age of 21, was killed by the cars of the defendant while operated by its agents on its road, and that the equitable plaintiff herein is related to him in the manner as set forth in the pleadings, and that the said killing resulted from the want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased, directly contributing to the accident, then plaintiff is entitled to recover, while very general, is not reversible error.

Appeal from Circuit Court, Allegany County; Edward Stake, Judge.

Action by the state of Maryland, for the use of Ida F. Fuller, against the West Virginia Central & Pittsburg Railway Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

The action was brought to recover for the negligent killing of Melville W. Fuller, a boy 14 years old.

The following are the prayers referred to in the opinion of the court.

Plaintiff's prayer: "If the jury find from the evidence that on or about the 8th day of July, 1901, Melville Fuller, under the age of 21 years, was killed by the cars of the defendant while operated by its agents on its road, and that the equitable plaintiff herein is related to him in the manner as set forth in the pleadings, and that the said killing resulted from the want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased, directly contributing to the accident, that then the plaintiff is entitled to recover in this cause."

Defendant's first prayer: "The defendant, by its counsel, prays the court to instruct the jury that the plaintiff has offered no evidence in this case legally sufficient to entitle it to recover, and their verdict must be for the defendant."

Defendant's second prayer: "And further prays the court to instruct the jury that there is no evidence in this case of any such negligence on the part of the defendant in the discharge of its legal obligations to the deceased, or to the equitable plaintiff in this case, as entitles the plaintiff to recover in this action."

Defendant's third prayer: "And further prays the court to instruct the jury that if they find from the evidence that, at the time of the accident sued for, the defendant was operating a railroad through the suburbs of the village of Luke, in Allegany county, and that immediately west of its main track it had a siding opposite the house of a certain Mr. Rogers, and that the boy, Melville W. Fuller, for whose death this suit is brought, was standing on the company's right of way between the fence of said Rogers' lot and said siding, waiting for a train of cars which was then on said siding to move off the same so that he could cross the same with a bucket of water to the automobile works on the east side of said railroad, and that while said boy was so standing there part of the cars of freight train of the defendant which had gone up the track about a quarter of a mile broke loose from the train to which they were attached and ran back down the main line of said track, and that just before said cars broke loose and ran back said train which had been standing on said siding was pulled onto the main track going east by the servants of the defendant, and had all gotten off of said siding onto said main track except one car and the caboose on the rear end of said east-bound train, and that said cars so running back on said main track side-wiped and struck said caboose and knocked it over against and upon said boy, where and while he was so standing on the west side of said siding waiting to cross the track, whereby said boy was killed, still the plaintiff is

not entitled to recover, even though the jury shall further find that at the time he was waiting to cross said track and for a long time before there was a path or walk across the right of way of the tracks of the defendant from the property of said Rogers over to said automobile works, over which persons, together with the said boy, were accustomed to pass and repass, and over which said boy on said occasion was waiting to pass, and even if the jury shall further find that none of the cars which broke away from said train and ran back on the main track were equipped with air brakes, or connected up with air-brake connections, with the balance of said train from which they had just broken."

Defendant's sixth prayer: "And the defendant further prays the court to instruct jury that under all the circumstances of this case the defendant owed no duty to the deceased, or to the equitable plaintiff, to equip its cars, or any of them, with air brakes, in the running of its trains; and even if the jury believe from the evidence that the defendant failed so to equip its cars, and that the death of the said Fuller boy resulted from that failure, yet the plaintiff is not entitled to recover."

Defendant's seventh prayer: "And the defendant further prays the court to instruct the jury that even if they shall find that the cars which broke loose and ran back were not equipped with air brakes, and if they had been so equipped they would have stopped, and not run back, resulting in the collision testified to by the witnesses, yet that the direct and proximate cause of the accident was the parting of the cars from the train, and not the failure to have said cars equipped with air brakes, and there being no sufficient evidence in this case to show that the parting of the train was due to any negligence of the defendant, the plaintiff is not entitled to recover."

Defendant's eighth prayer: "And further prays the court to instruct the jury that if they find that, but for the intervention of the train going east, the cars which broke off and ran back would have gone on down the main track of the defendant's railroad, and done no injury to the deceased, then the plaintiff is not entitled to recover, even though the jury may find that the cars which ran back and struck the intervening train were not equipped with air brakes, unless the jury further find that in drawing said east-bound train out of the siding on to the main track the servants of the defendant were guilty of negligence in so doing."

Defendant's ninth prayer: "And further prays the court to instruct the jury that there is no evidence in this case legally sufficient to show that the servants of the defendant were guilty of any negligence, under the circumstances, in drawing said east-bound train from the siding on to the main

track, or that the parting of said train was in any way caused by the negligence of the defendant."

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Benjamin A. Richmond and C. W. Dally, for appellant. D. James Blackiston and D. J. Lewis, for appellee.

McSHERRY, J. This is a personal injury case. All the questions involved arise on the instructions granted and on the prayers rejected by the trial court, and they are brought up by the one bill of exceptions which the record contains. The legal principles that must control the final decision are perfectly familiar, and the only difficulty presented springs, as is generally the case, from the application of those principles to the peculiar facts of the occurrence. A brief statement of the facts—both those which are uncontroverted and those which are disputed—will now be made, as they furnish the basis of the discussion which will follow.

The appellant is a railroad company whose road extends from Cumberland, in the state of Maryland, southwardly to West Virginia Junction, and thence on to Elkins, in the state of West Virginia. The accident out of which this case grew happened near the town of Luke, in Allegany county. At the place of the accident there is a siding used to let trains going in opposite directions pass. On the day the injury was inflicted a train of 49 freight cars, 33 of which were loaded with steel rails and 16 of which were empty, was proceeding southwardly towards West Virginia Junction up a considerable grade, whilst a train of empty freight cars, destined northwardly, stood on the siding waiting for the south-bound train to pass. Upon one side of the railroad track an automobile works was located. Upon the opposite side of the track a man by the name of Rogers lived. The men employed at the automobile works got their drinking water from a well in the yard of Rogers. Melville W. Fuller, a boy of little more than 14 years of age, was employed at the automobile works to carry water from the Rogers' well to the works for the use of the workmen there. To go from the works to the well he was compelled to cross the main track and the siding by a path used by him and others, though the path was not a regular public or private crossing. On July 8th, 1901, the boy crossed the two tracks with a bucket in his hand to get water. Before he could return the north-bound train of empty freight cars backed into the siding, and the south-bound train of loaded and empty freight cars passed, going up a heavy grade. This latter train was hauled by two engines, one of which was in front and the other was some six or seven cars back from the front. After it had passed the switch the train of empties

standing on the siding started to pull out. The boy all this while was standing according to the contention of the railroad company on its right of way, but according to the contention of the appellee in the yard of Rogers, waiting for the two trains to clear the crossing at the path so that he might return with his bucket of water to the automobile works. After the south-bound train had passed some distance up the grade, six or eight of the rear cars broke loose and came back at a high rate of speed, and as the train of empties had not entirely cleared the siding the caboose of the former struck with a glancing blow the caboose of the latter, derailing both, and driving the last-named caboose over into the yard of Rogers. It fell upon the boy, and instantly crushed him to death. This suit was then brought in the name of the state for the use of the boy's widowed mother against the railroad company to recover damages for the injury she sustained by the death of her son. It was shown that whilst most, if not all, of the cars in the south-bound freight train were equipped with air brakes, all of those so equipped were not coupled up with the air; and it was proved that, if the air brakes had been properly coupled up, the moment the train parted both sections of it would have instantly stopped, and the collision which ensued would have been avoided, and the boy would not have been killed. It was not shown by the appellee what caused the six or eight rear cars of the south-bound train to part from the other cars, nor did the appellant offer any explanation of that occurrence.

At the close of the evidence the appellee offered one prayer, which was granted, and the appellant offered ten, of which the fourth, fifth, and tenth were granted and the others were rejected. The verdict and the judgment thereon being in favor of the appellee, the appellant appealed, and the rulings of the trial court in granting the appellee's prayer, and in refusing to grant the appellant's first, second, third, sixth, seventh, eighth, and ninth prayers, are assigned as errors for review in this court. The prayers will be found set out at length in the reporter's statement of the case.

The first and second prayers of the appellant go to right of recovery, and were designed to withdraw the case from the jury, on the ground that no legally sufficient evidence had been adduced to show negligence on the part of the appellant in the discharge of its legal obligations to the deceased boy or to his mother. This opens up the whole law of the controversy.

Of course there can be no negligence where there is no duty that is due; for negligence is the breach of some duty that one person owes to another. It is consequently relative and can have no existence apart from some duty expressly or impliedly imposed. In every instance, before negligence can be predicated of a given act, back of the act must be sought

and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury. This has been so often stated that it is not deemed necessary to elaborate it. As the duty owed varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies, and the act complained of never amounts to negligence in law or in fact, if there has been no breach of duty. Thus the duty due by a common carrier to its passengers is entirely different from the duty owed by the same carrier to a trespasser on its right of way, and therefore an act which in the first instance would be negligent because a breach of the particular duty there due would not be negligent in the second instance, simply because the same duty is not due. The duty owed to a trespasser on a right of way is measurably less than the duty owed to the same person when not a trespasser, but when entirely off the right of way. As said by this court in *West. Md. R. R. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 94: "A railway company is not bound to anticipate that a person will be negligently or wrongfully on its tracks, but if its servants see a person in a place of peril on the right of way then the duty arises to avoid injuring him if possible. But, to recover for an injury sustained when in such a position, the plaintiff must show (1) that the company's servants had knowledge of his peril; (2) that they had knowledge in time to avoid the injury; (3) that they then failed to exert proper care to avoid the injury." This doctrine, stated even more broadly, the appellant had the full benefit of in its fifth instruction; for the jury were there told that if the boy was on the right of way the appellee would not be entitled to recover, although the death of the boy was the result of the appellant company not having air brakes on the cars that became detached from the train, "or the result of defective appliances or machinery." But whilst the measure of duty due by a railroad company to a trespasser is as stated in *Kehoe's Case*, supra, there is manifestly a higher duty due by railroad companies to persons on their own premises or lawfully on the premises of others. So use your own rights and property as to do no injury to those of others is a maxim of the law which imposes upon a railroad company a duty towards the public and towards each individual who is not himself a wrongdoer, and which is no less binding than when applied to natural persons in their ordinary relations. Numerous illustrations of the application of this doctrine might be given, but a few familiar ones will suffice. The maxim, though not as applying to a railroad company, was cited and adopted generally by this court in *Scott v. Bay*, 3 Md. 446. That was a suit brought to recover damages which the plaintiff sustained by the quarrying of stone by the defendant on the latter's own premises. The blasting threw large quantities of

stone on the plaintiff's land. The defendant asked the lower court to instruct the jury that the defendant had a right to quarry stone from his quarries, and that the plaintiff could not recover for any injury he sustained in consequence of such quarrying, if the jury believed that proper precautions were used in working the quarries, and that such injuries were sustained without default of the defendant. The prayer was rejected, and on appeal that court said: "In the first place, there is no sufficient evidence in the record to warrant such a prayer, that proper precautions were used in working the quarries. But, if proper precautions had been taken, they would still constitute no vindication of the defendant for the injuries resulting to the plaintiff. Unless a party can show a right, either in the nature of a presumed grant or easement, or in some other mode, to use his property in a particular way, he cannot use it in that particular way, if it occasions injury to his neighbors in the quiet enjoyment of their legal rights and privileges, and it makes no difference whether precautions were used or not to prevent the injury complained of." The same principle underlies the decision of *B. & P. R. R. Co. v. Reaney*, 42 Md. 117. There the railroad company had been given authority to construct a tunnel under Wilson street, in the city of Baltimore. In doing the work the walls of Reaney's house were injured. The house stood on Madison avenue, nearly 25 feet northwest of Wilson street, with another dwelling intervening between it and Wilson street. The excavation made for the tunnel did not come within something over 25 feet of Reaney's house, but did approach quite near the one adjoining it. The walls of the latter settled, and that caused the walls of Reaney's house to crack. Reaney sued the company for the damage thus inflicted, and recovered a judgment. On appeal the judgment was affirmed, and this court, speaking through Judge Alvey, said: "That there was no negligence or want of care in doing the work is no answer in a case like this. * * * That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defense to this action, if damages actually resulted from the work. There are many cases in which an act may be perfectly lawful in itself, and will continue to be so until damage has been done to the property or person of another, but from the moment such damage arises the act becomes unlawful, and in an action is maintainable for the injury." And *Bonomi v. Backhouse*, El. Bl. & El. 622, *Smith v. Thackerah*, L. R. 1 C. P. 564, and *Add. on Torts*, 9, are cited. The same doctrine was applied at an early date in actions of trespass. Thus, in *trespass quare clausum fregit*, the defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, ipso invito, fell

upon the plaintiff's land, and the defendant took them off as soon as he could, which was the same trespass, etc. On demurrer judgment was given for the plaintiff, on the ground that, though a man may do a lawful thing, yet, if any damage thereby befalls another, he shall be answerable if he could have avoided it. *Broom's Leg. Max.* 161, and cases there cited. It is true these last cases were in trespass, and the declaration now before us is in case. But the prayers at present under consideration are demurrers to the evidence, and make no reference to the pleadings; hence the right to recover depends not upon the form of the action or the state of the pleadings, but solely upon the case made by the proof. *Balto. Bldg. Ass'n v. Grant*, 41 Md. 509; *Leopard v. Canal Co.*, 1 Gill, 222.

There is another class of cases, more akin to the one stated in the declaration in this record, wherein it has been recognized as the settled law that when an injury results from the negligent performance of a lawful act a right of action arises by reason of the negligence. *B. & P. R. R. Co. v. Reaney*, 42 Md. 130; *Leader v. Moxton*, 3 Wils. 461; *Jones v. Bird*, 5 Barn. & Ald. 837; *Lawrence v. Ct. N. R. Co.*, 16 Q. B. 653. The running of its trains by the railroad company was a lawful act; but was there negligence in permitting some of its cars to be hurled outside of the right of way, whereby the injury was inflicted? It must be borne in mind that we are dealing with a demurrer to the evidence, and as there was some proof from which the jury could conclude that the boy, when killed, was not on the right of way, it must be assumed as a fact that he was not.

Let us see, then, first, what caused the death; and, secondly, what duty due by the appellant was disregarded by it.

It is obvious that the injury would not have happened if the rear cars of the south-bound train had not become detached from those in front of them, or if the detached cars had been equipped with air breaks in working order, or if just at the precise moment of the collision the caboose of the north-bound train had been clear of the siding and on the main track, because the glancing blow which threw the caboose to the side could not have been given. The concurrence of these three things produced the injury. Whilst each was prior in point of time to the one that succeeded it, when measured by minutes, or perhaps seconds, all together constituted the efficient cause, but for the occurrence of which the boy would not have been killed. No independent act emanating from some other agency than the defendant itself intervened to give rise to the application of the doctrine of proximate and remote cause, because all three acts which combined to produce the death were acts of the appellant.

Now, it would seem to be a perfectly plain duty of a railroad company to keep its cars on the rails laid on its right of way, or, at least,

to keep them within the limits of its right of way. Every abutting land proprietor has a right to insist that this shall be done, so that in using the dangerous agencies employed in operating the road his person and property may not be injuriously affected. This duty is due not only to the abutting landowner, but to every individual lawfully on contiguous property to the right of way. It is therefore a duty due to every person along, or who may be passing along, but not on, the right of way. And this duty springs out of the obligation upon the company to so use its own rights and property as not to injure the rights or the property of others. Starting with that duty, it is clear when a car has by a collision been hurled outside the right of way, and an injury has been inflicted on one lawfully there, a breach of duty has occurred, and consequently there has been negligence, and for the injury thus inflicted an action will lie unless it be shown that an unavoidable accident was the efficient cause of the injury. No effort was made to do this, and therefore it does not become necessary to trace back of the breach of duty which occasioned the injury the causes which produced that breach, or to ascertain whether the causes of the cause were themselves acts of negligence.

From the views we have expressed it is quite clear, in the light of the conflicting evidence as to whether the boy was within or outside of the right of way, that the court was entirely right in refusing to withdraw the case from the consideration of the jury, and it only remains to inquire whether there was any error in the other rulings to which exception was reserved.

The appellant's third prayer proceeds upon the theory that if the boy was standing, when killed, within the company's right of way, then no cause of action exists, even though the cars which broke away from the south-bound train and collided with the other train were not provided with air brakes or connected up with the air-brake appliances. There was no error in rejecting that prayer, for the plain reason that its theory was distinctly covered by the fourth and fifth, which were granted. The theory which both the fourth and fifth instructions announce is that the failure to use appropriate appliances to prevent such collisions as the one described cannot be relied on by a trespasser as evidence of an omission by the company to discharge any duty which it owed to him. It would have been error to repeat that same doctrine by granting the third prayer.

The appellant's sixth prayer was radically defective. It asked the court to rule that "under all the circumstances of this case the defendant owed no duty to the deceased" to equip its cars or any of them with air brakes, and that even if the death of the boy resulted from the company's failure to so equip its cars no recovery could be had. Had the prayer been granted, the legal con-

clusion deducible from it is this: Even though the boy had not been on the right of way, and even though by the failure to supply air brakes the company had not so used its rights and property as to avoid injury to others to whom it owed a duty of not inflicting an injury upon them, still no recovery could be had. What has been said in disposing of the first and second prayers of the appellant is sufficient to show the fallacy of this sixth prayer.

The seventh prayer is defective, in that it undertakes to divide up and segregate the several elements which constitute the final and ultimate cause of the injury, and to say that inasmuch as the parting of the train, and not the failure to have air brakes, was the proximate cause of the accident, no recovery could be had, because there was no evidence to show that the severing of the train was due to any negligence on the part of the appellant. It is clear that this prayer entirely ignores the difference in the duty owed by the company to a trespasser and to one not a trespasser on its right of way, and wholly disregards the principle that the company in using its own appliances was bound to so use them as not to injure another in the lawful pursuit of his rights. If the boy was killed when not on the right of way, then the company did not so use its own rights and property as not to injure another, and in consequence was responsible, because the failure to keep within its right of way was, in the circumstances stated, a breach of duty that it owed to every one so situated, and was therefore negligence, and it was not incumbent on the appellee to prove that there had been antecedent negligence producing the ultimate negligent act. The act claimed to be the ultimate negligent act being established, the appellant was then required to show in exculpation or defense that the act was an unavoidable accident, which did not proceed from prior or coincident negligence.

A kindred vice runs through the eighth and ninth prayers. By the eighth the court was asked to say to the jury that if, but for the intervention of the train of empty freight cars, the detached cars from the south-bound train would have gone on down the track without injuring the deceased, then no recovery could be had unless there had been negligence in drawing the train of empty cars from the siding; and by the ninth an instruction was sought to the effect that there was no evidence of negligence in so drawing the train of empty cars from the siding, or that the parting of the south-bound train was in any way caused by the negligence of the appellant. The actionable negligence did not consist of one or the other of a series of acts, but in the ultimate outcome of all. Separated and wholly segregated from everything else, there may have been no negligence in the act of moving the train of empties from the siding, but when the concurrence of that act with the parting of the

other train, and with a failure to equip the cars with air brakes in working order, resulted in a collision which threw the caboose outside of the right of way, and when the throwing of the caboose outside of the right of way is the thing which caused the death, that act, and not the antecedent steps which led to it, must be treated as the efficient cause of the injury and the act of negligence for which the appellant is answerable, because that is the act whereby the railroad company, in exercising its own right, exceeded the limits of those rights, and inflicted an injury, outside of its right of way, upon a person towards whom it owed the duty not to inflict such an injury, as that person was then situated. The plaintiff's or appellee's prayer, whilst very general, is not open to such criticism as would justify a reversal. *B. & O. R. R. Co. v. State, Use of Trainor*, 33 Md. 545. As we find no errors in the rulings complained of, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

WHITBY et al. v. BALTIMORE, C. & A. RY. CO.

(Court of Appeals of Maryland. March 31, 1903.)

RAILROADS — EMBANKMENTS — APPROACHES — SAFE CONDITION OF APPROACH — INJURIES — LIABILITY — QUESTION FOR JURY — TRIAL — PRAYERS — APPEAL.

1. On appeal, prayers will be held to relate exclusively to the evidence, and their correctness will be determined thereby, rather than by the pleadings, unless special reference is made to the pleadings in the prayer.

2. Where a railroad company, having obtained permission to cross a street, constructs an embankment across the same, it is bound not only to keep the portion of the street occupied by its tracks in a safe condition, but also the approaches to the crossing.

3. If the construction of an approach to the crossing does not make the street more dangerous than before the railroad was built, the railroad is not required to correct defects that existed prior to the building of the road.

4. In an action against a railroad for injuries sustained by one driving, owing to the alleged defective construction of a crossing over a street, the question whether the crossing and its approaches was so constructed as to make it dangerous for those exercising due care was for the jury.

5. In an action against a railroad company for injuries sustained by a woman while driving, owing to the alleged defective construction of the approaches to a crossing, the action was tried with one brought by her husband for the same injuries; and the court instructed that if the woman was riding in a buggy drawn by an unsafe and foolish horse, which the "plaintiff, or either of them, knew," or should have known, etc. *Held*, that the instruction was erroneous, since, the husband not having been driving with the wife, and it not appearing that he knew that she was going to use the horse, she could not be held responsible for any knowledge of his.

Appeal from Circuit Court, Talbot County; William R. Martin and Edwin H. Brown, Judges.

Action by Annie L. Whitby and another against the Baltimore, Chesapeake & Atlantic Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Guion Miller, for appellants. Wm. H. Adkins, for appellee.

BOYD, J. The appellants sued the appellee to recover damages for injuries sustained by Mrs. Whitby by reason of the alleged dangerous and unsafe condition of a highway known as "Harrison Street Extended," which is crossed by the defendant's railroad near Easton, in this state. The Baltimore & Eastern Shore Railroad Company built the railroad, and, after obtaining permission from the county commissioners of Talbot county, constructed an embankment 8 or 10 feet high across Harrison street extended, upon which it placed its track. The approaches to the crossing were made by that company by filling in and building up the street for a distance of 60 or 70 feet on each side of the track, although the plans submitted to the county commissioners provided for its being filled 60 or 70 yards. The plaintiff's testimony tended to show that the grade of the street for the distance of 20 feet south of the railroad track was at the time of the accident a 15 per cent. grade; and it was conceded at the trial that the defendant company had succeeded to all the rights, privileges, and immunities of the Baltimore & Eastern Shore Railroad Company, and is operating its railroad. Mrs. Whitby and a friend were driving on this street, and, as the horse got his front feet between the rails of the track, he began backing, the wheels turned on the lock, and the carriage was backed down an embankment, at a point about 20 feet from the track, into a hole which was at the end of a drain pipe—placed there by the railroad company in constructing the approach to the crossing. The carriage and horse fell on Mrs. Whitby, and she was seriously injured. The questions for our consideration are presented by the first bill of exceptions, which relates to the exclusion of some photographs offered by the plaintiffs in rebuttal, and by the second, sixth, seventh, eighth, ninth, and tenth prayers offered by the plaintiffs and rejected by the court, and the fourth and seventh prayers offered by the defendant, which were granted. The verdict being for the defendant, the plaintiffs appealed from the judgment rendered thereon.

The principal and most important question involved in this case can be discussed in connection with defendant's seventh prayer, which, after leaving to the jury to find that Harrison street extended was an existing road at the time of the construction of the railroad, and continued to be a pub-

lic road up to the time of the accident, instructed them that "it was only the duty of the defendant to keep that portion of said road crossing its track, lying within its right of way, in such repair and condition as to afford free, safe, and convenient passage to persons traveling over same with horses and carriages, and exercising reasonable care." The right of way of the defendant extends 30 feet south of the south rail of the track on both sides of the street, but where the railroad crosses the street there was "a level or flat surface, including space covered by the track, of about nine feet." It is contended by the appellee that its right of way over the street was limited to that width, and hence the object of this prayer was to make its liability dependent upon the failure to keep that portion of the road or street, as we have called it, in repair. Is it to be so restricted? It was argued that, as the declaration alleges that the place complained of was "within the limits of said right of way," the plaintiffs were confined to that, and could not recover for any injuries sustained by reason of the condition of the approaches outside of the right of way; but neither this prayer, nor those of the appellants, refer to the pleadings. The law on that subject is thus concisely stated in 2 Poe, § 302: "Unless special reference is made in the pleadings, prayers will be held to relate exclusively to the evidence, and their correctness will be determined entirely by a consideration of the evidence. Wherever, therefore, it is proposed to make a point or raise a question upon the pleadings, or upon the testimony as applicable to the pleadings, it is essential to call special attention to them. This is a well-settled doctrine in our practice." In the note to that section many cases are cited, and the reason of the rule is that under the statute this court cannot decide any point or question which does not plainly appear by the record to have been raised and decided by the court below. If a party to a suit wants to raise such a question by a prayer, he must refer to the pleadings, and thus call upon the court to examine them; and, if necessary, the opposite party then has the opportunity to amend. This case well illustrates the justice of such rule, as the appellants evidently intended by their allegation, "within the limits of said right of way," to embrace the portion of the street that would be included by extending the southern lines of the right of way across the street, as the precipice and hole mentioned in the declaration and in the testimony are north of those lines extended. We need not, therefore, determine whether or not "the right of way" of the appellee is limited to the nine feet; but as that was evidently the intention of the prayer, and was doubtless so understood by the jury, we must determine whether it is proper to so limit the liability of the defendant, conceding the right of way

over the street to be confined to the nine feet.

Although it may not be necessary for us to refer to authorities outside of those in this state, the article on "Crossings" in 8 Ency. of Law (2d Ed.), has collected so many cases on that subject, and so succinctly states the law, that it will not be amiss to refer to some portions of it. On page 363 of that volume it is said: "It is the duty of every railroad company properly to construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road." Again, on page 366: "An embankment constructed as a necessary approach to a railroad track is, in legal contemplation, a part of the crossing, and should comply with the provisions regulating crossings in general." And on page 369 it is said: "As a general rule, the duty of keeping a public crossing in repair is the same as the duty of construction; it being the duty of the railroad company to keep its track and approaches thereto in a condition fit to meet the demands of public travel." And as reflecting upon the liability of the appellee, as the successor of the road which constructed this crossing, on page 370 it is said: "The obligation to keep up the crossing, imposed as a condition of the right to cross, necessarily attaches to whatever person or corporation may become the owner of the road, so long as the right is exercised. It is a continuing condition or obligation, inseparable from the enjoyment of the franchise." In some of the cases cited in the notes on the pages we have referred to, statutes were being construed; but the general principles announced in the text are correct, independent of statutes. When a railroad company has the privilege of building its road over a public highway, and, in the course of its construction, finds it necessary or desirable to change the grade of the highway, there can be no valid reason for not requiring it to keep the approaches in a safe and proper condition, as well as the crossing itself. "At common law it is undoubtedly the rule that where a new way or road is made across another, which is already in existence and use, the crossing must not only be made with as little injury as possible to the old road or way, but whatever structures are necessary for such crossings must be erected and maintained at the expense of the party under whose authority and direction they are made." *Northern Cent. Ry. Co. v. Baltimore*, 46 Md. 425. See, also, *Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900; *Cent. Pass. R. Co. v. P. W. & B. R. Co.*, 95 Md. 428, 52 Atl. 752; *Eyler v. County Commissioners*, 49 Md. 269, 33 Am. Rep. 249. In the last case it was held that both the canal company and the county were liable for not keeping the bridge in repair that caused the injuries to Eyler,

and subsequently the county recovered the amount of the judgment against it from the canal company. *C. & O. Canal Co. v. County Commissioners*, 57 Md. 201, 40 Am. Rep. 430. That county commissioners may be held liable for not having a railing or barrier of some sort along an embankment or precipice on a public road, if that be necessary, in the opinion of the jury, to make it safe, is shown by the case of *County Commissioners v. Broadwaters*, 69 Md. 533, 16 Atl. 223. And a railroad company was held responsible when there was no railing or other protection along the approach to its bridge, on which travel was permitted in carriages and on foot by persons paying toll. *B. & O. R. Co. v. Boteler*, 38 Md. 568. It is held to be the duty of turnpike companies to protect travelers by guards or railings of some kind along embankments which are steep and dangerous. *B. & Y. Turnpike Road v. Crowther*, 63 Md. 558, 1 Atl. 279; *B. & R. Turnpike Road v. State, Use of Grimes*, 71 Md. 573, 18 Atl. 884; *Turnpike Co. v. Hebb*, 88 Md. 132, 40 Atl. 879. In this latter class of cases this court has held that when there are differences in the grades on a turnpike "the company is bound to make safe and convenient turnouts to the side roads, and where they are so great, and the slopes to the side roads so precipitous, as to be necessarily dangerous, such places should be protected by proper safeguards." *Crowther's Case*, supra.

How far, then, are these principles applicable to this case? As we have seen, the railroad company for its own benefit changed the grade of this street for a distance of 60 or 70 feet, and for 20 feet south of its track made a 15 per cent. grade. At or about the place where the accident occurred, which was 20 feet from the south rail, the company laid a drain pipe under the approach, which emptied into a hole 2 or 3 feet deep, which was partly within the limits of the right of way of the defendant west of Harrison street extended, and partly within the limits of said street. The entire width of the street, as originally laid out, was 60 feet; it being intended to have sidewalks on each side, of 7 feet. Opposite the place where the accident occurred the street was made comparatively level to a point 14 feet from the western limits, and from there it sloped to the hole spoken of; it being 8.5 feet deep at the western limits of the street. There is some controversy as to what caused the horse to back, and the defendant had a number of witnesses tending to prove that the street where the accident occurred was not dangerous to travelers using reasonable care, notwithstanding the embankment, approaches, and hole, and offered other evidence tending to show that the grade was not a difficult one. "But whether it was unsafe and dangerous was a question for the jury, to be determined upon consideration of all the evidence." *Grimes' Case*, supra.

And as was there said: "Horses ordinarily safe and well broken will sometimes shy and start at strange or unusual objects along the road, and travelers ought not to be exposed to peril by dangerous embankments on the side of the road, and which by proper guards could be made ordinarily safe." It sometimes happens that horses which are usually quiet and reliable will back down a hill, by reason of some unknown trouble about the harness, or because something frightens them, or for some cause that cannot be anticipated. It is possible that the jumping and barking of the dog of Mrs. Whitby may have caused this horse to back, but, whatever the cause may have been, the fact is that it did back and fell over this embankment, which had been made by the railroad company as an approach to the crossing. Under the authorities cited above, it is clear that it was the duty of the defendant not only to keep the portion of the street occupied by its track in a safe condition, but the approaches to it. The seventh prayer of the defendant, therefore, ought not to have limited the duty of the defendant to keeping the portion of the road crossing its track, lying within its right of way, in repair, and there was error in granting it with that limitation.

The second and sixth prayers of the plaintiffs were intended to have the jury instructed as to the duty of the defendant in reference to the approaches to the crossing. The expression used in the second as to the highway being "severed" by the construction of the embankment is not altogether appropriate, although it would probably have placed an unnecessary burden on the plaintiffs. That expression is apparently taken from Eyer's Case, but there the highway was "severed" by the canal. The latter part of that prayer ought to have submitted more clearly to the jury the question whether the construction of the approaches to the crossing was done in such way as to make it dangerous to parties using due care in traveling on the highway, and also let the jury determine whether the conditions were such as to require a railing or other protection against danger on account of the elevation of the highway. No reference is made to the former condition of the street, and, if the construction of the approach to the crossing did not make the street more dangerous than it was before the railroad was built, the defendant should not be required to correct defects that existed prior to the time its road was built. What we have last said also applies to the sixth prayer. These prayers ought to have submitted to the jury to find from the evidence whether the approach to the crossing was so constructed as to make it dangerous to those using the highway, while exercising due and reasonable care, unless protected by a railing or some sufficient guard; and they could have been further instructed that, if they so

found, then it was the duty of the defendant to maintain such railing or other sufficient safeguard, and that, if they further found that Mrs. Whitby sustained the injury complained of by reason of the failure of the defendant to perform that duty, then the plaintiffs were entitled to recover, provided, of course, Mrs. Whitby had exercised due care, and the jury found such other facts as were proper to be incorporated in the prayers. In cases of this character it must ordinarily be left to the jury to determine what the condition of the road or street was. Each case generally depends upon its own facts, as to the necessity of having a railing or other safeguard to protect the traveling public; but if the jury find that a road or street is dangerous without it, and the duty rests on the defendant to keep it in safe condition, then the court should instruct the jury as to such duty, leaving it to determine whether the facts were such as to require a railing or other protection. These prayers were properly rejected.

The seventh prayer of the plaintiffs was properly rejected, because there was no evidence of an unnecessary obstruction or defect in the road, which caused the accident. It was said by counsel that it referred to the grade of the road, but, without deeming it necessary to determine whether that of itself would make the defendant responsible, the horse was on the level part of the road when he commenced backing, and such a prayer would be misleading.

The eighth, ninth, and tenth prayers are manifestly too broad, without referring to other objections to them. There was no occasion for so many prayers in this case, and we do not feel called upon to discuss each one at length.

The fourth prayer of the defendant is of a character that is well calculated to mislead the jury, and to cause them to attach more importance to items of evidence referred to in it than some of them justify. But independent of that, it embraces at least one statement that was clearly erroneous. It says that if the jury find that the plaintiff Annie L. Whitby was, at the time of the injury complained of, riding in a buggy drawn by an unsafe and foolish horse, which the plaintiffs, or either of them, knew, or by the exercise of reasonable diligence could have known, to be unsafe and foolish, etc. There were two suits tried together—one brought by Mr. and Mrs. Whitby for injuries sustained by her, and the other by Mr. Whitby for the loss of services of his wife, and for money expended by him by reason of her injuries. He was not driving with her, and, so far as the record discloses, did not know that she was going to use the horse; but if he knew that the horse was unsafe and foolish, and she did not, why should Mrs. Whitby be held responsible for her husband's knowledge on that subject? So, without further discussion of that prayer,

we think it ought to have been rejected. The evidence offered and excluded which is referred to in the first bill of exceptions does not become material, in view of the fact that the judgment must be reversed for reasons we have given. It is proper to add, however, that the record does not disclose any reversible error in that ruling. The case involved the condition of the embankment and hole when the accident happened, and, as the plaintiffs presumably offered evidence on that subject in chief, they cannot complain of the refusal of the court to allow them to offer other evidence on that subject in rebuttal.

For the reasons we have given, the judgment must be reversed. Judgment reversed, and a new trial awarded; the appellee to pay the costs.

MARYLAND CASUALTY CO. OF BALTIMORE v. GEHRMANN.

(Court of Appeals of Maryland. March 31, 1903.)

ACCIDENT INSURANCE—BREACH OF WARRANTY—MATERIALITY—APPLICABILITY OF STATUTE—JURY QUESTION—PRESENT PHYSICAL UNSOUNDNESS—WHAT CONSTITUTES—EXTENT OF DAMAGES—CONTRIBUTORY NEGLIGENCE—AVOIDANCE OF POLICY—BURDEN OF PROOF.

1. Acts 1894, p. 1059, c. 662 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 142a), provides that a breach of warranty in an application for insurance shall not effect a forfeiture unless it relates to some matter material to the risk. Acts 1888, p. 688, c. 424, § 82 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 127), declares that any person or corporation, etc., engaging to pay money in the event of "sickness, accident, or death," etc., shall be a life insurance company, and shall be subject to all the requirements of law applicable to such companies. *Held*, that the act of 1894 was applicable to accident insurance.

2. In a suit on an accident policy, the question whether breaches of warranty as to previous receipt of indemnity for accident and as to physical soundness are material to the risk is for the jury; the evidence showing that many years before the applicant had received a blow on the knee, which troubled him for a couple of days, and that one leg was slightly curved.

3. It is not a breach of a warranty of physical soundness, in an application for accident insurance, that the applicant's leg is slightly curved, and therefore more susceptible to inflammation from future accidents than a normal leg would be.

4. It will not terminate an insured's right to weekly indemnity on his accident policy that after an accident to his knee, resulting in complete disability, he prematurely went upon the street, thereby bringing on a hemorrhage of the knee and prolonging his disability.

5. Under Acts 1894, p. 1059, c. 662 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 142a), providing that a breach of warranty shall not avoid a policy, unless in a matter material to the risk, the burden of proving materiality is on the company.

6. The burden of proving a breach of warranty in an application for accident insurance is on the company.

Appeal from Court of Common Pleas: Henry D. Harlan, Judge.

Action by Charles Gehrmann against the Maryland Casualty Company of Baltimore. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSMERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

George Weems Williams and William L. Marbury, for appellant. Robert P. Graham, for appellee.

PEARCE, J. On April 6, 1901, Charles Gehrmann, of A., brought suit against the Maryland Casualty Company of Baltimore City, a corporation, upon a policy issued by it to him, and insuring him in the amount of a principal sum of \$5,000 in event of death resulting from external, violent, and accidental means, occurring during the continuance of the policy, and in the amount of \$25 weekly indemnity, for a period not exceeding 104 consecutive weeks, against bodily injuries sustained in like manner, and continuously and wholly disabling and preventing him from performing any and every kind of duty pertaining to his occupation as business manager of a lace manufactory. On March 22, 1900, during the continuance of this policy, and while the plaintiff was crossing the street after leaving an electric car, he fell upon the track and seriously injured his right knee, resulting immediately and continuously in complete disability, within the terms of the policy. No question is made as to the happening of the accident or the extent of the injury, but defense is made on other grounds, which will be stated later. The plaintiff claimed the stipulated weekly indemnity from March 22, 1900, to March 22, 1902, being 104 weeks, but the court restricted recovery to April 6, 1901, the date of bringing the suit. The only exception taken was to the ruling on the prayers, and, the verdict and judgment being for the plaintiff, the defendant has appealed.

The policy states upon its face that the insurance was made in consideration of \$25, and "of the warranties made in the application for this policy, copy of which is endorsed on the back hereof." Looking to this copy and to the original, which is embraced in the record, it appears that, in answer to a question put therein, the plaintiff stated he had never received indemnity for any accident, except from the Standard Company, and, in answer to another question, that he was in sound condition mentally and physically, whereas he testified in chief that in 1865 he received a blow on the right knee, which for two days gave him some trouble, but no longer, and that afterwards his leg was as strong as ever; and he admitted upon cross-examination that he had received about 15 years before from the United States Company an indemnity of \$205 for an ac-

cident. The alleged falsity of the two answers referred to are claimed to be breaches of warranty avoiding or forfeiting the policy. The answer to the first question was admittedly untrue, in fact, whether made deliberately or inadvertently; but the falsity of the other answer is a matter of inference, dependent upon the view taken of the testimony relating to it.

Dr. Steel, the plaintiff's family physician for 22 years, says that he saw the leg when attending him for other ailments, and that it was perfectly sound, though slightly curved; that after curvature a leg is just as sound as before, and the bone absolutely healthy and good. Dr. Blake, who was called in consultation after the accident of March 22d, said the plaintiff's leg was deformed, but not diseased or unsound, though he also said that after curvature a bone is more likely to set up inflammation in case of an accident by a blow or fall; and both these physicians said this leg had never been broken. Dr. Brinton, chief surgeon for the defendant company, saw the leg the day after the accident, and said such a leg was more liable to inflammation from any accident than a normal leg, and that plaintiff told him the curvature was caused by a fracture 25 or 30 years before, though this was denied by the plaintiff in rebuttal. Dr. Brinton also said on cross-examination that when he looked at the leg he knew it had never been broken. Dr. Trimble, the local surgeon of the defendant company, saw the leg on May 1st, and said that he did not consider that plaintiff, when insured, was in sound physical condition for work which would require him to walk a great deal, or to stand on his legs to work as a policeman, for instance, must do.

Upon this testimony, plaintiff offered eight prayers, of which only the fifth, sixth, and eighth were granted, and defendant offered ten, of which only the third and tenth were granted. The plaintiff's fifth prayer was to the effect that, if the jury found the representations as to physical soundness and as to the receipt of indemnity against accident were made in good faith, then the burden was on the defendant to show that these representations were false and material to the risk of insurance. The plaintiff's sixth prayer placed upon the defendant the burden of proving physical unsoundness at the time of making application for insurance; and the eighth prayer stated the measure of damages, in event of finding for plaintiff, to be \$25 per week from the date of the accident to the date of bringing suit. Of the defendant's granted prayers, the third was that plaintiff could not recover unless the injuries complained of, independently of all other causes, continuously and wholly disabled him from prosecuting his occupation; and the tenth was that as the statement of the plaintiff that he had received no indemnity for accident except from the Standard Company was admittedly untrue, though

warranted to be true, the verdict must be for defendant if the jury found such untrue statement related to a matter material to the risk of the insurance. Of the defendant's rejected prayers, the first, second, sixth, and seventh sought to take the case from the jury—the seventh because there was no legally sufficient evidence to warrant recovery; the first, because it did not appear that the injury complained of, independently of all other causes, continuously and wholly disabled the plaintiff; the second, because the uncontradicted evidence showed that defendant was not in sound condition physically when the application for insurance was made; and the sixth, because the uncontradicted evidence showed that plaintiff had received indemnity for an accident, other than that received from the Standard Company. The defendant's fourth prayer went upon the theory that the plaintiff warranted the truth of his statement that he was in sound physical condition, and that, if this statement was not true in fact, he could not recover, although made in absolute good faith. The defendant's fifth prayer asserted that if plaintiff had a curvature of the leg, which rendered it more susceptible to injury from a blow or fall, he could not recover unless the jury found his leg was an exception to this rule. The defendant's eighth and ninth prayers asserted the measure of damages to be \$25 per week from March 22, 1900, to May 11, 1900; both these prayers being based upon evidence that on May 11, 1900, plaintiff prematurely left his house and went upon the street, thereby bringing on a hemorrhage of the knee, to which his subsequent disability must be attributed.

The main question in the case, and that upon which the correctness of most of the rulings of the lower court depends, is whether the warranties made in an application for an accident insurance policy are within the scope and operation of chapter 662, p. 1059, of the Acts of 1894, codified in Poe's Supp. to Code Pub. Gen. Laws 1900, as section 142a of article 23. That section is as follows: "Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." In granting the plaintiff's fifth and sixth prayers, and in rejecting the defendant's first, second, fourth, fifth, sixth, seventh, eighth, and ninth prayers, the court acted upon the view that the case was governed by that section of the Code, and this we think is the correct view. There is no doubt that at common law the falsity of a warranty made in an application for an insurance policy was a condition pre-

cedent to the legal existence of the policy, and defeated recovery, even though not material to the risk. As stated by Lord Mansfield in *De Hahn v. Hartley*, 1 Term Rep. 343, "There is a material distinction between a warranty and a representation. * * * It is perfectly immaterial for what purpose a warranty was introduced, but, being inserted, the contract does not exist unless it be literally complied with." This is the law as stated in *Kerr on Insurance*, p. 319, and *Joyce on Insurance*, par. 1964; and it was so held in this state in *Mut. Ben. Association v. Wise*, 34 Md. 597; *Wineland v. Security Co.*, 53 Md. 276; and *Fidelity Mut. Association v. Ficklin*, 74 Md. 180, 21 Atl. 680, 23 Atl. 197. But this rule was held to operate harshly and unjustly in many cases, and led the Legislature of Maryland, following the example of other states, to enact the act of 1894, p. 1059, c. 662, for the purpose of relaxing this rule and modifying the harshness of its operation; and, as said by the Supreme Court of Pennsylvania in *Lutz v. Metropolitan Co.*, 186 Pa. 527, 40 Atl. 1104, in commenting upon a similar statute, "This act has effected a wise and wholesome change in life insurance contracts, in sweeping away a class of merely technical objections to recovery."

It was earnestly and ably argued by defendant's counsel that it would appear upon a careful examination of all the legislation in this state relating to the various kinds of insurance contracts that the Legislature never intended that section 142a should be applicable to accident insurance policies, and we have made such an examination; but, without going into an analysis of this branch of the argument, we are of opinion that the question is concluded by section 32, c. 424, p. 688, of the act of 1888, codified in *Poe's Supp. Code Pub. Gen. Laws*, 1900, as section 127 of article 23 of the Code, which in express terms declares that "any person, body politic or corporate, partnership or association, * * * making any engagement for the payment of any money, or other benefits in the event of sickness, accident, or death, or other contingency, * * * shall be deemed and taken to be a life insurance company within the meaning of this article, and shall be subject to all the requirements of law applicable to said life insurance companies." The will of the Legislature is here expressed in unambiguous terms. We have been furnished with no satisfactory reason for taking accident insurance companies out of its apparently designed operation; and the construction we have placed upon it is supported by the text-writers, and by the best-considered case to which we have been referred upon the question.

Cook on Insurance, § 2, states the law thus: "Where the insurance is confined to accidental bodily injuries, and death resulting therefrom, it is commonly called 'accident insurance,' which is, however, merely a form

of life insurance, and governed by the same general principles." The first volume of the second edition of *Amer. & Eng. Enc. of Law*, p. 785, says, "Accident insurance depends upon essentially the same principles as other kinds of insurance." In *Logan v. Fidelity & Casualty Company*, 146 Mo. 114, 47 S. W. 948, it was held that section 5855 of the Revised Statutes of 1889, declaring that suicide shall be no defense on a policy for the payment of so much money in case of death, or other contingencies stated, applies to policies issued by accident insurance companies as fully as to those issued by any other kind of life insurance companies. In that case the policy sued on is identical in terms with the policy in this case. All the arguments urged in this case for defendant were urged in that case, and were fully considered. A detailed history of the legislation of Missouri bearing upon the subject of life and accident insurance was given in the brief, in which it was argued that a class distinction was made between life and accident insurance, and the policies relating to such insurance, under separate articles, appropriately entitled "Life Insurance," and "Insurance Other than Life," and that as each department was provided for by provisions and requirements peculiar to each, as a separate business venture, and as section 5855 first appeared in the department entitled "Life Insurance," that the provisions of that section related only to policies issued by life insurance companies as were treated of in that article. But the court rejected this view, and after motion for reargument, overruled the motion, and adhered to the opinion. The court said: "The history of the legislation in this state furnishes no particular assistance in the matter of interpreting the meaning of section 5855. * * * It is the language of the section, and not its arrangement in the statute under one article or another, that must first be looked to, to determine its meaning. * * * The real object of the section, as the clear terms of its language express, is to affect all policies of insurance on life, from whatever class, department, or line of insurance the policy may be issued, or by whatever name or designation the company may be known. * * * When a policy covers loss of life from external, violent, and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance company admittedly would be insurance on life; then, why less insurance on life, because not coupled with provisions covering loss of life from usual or natural causes as well? * * * The mere addition of one or more features or elements in a contract of insurance on life, that may serve to give the policy or contract a particular designation in the business or insurance world, will not in the least divest the policy or contract of its chief character of insurance on life, or make the contract other than life insurance." The

case before us is stronger than the Missouri case, because there was in that state no statute similar to ours declaring that accident insurance companies shall be deemed life insurance companies, and shall be subject to all the requirements of law applicable to life insurance companies. The case of *Ticklin v. Fidelity & Casualty Company*, 87 Fed. 543, decided in the United States Circuit for the Western District of Missouri, six months before Logan's Case was decided, held that section 5855 of the Revised Statutes of that state did not apply to accident policies. But we prefer to adopt and follow the view of the state court, as the sounder and more salutary view.

Having determined that section 142a is applicable to this contract, the next question is whether the materiality of the alleged untrue statements, to the risk, is to be determined by the court or by the jury; and, under our own decisions, there can be no doubt that question in this case is for the jury. In *Chew v. Bank of Baltimore*, 14 Md. 299, Judge Bartol said: "It is everywhere conceded that the materiality of the disclosure or concealment is a question of fact which must be submitted to the jury." And it was so held in *Mut. Ins. Co. v. Deale*, 18 Md. 50, 79 Am. Dec. 673, and in *Fidelity Mut. Co. v. Ficklin*, 74 Md. 184, 21 Atl. 680, 23 Atl. 197. There may be cases in which it would not be proper to submit this question to a jury, as in *Lutz v. Metropolitan Co.*, 186 Pa. 527, 40 Atl. 1104, where the plaintiff's decedent declared in his application that he had never had spitting or raising of blood, though the proof showed he had for a long time been subject to it, and that he died of consumption a year or two after the insurance was effected. But in that case, while refusing to submit the question to the jury, the court said: "Ordinarily questions of good faith and materiality are for the jury, and, where it is doubtful whether the matter was material, the question of materiality must be submitted to the jury."

Applying these principles to the instructions now under consideration, it is clear, without further discussion, that the defendant's second, fourth, sixth, and seventh prayers, all of which are based upon the theory that section 142a does not apply, were properly rejected. Its first prayer was also properly rejected, because there was abundant evidence tending to prove that the disability of plaintiff was complete and continuous, and due to the injury complained of, independently of all other causes. Its fifth prayer was properly rejected because a defective leg is not necessarily an unsound leg, and also because susceptibility to inflammation from future accident is not present physical unsoundness. Its eighth and ninth prayers were both properly rejected because the doctrine of contributory negligence which they invoke is not applicable in this case. Cook

on Insurance, §§ 49, 51; *Providence Life Ins. Co. v. Martin*, 32 Md. 313.

The plaintiff's fifth and sixth prayers rest upon the theory that section 142a applies as we have determined it does, and there was no error in putting the burden of proof upon the defendant, as they do. "The defense of forfeiture must be pleaded and proven by the insurer." *Kerr on Insurance*, p. 778. "The burden is upon him who claims a forfeiture to show that he is clearly entitled to it." *Id.* 432; *Kasten v. Interstate Casualty Co.*, 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651; *Jones v. U. S. Mut. Accident Association*, 92 Iowa, 652, 61 N. W. 485; *Mut. Ben. Life Ins. Co. v. Wise*, 34 Md. 597. No objection was made in the brief or at the argument to the granting of plaintiff's eighth prayer on the measure of damages, and we presume it was waived.

Finding no error in the rulings of the court, the judgment will be affirmed. Judgment affirmed, with costs above and below.

MAYOR, ETC., OF CITY OF BALTIMORE et al. v. ROBERT POOLE & SONS CO.

(Court of Appeals of Maryland. April 1, 1903.)

MUNICIPAL CORPORATIONS — ASSESSMENT — FAILURE TO NOTIFY OWNER — ENJOINING COLLECTION—RATE OF TAXATION—POWER TO FIX.

1. Baltimore City Charter, § 164a, gives the appeal tax court power to revise the valuation and assessment of property in the city, and to lower or increase the same, but requires five days' notice, in writing, to the owner or person in charge of the property, of a purpose to increase the assessment. Section 150 provides that, before increasing an assessment, the appeal tax court shall notify the owner by written or printed summons, containing interrogatories in regard to the property, and fixing a day to answer such interrogatories and present proofs. Section 170 provides for an appeal to the Baltimore City court from an erroneous, illegal, or invalid assessment. *Held*, that failure to notify the property owner is a jurisdictional defect, and the assessment void, and the remedy therefor is by injunction to strike out the assessment, and not by appeal under section 170, which is provided for in cases where jurisdiction has attached but the assessment is illegal or erroneous.

2. Baltimore City Charter, § 40, requires the board of estimates to send, with the ordinance of estimates, a report showing the taxable basis for the next ensuing fiscal year, and the rate for the levy upon the basis of the ordinance of estimates, and the mayor and city council must fix a rate not less than that stated in the report. *Held*, that the power to determine or alter the rate of taxation is lodged exclusively in the mayor and city council, and is not within the jurisdiction of the appeal tax court.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Bill for an injunction by the Robert Poole & Sons Company against the mayor and city council of Baltimore and others. From a decree overruling a demurrer to bill, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Olin Bryan, for appellants. Randolph Barton, Jr., and Redmond C. Stewart, for appellee.

PEARCE, J. This appeal is taken from a decree of the circuit court of Baltimore City overruling a demurrer to a bill in equity filed by Robert Poole & Sons Company, a corporation, against the mayor and city council of Baltimore and James P. Gorter, city collector, praying that until all the provisions of section 19 of chapter 98, p. 127, of the Acts of 1888, known as the "Annexation Act," have been complied with, it may be decreed that the plaintiff shall not be liable to pay taxes for city purposes upon its property mentioned in the bill of complaint at a greater rate than 60 cents per \$100 of its assessed value; and that in the meantime, a mandatory injunction, under section 177 of article 16 of the Code of Public General Laws, may be issued, requiring the defendants to make out a tax bill against the plaintiff, as the owner of said property, at the rate of 60 cents per \$100 of its assessed value, and to accept from the plaintiff the tender of taxes lawfully due thereon at said rate, and to give to the plaintiff a full and complete receipt therefor; also praying an injunction to restrain the sale of said property for nonpayment of taxes.

The material averments of the bill are as follows: That the property in question is situated within the territory brought into the city by the annexation act, and that the conditions of section 19 of that act relating to the increase of the rate of taxation upon such property have not been fulfilled, though the bill concedes the right to increase the assessment, after the year 1900, in the manner prescribed by the new charter of the city; that no notice was ever given to the plaintiff of the purpose to change or alter the assessment of said property, as required by sections 150 and 164a of the new charter, nor of the purpose to increase the rate of taxation for city purposes on said property, and that the first knowledge plaintiff had of either the increase of assessment or the rate of taxation was obtained when he applied in 1901 to the collector for a tax bill for that year; that said property was assessed up to the year 1901 at \$116,125, upon which assessment he paid city taxes at the rate of 60 cents per \$100, but that for 1901, without any notice to it, and without its knowledge, the assessment was raised to \$137,900, and the rate of taxation to \$1.81½ per \$100; that upon a portion of the property, assessed at \$9,667, the city conceded 60 cents to be the proper rate, which has been paid, but that upon the residue, assessed at \$128,233, the city demands \$2,433.21, and has refused from it the tender of the true amount—\$804.37.

It is contended by the appellee that the

case of *Gittings v. The Mayor and City Council* (decided June 18, 1902, and not yet officially reported) 52 Atl. 937, is conclusive of the correctness of the ruling of the circuit court of Baltimore City, while the appellants urge that the provisions of section 170 of the new charter were not fully brought to the attention of the court in that case, as they have been in this, and earnestly argue that under that section the appellee, when he first obtained knowledge of the increased assessment and of the increased rate of taxation, upon delivery of the bill for 1901 by the collector, had the right then to demand an abatement both of the assessment and rate of taxation, and the right of appeal to the city court within 30 days of refusal to make such abatement, and that, thus having a clear legal remedy, equity has no jurisdiction to relieve him now. We are not able, however, to agree with this view. Section 164a of the new charter gives the appeal tax court the power to revise the valuation and assessments of real and personal property in the city, and to lower or increase the same. But, as a condition precedent to the exercise of such power, it requires five days' notice, in writing, of such purpose to increase the assessment, to be given to the owner or person in charge of the property, or, if these cannot be reached, then by posting such notice on the land. This is the foundation of the jurisdiction of the appeal tax court, and when the foundation gives way the superstructure falls. We cannot perceive that section 170 of the new charter at all touches the jurisdiction of the appeal tax court. It deals with questions arising after a valid, though an erroneous, assessment has been made. The remedy against an invalid assessment—one made without jurisdiction to make it—is to strike it out, although the result be to lose the taxes for that year; the remedy against an assessment, valid as an assessment, but illegal because of the manner in which it was made, or erroneous because of under or over valuation, is by application recognizing the jurisdiction to assess, but attacking the legality or regularity of the form of proceedings resulting from the conceded jurisdiction. In *Gittings v. Mayor and City Council*, supra, we said, "It is of no avail that the law requires notice to be given of the purpose to alter or change an assessment, if no notice in fact be given, and it cannot be said that a taxpayer is in default for failure to appeal from an increase of his assessment if he has neither knowledge nor means of knowledge of the purpose to make such increase," and we are still of opinion that this is a correct statement of the law, and the logical and necessary result of the decision in *Monticello Company v. The Mayor and City Council of Baltimore*, 90 Md. 416, 45 Atl. 210. Section 150 of the new charter bears materially upon this question, and confirms the conclusion reached in the *Gittings Case*. That section provides that, before increasing the assess-

ment of any property theretofore assessed, the appeal tax court shall notify the owner by written or printed summons containing such interrogatories in regard to the property as they may require to be answered under oath, and fixing a day to answer such interrogatories and to present such proof as the owner may desire. This section contemplates a hearing before action is taken by the appeal tax court, when its mind is open and unbiased, and not after action, when an ex parte conclusion has been reached, and the natural and inevitable disposition to sustain the position taken has been aroused. We have considered this appeal, so far as is possible, as if the question were for the first time presented; but we are led irresistibly to the same conclusion reached in the Gittings Case.

There is, however, a branch of the question involved here which was not involved there, and that is the right of the appeal tax court to increase the rate of taxation, irrespective of the basis of taxation, and, as counsel have requested us to state our views upon that branch of the case, we shall do so as briefly as possible. Section 40 of the new charter requires the board of estimates in each year to procure from the proper municipal department, and to send with the ordinance of estimates to both branches of the city council, a report showing the taxable basis for the next ensuing fiscal year, and the rate for the levy of taxes sufficient to meet the necessities of the city upon the basis of the ordinance of estimates, and the mayor and city council, in the ordinance making the annual levy of taxes, must fix a rate not less than that stated in the said report. It is thus clear that the appeal tax court, whether with or without notice to the taxpayer, has no power to determine in the first place, or to alter, the rate of taxation. That can be determined only by the ordinance of the mayor and city council, and, when so determined, is applicable throughout the city, except as to property exempted from that rate by the annexation act.

The evil or wrong against which the taxpayer is intended to be protected, and which was denounced in the Monticello Case, is the increase in his proportionate share of the burden of taxation without notice designating a time and place where he may contest the justice of such increase, and it is not material whether this wrong is worked by an increase in the assessment or in the rate of taxation imposed. The basis might be lowered and the rate increased, and yet the final result might be an increase in the party's proportionate share of the burden of taxation. If the statute law prescribes no particular notice for this purpose, the law of the land requires reasonable notice of time and place where the party may be heard. There is no hardship imposed upon the city in this requirement, which is only designed to secure orderly procedure and to give the taxpayer his day in court, and the city,

through its assessment books and tax rolls, has at command every facility for giving such notice. When, therefore, the appeal tax court may be informed, or have reason to believe, that any property within the territory annexed under the act of 1888 has been brought within those conditions of the annexation act which will warrant the imposition of the regular city rate of taxation, they should give reasonable notice to the owner of their purpose to impose this rate, fixing a time and place when he can be heard in relation to the matter. We have not been advised of, and have not discovered, any specific provision of law prescribing how, and by what authority, property in the annexed territory which has been brought within the conditions of the act of 1888 warranting the imposition of the city rate of taxation is to be put into that category upon the books of the appeal tax court, but it would seem, in the absence of such specific provision, that that court should have power to make such classification. The correctness of such classification, however, is a question of fact dependent upon proof as to the opening of avenues, streets, and alleys through the property, and the erection of the prescribed number of houses upon a block as provided in the annexation act, and, if no tribunal has been provided for the determination of that question, it follows that relief against such erroneous classification can be had only through the restraining power of a court of equity; and the exercise of that power, in cases involving the question of the rate of taxation under the annexation act, was sustained in *Sindall's Case*, 93 Md. 526, 49 Atl. 645, *Goebel's Case*, 93 Md. 749, 49 Atl. 649, and *Kuenzel's Case*, 93 Md. 750, 49 Atl. 649, where the injunction was denied only because the amount involved was not sufficient to give a court of equity jurisdiction.

Decree affirmed, with costs above and below.

STATE v. ROLLO.

(Court of General Sessions of Delaware. New Castle. Nov. 26, 1901.)

LARCENY — INDICTMENT — OWNERSHIP OF PROPERTY—LARCENY FROM CORPORATION — AVERMENT OF CORPORATE NAME.

1. An indictment alleging a larceny of goods from a designated corporation need not specifically allege that the owner of the goods was a corporation.
2. An indictment for larceny from a corporation need not allege the correct name of the corporation. It is sufficient to allege the name by which it is generally known.

John Rollo was indicted for larceny, and moved to quash the indictment. Motion overruled.

The indictment charged, on August 1, 1901, the larceny, by the defendant, of certain

¶ 1. See *Indictment and Information*, vol. 27, Cent. Dig. § 277.

books, giving the value of the same, "of the goods and chattels of Wilmington Institute," etc.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Robert Adair, for defendant, moved to quash the indictment as insufficient because it did not allege that the Wilmington Institute, whose property was alleged to have been stolen by the defendant, was a corporation, or an association of persons, or indicate in any way what it was; and, furthermore, it did not aver the correct corporate name thereof.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State.

Where the name of a corporation is stated as owner, there need be no averment that it is a corporation.

It is sufficient to allege and prove the name by which a corporation is generally known.

PER CURIAM. Indictment sustained.

The defendant thereupon entered a plea of guilty.

STATE v. SOLIO.

(Court of General Sessions of Delaware. New Castle. Nov. 21, 1902.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INDICTMENT—SUFFICIENCY—DESIGNATION OF OFFENSE.

1. An indictment for selling liquor illegally, averring that defendant at a certain place "did then and there unlawfully sell intoxicating liquor" to a certain person, does not set out with sufficient certainty the nature and character of the offense charged.

John Solio was indicted for selling liquor illegally, and moved to quash the indictment. Indictment quashed.

The indictment was as follows: "November Term, 1902. New Castle County—ss.: The grand inquest for the state of Delaware, and the body of New Castle county, on their oath and affirmation respectfully do present that John Solio, late of Wilmington hundred, in the county aforesaid, on the first day of September in the year of our Lord one thousand nine hundred and two, with force and arms, at Christiana hundred, in the county aforesaid, at a certain place there situate, to wit, at the place known as 'Montchanin Station,' in the hundred and county last aforesaid, and at which said place the business of selling intoxicating liquors was then and there carried on, he, the said John Solio, did then and there unlawfully sell intoxicating liquor, to wit, unlawfully to one John Mackinnon, against the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the state. Herbert H. Ward,

Attorney General. Robt. H. Richards, Dep'ty Atty. General."

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State. J. Frank Ball, for defendant.

LORE, C. J. The court are unanimously of the opinion that this indictment should be quashed because it does not set out with sufficient certainty the nature and character of the offense charged. Indictment quashed.

DEVALINGER v. MAXWELL.

(Supreme Court of Delaware. Jan. 18, 1903.)

VENDOR AND PURCHASER—STATUTE OF FRAUDS—CONTRACT FOR SALE OF LAND—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—JUDGMENTS—LIENS—OBLIGATION OF CONTRACT—CONSTITUTIONAL LAW.

1. Before delivery of a deed, the grantee discovered that there was a judgment against the vendor; and an agreement was made whereby the deed was delivered, and a sum less than the agreed consideration paid. In an action by the vendor for the balance of the price he claimed that, by a parol agreement, the balance was to be paid as soon as the judgment should be discharged; and the vendee claimed that the amount paid was in full settlement, in consideration of his assuming the risk of the judgment. *Held*, that on no phase of the testimony was the contract one within the statute of frauds, as a contract for the sale of land.

2. An agreement which may by any possibility be performed within a year, in accordance with the intention of the parties when made, is not within the statute of frauds.

3. Plaintiff's bill of particulars was: "D. to M. Dr.: To balance of purchase money of hotel property promised to be paid January 1, 1886, \$400." And the plaintiff testified that defendant agreed to pay him \$400 in addition to a sum that defendant had paid plaintiff on the sale of a hotel whenever a certain judgment against plaintiff was discharged by the operation of a certain law, which went into effect January 1, 1896, after the alleged agreement. *Held*, that there was no variance between the bill of particulars and the proof.

4. Rev. Code 1852, amended in 1893, p. 814, c. 110, § 3, provided that after the 1st of January, 1896, no real estate should be taken on execution on any judgment recovered prior to January 1, 1886, and that after such date the lien of such judgment should be lost, unless before that it should be renewed by agreement or scire facias; and section 1 provided that judgments should not continue a lien on real estate for over 10 years. *Held* that, as to a judgment lien which had attached before the passage of the statute, it was not unconstitutional, as impairing the obligation of contracts.

Error to Superior Court, New Castle County.

Suit by Alexander Maxwell against Charles Devallinger. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before NICHOLSON, Ch., LORE, C. J., and SPRUANCE and PENNEWILL, JJ.

¶ 2. See *Frauds*, Statute of, vol. 23, Cent. Dig. §§ 74, 75.

Harry Emmons, for plaintiff in error. Edwin R. Cochran, Jr., for defendant in error.

PENNEWILL, J. On or about the 7th day of March, 1893, Alexander Maxwell, the defendant in error, conveyed to Charles Devalinger, the plaintiff in error, certain real estate situated in Middletown, in New Castle county, and known as the National Hotel property. The sum of \$22,000 had been agreed upon by the parties to the conveyance as the consideration, but prior to the delivery of the deed the grantee was apprised of the existence of an old judgment against the grantor for the real debt of \$190.41, with interest thereon from December 10, 1857. This judgment was No. 206, to the March term, A. D. 1857, of the superior court of said county, and was open and unsatisfied upon the records of said court at the time of the conveyance, March 7, 1893. On account of the judgment, the grantee, the plaintiff in error, objected to the payment of the entire consideration money as originally agreed upon; and the sum of \$21,600 was paid to and accepted by the grantor, and the deed delivered by him to the grantee. At the time of the delivery of the deed, however, an agreement is alleged to have been made by the said parties respecting the judgment and the balance of the purchase money, to wit, the sum of \$400; and it is that agreement upon which the action in the court below was based, and with which we have to deal.

According to the testimony of the plaintiff in error, as disclosed by the record, it appears that the sum of \$21,600 paid by him at the time of the delivery of the deed was accepted by Maxwell in full settlement for the property, and that, in consideration of the abatement of \$400 of the price originally agreed upon, he (Devalinger) should and did assume all risks on account of the old judgment. From the testimony of Maxwell, on the other hand, it appears that no abatement of the original price was made, but that Devalinger agreed to pay the balance of the consideration, to wit, the sum of \$400, when the law known as the "Judgment Lien Law" should go into effect, and discharge the real estate from the lien of the judgment. The said law became operative January 1, 1896, and its effect, the defendant in error contends, was to discharge the real estate afore-said from the lien of the said judgment.

There were numerous assignments of error filed, but the briefs and arguments of counsel cover the following only, viz.: (1) The court below erred in not charging the jury that the contract proved by the plaintiff below as his cause of action was a contract for the sale of lands, and, not being in writing, was void under the statute of frauds. (2) The court below erred in not charging the jury that the said contract was one which, under its terms, could not

be performed within the space of one year from the making thereof, and, not being in writing, was void under said statute of frauds. (3) The court erred in refusing to charge the jury that there was a fatal variance between the contract proved and the bill of particulars filed by the plaintiff below.

In the argument before this court the plaintiff in error relied mainly upon the first of said assignments of error. It does not appear that the court below specifically considered this question, and presumably it was not pressed or argued.

Was the agreement which was made with respect to the payment of the balance of the \$400, and upon which the suit was entered in the court below, in any sense an agreement for the sale of lands, and therefore within the operation of the statute of frauds? It must be manifest to any one who carefully reads the testimony in the case that when Maxwell accepted the sum of \$21,600, and delivered the deed to Devalinger, the original agreement respecting the sale of the property was terminated. The title to the real estate in question had then passed from Maxwell, and all his rights therein were extinguished. There was no longer, and could not be at the time the action below was brought, any agreement in existence for the sale of the hotel property from Maxwell to Devalinger. After the discovery of the judgment, and subsequent to the original contract, Maxwell agreed to part with the property for \$21,600, and made a new agreement with Devalinger, not in relation to the sale of the real estate, for that was consummated, but in relation to the old judgment and the \$400. Devalinger testified that Maxwell accepted the \$21,600 in full payment for the property, and made the abatement of \$400 because of the risk the purchaser would assume on account of the judgment. According to his testimony, therefore, the contract, so far as it concerned the real estate, was absolutely closed when the \$21,600 was accepted and the deed delivered. According to the testimony of Maxwell, he did accept said last-named sum and deliver the deed, but Devalinger then agreed that he would pay him the sum of \$400 when the judgment was discharged by the operation of the said law known as the "Judgment Lien Law," and it was so discharged January 1, 1896. From no part of the evidence, therefore, does it seem that the agreement sued upon was one respecting real estate, but, on the contrary, it was one that was different from and subsequent to the original agreement, and referred to the old lien, and to the \$400 which was to be regarded as in the nature of an indemnity till the judgment was discharged. We think, therefore, the court below did not err in refusing to charge the jury that the contract was void under the statute of frauds.

The case of *Duncan v. Blair*, 5 Denio, 196.

is the only one cited by the plaintiff in error which could be considered as even remotely bearing on the point under discussion; and this is found, upon examination, to be not at all in conflict with the conclusion we have reached. In that case there was a contract for the sale and conveyance of land to the plaintiff on terms agreed to by him; the sellers, on their part, agreeing to pay off and discharge the incumbrances on said land. The court said: "The contract was entire. It is counted upon as such, and, if any contract was established by the evidence, it was of that character. Being a mere verbal contract for the sale of land, the statute makes it void. It may be that an agreement to pay off incumbrances would be good, although not in writing; but a stipulation to that effect, forming a part of a verbal agreement for the sale of land, is invalid." This is obviously a very different case from the one we are considering. In the case before us the agreement sued upon was in no sense a part of the contract which was made for the sale of real estate, and was not even made at the same time. In the case in *Denio* the contract was entire, covering both the sale of real estate and the discharge of incumbrances thereon, and it was not pretended that there was any other or different contract.

The plaintiff in error also contends that the contract sued upon was a contract which, under its terms, could not be performed within the space of one year from the making thereof, and, not being in writing, was void under said statute, and that the court below erred in refusing to so charge the jury. We think the court, in its charge to the jury, stated the law upon this point very clearly and accurately, as follows: "The statute of frauds applies to agreements which, according to the intent and express understanding of the parties at the time of the making thereof, cannot possibly be performed within the space of one year thereafter. If the performance of the agreement within one year from the time of the making thereof be distinctly contrary to and inconsistent with the intent of the parties at the time of entering into the same, then such an agreement must be evidenced by writing, as required by the statute; else a recovery thereon cannot be had. But while it is true that, when it is clearly the intention of the parties that an agreement shall not be performed within a year, it must be reduced to writing, or some memoranda or note thereof must be made and signed by the party to be charged therewith, yet it is equally true that the statute does not extend to an agreement which may by any possibility be performed within a year, in accordance with the understanding and intention of the parties at the time when the agreement was entered into. And if the specific time of performance be not determined upon at the time of the making of the contract, yet, if by any

possibility it may be performed within a year, the statute does not apply, and such an agreement need not be in writing. And likewise when the performance of the agreement rests upon a contingency which may happen within a year."

The cases cited by the plaintiff in error are not in conflict with the law as here stated. They were for the most part cases in which the courts held that, while a suit could not be maintained upon a verbal contract which was not to be performed within one year, yet suits could be maintained to recover for services actually rendered where there had been a performance of the contract. He cites no authority inconsistent with the proposition that the statute does not apply if the agreement sued upon may be performed within one year.

The contention of the plaintiff in error with reference to a variance between the bill of particulars filed by the plaintiff below and the proof cannot be sustained, for the reason that there was no such variance as the law regards as fatal in such cases. The bill of particulars was as follows: "Charles Devalinger to Alexander Maxwell, Dr.: January 1, 1896. To balance of purchase money of National Hotel property, Middletown, Delaware, promised to be paid January 1, 1896, \$400.00. Interest on same from January 1, 1896." Maxwell testified that Devalinger agreed to pay the \$400 whenever the old judgment was discharged by the operation of the above-mentioned law, and that it was in fact so discharged January 1, 1896, the time when the law became effective. There was therefore a substantial agreement between the bill of particulars and the proof. Perfect exactness and agreement are not required. It is sufficient if the defendant is reasonably informed by the bill of particulars of the subject-matter involved, the nature and character of the claim, and the several items thereof which he may be required to meet. We think there was no error in the statement of the law by the court below upon this point.

There is another assignment of error, which involves the constitutionality of a statute of this state, and upon which it may be well for this court to express an opinion, although it was not referred to in the argument before us. The reason it was not argued was, perhaps, because the plaintiff in error had become satisfied that the charge of the court below upon that point was free from error. We allude to the statute, chapter 778, 19 Laws Del. (Rev. Code 1852, amended in 1893, p. 814, c. 110), entitled "An act limiting judgment liens upon real estate, and for other purposes," passed May 4, 1893. Section 3 of that act provides that "after the first day of January, A. D. 1896, no real estate shall be seized or taken by virtue of execution process upon any judgment for the recovery of money entered or recorded in the superior court of this state in any county prior to the first

day of January, A. D. 1886, and wholly due and payable on or before the day and year last aforesaid; and from and after said first day of January, A. D. 1896, the lien of such judgment upon real estate shall be lost, unless prior to that time such lien shall be renewed and continued by agreement filed, or scire facias sued out in manner as provided in the preceding section of this act." Section 1 provides "that no judgment for the recovery of money, hereafter entered or recorded in the superior court of this state in any county, howsoever recorded in said court, shall continue a lien upon any real estate for a longer term than ten years next following the day of entry or recording of such judgment," etc. The said act, before it went into effect, was limited in its operation to New Castle county. The court below rightfully declared "that it was competent for the Legislature to pass said act, shortening the time during which the lien of a judgment entered thereafter may continue upon real estate without a renewal of such judgment, and that its application to the lien of judgments which had attached before the passage of the said act is not open to any constitutional objection; a reasonable time (from May 4, 1893, to January 1, 1896) having been given by the terms of the act to judgment creditors in which to renew and continue their liens. The statute merely affects the remedy for the enforcement of the judgment in shortening the time of the existence of the lien thereof without renewal as provided by the act. And it does not impair the obligation of the contract of the judgment creditor." 1 Black on Judgments, § 403; McCormick v. Alexander, 2 Ohio, 66; The Bank of United States v. Longworth and Wright, 1 McLean, 35, Fed. Cas. No. 923; Cooley's Const. Lim. (5th Ed.) top page 384, star page 287. We are clearly of the opinion that the effect of said act was to discharge the real estate of Maxwell, the plaintiff below, from the lien of said judgment on the 1st day of January, 1896.

The judgment of the court below is affirmed.

MONTELLO BRICK CO. v. PULLMAN'S PALACE CAR CO.

(Superior Court of Delaware. Sept. 15, 1902.)
SUITS AGAINST CORPORATIONS—WRONG NAME—LEAVE TO FILE AFFIDAVIT OF DEFENSE—REQUISITES.

1. When, in a suit involving a mechanic's lien, against a corporation, it has been sued under a name which it has ceased to be known by, the corporation may appear specially and file an affidavit of defense; but such affidavit must show that the corporation is using a name different from that which it was sued under, and the necessary facts connected therewith.

Suit by the Montello Brick Company against the Pullman's Palace Car Company. The Pullman Company granted leave to file an affidavit of defense.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Walter H. Hayes, for plaintiff. Anthony Higgins, for Pullman Co.

Mr. Higgins: I ask leave to appear on behalf of the Pullman Company, a corporation of the state of Illinois, and file an affidavit of defense. It is impossible for Pullman's Palace Car Company to appear, it having gone out of existence as such. Its successor has a right, however, to defend the property of the company. If judgment were to go against Pullman's Palace Car Company, it would create a cloud upon the title, if it did not make a lien. The owner of the property, of course, must have his day in court. This is not such a situation as calls for a special appearance.

SPRUANCE, J. It is really an application to allow your client to intervene.

Mr. Higgins: I think it goes a little further than a mere intervention. It is not a third party, but the actual defendant. The mechanic's lien law gives to the party sued the right to come in and defend. We are the party, but they have sued in the wrong name. We ask to appear in said suit and file therein an affidavit of defense.

Mr. Hayes: That must be based upon an affidavit, and the reasons set out. If there has been any change in the name of the corporation, it should appear by affidavit.

LORE, C. J. We will give you leave, Mr. Higgins, to appear specially for the purpose named, and file your affidavit of defense, but the affidavit must show how it is that you are using a different name from that under which you were sued, setting out all necessary facts.

Mr. Hayes asked to note an exception. The court held that an exception would not lie to the above decision.

CHORMAN v. QUEEN ANNE'S R. CO.

(Superior Court of Delaware. Sussex. Oct. 15, 1901.)

WIFE'S REALTY—HUSBAND'S TENANCY—INJURY TO CROP—RIGHT TO SUE—SURFACE WATER—RAILROAD COMPANY—RIGHT OF DRAINAGE—LIABILITY FOR DAMAGES.

1. A husband who takes possession of his wife's land with her consent, puts in a crop, furnishing the material therefor, and is to have the entire proceeds, may maintain action in his own name for a tortious injury to the unsevered crop, whether his contract with his wife is written or verbal, express or implied.

2. A railroad company gains no right, through its duty to passengers or shippers to protect its roadbed, to cast surface water on the land of an adjacent owner, different from that which inheres in any private owner.

3. A railroad company which, by digging ditches alongside its track embankment, accumulates surface water and casts it on adjacent land in unnatural quantities, is liable for damages to crops caused thereby.

Action by Philip H. Chorman against the Queen Anne's Railroad Company. Verdict for plaintiff.

Action on the case for damages to the wheat crop of the plaintiff by reason of wa-

ter being gathered along the embankment made by defendant road and discharged through trunks upon the lands whereon the plaintiff's wheat crop was growing.

The testimony of the plaintiff, in response to interrogatories by his counsel, Mr. White, concerning his ownership and possession of the wheat crop, was as follows: "Q. Were you farming in January or February, 1899? A. Yes, sir. Q. Did you have any crops pitched at that time? A. Yes, sir; I had a crop of wheat sowed at that time. Q. On whose land was it sowed? A. My wife's. Q. Whose crop of wheat was it? A. Mine. Q. In whose possession was the crop of wheat? A. Mine. Q. Who sowed it, supplied the manure, and all that sort of thing? A. I did; I found all. Q. It was your crop of wheat? A. Yes, sir; my crop of wheat. Q. By what right, and how, do you hold or possess the farm you now occupy, and occupied in 1899? A. Well, my wife beired it on the death of her grandfather. Q. Then how did you get it? A. I simply taken the farm and lived there and used it as my own. She had no voice in it. She gave up entirely to me. Q. Who stocked the farm? A. I did. Q. Who had the rents and profits from it? A. I did. Q. Did she have any part or share in it? A. No, sir. Q. Did that relate to the entire farm? A. That related to the entire farm."

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Robert C. White, for plaintiff. Charles W. Cullen and Charles M. Cullen, for defendant.

Defendant's counsel moved for a nonsuit on the grounds: First. That the plaintiff's proof failed to show that he was a tenant of the land and entitled to the possession or ownership of the said crop of wheat, for damages for which the action was brought; that the wheat crop was not goods and chattels, but was part of the realty growing upon the land, and there was no severance. Second. The allegation in the narr. is that the defendant designedly and maliciously caused the overflow of water upon the plaintiff's land, and the proof did not show such to be the fact; the proof being that the water was drained of necessity upon the low land where the plaintiff's wheat crop was growing, that being the only place where the water could go at that time out of that cut. There was a variance, therefore, between the allegation in the plaintiff's declaration and the proof. The plaintiff, furthermore, was not entitled to recover, as the great quantity of water arose from a phenomenal storm, and was the act of God. Third. That the alteration in the flow of mere surface water affords no cause for action to the person who may suffer loss or detriment therefor against one who does no act inconsistent with the due exercise of dominion over his own soil.

LORE, C. J. The motion for nonsuit is refused.

Plaintiff's Prayers.

First. That it is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbors, and, if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands.

Second. That, if an owner of land divert the natural course of surface water upon his own land, he must suffer the inconvenience himself, and cannot carry it off upon the land of his neighbors.

Third. That an owner of land has no right to gather the surface water upon his own land and discharge it by artificial means on the lands of his neighbor.

Fourth. Railroad companies, like individuals, cannot gather the surface water on their lands into ditches and drains, and discharge them in a body on other lands to their injury.

Fifth. That, if the defendant could have carried the water off without injury to the plaintiff, it was bound to do so.

Defendant's Prayers.

First. That a mere possession is not sufficient to show title to the crop of wheat alleged to have been destroyed, unless proof be adduced sufficient to show that the plaintiff was vested with a good title thereto.

Second. That, if the water caused to flow through the ditches on each side of the railroad tracks at Chorman's crossing, did not immediately flow upon said lands on which the crop of wheat was growing, as alleged in said declaration, but continued to flow on the defendant's lands for several hundred feet until the water reached the natural slope towards said wheat crop, then and in that case the plaintiff cannot recover any damages whatever.

Third. That the said defendant had a legal right, for the protection of its property and its passengers and freight, to use all proper means for the removal of any surface water caused by melting snow and rain occasioned by an extraordinary storm which endangered its roadbed.

Fourth. That if the said damages accrued by reason of an excessive rain and snow fall occasioned by an extraordinary or phenomenal storm, it being the act of God, the defendant is not liable.

Fifth. That if the cutting of the ditches was necessary by reason of the excessive rain and snow, all occasioned by an extraordinary or phenomenal storm, the defendant had the right to cut the same—any injury was the act of God.

LORE, C. J. (charging jury). Philip H. Chorman, the plaintiff, claims that in Febru-

ary, 1899, he was in possession of a tract of land situate in Broadkin hundred, in this county, through which the roadbed and the track of the Queen Anne's Railroad Company, the defendant, passed. That on that land he had growing a crop of wheat on about nineteen acres. That on or about that date the defendant cut a ditch on each side of its railroad track, through a ridge or bank of earth called "Chorman's Crossing," from east to west. That through said ditches the defendant conducted and turned a large quantity of surface water, which had accumulated from melted snow on the east side of the crossing, into and upon his wheat field, where it remained for a long time, until thereby the wheat crop was destroyed, and he was damaged to the extent of the value of the wheat so lost. That the water would not have flowed upon his wheat field if the said ditches had not been so cut. The defendant, on the other hand, claims that the plaintiff was not possessed of the wheat crop. That, even if he was so possessed, the wheat field was at the bottom of a large basin, and that the same and other water would have found its way there even if the ditches had not been cut. Moreover, that the company had a right to so cut the ditches and discharge the water, to protect its roadbed and assure the safety of passengers and freight. That the company is not liable, because the damage resulted from an extraordinary snowstorm. This action is founded upon tort; that is, upon the wrongful act of the defendant. In order to recover, therefore, the plaintiff must satisfy you by a preponderance of the evidence: (1) That he was in possession of the wheat crop; (2) that the crop of wheat so in his possession was destroyed by the water wrongfully discharged upon it through the ditches cut by the defendant, and not by water coming from any other source. If the plaintiff was not in possession of and entitled to the wheat, he cannot recover. If you believe from the evidence that the title to the land was in Chorman's wife; that with her consent and approval he was in possession of the land, and with the like consent and approval he furnished the manure, put the wheat crop in; that he was to have the rents and profits; that she was to have no part or share in it; that she gave it up entirely to him—in such case the relation so created, whether verbal or written, express or implied, would give to him such legal possession of the wheat as to support this action. In other words, if you conclude, from all the evidence in the case, that the husband was possessed of the wheat as his own, and the wife was to have no part thereof, then in such case he was in lawful possession. Whether he was so possessed or not is a question of fact for you to determine from the evidence. If you find he was, your next inquiry is, was the wheat destroyed by the water wrongfully turned upon

it through the ditches cut by the defendant company?

For the purposes of this case, the plaintiff and the defendant company are private parties, and the rules of law governing the rights and duties of private owners of adjoining lands in respect to surface water are applicable. We know no public right or privilege belonging to the company to use or dispose of its surface water different from that of a private owner. Whatever may be its rights and duties to see to the safety and protection of its passengers and freight as a common carrier, they do not enter into its relation to the plaintiff as owner or possessor of adjoining lands. As to these adjoining lands, they are on an exact equality. The rule in respect to surface water is well expressed in *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50, decided in the Supreme Court of Wisconsin in 1870, in the following language: "It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbor, and, if he cannot, he must suffer the inconvenience arising from its presence. We know of no adjudged case where it has been held that the waters of a natural pond or reservoir upon the land of one person may be drained by him directly upon the land of another, greatly to his injury; nor where one owner has been allowed, by means of a ditch, trench, sewer, or the like, to gather the surface water from his own land and throw it upon the land of another, so as materially to lessen its value and produce injury to the owner. Such a proceeding would be contrary to natural right and justice, and the law does not sanction it. If the owner of land has the right, by artificial means, to prevent the flowing thereon of surface water from the land of another which in a natural state would flow there, it follows a fortiori that no owner may, with impunity, turn the surface water from his land upon the land of another to the injury of the latter, when, without the employment of artificial means for that purpose, the same never would have flowed there at all."

The same doctrine is tersely expressed in *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519, cited by the defendant, where it says: "But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water flowing or collecting on his land, and his right in the water of a natural water course. In such water, before it leaves his land and becomes part of a definite water course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his own use, or get rid of it in any way he can, provided only that he does not cast it, by drains or ditches, upon the land of his neighbor."

In the same case it is said: "There is a

manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own."

This distinction, we may say in passing, practically disposes of the cases cited by the defendant, viz.: 11 Exch. 380; *Ashley v. Wolcott*, 11 Cush. 195; *Goodale v. Tuttle*, 29 N. Y. 459; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Flagg v. City of Worcester*, 13 Gray, 601—which were all cases of preventing the flow of surface water upon one's own land, and are clearly not applicable to this case, where the damage is claimed to result from casting water upon another's land.

In *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, a carefully considered case, it was held that if a ditch made by the defendant for the purpose of draining his land, and which terminated within 60 feet of the line of the plaintiff, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of ordinary use and improvement of his farm.

In *Whalley v. Lancashire, etc., Co.*, L. R. 13 Q. B. D. 131, it was held that, where an embankment was cut to let off accumulations of an unprecedented rainfall, and though it was reasonably necessary to save the embankment, and though the water would have percolated through it in time, it was held a wrong.

Cooley on Torts, star page 580, says: "These cases seem to confine the obligation of the owner of the lower estate to receive the water flowing from the upper estate to 'waters which flow naturally without the art of man; those which come from springs, or even by natural depressions of the place.' The conclusion seems to be that where the surface waters are collected and cast in a body upon the proprietor below, unless into a natural water course, the lower proprietor sustains a legal injury, and may have his action therefor."

Cases might be multiplied almost indefinitely in support of this doctrine. Indeed, we find no well-considered cases to the contrary.

It must be borne in mind that we are not considering cases where for purposes of improvement the owner of land is preventing the flow of surface water upon it from other lands. In this case we deal only with the principles of law which govern the throwing of surface water from the land of one owner into and upon the land of a neighboring owner. If, therefore, you find that, by digging the said ditches, the defendant caused surface water to flow upon the wheat field of the plaintiff, which destroyed the wheat crop in his possession there, and that the

said water would not have found its way upon such wheat field if those ditches had not been cut, the plaintiff would be entitled to recover. If, on the other hand, you find from the evidence that the plaintiff was not possessed of said wheat crop, or that, being so possessed, the wheat was destroyed by water from some other source, or from the same water which would have run upon it by other courses even if the ditches had not been cut, then your verdict should be for the defendant. Should you find for the plaintiff, your verdict should be for such amount as, from the proof, the crop of wheat was reasonably worth.

Verdict for plaintiff for \$135.

STATE v. FAHEY.

(Court of General Sessions of Delaware. New Castle. Sept. 30, 1902.)

SUBORNATION OF PERJURY—ELEMENTS—CRIMINAL LAW—PRESUMPTION OF INNOCENCE—BURDEN OF PROOF—REASONABLE DOUBT—EVIDENCE—ACCOMPLICE TESTIMONY—SUFFICIENCY.

1. To constitute the crime of subornation of perjury, it is necessary that the testimony of the witness claimed to have been suborned was false; that it was given by him willfully and corruptly, knowing it to be false; that defendant knew or believed that the testimony given would be false; that he knew or believed the witness would willfully and corruptly so testify; and that he induced or procured witness to give such false testimony.

2. A person charged with crime is presumed to be innocent until the crime is proven to the satisfaction of the jury beyond a reasonable doubt.

3. The burden of proving a crime beyond a reasonable doubt is on the state.

4. A conviction of subornation of perjury should not be had on the uncorroborated testimony of the witness suborned.

5. In criminal cases the guilt of accused must be fully proven, and no weight of preponderating evidence is sufficient unless it produces full belief of the fact to the exclusion of all reasonable doubt.

6. Reasonable doubt is not possible doubt, but is that condition of mind in which there is not an abiding conviction to a moral certainty of the truth of the charge.

Patrick Fahey was indicted and tried for subornation of perjury. The jury disagreed.

The first count of the indictment was as follows: "That at the November term, A. D. 1901, of the court of general sessions of the state of Delaware, in and for the county of New Castle, holden at the city of Wilmington, in the county of New Castle and state of Delaware, before the Honorable Charles B. Lore, chief justice, and the Honorable William C. Spruance and Ignatius C. Grubb, associate judges of the said state, and sitting in said court, the said court then and there being in session, and the said court having then and there authority to hear and determine divers felonies, misdemeanors and other offenses against the laws of the state

¶ 1. See Perjury, vol. 39, Cent. Dig. § 614.

of Delaware, a certain indictment was presented and returned in due course of law by the grand jury for the said county against one John Lynn, the said indictment being No. 49 to the November term, A. D. 1901, aforesaid, of said court, and the said indictment charging the said John Lynn with obtaining by certain false pretenses in said indictment set forth certain money, to wit, the sum of fifty-six dollars, lawful money of the United States of America, from one Horace G. Bettew, the said Horace G. Bettew being then and there the receiver of taxes and county treasurer of the said county of New Castle, and that afterward the said John Lynn was duly and legally arraigned upon said indictment and pleaded to the same that he was not guilty thereof; upon which issue such proceedings were had that afterward, to wit, at the said November term, A. D. 1901, of the said court of general sessions, in and for the county aforesaid, so held, as aforesaid, a trial was had and held before a jury duly drawn and impaneled, between the said state of Delaware and the said John Lynn, upon the said indictment, upon which said trial evidence was given on behalf of said state of Delaware against the said John Lynn that the misdemeanor in said indictment specified and charged, to wit, the misdemeanor of obtaining money by false pretenses, was committed by the said John Lynn as in said indictment set forth. And the jurors first aforesaid upon their oaths and affirmations respectively aforesaid do further present that Patrick Fahey, late of Wilmington hundred, in the county of New Castle aforesaid, being a person of an evil and wicked mind and disposition, and devising and intending as much as in him lay to pervert the due course of law and justice and to cause and procure the said John Lynn to be entirely acquitted of the said misdemeanor charged on him by the said indictment and to escape punishment for the same, did, before the said trial, to wit, on the first day of November in the year of our Lord one thousand nine hundred and one, at Wilmington hundred aforesaid, then and there unlawfully, corruptly, wickedly, maliciously and feloniously solicit, suborn, instigate and endeavor to persuade one Frederic Vansant to be and appear as a witness, at the trial of the said issue, upon which issue the said state of Delaware was the plaintiff and the said John Lynn was the defendant, for and on behalf of the said John Lynn, the defendant in the said issue as aforesaid, and upon the said trial falsely to swear and give in evidence upon his corporal oath, taken upon the Holy Evangelists of Almighty God, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue and to the matters therein and thereby put in issue in substance and to the effect following, that is to say: That he, the said Frederic Vansant upon some day in the

month of October in the year of our Lord one thousand nine hundred, was at the house of the said John Lynn in Elsmere, in the county aforesaid, and while so at the house of the said John Lynn, on the said last mentioned day that he, the said Frederic Vansant heard a certain conversation between the said John Lynn and a certain Lawrence M. Whiteman concerning the payment of the sum of fifty-six dollars in money by the said Lynn to the said Whiteman, and that he, the said Frederic Vansant, on the said last-mentioned day, while so, as aforesaid, at the said house of the said Lynn, saw the said Lynn give to the said Whiteman certain money, and that he, the said Frederic Vansant, on the said last-mentioned day, while so, as aforesaid, at the said house of the said Lynn as aforesaid, saw a certain Caleb Johnson present at the said house of the said Lynn, and standing near the said Lynn and the said Whiteman during the said above-mentioned conversation."

The second count was similar to the above, with a slight variation in the phraseology.

At the May term, 1902, Mr. Biggs, for defendant, moved to quash the indictment.

After hearing argument, the court sustained the indictment.

At the trial the state proved the formal allegations in the indictment as set out above, and produced Frederic Vansant, the alleged suborned witness, who admitted that his testimony in the case of State v. John Lynn (tried at the November term, 1901) 51 Atl. 878, as to seeing Lynn paying one Lawrence M. Whiteman money, was false, testified further as follows: "I was working at Ninth and Girard, on Tatnall street, tearing down some houses. I think there were five houses there, if I am not mistaken, that we were tearing down; and Richard Fall and Oscar Comegys and Chas. Collins were helping me tear them down; and Mr. Fahey and Mr. Lynn drove around there, and hallooded for me to come across to them. Q. Where were you when they hallooded for you? A. On the opposite side of Tatnall street. I went across to Mr. Fahey and Mr. Lynn, and Mr. Fahey said, 'Fred—' Q. (interrupting witness). Where was Lynn when Mr. Fahey started to talk? A. Why, I suppose, maybe ten or fifteen feet, or a little further than that, down the street from him. Mr. Fahey said: 'Fred, Johnson had been up before Bird, and stated that he saw Lynn give Whiteman this money in the presence of you'—that is, myself. I said: 'Mr. Fahey, I have not anything to do with that. I never saw Mr. Johnson there; never saw anything about it, and know nothing about it at all.' He said: 'I know you did not, but we have got to do something. Lynn is in a hole, and liable to go to the workhouse, and I may get in a hole, and you know how things are, and we want to help him out if we can.' I said: 'Mr. Fahey, I cannot do anything like that; it might get me in a hole;' and he said: 'No,

but you must do something for him. We have got to do the best we can.' I said, 'I cannot do it,' and then he walked down to Lynn, and they both came back towards me, and, of course, they both came at me; one saying one thing, and the other another. Of course, I cannot remember everything they did say at the time. It would be impossible, and I could not do such a thing. They made some suggestions what they would do and what he would do if I would do it. Q. What suggestion did he make that he would do if you would do it? A. Well, he said if I would say that I saw Johnson and Lynn and Whiteman have this transaction on the porch, that he would swear that he had taken me out there. I said: 'Mr. Fahey, you did not take me out there, because I never was out there. I don't know anything about it.' 'Well,' he said, 'if you say that you went out there with me, I will swear that I had taken you out there.' And of course they talked on and planned one thing and another, and finally, of course, I gave my consent that I would do it by him, saying that he would swear that he had taken me out there."

The defendant admitted being at the place mentioned by Vansant, together with Lynn, a short time before the trial of the latter, and called Vansant over from the buildings to the opposite side of the street, and told him that Lynn wanted to talk with him, and then left Vansant and Lynn together, going further up the street, and calling another man from the buildings; but denied that he ever had any such conversation with Vansant as the latter had testified to. The defense contradicted Vansant's testimony (to the effect that Fahey talked to him while Lynn walked away) by testimony by one of the witnesses for the state, who was present at the buildings upon the occasion referred to by Vansant, and confirmed the statement of Fahey that he walked off, and left Lynn and Vansant talking together. Vansant was also contradicted upon other material points by several other witnesses, and the defense closed by producing six witnesses, each of whom testified that the reputation of Vansant for truth and veracity was bad, and that they would not believe him on his oath.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State. John Biggs and Samuel S. Adams, for defendant.

LORE, C. J. (charging jury). Patrick Fahey is charged in the indictment in this case with subornation of perjury. At common law, perjury is committed "when a lawful oath is administered in some judicial proceedings in due course of justice to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question." Where the crime is committed at the

instigation or procurement of another, it is termed "subornation of perjury." 3 Green. Ev. § 188. In this case it is charged that Patrick Fahey suborned or procured Frederick Vansant to commit perjury. The crime charged is a felony of high grade. It is one that touches the administration of justice in a vital point, and, where successful in its purpose, procures a miscarriage of justice by inducing false verdicts, and thus turns right into wrong. It undermines and destroys the confidence of the people in verdicts of juries, and opens the way to anarchy, or the righting of wrongs by resort to violence, instead of to courts of justice. In this state happily the crime is of rare occurrence. No such case has heretofore come within the cognizance of this court. This, gentlemen, is the character of the crime you are called to pass upon in this case. It is a crime that invokes the sanction of the Almighty to a lie. We have spoken thus of the gravity of the crime that your attention should be directed to the importance of this case, and to the care and consideration you should give to it.

But the mere magnitude of the crime charged, however heinous, or however difficult it may be to prove it, can never justify a conviction unless the guilt of the accused be proved to the satisfaction of the jury beyond a reasonable doubt. In order to convict of this crime, you should be satisfied from the evidence: (1) That the testimony of Vansant, the witness claimed to have been suborned, was false; (2) that it was given by him willfully and corruptly, knowing it to be false; (3) that Fahey knew or believed that such testimony would be false; (4) and that he also knew or believed that Vansant would willfully and corruptly so testify; (5) that Fahey induced or procured Vansant to give such false testimony. It has been tersely said by the court in *Commonwealth v. Douglass*, 3 Metc. 245: "To constitute the crime of subornation of perjury, the party charged must have procured the commission of the perjury by inciting, instigating, or procuring the guilty party to commit the crime."

Your attention is now directed to some of the principles of law governing this case. Every person charged with crime is presumed by the law to be innocent, and that presumption remains as a protection and shield until the crime is proved to the satisfaction of the jury beyond a reasonable doubt. The burden of so proving the crime is upon the state. "In proof of the crime of perjury it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict. But this strictness has long since been relaxed; the true principle of the rule being merely this: that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence." 1 Green. Ev. § 257. "The degree

of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge. * * * It may be regarded as the settled course of practice not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice. 1 Green, Ev. § 380. The same rules are applicable to the case of a witness who has perjured himself in a former trial; and in cases of this character there should not be a conviction of a felony upon the uncorroborated testimony of such a witness.

The rule governing the weight of evidence necessary to convict and as to what constitutes a reasonable doubt is clearly stated by Chief Justice Gilpin in *State v. Goldsborough*, *Houst. Cr. Cas.* 316. In civil cases it is the duty of the jury "to weigh the evidence carefully, and to find for the party in whose favor it preponderates, although it may not be free from reasonable doubt. But in criminal cases the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scales in his favor. It is, therefore, a rule of criminal law that the guilt of the accused must be fully proved; and neither a preponderance of evidence nor any weight of preponderating evidence is sufficient unless it produces full belief of the fact to the exclusion of all reasonable doubt in the mind of the jury. But that does not import, in contemplation of law, a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after entire comparison and full consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot feel any abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent of the offense charged until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the

benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty which convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

Governed by these instructions as to the law, you are to reach your verdict in this case from the evidence which you have heard in this courtroom, and from that alone. The case challenges your most careful and conscientious consideration. It is your duty alike to see that the innocent are acquitted and that the guilty are convicted. If, therefore, from the evidence in this case, you are satisfied beyond a reasonable doubt that Patrick Fahey suborned or procured Frederic Vansant to commit the crime of perjury, as charged in the indictment, your verdict should be "Guilty." On the other hand, should you not be so satisfied from the evidence, it is your duty to return a verdict of "Not guilty."

The jury disagreed.

BOULDEN v. GOUGH.

(Superior Court of Delaware. New Castle.
Feb. 21, 1902.)

TROVER—CONVERSION—NECESSARY PROOF—
RIGHT TO TRANSFER PERSONAL PROPERTY—
TITLE—OWNERSHIP—POSSESSION—INNO-
CENT PURCHASER.

1. To entitle plaintiff in trover to recover, he must prove ownership and right of possession to the property at the time of the alleged conversion, and a conversion by defendant.

2. No one can convey a valid title to goods or personal property unless he be the owner or lawfully represents him.

3. Even though a party takes possession of personal property as an innocent purchaser for value, he acquires no title, if the property has been wrongfully taken from one having a general or special ownership therein.

Trover by David Boulden against John T. Gough. Verdict for defendant.

Argued before LORÉ, C. J., and PENNEWILL and BOYCE, JJ.

Alexander B. Cooper and Walter H. Hayes, for plaintiff. William T. Lynam, for defendant.

PENNEWILL, J. (charging jury). This is an action of trover, which is a remedy to recover the value of personal property wrongfully converted by another to his own use. The suit is brought by the plaintiff, David Boulden, against the defendant, John T. Gough, for the recovery of the value of a lot of wheat which the plaintiff claims was his property, and which was on or about the 26th

day of November, 1898, taken, without his consent, by his former tenant, Joseph S. Petit, and delivered to the defendant, who converted the same to his own use. The plaintiff contends, as you have observed, that Petit gave him the said wheat in satisfaction of a certain debt of \$430.29 which he (the said Petit) owed him, or in satisfaction of so much thereof as might be realized from the sale of the wheat, and that at the time Petit removed the wheat from the granary where it was stored, and delivered the same to the defendant, it belonged to, and was the property of, the plaintiff. The plaintiff further contends that the quantity of wheat so taken and delivered to the defendant, and by the defendant converted to his own use, was about 475 bushels, the value whereof was at the time 70 cents per bushel. The defendant, on the other hand, claims that he is not liable to the plaintiff for anything, because the wheat in controversy was not the property of the plaintiff at the time he bought it, but that the title thereto was at that time still in Petit, with whom he dealt and from whom he purchased.

To entitle the plaintiff to recover in an action of trover, two points are essential to be proved: (1) Property in the plaintiff, and a right of possession at the time of conversion; and (2) a conversion of the property by the defendant to his own use. It is admitted, however, by the defendant, that 404 bushels and 10 pounds of the wheat in controversy were delivered to him by Petit at the time alleged by the plaintiff, and that its value was 68 cents per bushel; that being the price he paid for it. It is also admitted by the defendant that he did convert that quantity of wheat to his own use, and without the consent of the plaintiff; his defense being that the wheat at the time of its conversion was not the property of the plaintiff. It is manifest, therefore, that the important question for you to determine from the evidence in this case is, was the wheat, at the time of its conversion by the defendant, the property of the plaintiff? No one can convey a valid title to goods or personal property unless he be the owner, or lawfully represents the owner. If personal property be wrongfully taken from the possession of a person who has at the time a general or special property therein, and delivered to another, no title passes thereby to the person to whom it is delivered, even if he be an innocent and bona fide purchaser for value, because the seller, in such case, having no right or title to the property, can convey none to the purchaser.

If you believe from the preponderance (that is, the weight) of the evidence that the wheat in question belonged to and was the property of the plaintiff at the time of its conversion by the defendant, your verdict should be for the plaintiff. If, however, you do not so believe, your verdict should be for the defendant. If your verdict should be for the plaintiff, it should be for such a sum as you be-

lieve from the evidence to be the value of the wheat converted by the defendant, at the time of the conversion, with interest.

Verdict for defendant.

PRATESI v. MAYOR, ETC., OF CITY OF WILMINGTON.

(Superior Court of Delaware. New Castle.
Feb. 17, 1903.)

VIOLATION OF CITY ORDINANCE—INFORMATION.

1. In a criminal proceeding for violating a city ordinance by obstructing a street, an information is the proper paper to be filed, both in the municipal court and on appeal.

Appeal from Municipal Court of City of Wilmington.

Charles Pratesi was convicted of violating a city ordinance, and he appeals. Demurrer to the information overruled.

This was a criminal proceeding against the appellant for a nuisance, viz., for violating a city ordinance by obstructing King street, a public thoroughfare of the said city. The appellant was arrested upon a warrant, and, upon information filed, was tried, convicted, and sentenced to pay a fine of \$1 and costs of prosecution. An appeal was taken to the superior court, and the appeal duly entered. Thereupon the respondent filed an information as in the proceedings below. To this information the appellant demurred specially, and alleges that such "an information is not the proper and legal paper to be filed in this action."

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

A. D. Chaytor, Jr., for appellant. David J. Reinhardt, for respondent.

LORE, C. J. The court is clear that an information such as filed in this case conforms to the nature of the proceedings below and also in this court, and that it is the proper paper to file, in contemplation of the statute in that behalf. The demurrer is therefore overruled.

KLAIR et al. v. WILMINGTON STEAM-BOAT CO.

(Superior Court of Delaware. New Castle.
Feb. 24, 1902.)

CARRIER—LIABILITY—INEVITABLE ACCIDENT—MEASURE OF DAMAGES—VALIDITY OF RULE LIMITING LIABILITY.

1. A carrier is not liable for the death of a mare due to an attack of meningitis, of which it was not forewarned, when it did all in its power to care for the animal after the attack.

2. A rule of a carrier that its liability is limited by the rate of freight paid on shipments is binding on shippers having notice.

Action on the case for damages by William H. Klair and another against the Wil-

Wilmington Steamboat Company. Verdict for plaintiffs.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

T. Bayard Helsel, for plaintiffs. Horace G. Knowles, for defendant.

LORE, C. J. (charging the jury). Gentlemen of the Jury: William H. Klair, the plaintiff, has brought an action against the Wilmington Steamboat Company to recover the value of a gray Percheron mare, which he alleges he delivered on or about the 14th or the 13th of May, 1901 (the time we think not material in this case), to the Wilmington Steamboat Company, here in this city, for safe carriage to the city of Philadelphia, claiming that at that time the defendant was a common carrier between Wilmington and Philadelphia. He claims that while in the care of defendant for such safe carriage the mare was injured so that it subsequently died, and this suit is brought to recover from the defendant the sum of \$175 as damages, which the plaintiff claims is a fair valuation of the mare. The defendant, on the other hand, claims that it is not liable; that it exercised all due care that was incumbent upon it as a common carrier; and that the injuries to the horse did not result from any act or misconduct or neglect on its part whatever.

It is conceded in this case that the defendant company was a common carrier, and that as such common carrier on that day (either the 13th or 14th of May, 1901) received this mare from the plaintiff for transportation from Wilmington to Philadelphia. We find the liability of common carriers nowhere better expressed than in our own reports, by Chief Justice Booth, in *McHenry v. The Philadelphia, Wilmington & Baltimore R. R. Co.*, 4 Har. 448, 449: "A common carrier is bound to exercise the strictest care, and to deliver safely at their place of destination the goods entrusted to him. He is regarded by the law in the light of an insurer; and, in case the goods are injured, lost, or destroyed, nothing will excuse or discharge him but the act of God or of the public enemies. By the act of God is meant such inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning and tempest, floods and inundation, etc. This rule of the common law has been spoken of as severe and rigorous; but, like most of the principles of the common law, it is founded in wisdom and dictated by sound policy. The exigencies of society require the adoption of the rule. Men engaged in the various business transactions of life are obliged from necessity to intrust common carriers with their goods. If such carriers are to be excused from all loss, destruction of, or injury to goods, in case it be shown that they have used due care, precaution, or attention, the party employing them could

never show the want of such care, unless he had an agent to accompany his goods during the whole time occupied in their transportation. The carrier might at all times, by fraud and collusion, or by means of his own agents or servants, throw the burden of proof upon the owner or consignee of goods, by making out a statement of facts which although untrue in itself would show the exercise of ordinary care and diligence. Therefore, in actions against common carriers, founded on their ordinary liability for the loss of goods, the inquiry is not whether the carrier has used due care or been guilty of negligence; but whether he can show that the loss happened by inevitable accident or by the public enemies."

That doctrine is stated also in *Reed & Walker v. P. W. & B. R. Co.*, 3 *Houst.* 206, and is modified to some extent by Chief Justice Gilpin in *Truax v. P. W. & B. R. Co.*, *Id.* 245, as follows: "And, as common carriers, they are held responsible for all losses, except those occasioned by inevitable accident, called the act of God, or of the public enemy. The act of God denotes such causes as are beyond the control of the carrier, and produce loss without the intervention of human agency. This rule of law, however, must be understood with the following qualifications, namely, that the carrier is not to be held responsible for ordinary wear and tear and chafing of the goods in the course of their transportation, or for their ordinary loss or deterioration in quantity or quality, or of any inherent natural infirmity or tendency to damage, depreciation, or decay," etc.

We say to you, therefore, that if you believe from the evidence that the injury to and death of this animal was due to an attack of meningitis, of which the defendant was not forewarned, and that defendant did all in his power to protect the animal after being so attacked with meningitis, then that would be an unavoidable accident.

Having given you thus far the principles of law governing the liability of a common carrier, the next question is as to the matter of damages. The ordinary rule controlling the subject of damages, in case the article is lost, destroyed, or injured during transportation, is the value of the article so lost, destroyed, or injured. But we will say to you in this case that if you believe from the evidence that there was a rule of the company, of which the plaintiff had notice when he shipped this mare, that the liability of the company was fixed by the rate of freight paid, and that for the purpose of obtaining a certain rate of freight he reported to the company a value of the mare, thereby limiting, as it were, by tacit agreement, the liability to such a sum as was named by him, that would be the amount of the liability of the company. Otherwise, although there may have been such a rule, if he had no notice of it, the measure of damages would

be the fair value of the mare at the time of snipment, if the injuries and death resulted from the defendant's want of care, as a common carrier, as we have laid the law down to you covering the matter.

Verdict for plaintiffs for \$100.

PENNSYLVANIA R. CO. v. STEVENSON et al.

(Court of Chancery of New Jersey. July 29, 1902.)

TRUST FUND—DISINTERESTED HOLDER—INTERPLEADER—EMPLOYEES SAVING FUND—BENEFICIARY—DEPOSIT SUBJECT TO REGULATIONS—WILL CHANGING BENEFICIARY.

1. The holder of a fund, in which he has no interest, has no duty to decide as to the contentions of rival claimants therefor, from whom he is entitled to be protected, and may in good faith bring them and the fund into court, and compel them to interplead.

2. Money was deposited in a railroad employees' saving fund, the depositor signing an application, in which he designated his wife as the person to receive the money on his death. He also signed an agreement, in the deposit book given him, to be bound by the regulations therein, one of which provided that on the death of a depositor the money belonging to him should be paid only to the person designated in his application to receive the same. *Held*, that the deposit was a trust, and that the wife's right to the money on the death of her husband was unaffected by his will, bequeathing all his estate to his executor.

Bill by the Pennsylvania Railroad Company against Charles R. Stevenson, executor of Walter Earl, Jr., and another, to obtain a decree compelling defendants to interplead for a fund held by complainant. Decree that complaint be dismissed, with its costs, and a fee allowed on payment of fund into court, and further decreeing wife of deceased to be entitled to fund.

Alan H. Strong, for complainant. Thomas E. French, for defendant Charles R. Stevenson. William T. Boyle and John W. Westcott, for defendant Ellen V. Earl.

GREY, V. C. (orally). The bill of complaint is filed to obtain a decree that the defendants may interplead respecting their conflicting claims upon a fund which the complainant holds, but in which it has no interest. The fund in question is a balance of money deposited with the complainant company's "employees' saving fund" by Walter Earl, Jr., who died in February, 1901, testate. The defendant Stevenson is the executor of his will. The defendant Mrs. Ellen V. Earl is his widow. Each defendant claims to be the owner of the balance of the fund in the hands of the complainant company. The latter is a mere custodian, indifferent between the claimants, and by this suit brings the money and the claimants into court, asking that they interplead. The counsel for the defendant Stevenson, executor of Earl, while insisting on his right to the fund, admits

that the complainant company has a status to ask for an interpleader decree. The counsel for the defendant Mrs. Earl resists the complainant's claim to an interpleader, insisting that on the face of the transaction, as exhibited by the pleadings, the complainant, by its own acknowledgment, is bound to pay the fund to Mrs. Earl; that there is no possible question of her right on which the complainant can ask the protection of this court, and that its bill should be dismissed.

The undisputed facts exhibited are these: The decedent, Earl, was an engineer in the complainant company's employ. The complainant inaugurated a saving fund depositary, whereby its employees might, subject to certain regulations, deposit moneys with the Pennsylvania Railroad Employees' Saving Fund, and receive a book, in which the deposits were entered. By the regulations, withdrawals might be made, in a prescribed mode, by the depositor, the book being balanced with each withdrawal, so that it always showed the residue on deposit. Earl became a depositor by signing and delivering to the complainant company an application in these words:

"The Pennsylvania Railroad Employees Saving Fund Depositary, at Camden, N. J., Station. March 16th, 1888.

"To the Superintendent of the Pennsylvania Railroad Employees' Saving Fund:

"I, Walter Earl, Jr., of 204 York St., Camden, N. J., county of Camden, State of N. J., at present employed as * * * Engineer on * * * Division or Dept., C. & A. Railroad, hereby express my desire to avail myself of the Pennsylvania Railroad Employees' Saving Fund, upon the terms and conditions set forth in its Regulations, as printed in the regular deposit book of the Fund.

"I agree that in the event of my death all deposits standing to my credit in said Saving Fund and all interest due thereon, shall be paid to my wife, who resides at 204 York St., Camden, county of Camden, in the State of N. J., or, if not living, to my legal representatives.

Walter Earl, Jr.

"Witness: J. W. Callahan, Agent, Camden."

He received a book, which contained the printed regulations referred to in his application. At the end of these regulations, in the deposit book, Earl signed this additional agreement:

"Camden, N. J. Station.

"March 20th, 1888.

"I, Walter Earl, Jr., of Camden, county of Camden, State of N. J., at present employed as Engineer, C. & A. Division, Penna. Railroad, having made application to become a depositor in the Pennsylvania Railroad Employees Saving Fund, do hereby agree to be bound by the foregoing regulations, which I have read, or have had read to me.

"Walter Earl, Jr.

"Witness: J. W. Callahan, Agent at Camden, N. J."

The first book was "No. E. 28," and was continued over into a second one, "No. E. 215"; the first entry in the latter book being "1897, Jany. 1. Balance from book No. E. 28, \$201.61." The balance in hand in the later book, at the date of the last item, is \$1,578.08. This sum, amounting, with interest thereon, to \$1,600.37, is the fund presently in dispute, which the complainant holds, and fears to pay to either claimant.

Neither party defendant challenges the complainant's good faith and impartiality in its attitude of a stakeholder. Each party defendant claims a right to be paid the whole of the fund—Mrs. Earl by the effect of Mr. Earl's deposit of the fund for her benefit; and Mr. Stevenson by bequest under Mr. Earl's will, which he claims destroys any right Mrs. Earl might have had. The complainant stands ready to pay the fund to either, but cannot justly be required to pay it twice, and invokes the aid of this court to protect it from two hostile suits, in separate rights, to recover one fund.

The complainant, under such conditions, has an equity that it shall not be sued twice when it can have but one liability. The counsel for the defendant Mrs. Earl advances, as his one objection to the protection of the complainant, the argument that the complainant's receipt of the money, accompanied by instructions to pay it to Mrs. Earl in case of Mr. Earl's death, makes the complainant's course so plain that it would be entirely safe in paying the fund to Mrs. Earl. But if it be admitted that Mrs. Earl probably has the better claim, and that she may ultimately show it, this does not relieve the complainant from its embarrassment meanwhile. The claim of Mr. Stevenson, as executor of Mr. Earl's will, that the will has destroyed the deposit agreement, is admitted to be advanced and maintained in good faith. It will not be settled by any payment of the fund to Mrs. Earl. If that were done, the complainant would be certainly left to stand the expense of defending a suit brought by Mr. Stevenson about a matter in which the complainant admittedly has no interest, with quite a possibility that a novel question may be decided against justifiability of its payment of the fund to Mrs. Earl: in which case the complainant would be obliged to pay the money over again to Mr. Stevenson as executor. The complainant has no duty to decide between the respective contentions of these claimants upon the funds in its hands. It is entitled to be protected from both. I will advise a decree that the complaint be dismissed, with its costs, and a fee allowed, according to the statute, upon depositing the fund in court.

The vice chancellor then heard testimony as to the respective claims of the defendants upon the fund.

GREY, V. C. (orally). The counsel for the defendant Mrs. Earl claims that the fund is

in the nature of a matured insurance; that the complainant received the deposits, compensated itself for its payments of interest on it by the use of the money, and agreed to pay it over to Mrs. Earl upon Mr. Earl's death. The deposit scheme, as indicated by the application, the printed regulations, and the agreement that they should be binding upon the depositors, lacks the elementary characteristics which attend upon an insurance. There is no undertaking by the company to compensate either Mr. or Mrs. Earl in case either should suffer a loss by death or otherwise. The transaction was a deposit made by Mr. Earl with the company for his own benefit to the extent that he observed a specified mode of withdrawal, and for Mrs. Earl's benefit as to any residue of the fund which remained at Mr. Earl's death. This appears by his original application. He applied to be admitted to avail himself of the benefits of the fund "upon the terms and conditions set forth in its regulations, as printed in the regular deposit book of the fund." In his application he declares: "I agree that in the event of my death, all deposits standing to my credit in said Saving Fund and all interest due thereon, shall be paid to my wife, who resides at," etc. The scheme, as shown by the regulations, is a plan whereby those of the company's employes who enter into it may save their money, have it available in case they may themselves choose to withdraw it in the specified mode, and be assured that upon the death of any one the balance standing to his credit will be paid to the person whom he has named in his application. These are the general objects sought to be accomplished by the plan. The regulations define the terms and conditions upon which the deposits were made. The very first one declares that the fund should be in charge of a superintendent appointed by the directors of the Pennsylvania Railroad Company. The depositor, by this, dispossessed himself of the money deposited. Then follow provisions for the convenient depositing of money by the employes, the entry thereof in a book given to the depositor, the forwarding to the company's office of duplex tickets noting the deposit, and the allowance of interest to the depositor. There is a provision that depositors may withdraw money by giving 10 days' notice in the form of an order, which must be forwarded, with the depositor's book, to the superintendent of the fund. Upon receipt of the order and book the superintendent enters in the deposit book the amount to be withdrawn, deducting it from the total sum deposited, so as to show the balance after the withdrawal. The superintendent then issues an order on the treasurer of the Pennsylvania Railroad Company for the amount to be withdrawn, and sends it, with the book, for delivery to the depositor, who may draw the money on the order, or deposit it in bank. The right is reserved to require 30 days' no-

tice for the withdrawal of the entire amount credited to any account. In case any depositor becomes insane, or otherwise incapacitated to act, provision is made for the payment of so much of the deposit as may be necessary to meet the pressing wants of the incapacitated depositor or his wife or children. The eighteenth regulation deals with the payment of the amount on deposit at the time of the death of the depositor, and is in these words: "18. Upon the presentation to the Superintendent of the Fund of satisfactory proof of the death of a depositor, the money belonging to him shall be paid over only to the person designated in his application to receive same; or if the person so designated shall not be then living, said funds shall be paid either to the heirs or personal representatives of the deceased depositor as the Board may determine." There is no provision anywhere in the regulations which authorizes the depositor to revoke or alter the terms and conditions set forth in the regulations, or to withdraw or dispose of the money deposited in any other manner than that prescribed by the regulations. They contain no provision whatever whereby "the person designated in the application" to receive the money remaining on deposit at the time of the depositor's death may be changed, or the rights of such person may be in any way affected by any act of the depositor, either *inter vivos* or by his will, except that he may withdraw the moneys in the mode prescribed by the regulations, and in no other way. All moneys not so withdrawn at the time of his death, he has directed shall be paid "to the person designated in his application to receive the same." He has, by the express terms of his written agreement, denuded himself of all power to revoke or alter the disposition of the balance of the deposits made by him by his application and the applying regulations.

Notwithstanding the express direction of Mr. Earl, in his original application, that the balance of the deposit on hand at his death should be paid to his wife, and the explicit declaration of the eighteenth regulation that it "shall be paid over only to the person designated in the application to receive same," counsel for Mr. Stevenson insists that the fund passed, by Mr. Earl's will, to his executor. This contention necessarily rests upon the idea that the title to the fund remained at all times the property of Mr. Earl, subject to his disposal (irrespective of the terms of the agreement) by any instrument efficient to pass his property. Upon this construction of the transactions affecting this fund, Mr. Earl could have transferred by assignment *inter vivos*, without observing any of the conditions imposed by the regulations. If the title to the deposit remained in Mr. Earl, it would, on his death, if he died testate, have passed under any general bequest of his personal estate, and, if he died intestate, would have gone to his

administrator as part of the personality whereof he died possessed. This view is destructive of the whole scheme contemplated and intended by the parties, and directly contrary to the expressed terms of their agreement. In my judgment, the effect of the agreements of the parties, and their action thereupon, was to create a trust. Mr. Earl, the donor, by his application, accepted the printed regulations as the definition of the terms of the trust. These were that the company would receive the money and pay interest on it; that Mr. Earl should be permitted to withdraw such sums as he might choose, by the observance of the mode prescribed in the regulations (which necessarily required that this should be done during his life), and that the portion of the fund not so withdrawn should, at the time of his death, be paid to his wife. In directing the payment to be made to her, he considered the possibility that she might die before him, and provided that in such case the money should go to his legal representatives. Upon these trusts Mr. Earl deposited the money with the railroad company. He divested himself of his property in the deposit, and transferred it to the railroad company, as trustee, upon the trusts above indicated. He ceased to own the money, and became entitled to the right, under certain conditions, to withdraw it. The company accepted the trusts, and undertook the performance of them. Mr. Earl received from the company, the trustee, the deposit book, which was, in effect, a statement of account of the trust moneys, and an ascertainment of the balance, which was subject to his withdrawal, in the mode prescribed by the regulations, and which was payable to his wife in case he died without withdrawing the fund. This book Mr. Earl delivered to his wife, as the evidence of her right to receive the balance, telling her that, if he died, she could get it in 10 days by giving notice to the company. If there were any doubt of Mrs. Earl's acquiring an interest in the fund, this delivery to her of the evidence of the creation and existence of the trust for her benefit should be held to have completed the gift. She has an equitable right to enforce her interest in the fund against the trustee, the railroad company. It is true the amount which she might receive might be diminished by Mr. Earl's withdrawals in the mode prescribed by the regulations, but it is also true that by the terms of the application and the regulations the balance which might remain at Mr. Earl's death was payable only to her as "the person designated in his application to receive the same." The time of payment to her was postponed until after Mr. Earl's death, and the amount was subject to diminution to the extent of any withdrawals he might make during his life, in the mode required by the regulations, and to be destroyed by her predeceasing Mr. Earl. Her right in any balance that might remain

became vested in her on the creation of the trust, subject to be defeated in the modes prescribed by the terms of the trust, but in no other way. It was a voluntary gift by the husband donor, in trust for the benefit of his wife, completed by the donor's delivery of the property to a trustee, who accepted the trust and delivered the evidence of it, by the deposit book and printed regulations, to the donor, who ratified and confirmed the trust, as to the wife's interest in it, by handing the deposit book to her, and telling her it was for her benefit. No pecuniary consideration passing to the husband was necessary to make such a gift to the wife effectual. Title will pass by a voluntary gift, if completed, as effectually as by purchase.

The defendant executor insists that the provision for payment to the wife, after Earl's death, is, in legal effect, testamentary, and that none of the statutory observances necessary to the execution of an effective will appears. The case of *Reiff's Estate*, 16 Pa. Super. Ct. 80, is cited as recognizing this construction of a like agreement and regulation of deposits, which came into litigation in Pennsylvania. The learned judge who pronounced that judgment did declare that the "writing is, in a sense, testamentary, in that it is intended to take effect only in the event of the death of the depositor." On this ground the learned judge held the direction for the payment to the wife of the balance of the fund remaining at the death of the depositor to be a revocable writing. He upheld the direction for payment to the wife, however, declaring that the terms of the will, as expressed, did not amount to a revocation. With very great respect for the views there expressed upon this somewhat novel question, I am unable to accept this construction of the instruments under consideration. They seem to me, upon any ascertainment of the equities of the parties, to be, in effect, the creation of a trust, as above stated, passing title, at the time of the creation of the trust, out of the donor into the trustee, subject to the terms of the trust defined by the regulations, none of which reserve to the donor any right, in any mode, to take away the gift of the balance in hand, at his death, from the person whom he "designated in his application to receive the same." In our own state there are several decisions in which a delivery, by the donor, of the subject-matter of a gift to a trustee, to be handed to a beneficiary in case of the donor's death, has been held to be a complete transfer of the title, and not a testamentary act. In *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9, Vice Chancellor Pitney reviews the cases on the point, and concludes that a deposit resembling the present case in principle was a completed gift, and not a testamentary act. Reservation of payment of interest to the donor during his life was held not to have affected the trust to deliver the deposit after his death. So, in

Dennin v. Hilton (N. J. Ch.) 50 Atl. 600, the same learned vice chancellor held that, where a deposit was made by a donor in the joint names of herself and the donee, with a proviso that the survivor should draw the balance, the delivery of the deposit books to the donee was an absolute delivery of the deposits, making a complete gift, notwithstanding the donor retained the right to draw the money deposited. The gist of the question is whether the donor manifests, in the act of delivery, a complete donative purpose. If that is shown, the fact that precedent possibilities may diminish or even destroy the gift, if they happen, will not be permitted to defeat the donor's purpose, if they do not happen.

A decree will be advised according to the views above expressed.

PROFILE & FLUME HOTELS CO. v. BICKFORD.

(Supreme Court of New Hampshire. Grafton. March 3, 1903.)

TRESPASS QUARE CLAUSUM—TITLE TO WHOLE TRACT—ISSUES—DEPOSITION—INCOMPETENCY—USE AS WRITTEN ADMISSION.

1. In trespass quare clausum, plaintiffs described their close as lot No. 11, range 8, in F. This lot was at one time divided into four quarters, and the trespass alleged was committed on the south quarter. Defendant pleaded title in himself to this and the adjoining quarters, and also the general issue. *Held*, that only the title to the south quarter was in issue.

2. Though defendant's deposition be incompetent because not filed as required by statute, or because he is present in court, yet it may be introduced as his written admission.

Report from Superior Court, Grafton County; Wallace, C. J.

Trespass quare clausum by the Profile & Flume Hotels Company against John M. Bickford. Case reported. Judgment for plaintiffs.

The plaintiffs described their close as lot No. 11, range 8, in Franconia. This lot contains about 160 acres, and was at one time divided into four quarters or sections; the first north quarter being a parallelogram off the north side of the lot, the second north quarter a similar tract just below the first north quarter, the first south quarter a parallelogram off the south side of the lot, and the second south quarter the tract between the first south and second north quarters. Each quarter contained about 39 acres. The alleged trespass was upon the first south quarter. The defendant pleaded title in himself to the south quarters, and the general issue. The defendant claimed that the title to that quarter only upon which the trespass was committed was in issue. Subject to exception, the court ruled that the title to the whole lot was involved. It was found that the plaintiffs were in possession of the first south quarter, and that there was no evidence of

¶ 2. See Evidence, vol. 20, Cent. Dig. §§ 733, 734.

title in the defendant to this quarter. Subject to exception, the plaintiffs introduced certain parts of the defendant's deposition taken by them on August 13, 1902, as admissions showing the defendant's knowledge of the plaintiffs' possession of the land in dispute. The deposition was not filed until during the trial, on October 2d, when the defendant was in court, ready to testify. The court found a verdict for the plaintiffs, and reported various rulings as to the title of the plaintiffs to the whole lot, which are not material to the result reached in the opinion.

Ratchellor & Mitchell and Smith & Smith, for plaintiffs. George F. Morris, William H. Sawyer, and Scott Sloane, for defendant.

PARSONS, C. J. The fact that the plaintiffs described their close as a single tract did not necessarily put the title to the whole in issue, and the ruling to that effect at the trial was erroneous. *Cassidy v. Mudgett*, 71 N. H. 491, 53 Atl. 441. The gist of the action of trespass *quare clausum* is the disturbance to the possession. Either party who maintains against the other his right to the possession of that portion of the premises where the trespass was committed is entitled to judgment, without reference to the title or right of possession in the balance of the land described in the declaration or plea. The plaintiff, having the right to the spot trespassed upon, recovers because his possession has been disturbed, while, on the contrary, the defendant, by proving his right to all the land upon which he entered, establishes his nondisturbance of the plaintiffs' possession. The allegation as to title to the whole close, whether in the declaration or plea, is divisible, and is sustained by proof of title to that part where the trespass occurred, although the adverse party owns other portions of the close. *Knowles v. Dow*, 20 N. H. 135; *Wheeler v. Rowell*, 7 N. H. 515; *Peaslee v. Wadleigh*, 5 N. H. 317; *Rich v. Rich*, 16 Wend. 663, 671; *King v. Dunn*, 21 Wend. 253; *Richards v. Peake*, 2 B. & C. 918; *Tapley v. Wainwright*, 5 B. & Ad. 393; *Bassett v. Mitchell*, 2 B. & Ad. 99; *Smith v. Royston*, 8 M. & W. 381; 2 Gr. Ev. §§ 613, 618, 626.

In the present case the defendant did not trespass upon or claim title to either of the north quarters. Consequently the title to these quarters was in no way involved in the suit. If, under his plea of not guilty, it had been established that no trespass had been committed upon any quarter, the defendant would have been entitled to judgment, and the question of title to no part of the lot would have been involved. It has been found that the defendant did trespass upon the first south quarter, of which the plaintiff was in possession—a fact admitted by the plea *liberum tenementum* (2 Gr. Ev. § 626); and, as it is conceded the defendant showed no title to this quarter, the de-

fendant falls on both pleas as to this land, and the plaintiffs are entitled to judgment without reference to the state of their title to the balance of the lot. Whether the plaintiffs or the defendant have title to the second south quarter, is immaterial here. If it were determined that the defendant had the title, the judgment required in this suit would in no way be affected. As the title of the parties to the second south quarter is not material to the judgment, the title thereto cannot be determined by the judgment to be now rendered, and a discussion of the legal questions presented by the claims of the parties as to such title would serve no useful purpose.

The plaintiffs have not deemed it wise to transform their action by amendment, so that a judgment deciding the question of title could be rendered, and the question of title to the second south quarter must remain undetermined by this suit. The rulings of the court upon the question of title favorable to the plaintiffs, to which the defendant excepts, have not been considered, because, conceding them all to have been erroneous, nevertheless in this form of action the plaintiffs would still be entitled to judgment upon the verdict.

If the deposition of the defendant was incompetent as substantive evidence, either because not filed as required by statute, or because the deponent was present in court, nevertheless any admissions or declarations of the defendant pertinent to any issue on trial were competent to be proved by the adverse party; and it is immaterial whether such declarations were proved by the oral testimony of one who heard them, or by the defendant's signed statement in the form of a deposition. *Phoenix Ins. Co. v. Clark*, 58 N. H. 164.

The exception to the ruling that the title to the whole of the land described in the declaration was in issue is sustained. The exception to the use of the deposition permitted is overruled. The remaining exceptions are not considered. The order is: Judgment for the plaintiffs.

CHASE, J., was absent. The others concurred.

BENNETT et al. v. TOWN OF TUFTON-BOROUGH.

(Supreme Court of New Hampshire. Carroll. March 3, 1903.)

HIGHWAYS—PROCEEDINGS BEFORE SELECTMEN—PARTIES—RIGHT OF APPEAL—TAXPAYERS.

1. The inhabitants and taxpayers of a town are not parties to highway proceedings, and have, as such, no right to appear and be heard in opposition to the laying of a highway, but are represented by the town.

2. Under Pub. St. c. 68, § 2, providing that any person aggrieved by the decision of select-

¶ 2. See Highways, vol. 25, Cent. Dig. § 178.

men in highway proceedings may appeal to the Supreme Court, a taxpayer or citizen, who shows no special injury different from that of the public in general, has no right of appeal.

Exceptions from Superior Court, Carroll County; Peaselee, Judge.

Highway proceedings before the selectmen of the town of Tuftonborough. There was a decision of the selectmen laying out the highway, and plaintiffs, citizens and taxpayers of the town, but not otherwise interested in the proceedings, except. Exceptions overruled.

Arthur L. Foote, for plaintiffs. Sewall W. Abbott, for defendant.

PARSONS, C. J. The inhabitants of a town are not parties in highway proceedings. Landaff's Petition, 34 N. H. 163, 172. Individual taxpayers, as such, have no right to appear and be heard in opposition to the laying of a highway. They are represented by the town, the aggregation of all the taxpayers, voters, and citizens who reside therein. Burnham v. Goffstown, 50 N. H. 560, 562, 563. "Towns are given no right of appeal from the decision of the selectmen. The presumption is that no injustice will be done them by the action of their own citizens, equally interested with other citizens in preventing unnecessary burdens. They have the power to discontinue the road at any time." Carpenter's Petition, 67 N. H. 574, 32 Atl. 773; Eames' Petition, 16 N. H. 443, 448. As the right of appeal is not given to "any person," or to "any taxpayer," or to "any citizen," but only to "any person aggrieved" (Pub. St. c. 68, § 2), it must be understood that the Legislature intended to give this right to those persons only who were interested in or affected by the proceedings in some manner differently from the public, citizens, and taxpayers generally. Rex v. Essex, 5 B. & C. 432. The extent or character of an interest or injury sufficient to constitute one a person aggrieved, by differentiation from taxpayers and citizens generally, is a question not raised. The plaintiffs have alleged nothing distinguishing their right and interest from that of other citizens and taxpayers. Generally, it may be said that one cannot be legally aggrieved by a decision unless he has some private right which is affected thereby. Rex v. Dewsnap, 16 East, 194, 196; Rex v. Middlesex, 3 B. & Ad. 938; Bryant v. Allen, 6 N. H. 116, 118; Clark v. Courser, 29 N. H. 170; Shirley v. Healds, 34 N. H. 407, 411; McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218; Wigglin v. Swett, 6 Metc. 194, 197, 39 Am. Dec. 716; Lawless v. Reagan, 128 Mass. 592, 593; Chandler v. Commissioners, 141 Mass. 208, 5 N. E. 509; Travis v. Waters, 12 Johns. 500, 511. It is not necessary now to decide that in no case could a taxpayer be aggrieved by the imposition of a burden upon the municipality of which he is a member. The legislative intention in this case not to confer an indiscriminate right of appeal is sufficiently clear. It is not probable that a right of ap-

peal not considered necessary for the whole body of taxpayers in their corporate capacity was intended to be given to individual taxpayers, who have, as such, no right to appear and be heard. Burnham v. Goffstown, supra. Exception overruled.

CHASE, J., was absent. The others concurred.

STOCKWELL v. STOCKWELL.

(Supreme Court of New Hampshire. Cheshire. March 3, 1903.)

DIVORCE—CONVEYANCE IN FRAUD OF ALIMONY—SUIT FOR RECONVEYANCE.

1. A bill for the recovery of realty alleged that a divorce suit was pending against plaintiff, and that she deeded the land to defendant "on account of said litigation, and to protect herself in the matter of alimony"; that defendant gave plaintiff a bond for reconveyance, fully describing the property, which was recorded; and that the decree for alimony rendered against plaintiff had been paid. Held not demurrable for disclosing fraud in plaintiff precluding relief.

Exceptions from Superior Court; Wallace, Judge.

Bill for the reconveyance of real estate by Rosa B. Stockwell against Thomas E. Stockwell. Decree sustaining a demurrer to the bill and plaintiff excepts. Exception sustained.

The bill alleges, in substance, that on October 13, 1890, the plaintiff executed to the defendant a deed of six parcels of land, and upon the same day the defendant gave the plaintiff a bond to reconvey the same to her upon demand, under a penalty of \$3,000. The land conveyed was fully described in the bond, which was duly recorded. The plaintiff has demanded a deed of the land in accordance with the terms of the bond. At the date of these instruments a libel for divorce against the plaintiff, praying for alimony in favor of her then husband, one Shepardson, was pending. The bill alleges that she deeded the land in question to the defendant "on account of said litigation, and to protect herself in the matter of said alimony." At the April term, 1900, of the supreme court for Cheshire county, a divorce was granted to Shepardson from the plaintiff, and the sum of \$2,000, decreed him as alimony, was paid by the plaintiff June 1, 1900. August 25, 1900, the plaintiff and defendant became husband and wife, which relation still exists.

The defendant demurred as follows: "The defendant says the plaintiff is not entitled upon her said bill to the relief prayed for, because said bill sets forth a fraudulent purpose and intent on her part in making the conveyance and agreement which she seeks to have enforced." The demurrer was sustained by Wallace, J., at the April term, 1902, of the superior court, and the plaintiff excepted.

Charles H. Hersey and Clark C. Fitts, for plaintiff. Batchelder & Faulkner, for defendant.

PARSONS, C. J. The plaintiff conveyed to the defendant certain real estate, taking back from him a bond, with a penalty for a reconveyance of the same upon demand. The bill is brought to secure a reconveyance according to the terms of the bond. If the transaction were voidable as to creditors, it was valid between the parties unless in fact made with a fraudulent intent. *Hall v. Hall*, 70 N. H. 47, 47 Atl. 79; *Esty v. Long*, 41 N. H. 103. Unless defeated on the ground of the illegality of the contract sought to be enforced, the plaintiff is entitled to a reconveyance according to the terms of the bond. *Ewins v. Gordon*, 49 N. H. 444, 457. Where the parties to an executed illegal contract are equally in fault, the law leaves them where they have placed themselves, and will not interfere for the recovery of money paid, or lands or goods delivered, under such a contract. 1 Story, Eq. Jur. § 298; *Edgerly v. Hale*, 71 N. H. 138, 51 Atl. 679; *M. & L. Railroad v. Railroad*, 66 N. H. 100, 131, 20 Atl. 333, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Leach v. Tilton*, 40 N. H. 473. "The fraudulent grantor himself cannot elect to set the conveyance aside, nor enforce a secret trust for his own benefit. * * * The principle is one of the common law, which makes that which is fraudulent in fact void, but whose maxim in all cases of confederate fraud is 'In parl delicto mellor est conditio defendantis.'" Bisp. Eq. 310.

The defendant demurs upon the ground that the allegations of the bill disclose a fraudulent purpose and intent on the part of the plaintiff. Between the parties to this suit the question of fraud is solely one of fact. It is not to be inferred as a presumption of law from an alleged secret trust or a want of consideration, as it would be in a controversy between the grantee and creditors of the grantor who had seized the property. *Stratton v. Putney*, 63 N. H. 577, 4 Atl. 876; *Gove v. Campbell*, 62 N. H. 401; *Thompson v. Esty*, 69 N. H. 55, 70, 71, 45 Atl. 566; *Leach v. Tilton*, 40 N. H. 473. The bill does not admit the existence of the alleged fraudulent intent. Fraud is not to be presumed. It must be clearly established by proof, or at least be manifestly indicated by the circumstances. *Jones v. Emery*, 40 N. H. 348. The plaintiff's purpose may have been to secure funds to conduct the litigation and to pay the probable judgment against her. She may have been deceived or badly advised as to her proper course, and may in fact have done what she did in entire good faith, although she made the conveyance on account of the litigation, and to protect herself in the matter of alimony. Whether she acted with an honest purpose, or with an unlawful one to ob-

struct the course of justice and defeat the collection of any judgment against her, are questions of fact. The fact that the agreement to reconvey was not kept secret, but was recorded, leaving her interest in the real estate open to seizure upon execution (Pub. St. c. 220, § 7; *Low v. Carter*, 21 N. H. 433, 435), is an evidentiary fact tending to show that her purpose was not to defraud creditors. The allegations of the bill do not necessarily conclude the plaintiff upon the question of her good faith. As her bad faith is not admitted, it cannot be inferred as matter of law. What inference of fact should be made upon the facts alleged is immaterial. Until the fact is admitted or found against the plaintiff, her right to maintain the bill is not determinable as matter of law. Other questions discussed can more profitably be considered when the facts are found. The demurrer should have been overruled.

Exception sustained.

CHASE, J., was absent. The others concurred.

HANRAHAN v. SEARS.

(Supreme Court of New Hampshire. Sullivan. March 3, 1903.)

FOREIGN GUARDIAN—CUSTODY OF MINOR WARD—WELFARE OF WARD—HABEAS CORPUS—RIGHT TO MAINTAIN—EVIDENCE.

1. Though by comity the rights of a guardian appointed in one state to the custody of his minor ward, living, with his consent, in another, may be recognized in habeas corpus brought by him in that state, yet the controlling consideration in determining whether the ward should remain where it is or be placed with the guardian is which will best promote the ward's welfare, and evidence bearing on this point is admissible.

2. Though the rights of a guardian appointed in one state to the custody of his ward, living, with his consent, in another, can only be recognized as a matter of comity in the state where the ward lives, yet, since the best interest of the ward may be promoted by awarding its custody to the guardian, he can maintain habeas corpus for that purpose in the state of the ward's domicile.

Transferred from Superior Court; Peaslee, Judge.

Habeas corpus by John D. Hanrahan, guardian, against Mary T. Sears. Order that defendant deliver plaintiff's ward to him. Transferred from the superior court on defendant's exceptions. Exceptions overruled in part and sustained in part.

The plaintiff is a resident of Vermont. July 26, 1894, he was there appointed guardian of the person and estate of Irene Kelly, an orphan five years old, and there resident. He then placed her in an orphan asylum in Burlington. The following year a brother of the defendant and a second cousin of the ward, with the consent of the guardian, took her to the defendant's home in Claremont, N. H., intending (as the defendant says) to

support the child and have the care and custody of her during her minority. Since then the defendant has supported and schooled the ward. Before commencing this proceeding the guardian called upon the defendant, intending to take his ward and place her in the family of her married sister in Vermont. The defendant refused to surrender the child.

The defendant moved to dismiss the action for the reason that the plaintiff has no authority over the person of his ward in this state. The motion was denied, and the defendant excepted. The defendant, conceding that the family in which the guardian proposes to place the child is one which will furnish a suitable home, offered to show that the ward's situation is much better in the defendant's family, and that for several reasons it is for the good of the child that she should remain where she is. The evidence was excluded, subject to exception. An order was made that the defendant deliver the child to the guardian.

Frank H. Brown, for plaintiff. Burt Chellis and Hermon Holt, for defendant.

WALKER, J. Whatever rights a guardian appointed in another state may have to the custody of his minor ward, living, with his consent, in this state, it is well settled that upon habeas corpus, whether brought by a parent or a guardian, the controlling consideration is the present and prospective welfare of the child. "Ordinarily, a father is entitled to the custody of his minor children, and upon habeas corpus both courts of law and equity have power to award it to him. The application, however, being addressed to the sound discretion of the court, such award will be withheld when it is made clearly to appear that by reason of unfitness in the father for the trust or other causes the permanent interests of the child would be sacrificed by such change of custody, and in deciding upon this question the court will take into consideration the condition of the child with the persons from whose custody it is sought to be taken; its relation to them; the present and prospective provision for its support and welfare, the length of its residence there, and whether with the consent of the father, and the understanding, tacit or otherwise, that it should be permanent; the strength of the ties that had been formed between them; and, if the child has come to years of discretion, its wishes upon the subject." *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223; *State v. Richardson*, 40 N. H. 272; *United States v. Green*, 3 Mason, 482, 485, Fed. Cas. No. 15,256; *Hurd*, Hab. Corp. 461; *Church*, Hab. Corp. §§ 446, 447. If the relator were the father of the child, whose prima facie right to her custody might not be easily controlled by other considerations, still evidence that her substantial and permanent welfare would be greatly promoted by remaining with the respondent, in comparison with the advantages afforded by the father, would be competent for the con-

sideration of the court in a proceeding of this character, and its exclusion would be error.

The ward in this case has been rightfully within this state some seven years, with the consent of the relator, and while here her status and rights are to be determined by the laws of this state. If by comity the rights of a foreign guardian may be recognized in our courts, they cannot be allowed to prevail in opposition to the legal and equitable rights of the ward while within this jurisdiction. *Woodworth v. Spring*, 4 Allen, 321. Upon all the evidence, the superior court should determine the question whether the child's welfare will be best promoted by taking her from her relatives with whom she has lived for many years, and for whom she may have feelings of filial regard, and placing her in the custody of the relator, an officer appointed under the laws of Vermont. While the official character of the relator may have a legitimate bearing upon the question of custody, other considerations may be of controlling significance. The wishes of the child, who is about 13 years old, would seem to be entitled to considerable weight. *Church*, Hab. Corp. § 447. The exclusion of the evidence offered by the defendant was erroneous.

The defendant's motion to dismiss the petition was properly denied. From what has already been said, it is apparent that the relator may be the proper person to have the custody of the child, not because of his absolute right thereto, which, if it exists, is derived from the laws of another state, and can only be recognized here as a matter of comity (*Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106; *Morgan v. Potter*, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670; *Sto. Conf. Laws*, §§ 499, 504, 504a), but because the substantial interests of the child authorize that conclusion.

The defendant's first exception is overruled, and the second is sustained. Order set aside.

CHASE, J., was absent. The others concurred.

WESTON v. NEVERS.

(Supreme Court of New Hampshire. Carroll. March 3, 1903.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—EXTRATERRITORIAL EFFECT—CONSENT OF CREDITORS—PRIOR ATTACHMENT—PRESUMPTION—WRIT OF ENTRY.

1. Where a resident of Maine makes an assignment for the benefit of creditors, providing that in case of a decree of insolvency under the insolvency laws of Maine the assignee will transfer all property to the assignee in insolvency, it cannot be presumed, in a prior attachment suit in New Hampshire by a resident thereof, that the creditors assented to the assignment, and hence it is not good as against the attachment.

2. In a writ of entry the plaintiff must recover on the strength of his own title, and not on the weakness of defendant's.

¶ 2. See Entry, Writ of, vol. 18, Cent. Dig. § 4.

Transferred from Superior Court; Stone, Judge.

Action by Jane W. Weston against Holden E. Nevors. Case transferred from the superior court on agreed statement of facts. Judgment for defendant.

John Weston, a resident of Maine, being the owner of certain real estate located in this county, on November 30, 1896, made a common-law assignment in Maine to one Hastings, also a resident of that state, of all his property for the benefit of his creditors. On the same day he executed a deed of his real estate in this state to Hastings, in consideration of the trust created by the assignment. This deed was recorded December 1, 1896. In the assignment Hastings agreed to execute the trust "according to the provisions of this instrument and agreeably to law, and in case of a decree of insolvency of the said Weston under the insolvency laws, and the appointment of an assignee in insolvency, to * * * transfer * * * to such assignee all the property then remaining in his hands which is now conveyed to him by this instrument of trust." December 2, 1896, the defendant, a citizen of this state, attached real estate in this state in an action against Weston, and, having obtained a judgment therein, duly began a levy of an execution thereon, and on October 15, 1898, he received possession of the land in controversy from the sheriff under the levy. The return of the levy was duly recorded December 5, 1898. February 23, 1897, Hastings, in accordance with the terms of the assignment and his deed from Weston, conveyed the land by a quitclaim deed for a valuable consideration to third parties, who on December 17, 1897, for a valuable consideration, conveyed the land by a quitclaim deed to the plaintiff.

E. E. Hastings and Frank Weeks, for plaintiff. James A. Edgerly, for defendant.

WALKER, J. State insolvency laws do not affect the rights of a nonresident creditor in the collection of his claim in the state of his domicile, unless he has voluntarily submitted himself to their operation. *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791. But a common-law assignment, wherever made, is not thus restricted, and ordinarily binds resident and nonresident creditors alike, if it contains no prejudicial provisions and is made in good faith. *Roberts v. Norcross*, 69 N. H. 533, 45 Atl. 560. In such a case the assent of creditors may be presumed (*Fellows v. Greenleaf*, 43 N. H. 421), which affords a sufficient consideration for the transfer and the establishment of the trust. In the absence of their assent, the assignee holds the property as the agent of, or the trustee for, the debtor alone, and it is therefore subject to attachment by the debtor's creditors. *Haven v. Richardson*, 5 N. H. 113, 129; *Hurd v. Silsby*, 10 N. H. 108, 34 Am. Dec. 142.

The assent of creditors cannot be presumed when the assignment contains unnecessary conditions which may be prejudicial to the substantial rights of creditors. *Spinney v. Hosliery Co.*, 25 N. H. 9; *Brown v. Warren*, 43 N. H. 430; *Derry Bank v. Davis*, 44 N. H. 548, 550.

In this case it does not appear that any of Weston's creditors assented to his assignment, or that the assignee was one of his creditors. Nor can such assent be inferred or presumed. Upon the facts reported, the conveyance was without consideration so far as creditors are interested. *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 360; *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 846. The assignee accepted the trust upon the condition that if a decree of insolvency should issue against Weston in the state of Maine, where both resided, he would transfer to the assignee in insolvency the net proceeds of all the property he had received under the assignment, which would include not only the property located in that state, but the real estate located in this state. Whether the creditors would agree to such a disposition of the property in case Weston applied for and obtained a decree of insolvency in Maine cannot be determined by the court as a matter of mere presumption. They might reasonably prefer that the debtor's New Hampshire real estate should not be sold and the proceeds added to the other assets over which the Maine court of insolvency might have jurisdiction. They might not be willing to assent to a scheme by which the court of one state should obtain indirectly jurisdiction over property in another state, which it could not acquire directly. As speculation upon this subject leads to no satisfactory result, the court cannot presume that any creditor assented to the assignment. It was therefore without consideration as against attaching creditors, and furnished no consideration for the deed from the debtor to the assignee. *Osborn v. Adams*, 18 Pick. 245.

The defendant's attachment having been made before the assignee's conveyance of the land, the grantees of the latter, and the plaintiff claiming title under them, are chargeable with notice of its existence. They acquired only the assignee's interest in the land, whatever that may have been. It is certain that they acquired no title as against the attachment. And as the defendant is in possession under his levy, made to perfect and preserve his title by attachment, it is unnecessary in this action to consider whether the levy was in all respects valid. In a writ of entry the plaintiff must recover upon the strength of his own title, not upon the weakness of the defendant's. *Goulding v. Clark*, 34 N. H. 148, 155; *Spaulding v. Bartlett*, 55 N. H. 304, 307; *Lear v. Durgin*, 64 N. H. 618, 15 Atl. 128.

If it appeared that some creditors assented to the assignment before the attachment,

it might be necessary to consider whether the rights of the parties could best be determined in this form of action, or whether there might not be matters involved requiring the aid of equity. *Leeds v. Sayward*, 6 N. H. 83; *Hurd v. Silsby*, supra; *Spinney v. Hosliery Co.*, supra; *Roberts v. Norcross*, supra; *Faulkner v. Hyman*, supra. The facts contained in the present case do not justify a consideration of that question.

Although the superior court made no ruling upon the facts submitted, and no question is raised upon exception, which would have been a better method of procedure, the case has been considered as though the court had entered a nonsuit subject to exception; and the result is that as there was no evidence of assent to the assignment on the part of creditors, and as such assent cannot be presumed by the court, the plaintiff's title fails as a matter of law.

Judgment for the defendant.

CHASE, J., was absent. The others concurred.

BRACKETT et al. v. McINTIRE et al.
(Supreme Court of New Hampshire. Carroll.
March 3, 1903.)

HIGHWAYS-DISCONTINUANCE-PURPOSE OF VOTE BY TOWN.

1. Where the vote of a town was "to rescind all action taken by the selectmen relating" to a proposed highway, and the "action taken by the selectmen" was the laying out of the highway in question, the purpose of the vote was sufficiently stated to be the discontinuance of the highway.

Transferred from Superior Court; Peaslee, Judge.

Petition by J. Albert Brackett and others for a writ of mandamus against Lewis McIntire and others to compel the building of a highway. Petition dismissed, and plaintiffs excepted. Transferred from the superior court. Exception overruled.

April 21, 1902, a petition was presented to the selectmen requesting them to "lay out a road beginning at a stake and stone near the residence of Johnson Langlelle, and extending along the shore of Dan Hole Pond, as far as a stake and stone at the boundary line between Ossipee and Tuftonborough." The locus is known as Canaan. Upon this petition a hearing was had, and July 31, 1902, the selectmen made a return of the layout. Under a sufficient warrant, a town meeting was held August 23, 1902, when it was "voted to rescind all action taken by the selectmen relating to a proposed new road or highway in Canaan, so called." Since this time the selectmen have refused to build the road. September 30th taxpayers and citizens of Tuftonborough filed an appeal from the layout, which is still pending. The court dismissed the petition, and the plaintiffs excepted.

Sewall W. Abbott and J. Albert Brackett, for plaintiffs. Arthur L. Foote, for defendants.

WALKER, J. Whether a petition for mandamus against the selectmen is the appropriate form of action to secure the building of a highway laid out by them (*State v. Landaff*, 22 N. H. 588; *Currier v. Davis*, 68 N. H. 596, 41 Atl. 239); whether, if it is, it is not prematurely brought pending an appeal from the laying out; whether the plaintiffs are proper parties; and whether the highway in question is one the selectmen had power to lay out (*Griffin's Petition*, 27 N. H. 343)—are questions which it is unnecessary to decide, since it appears that the highway in question has been discontinued. The vote of the town of August 23d, "to rescind all action taken by the selectmen relating" to the proposed new road or highway, sufficiently states the purpose to discontinue the same. The "action taken by the selectmen" was the laying out of the highway in question, and the evident purpose of the vote was to nullify the action of the selectmen so far as the town had power to do so. As the power of the town to discontinue the highway is not denied (*Pub. St. c. 72, § 1*), and as the exercise of that power was the apparent purpose of the voters, shown by competent evidence, the highway, if legally laid out, was legally discontinued. Exception overruled.

CHASE, J., was absent. The others concurred.

ROCHESTER LUMBER CO. v. LOCKE.

SMITH v. SAME.

(Supreme Court of New Hampshire. Strafford.
Feb. 3, 1903.)

ATTACHMENT—LIEN—EXTENT—TROVER—TITLE OF PLAINTIFF—ACTUAL POSSESSION—SPECIAL PROPERTY—BANKRUPTCY—LIENS DISCHARGED—FAILURE TO DISPOSE OF PROPERTY—REVIVAL OF LIEN—DEBTOR'S INTEREST.

1. As against his debtor, a creditor acquires by attachment a lien on the property for the satisfaction of any execution obtained in the suit.

2. The actual possession of property by a sheriff is sufficient evidence of title to sustain an action of trover against a wrongdoer.

3. The possession of property by a sheriff under an attachment gives him a special property in the goods, and a right to the possession thereof, against any one claiming them under a title to which the lien of the attachment is superior.

4. The bankruptcy act of 1898, § 67f (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]), providing that liens obtained within four months prior to the filing of a petition in bankruptcy shall be null and void, and property so affected shall be wholly discharged and released therefrom, and shall pass to the trustee as a part of the bankrupt's estate, is for the benefit of the creditors, and does not affect the lien of an attachment as against the bankrupt himself.

5. Where property is attached, and in four months thereafter the debtor is declared a bankrupt, and his trustee asserts no right to the property, it is immaterial, as between the attaching creditor and the bankrupt, whether the trustee in bankruptcy has or had a valid title to the property, as the debtor has no other title or right to the property than he had when he filed his petition in bankruptcy, at which time it was subject to the attachment.

Exceptions from Superior Court.

Separate actions by the Rochester Lumber Company against J. Wesley Locke and by Frank J. Smith against the same defendant. Judgment for plaintiff in each action, and defendant excepts. Exceptions overruled.

The first action is *assumpsit*. The second is *trover* by the sheriff to recover the value of goods attached in the first action, and taken from him by the defendant. The judgment in the first action was in rem. The following were found to be the facts: January 25, 1901, Locke mortgaged certain personal property to one Cavanaugh, who did not make or subscribe the affidavit required by the statute. January 11, 1902, the lumber company caused Smith to attach the same property in a suit against Locke. Neither Smith nor the lumber company had actual knowledge of the mortgage, and are not chargeable with knowledge of it unless its record is sufficient for that purpose. January 16, 1902, Locke filed a voluntary petition in bankruptcy, and subsequently obtained his discharge. January 22, 1902, Locke forcibly took the property from the sheriff's keeper, and has since retained possession of it. Locke included the attached property in his bankruptcy schedules, but the trustee did not take possession of it, because of the mortgage.

Felker & Gunnison, for plaintiffs. Elmer J. Smart, for defendant.

PARSONS, J. As against the defendant Locke, the plaintiff company acquired by the attachment a lien upon the property attached for the satisfaction of any execution which they might obtain in the suit. *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 N. H. 227. The order of the court making such application was therefore authorized, unless the facts stated in the case arising after the attachment have annulled this lien as against Locke. The actual possession by Smith of the property taken by the defendant Locke is sufficient evidence of title to sustain an action of *trover* against a mere wrongdoer. *Harrington v. Tremblay*, 61 N. H. 413. His possession under the attachment gave him a special property in the goods, and a right to the possession against any one claiming them under a title to which the lien of the attachment was superior. *Johnson v. Railway*, 44 N. H. 626; *Lathrop v. Blake*, 23 N. H. 48, 56. Prior to the adjudication in bankruptcy, Locke had no right of possession, and, he is liable for the value of the goods

taken by him, unless, as matter of law, such adjudication revested in the bankrupt both the title and right of possession as against the officer.

One general purpose of the United States bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) was to distribute the bankrupt's property proportionally among all his creditors. In furtherance of that purpose, the act contains provisions designed to prevent one creditor from acquiring a preference over other creditors through legal proceedings commenced within four months prior to the bankruptcy. In *re Kenney*, 45 C. C. A. 113, 105 Fed. 897. Whether the sections inserted for this purpose (67c and 67f, Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, pp. 3449, 3450]) can, or not, be reconciled with each other, or, if not, which section is to be taken as the expression of the legislative purpose, is not here material. The purpose of each is the same—to secure to the trustee the bankrupt's property discharged of liens so created. Section 67f, under which the defendant claims, provides that liens so obtained "shall be deemed null and void," and that the property so affected "shall be wholly discharged and released therefrom, and shall pass to the trustee as a part of the estate of the bankrupt." This language is an elaboration of the provision of the bankruptcy act of 1867 (Act March 3, 1867, 14 Stat. 522, c. 176) that the conveyance to the assignee "shall dissolve any such attachment made within four months next preceding the commencement of proceedings." Rev. St. § 5044. It was held under this clause that an attachment was not dissolved as against the bankrupt. *Sims v. Jacobson*, 51 Ala. 186. The present language has no tendency to establish a purpose different from the construction put upon the former. It seems intended to make clear what before might have been open to argument. The peculiar language used raises the question, by whom and when are such liens to be "deemed null and void," and the property affected deemed "wholly discharged and released therefrom"? The inquiry is answered by the general purpose of the act and the language of the section. The property, by the section, is to pass to the trustee as a part of the estate of the bankrupt. From this it follows that in any controversy between the trustee and the lienors, and in any proceeding in relation thereto for the purposes of the act, the lien is to be deemed null and void. Further than this the act does not go. The language makes clear what has been stated was the construction put upon the act of 1867—that as against the bankrupt himself the lien was not affected. The same view has been expressed in a recent case in Massachusetts, where it is said: "The effect of section 67f of the United States bankruptcy act of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]), is not to avoid the levies and liens

therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him amongst the creditors of the bankrupt." *Frazer v. Nelson*, 179 Mass. 456, 460, 61 N. E. 40. As the attachment lien was valid against all the world except the trustee and those claiming under him, the possession of the sheriff was lawful as against the bankrupt *Locke*. Further support for this position may be found in the limitation contained in the section itself upon the general provision that such liens shall be deemed null and void, viz., "unless the court shall, on due notice, order that the right under such * * * attachment * * * shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate, as aforesaid." This provision is worthless if the lien is destroyed by the adjudication. To render the provision of any value, the lien and consequent right of the officer to possession must continue at least until the appointment of the trustee, in order to afford opportunity for application to the court for the preserving order. Whether the trustee would have been justified in forcibly taking the property from the sheriff's possession (*Valliant v. Childress*, 21 Wall. 642, 646, 647, 22 L. Ed. 549) need not be considered, for the action of the bankrupt was not adopted by the trustee, and the property did not become part of the bankrupt estate in the possession of the trustee. Whether, therefore, *Locke* could have successfully defended by showing, either in answer to the action or in mitigation of damages, that the property was distributed by the trustee, is a question not raised. The facts do not bring the case within *Whittredge v. Maxam*, 68 N. H. 323, 44 Atl. 491, or *Berry v. Flanders*, 69 N. H. 626, 45 Atl. 591, cited by the defendant, if the cases are otherwise applicable.

The defendant further claims that, because of the failure of the trustee in bankruptcy to dispose of the property in question, the title thereto reverts to or reverts in him, unaffected by the bankruptcy proceedings, and that he now owns it. *Jones v. Pyron*, 57 Tex. 43, 47; *Herndon v. Davenport*, 75 Tex. 462, 464, 12 S. W. 1111. If this claim is well founded, the bankruptcy proceedings are immaterial upon the question of *Locke's* title. He has now the same title and right to the property that he had when he filed his petition in bankruptcy. He then owned it subject to *Cavanaugh's* mortgage claim and the lien and right of possession of the plaintiffs under the attachment. It may be conceded that he has that right now. If the trustee in bankruptcy could have held the mortgaged and attached property as against either the attachment or the mortgage, his failure to make any claim against either by taking possession of the property is not an adjudica-

tion or evidence that either lien was invalid as against him or the bankrupt. The right of the plaintiffs under the attachment may or may not be superior to *Cavanaugh's* mortgage title. Whether it is, or not, is immaterial in this suit, to which *Cavanaugh* is not a party. The evidence as to the mortgage is therefore entirely irrelevant to any issue in this case.

In a controversy between the plaintiffs and *Cavanaugh*, neither claiming under the trustee in bankruptcy, evidence as to the bankruptcy would be immaterial. The unasserted right of the trustee, valid as against either or both of the claimants, would not confer any right upon either.

In the present case, whether the trustee in bankruptcy has or had a valid title to the property is equally immaterial and indeterminate. *Locke* can no more defend this suit by alleging the nonasserted right of the trustee, if once existent, than he could by setting up the equally nonasserted right of the mortgagee. As no title or right to the possession of the property taken from the possession of the sheriff by *Locke* after the bankruptcy is established in the defendant, judgment was properly ordered against him for the value of the goods so taken, and, his bankruptcy being suggested, against the avails of the attachment in the suit upon the pre-existing debt. *Batcheler v. Putnam*, 54 N. H. 84, 20 Am. Rep. 115.

Exceptions overruled.

CHASE, J., was absent. The others concurred.

BOYCE v. JOHNSON.

(Supreme Court of New Hampshire. Grafton. Feb. 3, 1903.)

MASTER AND SERVANT—SAWMILL EMPLOYE—ASSUMPTION OF RISK—JURY QUESTION.

1. Plaintiff's intestate, 17 years old and of deficient intelligence, was employed to attach logs to an endless chain, by which they were drawn up a slip to a sawmill. A year before he had been similarly employed for two months, and had also had like work in another mill. He was instructed not to attach a log nearer than four feet to the one ahead, nor till that one was landed on the mill floor; but, in drawing up a log, its forward end was sometimes depressed so as to present a deceptive appearance of landing. Logs also frequently became loose and slid back. Plaintiff's intestate had worked three days, when, an ascending log presenting this deceptive appearance, he stepped back to the slip to attach another log, and was fatally injured by the first one slipping back. *Held*, that the question of assumed risk was for the jury.

Transferred from Superior Court.

Action on the case for negligence by *Charles W. Boyce*, administrator, against *George L. Johnson*. Verdict for plaintiff, and case transferred from the superior court on defendant's exceptions. Exceptions overruled.

The defendant owned and operated a sawmill. From the back of the mill, a slip ex-

tended at a steep incline to a pond where logs were floated. Each log was drawn to the sawmill floor by hooking a small chain attached to one end of the log into a link of an endless chain which passed over a wheel in the mill, and thence under and over the slip. The plaintiff's evidence tended to prove the following facts: At the time of the accident (December 27, 1901) the plaintiff's intestate was 17 years and 1 month old. He was employed by the defendant in December, 1900, as a common laborer, and worked about two months upon the slip. He was again employed in December, 1901, and had worked three days when he was injured. Prior to his employment by the defendant in 1900, he had been engaged in another sawmill, at work similar to that he was performing when injured. He possessed less than ordinary intelligence, and was not as well developed mentally as the average boy of his age. To a certain extent, he understood things if they were called to his attention; but he did not comprehend them as boys of his age generally do, and forgot instructions quickly. Because of this, those with and under whom he was at work felt constrained to repeatedly warn him of the dangers connected with his employment. Upon such occasions he would laugh and hold up his hands, and the instructions or warnings made but little impression upon him. His duty required him to work at the foot of the slip, and to adjust the small chains around the logs and hook them into links of the endless chain. His instructions were (1) not to hitch a log into the endless chain nearer than four feet to the log ahead; and (2) not to hitch on at all until the log ahead was landed on the sawmill floor. He was also told that the hauling-in chain might unhook from the endless chain, or that the chain might slip from the log. He was not instructed that, in drawing in the logs by the endless chain, the forward end of the log would sometimes be pulled down so as to appear from the bottom of the slip to be landed, when in fact it was not landed. Some of the links in the endless chain had become broken, and were replaced with larger links, of a D shape. The chains were exhibited for the purpose of showing that the shallow hook of the smaller chain would be more likely to unhook from the D links than from the ordinary links of the endless chain. On the day of the accident the plaintiff's intestate hitched a peeled hemlock log, which was about 14 feet long and 18 inches in diameter, to a link of the endless chain, and stepped aside while the log was being drawn to the mill above; remaining in this position until the log appeared, from his position at the foot of the slip, to be landed on the mill floor. He then walked back and attempted to adjust a chain to another log. While he was so engaged, the hauling-in chain of the first log became unhooked from the endless chain, and the log tipped backward, slid rapidly down the slip, and injured him so that he

died soon afterward. The plaintiff's evidence also tended to prove that the chains and hooks were unsuitable in certain particulars, and that it was a frequent occurrence for logs to become unhooked while on the way up the slip, and when being pulled in to the floor above. The defendant's motions for a nonsuit and to direct a verdict in his favor were denied, subject to exception.

Shannon & Young and Burleigh & Adams, for plaintiff. Alvin F. Wentworth, Smith & Smith, and Jewell, Owen & Veazey, for defendant.

PARSONS, C. J. Logs were drawn from the defendant's pond to the floor of the mill, over a steep incline called a "slip," by an endless chain kept in motion by the machinery of the mill. The plaintiff's intestate was employed to attach these logs to the endless chain. This was done by securing a smaller chain around the log, and inserting the hook of the small chain in one of the links of the other. The place for this work was at the foot of the slip. Either from the character of the chains and hooks furnished, the construction of the slip, or as a necessary peril of the work, logs frequently became loose in their passage up the slip, and slid down. The possibility of injury from a log coming back in this way was one of the perils of the work, as it was conducted. So far as this danger was known, or could be ascertained and guarded against by ordinary care, the person doing the work assumed the risk. *O'Hare v. Company*, 71 N. H. 104, 51 Atl. 257. The plaintiff's intestate, if of less than average intelligence, was bound to use the reason he did possess; and if, by the due exercise of his physical and mental powers, he could have avoided the injury, this action cannot be maintained. *Bresnehan v. Gove*, 71 N. H. 236, 239, 51 Atl. 916. But whether of average or of deficient intelligence, he was not bound to protect himself from unknown, concealed dangers. "The law does not charge him with the risk of the perils to which he was subjected unless he was informed of them, or would have learned of them by an exercise of ordinary care." *Lapelle v. Paper Co.*, 71 N. H. 346, 350, 51 Atl. 1068. The danger of being struck by a log coming back could be avoided by remaining in a place of safety until the log was landed upon the mill floor. If the injury resulted from a mere failure to observe this precaution, it may be that, even without instructions, or in spite of the somewhat contradictory instructions given the deceased, and his deficient mental equipment, such want of care would be fatal to this action.

The deceased was instructed, among other things, not to hitch on a log until the log ahead was landed on the mill floor. As the logs were drawn upon the floor of the mill, the forward end of the log would sometimes be drawn down so as to appear to one at

the foot of the slip to be landed, when it was not. At the time in question the deceased had attached a log to the chain, and stood aside until the log appeared from his position to be landed. He then attempted to attach another log, when the first became unhooked, slid back, and killed him. Upon this evidence, the deceased was not in fault unless he knew the fact as to which he was not instructed—that the log might appear from his position at the foot of the slip to be landed before it was. It cannot be held, as matter of law, that he assumed this danger, of which he was not instructed, unless he knew or ought to have known of it. Assuming that, if he knew the danger, he had intelligence enough to protect himself, the case was properly submitted to the jury, if sufficient evidence was offered to sustain the burden resting upon the plaintiff of proving that the deceased did not know the danger, and, in the exercise of ordinary care, ought not to have known of it. *Burnham v. Railroad*, 68 N. H. 567, 44 Atl. 750. Direct evidence to the fact was not essential. Like any other material fact, it might be inferred from other facts proved. *Burnham v. Railroad*, 69 N. H. 280, 284, 45 Atl. 563. The manner in which, or the reason why, in some cases, to one at the foot of the slip a log might appear to be landed on the floor above, when it was not, is not fully stated. It is unnecessary to speculate upon the subject. The evidence tended to show that the work at the foot of the slip at certain times, while apparently safe, was in fact dangerous. The omission of instruction upon this point, in connection with the instruction given, had a tendency to create the belief that as soon as the log appeared to be landed the work at the foot of the slip could safely be continued. The evidence as to the accident also tends to prove that the deceased was faithfully observing the instructions given him, in ignorance of the special danger which resulted in his death. From the fact that the appearance of the log was deceptive to one at the foot of the slip, it may be inferred that the occasional action of the chain in drawing down the end of the log, by which the deceptive condition was produced, was not observable from the place where the deceased worked. It does not appear that his experience in mill work should, or naturally would, have given him the necessary information. It is at least extremely doubtful whether an inexperienced person of average intelligence would have suspected this special danger without instruction. The deceased's want of average intelligence was additional evidence upon the question whether he knew or ought to have known the danger. To what extent his powers of observation and reason were affected by the matters detailed in evidence, was necessarily a question of fact. It would not be unreasonable to find, upon the evidence disclosed by the case, that a person of such intelligence as the intestate might be

found to possess, of no greater experience than he is shown to have had, in the absence of instruction, did not know, and ought not to have known, the special danger causing the injury. *Demars v. Company*, 67 N. H. 404, 40 Atl. 902. The question whether the deceased was in fault for not knowing or protecting himself from the danger was therefore properly submitted to the jury. The danger of being deceived as to the position of the log upon the mill floor might, upon the evidence, be found to have been a concealed peril, as to which it was the duty of the master to warn an inexperienced employé. *Lapelle v. Paper Co.*, supra; *Bennett v. Warren*, 70 N. H. 564, 49 Atl. 105.

The case was properly drawn in compliance with the third rule of court. 71 N. H. 669. As the testimony has not been transferred by the superior court, the extracts therefrom printed by the defendant have not been examined.

Exceptions overruled.

CHASE, J., was absent. The others concurred.

CRAWFORD v. RUMPF.

(Supreme Court of Pennsylvania, March 23, 1908.)

BANKRUPTCY—PREFERENCES.

1. Where a creditor, knowing that the debtor firm was hopelessly insolvent, obtained, by considerable expense, securities of the firm, giving him a preference over other creditors, it will be presumed that he had reasonable cause to believe that the transaction was intended to give him a preference, within the meaning of the bankrupt act.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Frank M. Crawford, trustee of Gustav Stahl and Joseph H. Straub, against Gustav Rumpf. From a decree for plaintiff, defendant appeals. Affirmed.

The court found the facts to be as follows: "The facts of the case are, in the main, undisputed. Stahl & Straub were bankers and brokers. On November 24, 1899, they had on deposit, subject to check, some \$200,000. They were indebted to depositors and customers in amount approximating \$1,000,000. To one member of the firm, Joseph H. Straub, the firm's condition was unknown. He attended to the buying and selling of stock at the brokers' board. His partner looked after the finances and the books. On November 24th, their condition was so desperate that they could not go on. They could not pay their depositors or customers, and their suspension followed. True, in the confused condition of their affairs, there were hopes entertained by Straub and some of the customers that matters could in some way be righted, and the firm resume. But the fact is too clear to be doubted that on November 24th the firm was hopelessly insolvent. Had the

defendant, Gustav Rumpf, reason to think otherwise? He had in October requested that 500 shares of Electric Company of America stock and 200 shares of Union Traction Company stock purchased for him by the firm should be delivered to him. He had been put off by Stahl upon various pretexts. He had made similar requests in November, but with no success. After November 24th he again renewed his demands, but the stock was not forthcoming. Instead, Stahl suggested that, if Rumpf would pay off a balance due on a loan made by the West Philadelphia Trust Company, he might have the collaterals held by the trust company. These collaterals were \$20,000 of bonds of the Brooklyn Borough Gas 5's, and twenty-six shares of Bergner & Engel preferred stock. While the bonds had not, in the strict sense, any market value, they had intrinsic value. Their par was \$100. They had paid interest promptly. They had commanded par or over while Stahl & Straub 'supported the market.' When the firm failed there was no general sale for the bonds, and in the open market their price went down to \$70, or perhaps was a little lower. There was, however, every reason to believe that they were worth more, and would bring that much. The Bergner & Engel stock was worth, perhaps, \$40. Both stocks had a limited market, but they were, at the lowest price they had sold for between the date of the firm's suspension and the date when the defendant got them, worth considerably more than the sum due the trust company. The defendant knew from Stahl that the trust company had been the firm's creditor at the time of the suspension for some \$75,000; that the firm had been unable to respond to a call for cash on account of the loan, or more collateral to secure it; that thereupon the trust company, to secure itself, had at various times exposed to sale part of the securities held by it, and had by these several sales secured enough to reduce the firm's indebtedness to it below \$8,000. If the brewing company stock was worth \$40, and the bonds worth \$60, then the trust company had ample collateral for the balance due it. There was no reason why it should press the bonds and stock to sale, and the testimony of the treasurer of the company shows that there was on its part no intention to do so. The sales of the other collaterals had been made, not against the opposition of the firm, but with the firm's knowledge and assent. Every circumstance surrounding the firm's position after November 24th pointed to the fact that it was insolvent, and hopelessly so; and the trial judge finds that the defendant had no reason to believe otherwise, and that he was pressing for an advantage over the other creditors, and intended to get such advantage by the arrangement subsequently consummated, and in fact got what he expected. The action of the firm preferred him. The rest of the creditors will

get almost nothing. At present figures, Rumpf holds something over \$8,000 (above his advance to the trust company) towards securing his claim of about \$20,000.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, William Y. C. Anderson, and William Jay Turner, for appellant. Julius C. Levi, for appellee.

POTTER, J. The plaintiff, as trustee in bankruptcy, filed this bill to compel the return of certain securities which had been transferred to the defendant by the firm of Stahl & Straub under circumstances which it was alleged constituted an unlawful preference, and a violation of the provisions of the national bankruptcy act. The result of the transaction was that by the payment of about \$8,000 the appellant received securities of the par value of more than \$20,000. It is admitted that at the time of the arrangement the firm of Stahl & Straub were really insolvent, and that appellant was aware that they had suspended business on November 24, 1899, and had not resumed at the date of the transaction, which was upon December 22, 1899. Six days later a petition in bankruptcy was filed against them, and upon January 24, 1900, they were adjudged bankrupts. We have, then, the fact of insolvency, and that the debtor firm made a transfer of securities within about a month before the filing of a petition in bankruptcy against them, and that this transfer of securities would enable the appellant to obtain a greater percentage of his debt than other creditors of the same class. Under the bankruptcy law, such a preference is voidable by the trustee if the person receiving it "had reasonable cause to believe that it was intended thereby to give a preference." Bankr. Act, § 60, Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

It is here contended upon the part of appellant that, while he knew of the fact of Stahl & Straub's suspension of business, yet he did not know they were insolvent, and that he therefore could not be held to have had reasonable cause to believe that a preference was intended to be given him by the bankrupts. But the requirement of the bankruptcy law is not that the transferee should have had reasonable cause to believe that the transferors were insolvent, but that a preference was intended. It was not even necessary to show that the appellant in this case actually knew or believed that a preference was intended. Reasonable cause for such belief was enough. A creditor to whom a transfer is made under such circumstances as would arouse inquiry in the mind of a prudent man is bound to ascertain whether or not the financial condition of the debtor is such as to constitute of the transfer a preference. He cannot shut his eyes, and plead ignorance of all the

signs of imminent financial peril which are obvious to all who have to do with the debtor. In the present case these signs were notoriously apparent, and to none were they more so than to the appellant; and, in so far as the evidence shows, no one was more stimulated thereby, or displayed greater activity in attempting to protect his interests.

The trial judge has found as a fact that the appellant had no reason to believe that the firm of Stahl & Straub were otherwise than hopelessly insolvent after November 24, 1899. His conduct, and the energetic efforts which he made to secure his claim, confirm this view. He was seeking to procure the payment of an antecedent debt. He was naturally alarmed when the suspension occurred, and there is nothing in the testimony to show that his apprehensions were in any way lulled or allayed at or before the time when he obtained the transfer of the securities. Indeed, he was able to accomplish this result only by the payment or advancement of a very considerable additional sum of money. Why should he have done this, unless with the expectation and with the full belief that it would secure to him a greater percentage of his debt than would be received by other creditors of the same class? Under ordinary circumstances, his diligence would be most commendable, but in this case it was strong evidence that he was seeking for himself that which the bankruptcy law denies to any creditor—a preference over others of the same class.

The findings of fact by a chancellor are entitled to great weight, but, aside from this, we have no hesitation in saying that the facts and circumstances disclosed by the testimony make it clear that the appellant had reasonable cause to believe that in the transfer of the securities to him a preference was intended.

The assignments of error are overruled, the appeal is dismissed, and the decree is affirmed at the costs of the appellant.

IN RE SHAFFER'S ESTATE.

Appeal of ZURFLIEH.

(Supreme Court of Pennsylvania. March 9, 1903.)

SPECIFIC PERFORMANCE—PAROL CONTRACT.

1. A petition in the orphans' court alleged a parol contract by a decedent for conveyance of certain ground for services rendered. The evidence showed that petitioner was the nephew of decedent, who was an old man and childless; that the nephew had rendered valuable services to the uncle, who had declared to several persons that he intended to give the premises to his nephew because of such services; that the nephew had made valuable improvements, and had moved into the house with his wife, and was in possession. *Held*, that specific performance could not be decreed.

Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of John Shaffer. From a decree dismissing petition for specific performance, P. H. Zurflieh appeals. *Affirmed*.

Troutman, P. J., filed the following opinion on exceptions to report of the auditor:

"The contention arises upon a petition in this court, having the effect of a bill in equity to compel the specific performance by the administrators of decedent of an alleged contract or agreement on the part of such decedent to give or devise certain real estate in Dunmore to the petitioner, P. H. Zurflieh. The evidence in support of the petition is practically undisputed, and we have no hesitation in saying that the effect upon our mind of all the evidence adduced is to impress us with the belief that, unless there has been established a valid contract to give or devise the premises in question to the petitioner, his is a very hard case indeed. We repeat, unless there had been a contract established, for, to our mind, the whole case pivots upon that proposition. The petition alleges, the proofs should sustain it. In considering this point, we will carefully examine the evidence introduced to establish such contract; and we observe at the outset that the proofs are significant not so much for what they reveal as for what they leave for inference.

"(1) Not a witness has been produced who testifies directly to any contractual relation at all between John Shaffer, the decedent, and Peter Zurflieh, the petitioner. So far as the evidence discloses, no person ever heard the decedent say to the petitioner, 'I agree to give or devise the Cherry street property to you.' Nor has any person given testimony to any communication whatever between them. These considerations are perhaps not so important as they would be if the parties to the alleged parol contract were parent and child, according to the ruling in *Allison v. Burns*, 107 Pa. 50. Yet it must be considered that in the case before us, according to much of the testimony, the relations of the parties were much more intimate and confidential than those of mere strangers. From the testimony, the petitioner seems to have been the decedent's sister's son. He held decedent's written power of attorney, and one of the witnesses (P. D. Manley) testified that Mr. Shaffer declared to him that 'he felt towards Mr. Zurflieh as though he were a son, and looked upon him just as he would upon a son'; and, further on in his evidence, that the relations between them were 'just like father and son.' The rule of law is recognized in *Edwards v. Morgan*, 100 Pa. 330, wherein it is declared that, when an attempt is made to set up a parol contract of sale against a father by his son, * * * the contracting parties must be brought together, face to face. The witnesses must have heard the parties repeat in each other's presence. The contract is not to be inferred from the declarations of one of the

parties. Quoting *Ackerman v. Fisher*, 57 Pa. 457, the opinion proceeds: 'The burden is no lighter when the alleged contract is set up by a son-in-law. It might well be argued, therefore, that, inasmuch as the evidence discloses a relation like father and son, the rule to which we have adverted in *Allison v. Burns* would not apply, since the parties were not strangers, but that, on the contrary, by reason, if not by positive authority, it ought to be held necessary to establish a claim such as this by more than the declarations of one party to the contract; that is, by direct testimony of witnesses to the making of the contract, whose evidence should bring the parties face to face.'

"Resuming our examination of the evidence in the case at bar, we now come to another proposition.

"(2) None of the declarations of decedent, as testified to by the witnesses, relate either to the past or to the present. They all refer to the future. Not once is it testified that Mr. Shaffer declared, 'I have agreed,' or 'I have promised to leave the property to him.' The decedent seems to have confined himself solely to declarations of his intentions for the future with respect to the property, and generally of his intended testamentary disposition. Giving the language of the decedent its extreme effect, it is significant only of a voluntary intention to reward the petitioner for his services, which, it is true, seem to be satisfactory, or to show his appreciation of petitioner's conduct, which he declares to be that of a son. Let it be borne in mind that our search through the proofs offered is for some evidence of a contract or agreement. The petitioner alleges it, and the petitioner must prove it, or fall in his conclusion. So far, then, we have found evidence in abundance of an intention on the part of the decedent to devise the Cherry street property to the petitioner, but none at all of an agreement with Zurfleuh to do so; and ample evidence, too, of a disposition 'to reward Peter,' 'to give Peter,' to 'leave Peter,' but none of a gift actually accomplished or consummated between parties. Does this evidence, therefore, come up to the strict standard of proof required in cases of this nature? The whole matter, of course, rests in parol; and, as we have observed, the standard of proof required to take such contract, if a contract had been proven, out of the statute of frauds, is exceedingly strict, as of right it should be. We refer to some of the many authorities on the subject: *Hart v. Carroll*, 85 Pa. 508: 'In order to take a parol contract for the sale of land out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof.' *Allison v. Burns*, supra: 'To take a case out of the operation of the statute of frauds, the gift must be shown by full, complete, satisfactory, and indubitable proof; that is to say, such proof as is credible, and of such weight

and directness as to make out the facts alleged beyond a doubt.' The fact alleged in the case at bar—the fundamental fact upon which the whole case rests—is that there was a contract to give or devise, which the petitioner now prays may be specifically performed by a dead man's representatives. We are constrained to say that the proofs adduced do not, either to our mind or our conscience, establish such a contract between the petitioner and decedent.

"We have not lost sight of the fact that possession of the property was taken by petitioner, apparently with the consent of decedent; but it does not follow that such possession was in pursuance of an agreement to give or devise the premises, or, to put the proposition in a preferable form, the proof of such possession does not, to our mind, either by itself, or in connection with the other circumstances of the case, establish a contract to give or devise.

"The same reasoning is applicable to another fact in the case, namely, the making of permanent improvements upon the property by the petitioner. The improvement of the property may have been in pursuance of any other agreement than that of a contract to give or devise—such as, for instance, that the improvement should stand in lieu of rent; but what we are at present concerned with is whether the circumstances we are now considering, or any other fact in the case, or all the facts taken together, establish such a contract as is alleged in such petition. Here, in our opinion, is precisely where the petitioner failed, and failure here must rule the case against him."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. A. Vosburg and Thomas F. Wells, for appellant. S. B. Price, for appellee.

PER CURIAM. This proceeding in the court below was for a decree for specific performance of a parol contract made by decedent with petitioner for the conveyance or devise to the latter, in consideration of services rendered, of a lot of ground, with a house thereon, erected in the borough of Dunmore, Lackawanna county. The evidence on the part of petitioner showed that he was a nephew of deceased; that his uncle was an old man and childless; that for years the nephew, at request of the uncle, had rendered valuable services to his uncle in the management of considerable business connected with the latter's estate; further, that the uncle had declared to several third persons that he was going to give the house and lot to his nephew Peter, because he rendered him valuable services. It was further shown that the nephew had made valuable improvements to the property, had married and moved into the house with his wife, and was in possession when the uncle died. There is no question but that the nephew for a number of

years faithfully performed valuable services for the uncle at the latter's request. Nor is there any doubt that the uncle often acknowledged to others the value of these services, and declared his intention of compensating him. To several he said he would give to him or deed to him this house. But this proceeding for specific performance of a parol contract to convey land involves no question as to the value of the services, nor of an intention to convey or devise in the future. Still, this proof, while it might be sufficient to maintain assumpsit on a quantum meruit, falls short of that required to meet our statute of frauds, and therefore will not sustain a decree for specific performance. An intention announced to others to compensate the nephew in the future is not sufficient. As is said in *Edwards v. Morgan*, 100 Pa. 330: "The contracting parties must be brought together face to face. The witnesses must have heard the parties repeat it in each other's presence. The contract is not to be inferred from the declaration of one of the parties." Adopting this rule, which is, in substance, the same in all of our many cases on the question, the learned judge of the court below, in a very satisfactory opinion, dismissed the petition. We affirm his decree for the reasons given by him.

O'HARA v. CITY OF SCRANTON.

(Supreme Court of Pennsylvania. March 9, 1903.)

MUNICIPAL IMPROVEMENTS—LIABILITY OF CITY—NEGLECT OF CITY SOLICITOR.

1. A municipal contract provided that the fund for the payment of the contract price should be derived from assessments on the city and abutting property owners, and as to abutting properties the city should be liable only for the amounts actually collected. The city solicitor failed to file liens within six months from the date of confirmation of the final assessment, as required by the contract, whereby many assessments were lost to the contractor. *Held*, that the city was liable therefor.

Appeal from Court of Common Pleas, Lackawanna County.

Action by Vincent O'Hara, to the use of Fleming & O'Hara, against the city of Scranton. From an order dismissing exceptions of defendant to report of referee, defendant appeals. Affirmed.

The following is the opinion of the court below:

"V. H. O'Hara, the plaintiff, brought suit against the city of Scranton, in trespass, to the use of himself and another, as Fleming & O'Hara. He declared for damages for the defendant's breach of her contract with him for the construction of a sewer in the north end of the city. Upon the trial the referee allowed the plaintiff to amend the form of action by changing it to assumpsit, and upon the facts, about which there is no material controversy, he awarded judgment in favor of the plaintiff for the amount of his claim,

to wit, \$3,815.80. To this report numerous exceptions were filed on the part of the city. * * *

"Briefly stated, the facts are these: In 1898 an ordinance was duly enacted by the city providing for the construction of this sewer. Proceedings were had in court to assess the damages and benefits to private property affected by it, as well as the cost and expenses of construction. Twenty per centum of the cost was assessed upon the city; the balance, upon the abutting properties. Report of these proceedings having been confirmed, finally the contract was duly awarded by the city to the plaintiff in pursuance of certain provisions of the ordinance.

"The ordinance provided that the contractor should not receive any sum in excess of the amount actually received by the city from assessments for the sewer. The contract was duly executed on May 6, 1899, and by its terms the ordinance was made a part of the contract. Thereupon the contractor proceeded with the work to completion. It is not pretended that the work was not done in all respects according to the terms and conditions of the contract, and in conformity with the plans and specifications. Nor is it pretended that the city has not had the benefit of it from that time ever since. Thus the merits are entirely with O'Hara.

"The contract contained this clause: 'It is expressly understood that the fund for the payment of the above contract price is to be derived from assessments upon the city and abutting property owners according to benefit, and as to assessments upon abutting properties the city is liable to the contractor only for amounts actually collected.'

"The city solicitor failed to file liens against the properties chargeable with the assessments within six months after the right to do so attached, and so the liens expired, the properties were discharged from liability, the assessments thereby became uncollectible, and the city received only such portion of them as the property owners voluntarily paid, which, together with her twenty per centum, she paid over to the contractor. He sues for the balance. The city resists the action on the ground that she has paid to the contractor all of the moneys actually collected, and therefore, under the clause of the contract limiting her liability to that amount, she cannot be called on to pay any more. To this the plaintiff replies that it was the city's fault that the balance was not collected, as she ought to have filed the liens and enforced payment. The city's rejoinder is that the failure to file the liens in time, and to so make good the assessments, was the negligence of the solicitor, and that he, and not the city, must be held responsible for the consequences. This fairly defines the issue between the parties.

"It may be that, as between the city and her solicitor, the default should be charged to the solicitor; but, if so, the city must

indemnify herself at the expense of him and his sureties, and not at the expense of O'Hara. So far as he is concerned, the answer to her contention in this respect is that this is not an action in tort, as such, for negligence, but of assumpsit, for damages for the breach of a contract. It is fair argument that the contract contains an implied covenant on a city's part to file liens so as to secure and collect the assessments in order to discharge her whole duty to O'Hara, for good faith would require her to use the lawful means in her hands to raise the fund out of which she agreed to pay the contractor. But there is more than an implied covenant in this case. The contract and ordinance on which it is based must be construed as forming one instrument. The ordinance provides that 'the city solicitor shall, within six months from date of confirmation of the final assessment by the court, file liens for all said assessments which are not paid.' This read into the contract is nothing more nor less than an express covenant on the part of the city that the liens should be filed wherever necessary to secure the payment of the assessments. This is her covenant, not that of the solicitor. He was not a party to the instrument. It all amounts to this: By one clause of the contract the city limited her liability to a particular fund, which she, and she alone, had the power to create, and the specific means to secure and collect. By another clause she bound herself to exercise that power and to use those means. This she did not do. Thereby, without any fault on O'Hara's part, she failed to collect a portion of the fund, and to that extent the value of his contract was impaired. The city cannot now have the advantage of the clause limiting her liability to that portion of the fund actually collected, not having given him the correlative benefit of her covenant to secure the whole of it. Her liability flows from the breach of this obligation, and the learned referee correctly so held. The measure of damages is the balance of the contract price, with interest, and that is what was awarded.

"But it is claimed by the city that, upon discovering that the liens had been lost by the failure to file them in time, she notified the contractor to stop the work, and therefore he proceeded to complete it at his own risk; the amount of his work up to that time having been covered by the moneys actually received by the city from voluntary payments, and the percentage which she paid out of her general revenues—in other words, that she abrogated the contract. It is enough to say of this contention that, in the absence of fraud, it takes two parties to rescind a contract, as well as to make it.

"The conclusions of the referee were correct, and they are so well vindicated by his intelligent discussion and his apt and painstaking citation of authorities that more extended consideration of the case on our part

may well be dispensed with. The exceptions are dismissed, the report confirmed, and the prothonotary directed to enter judgment accordingly."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George M. Watson, City Sol., and Michael J. Martin, for appellant. I. H. Burns, for appellee.

PER CURIAM. The assignments of error in this case have no merit that warrants discussion. They are all overruled, and the judgment is affirmed on the opinion of the court below dismissing the exceptions to the report of the referee.

In re BELCHER'S ESTATE.

(Supreme Court of Pennsylvania. March 9, 1903.)

APPEALABLE ORDER.

1. An order of the orphans' court dismissing a motion to quash an appeal from an appraisement for the collateral tax is not appealable to the Supreme Court.

Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of Frank Belcher, deceased. From a decree dismissing a motion to quash an appraisement, the commonwealth appeals. Appeal quashed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Milton W. Lowry, for appellant. James E. Burr, and C. R. Pitcher, for appellee.

PER CURIAM. The orphans' court dismissed a motion to quash an appeal from the appraisement of Henry T. Koehler, appraiser. From that decree the present appeal is taken to this court. The executors now move to quash this appeal on the ground that it is not from a final decree. The motion is well founded. The decree of the orphans' court was clearly interlocutory, and in no way settled the real contention between the parties. The merits of the whole case can be raised at a final adjudication. The appeal to this court, is, therefore, quashed.

FRANTZ v. RACE.

(Supreme Court of Pennsylvania. March 9, 1903.)

WILL—NATURE OF ESTATE.

1. A will contained a provision giving to testator's son the farm "on which I now live after the death of my wife, the title of said farm to be and remain in the hands of my executors," who are to take charge of it whenever the son lets the farm or wastes the income, and pay the income or profits therefrom to the son. Held, that on the death of the mother the son did not take a title in fee simple.

Appeal from Court of Common Pleas, Wyoming County.

Action by John Frantz against Willard R. Race. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James W. Platt, for appellant. Charles M. Lee, for appellee.

PER CURIAM. This issue comes before us on a case stated involving an interpretation of the will of George W. Frantz, of Monroe township, Wyoming county. After making provision for his wife in the first and second clauses of his will, in the third he says: "I give and bequeath to my son John Frantz the farm on which I now live after the death of my wife Sarah M. Frantz, the title of said farm to be and remain in the hands of my executors who are to take charge of said farm at any time when the said John Frantz lets the farm, or income thereof is wasted, and the executors to take charge of the farm and pay the said John Frantz the income or profits therefrom." The fifth clause is: "I hereby appoint my friend Wheeler Herdman executor of this my last will and testament." The testator died in December, 1899. His widow remained in possession under the will until April 27, 1901, when she died. John then went into possession under the will, and so remains; but by written articles, on January 5, 1902, he contracted to sell and convey to Willard R. Race, the defendant; deed to be made "conveying a title in fee simple, clear of all imperfections in the title." John tendered to Race a deed purporting to convey the land in fee simple, which Race declined to accept until adjudication of title. Hence this case stated, on which the learned judge of the court below entered judgment for Race, this defendant, and we have this appeal by John.

It would, perhaps, be somewhat difficult to define the exact nature or extent of John's beneficiary estate, but for our present purposes we can say very certainly what it is not without being under the necessity of saying exactly what it is. He had no legal title to the land. That, by the express directions of the will was to be in the executor, Herdman; and the necessary inference is, from the inapt language, in him as trustee for John. But John was not to remain in the uninterrupted occupation of the farm. In two contingencies—"if he lets the farm," or "income thereof is wasted"—then the executor is to take charge of it, pay the income or profits of it to John. The trust is very far from being what the law calls a "dry trust." In two events, either of which might occur, the duty of the trustee was active. It involved the possession, actual or constructive, of the land, cultivation, collection of rents, payment of taxes and insurance, and the keeping up of repairs. Inferentially, as long as John did not let the farm

or waste the income, he was to occupy it, but neither expressly nor inferentially was the title to vest in him during his life. During his life, therefore, practically he had nothing to convey. The argument of appellant's counsel, under the rulings in *Dodson v. Ball*, 60 Pa. 492, 100 Am. Dec. 586, and like cases, that this was a "dry trust" and that, as John was to have the whole income and profits, carried with it to him the land itself, is without force. The trust was an active one. In certain contingencies, that John might have any income or profits, the executor could, under the terms of the will, take possession by himself or agent. Neither is there any force in the argument that because there is no devise over at John's death he must take more than a life estate. By the will there is no devise of the land to him. The income and profits are hedged around with a trust, obviously to guard against his mismanagement and improvidence. We have not reached that point where it is either wise or necessary to determine to whom the land may or shall go at his death. What estate under his father's will has he to convey during his lifetime? is all we decide now. As held by the learned judge of the court below, he had none.

The judgment is affirmed.

JENKINS v. RUSH BROOK COAL CO.
(Supreme Court of Pennsylvania. March 9, 1903.)

SET-OFF—ACTION FOR SERVICES.

1. In an action to recover for services rendered, defendant cannot set off the value of property which plaintiff, while in his service, had fraudulently taken title to in his own name, and which at the time of the action was in his possession, but had not been converted into money.

2. In an action of assumpsit, defendant cannot set off a claim for which assumpsit will not lie by him against plaintiff.

Appeal from Court of Common Pleas, Lackawanna County.

Action by John S. Jenkins against the Rush Brook Coal Company. From an order sustaining exceptions to report of a referee, defendant appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. B. Price and A. Ricketts, for appellant. Everett Warren and H. M. Hannah, for appellee.

PER CURIAM. Out of the 17 assignments of error preferred here, and pressed in the argument of appellant's counsel, the only one that caused us to hesitate in affirming the decree of the court below is the fourth, which complains that the court erred in overruling the report of the referee allowing defendant's claim of set-off. The referee found that plaintiff had established by proper proof a

claim of \$7,468.62, but that defendant had established a set-off of \$22,050. This wiped out plaintiff's demand, and, after a computation of interest, left a balance in favor of defendant of \$22,880.61. Without undertaking to deny the satisfactory character of the evidence to establish these respective amounts, the court is of opinion, from the character of it, that, in law, this set-off cannot be sustained in this proceeding. Apparently, it ought to be allowed, unless flatly against well-established precedent. The court below was of opinion that precedent effectually barred the set-off; and so, after a very careful examination of the authorities, we find it does. By our defalcation act of 1705 (1 Smith's Laws, p. 49), the defendant in any action or contract was authorized to plead payment, and give any bond, bill, receipt, account, or bargain in evidence. This action was assumpsit by plaintiff on substantially a contract for services. The defendant adduced evidence tending to show that plaintiff, while in its service, had fraudulently taken title in his own name to real estate, and to stocks in his own name, and was in possession of the same, which in fact belonged to his employer. The referee undertook to fix a value upon the real estate and stocks so taken, and then set off that value in favor of defendant. It will be noticed from the evidence that plaintiff was still the owner of the real estate, and still was in possession of the stocks. He had converted neither into money for his own use. His possession, then, was tortious. We have examined carefully the many cases cited by the court below, and they uninterruptedly hold, in substance, that a set-off claimed by a defendant, for which assumpsit would not lie by him against plaintiff, is not a proper subject of set-off in his favor when plaintiff sues him in assumpsit, and that assumpsit can only be maintained on a contract, express or implied. This is the sum of the many authorities, under our defalcation act, given in *Ahl v. Rhoads*, 84 Pa. 319. The defendant has its remedy either in an action for damages for the tort, or in equity to compel a transfer of its property.

There is no such merit in the other assignments as warrants discussion. They are all overruled, and judgment is affirmed on the opinion of the court below.

COMMONWEALTH v. ZORAMBO.

(Supreme Court of Pennsylvania. Feb. 2, 1903.)

CRIMINAL LAW—EVIDENCE—PRESUMPTIONS—SILENCE OF ACCUSED.

1. The silence of accused at a judicial inquiry into his guilt cannot be regarded as even the slightest evidence thereof.

2. At a hearing before a magistrate of two persons who were charged with murder, neither of whom could speak English, one of them, after the commonwealth had rested, stated that he desired to make a statement. After warning he made a sworn statement exculpat-

ing himself, and charging the other prisoner with the crime. The latter on the following day denied the truth of the statement. At the trial for murder the statement was offered as evidence of the guilt of the prisoner, because he had not denied the statement when made, and because on the following day he had declared it false. *Held*, that the statement was inadmissible as circumstantial evidence against the prisoner.

3. In a criminal case neither a deposition regularly taken nor an ex parte affidavit can be introduced as evidence by the prosecution.

Appeal from Court of Oyer and Terminer. Luzerne County; Lynch, Judge.

Victor Zorambo was convicted of murder in the first degree, and appeals. *Reversed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

R. Nelson Bennett and Evan C. Jones, for appellant. B. R. Jones, Dist. Atty., for the Commonwealth.

BROWN, J. The appellant and Peter Lenousky were charged jointly with the murder of Anthony Sennick. Both are foreigners, speaking their own language and not understanding ours. They were arrested within a few hours from the commission of the crime, and shortly afterwards given a hearing before a magistrate, who committed them for trial. At the hearing there was present, among other officers of the law, an assistant district attorney, with his stenographer and an interpreter. While in the magistrate's office Lenousky said he wished to make a statement. He was immediately warned by the assistant district attorney not to speak, as any statement he would make might be used against him on his trial in court. He persisted, however, in making a statement, and, after having been sworn by the magistrate, proceeded to give in detail a confession which he alleged Zorambo had made to him of his guilt alone of the crime charged against them both. This alleged confession implicated no one but Zorambo, and the statement made by Lenousky was manifestly for the purpose of exculpating himself, who has since been also convicted of the wilful murder of Sennick. The statement was taken down by the stenographer as interpreted to him by the interpreter. Zorambo sat still and made no reply to the accusation of his confederate in the crime.

It is not disputed by the commonwealth that, when Lenousky was warned by the assistant district attorney, through an interpreter, not to make any statement, Zorambo heard and understood what was said. On his trial this statement of Lenousky, as taken down by the stenographer—practically a deposition by him—was offered by the commonwealth as evidence of the prisoner's guilt—first, because he had not spoken and denied the accusation when Lenousky made it before the magistrate; and, secondly, because, on the day following, when his attention was called to it, he had declared it to

be false. At the time the offer was made it was objected to, for the reason that the statement "was made during a legal proceeding, when the accused had no right to speak, or at least was not bound to speak." This objection was overruled by the learned trial judge, and the offer admitted, for the reason, as given by him, that the statement "was made after the proceeding had ended before the magistrate." The single error assigned is that "the court erred in admitting in evidence the stenographer's notes of Lenousky's statement made in the magistrate's office."

It is by no means certain that the hearing was over at the time Lenousky made his statement, though the magistrate testified that it was, and the assistant district attorney corroborates him to a certain extent. The latter, on his examination in chief by the commonwealth, said: "I think he made it after the hearing;" but on cross-examination the following occurred: "Q. The commonwealth had rested its case? A. We called all the witnesses that were subpoenaed. Q. That you had? A. Yes, sir. Q. Then you suddenly discovered you had another witness? A. No, sir; he volunteered this statement himself. Q. Then you discovered you had another witness? A. Well, yes; after we heard this statement." If the hearing was not over, the silence of Zorambo and his failure to deny Lenousky's accusation could not be used against him. While it is true, as a rule, that when one charged with a crime is at full liberty to speak, but remains silent and makes no denial of the accusation by word or gesture, his silence is a circumstance to be taken into consideration by the jury, it is equally true that an accused at a judicial inquiry into his guilt may hold his peace in the face of any accusation against him, and his silence cannot be regarded as any, not even the slightest, evidence of his guilt. *Ettinger v. Commonwealth*, 98 Pa. 338; *Underhill's Criminal Evidence*, § 122; *Wharton's Criminal Evidence*, § 680; *Commonwealth v. Kenney*, 12 Metc. 235, 46 Am. Dec. 672. Assuming, as the learned trial judge did, that the hearing, as a matter of fact, was over, and that the officers of the law who were present so understood the situation, and felt there was nothing more for the magistrate to do but to commit the prisoners, the question to be determined in deciding whether Zorambo's silence under the accusation of Lenousky ought to have been left to the jury as a circumstance against him, is, did he know the hearing was over, or had he reason to believe that the judicial inquiry was still going on? If to him the proceedings before the magistrate had not ended, but were apparently still in progress, no tongue that he could understand having told him they were over, he could be silent before his accuser, and his silence could no more be afterwards used against him than if he had been silent when the hearing had been actu-

ally taking place. In the absence of proof that he knew it was over, the only fair conclusion to be drawn which is consistent with his rights is that he must have thought it was still going on. It is to be assumed that though a foreigner, speaking and understanding a strange language, he knew he was taken with Lenousky before the magistrate for a hearing. It is further to be assumed that, except when witnesses not understanding English were being examined, the proceedings were conducted in that language, of which he knew nothing. He was not represented by counsel, who might have explained everything to him. When Lenousky insisted upon making a statement, not a word was spoken to him indicating that the hearing was over; on the contrary, just as all prior witnesses had been sworn, so an oath or affirmation was administered to Lenousky, and, to all appearances, to the prisoner, who understood only what he saw, the hearing was still proceeding. The scene had not changed, and was calculated to produce on his mind the same influence at the end as had existed all through. *Commonwealth v. Harman*, 4 Pa. 269. But a moment must have intervened between the examination of the last witness formally called by the prosecution and the making of the statement by Lenousky, which was not addressed to Zorambo, but made to the magistrate, and, in that brief interval, Zorambo, through the interpreter, heard and understood the warning given by the commonwealth's officer to Lenousky not to speak, which it can hardly be seriously contended he ought not to have regarded as applying to himself as well. He knew from the lips of authority that, if he spoke, whatever he said might be used against him on his trial for his life, and he heard the caution not to speak. That he kept silent was his right as at the time he must have understood it, and manifest error was committed in submitting his silence to the jury as circumstantial evidence against him.

That the prisoner, on the day following the hearing, declared Lenousky's statement to be untrue, is urged as a reason why it was properly admitted in evidence because it showed what he had denied. The answer to this is that Zorambo's denial of the truth of Lenousky's statement was consistent with his innocence; and, if simply because he denied what had been charged against him, the commonwealth ought to be allowed to offer in evidence the statement as to what he had denied, an *ex parte* affidavit of the most serious import, containing the gravest accusation and imperiling his life, would practically become evidence against him, for it would naturally be so considered by the jury, and the accused would be denied the right guaranteed him of meeting his witnesses "face to face" (*Declaration of Rights*, art. 1, § 9), and of having his counsel cross-examine the accusing witness in his presence. *Howser v. Commonwealth*, 51 Pa. 332. *Lenousky*

was in court during the trial, and could have been called by the commonwealth to bear witness against the accused "face to face," if he knew anything that the jury ought to have known from him connecting the accused with the crime charged. Neither an *ex parte* affidavit nor a deposition regularly taken can be substituted with us for testimony "face to face" in any criminal prosecution, and the successful attempt of the commonwealth to do so in the present case, in which a human life is involved, calls for a reversal of the judgment.

Judgment reversed, and a *venire facias* de novo awarded.

WILLIAMSON v. CARPENTER.

(Supreme Court of Pennsylvania. March 9, 1903.)

REFORMATION OF DEED—MISTAKE—EVIDENCE.

1. The evidence necessary to reform a deed because of mistake must relate to the time when the instrument was executed.

2. A father conveyed two lots of different sizes to his sons. After the death of the father the grantee of one of the sons brought ejectment. Defendant alleged a mistake in the descriptions in the deeds. There was evidence that before the delivery of the deed the father had made declarations exactly reversing the descriptions in the conveyances, and that after the conveyances the sons occupied the premises as if the descriptions had been in accord with the declarations of their father. *Held* insufficient to justify the reformation of the deeds.

Appeal from Court of Common Pleas, Lackawanna County; Kelly, Judge.

Action by C. H. Williamson against M. H. Carpenter. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. M. Walker and Clarence Ballentine, for appellant. Emil Rosenberger, John F. Scragg, and Willard, Warren & Knapp, for appellee.

PER CURIAM. John Koch, deceased, was the owner of two lots, Nos. 57 and 58, on east side of Hyde Park avenue, in the city of Scranton. He had two sons, Henry George Koch and Henry F. Koch. The two lots adjoin. Each, in the regular plan, fronts 66 feet on the avenue. The father desired to convey these two lots to his sons, but not by an equal division of the land; so on same day, October 24, 1874, he delivered to each son a deed—one to Henry George for lot No. 57 and 25 feet additional, and one to Henry F. for 41 feet front of lot No. 58 on Hyde Park avenue. Both deeds were duly recorded. It was alleged by defendant that the father made a mistake in the description in the respective deeds; that the land he conveyed to Henry George was the land he intended to convey to Henry F., and that the land conveyed to Henry F. was what he intended to convey to Henry George. It was

sought in this suit in effect to reform the deeds.

There was evidence that the father, before the delivery of the deeds, by declarations to others, expressed an intention exactly reversing the description in the conveyances to the two sons. There was also evidence that the sons, after the conveyance, occupied the property exactly as if the father had conveyed according to that expressed intention. This last evidence lost most, if not all, of its significance, from the further fact that their occupation after the deeds was just the same as before their date.

The measure and character of evidence necessary to reform a deed on the ground of mistake has been so long firmly settled that it would be a waste of time to cite authorities. It must be clear, precise, and indubitable, of such character as would move a chancellor to reform a written instrument; not of such character as might induce a jury to reform it; and it must relate to the time when the instrument was executed. *Ahlborn v. Wolff*, 118 Pa. 242, 11 Atl. 799; *Boyertown Nat. Bank v. Hartman*, 147 Pa. 558, 23 Atl. 842, 30 Am. St. Rep. 759. The evidence of the father's intention before the deeds were made, when met by the contradiction in the deeds, only proves that he changed his mind, not that he failed to express it as finally resolved upon the day the deeds were made. We think the learned judge of the court below was clearly right when he held that the evidence of mistake or accident in the description did not come up to the measure of proof laid down without variation in all authorities.

The other assignments of error have no merit requiring special notice. They are all overruled, and the judgment is affirmed.

DIVER v. SINGER MFG. CO.

(Supreme Court of Pennsylvania. March 23, 1903.)

INJURY TO EMPLOYE—EVIDENCE.

1. In an action by an employé for damages caused by injuries received from slipping on a floor in her employer's store, evidence *held* insufficient to justify a verdict for plaintiff.

Appeal from Court of Common Pleas; Philadelphia County.

Action by Annie W. Diver against the Singer Manufacturing Company. Judgment for plaintiff, and defendant appeals. *Reversed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. T. Freedley and Arthur B. Eaton, for appellant. Maxwell Stevenson, for appellee.

FELL, J. The plaintiff slipped and fell on a floor in her employer's store. The room in which she was working was a large room, lighted by three skylights, and was used by the clerks and as a showroom. It was near

the middle of the building, and there was a clear passageway through it 10 feet wide, extending from the front to the rear room. The floor was of Virginia pine, and was dressed with a preparation of oil commonly used on floors of the same kind. It had been cleaned and the dressing applied on Saturday afternoon after the store was closed, and had been rubbed carefully, so that the floor would dry. When the store was opened on Monday morning, it was examined and found to be hard and dry. There was nothing unusual about the floor, or the manner in which it was cared for. The dressing was of a kind in common use, and was applied in the usual way. The floor had been dressed in the same manner a month before, and had been used by the plaintiff and others without accident. The passageway in which the plaintiff fell was unobstructed and thoroughly lighted, and there appears to have been only the usual danger in the use of oiled or polished floors.

To entitle the plaintiff to recover, it was necessary that she should show some specific act of negligence on the part of the defendant, or the existence of conditions so obviously dangerous as to amount to evidence from which an inference of negligence would arise. *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807; *East End Oil Co. v. Penna. Torpedo Co.*, 190 Pa. 350, 42 Atl. 707; *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 876, 52 L. R. A. 933, 82 Am. St. Rep. 792. The plaintiff had worked in the room a half hour before she fell. She testified: "As I crossed the room, I turned to one of the ladies and said: 'I am in such a hurry. I have so much work to do, and I am feeling so well.' And just as I crossed the room, my feet slipped from under me." This was the only testimony as to the way in which the accident happened, and it appeared from the testimony of her witnesses that it was obvious to any one that the floor had been newly dressed. It was not negligence to have an oiled floor in the room. The ordinary usage of the business was followed, both as to the character of the floor, and the manner in which it was cared for. This was the test of negligence. *Titus v. Bradford, etc.*, R. Co., 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944. The argumentative statement by the plaintiff that, when she fell, her dress was spoiled by the oil she fell in, does not sustain the allegation that the floor had been carelessly or negligently dressed. She did not say that there was loose oil on the floor, and no witness suggested this, and all the testimony was to the contrary. Some of the dressing may have remained on the surface of the floor, and been transferred to her dress by the force of her fall. Even if the employé who oiled the floor applied too much dressing, or failed to rub it thoroughly, his neglect would not make the defendant responsible for injuries sustained by another employé who had the full-

est opportunity to observe the condition of the floor.

The judgment is reversed, and judgment is now entered for the defendant.

CITY OF PHILADELPHIA, to Use of McFARLAND, v. McLINDEN et al.

(Supreme Court of Pennsylvania. March 23, 1903.)

MUNICIPAL CORPORATIONS—ACTION ON CONTRACTOR'S BOND—DEFENSES.

1. In an action by the city of Philadelphia on the bond of a municipal contractor, given under ordinance of March 30, 1896, to the use of the men employed on the work, it is no defense that the use plaintiffs are day laborers.
2. It is no defense to an action on the bond of a municipal contractor that the city paid the contractor after notice, as the city was under no obligation to pay the laborers, nor to see that they were paid.
3. It is no defense to an action on a municipal contractor's bond that the contract was in violation of the law forbidding the employment of alien labor.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia, to the use of Joseph McFarland, assignee of Jerry Lanno and others, against James McLinden and the Union Surety & Guaranty Company. Judgment for plaintiff for want of sufficient affidavit of defense, and defendants appeal. Affirmed.

The Union Surety Company filed an affidavit of defense, which was in part as follows: "Deponent is advised, so believes, and here avers that neither the plaintiff, the use plaintiff, Joseph McFarland, nor any of the assignors of the said Joseph McFarland, furnished any labor and material in furtherance of the contract mentioned in plaintiff's statement, and contracted with said McLinden as contemplated by the said ordinance of councils and the bond in suit, but that, on the contrary, the said assignors of the said McFarland, the use plaintiff, were nothing more or less than general laborers and employes of the said McLinden, and were not contractors with him for the work and labor mentioned in the statement; and that the bond in suit was not intended to and does not cover the various claims, or any of them, for which suit is brought. Deponent is advised, so believes, and here avers that the persons contemplated by the said ordinance and the bond in suit are citizens of the United States, and that by the act of assembly of June 25, 1895 (P. L. 269), none but such citizens were entitled to be employed as laborers, workmen, or contractors upon the work in question so as to be protected by the said bond. Deponent is informed, so believes, and here avers that neither the plaintiff nor the use plaintiff is or are entitled to recover in the action brought without averring in the statement of claim that the laws of Pennsylvania and the ordinances of councils were complied

with, and that the labor for which suit is brought was contracted for with citizens of the United States. The statement does not set forth these facts. Deponent is informed, so believes, and here avers that none of the parties mentioned in the said statement as performing the labor sued for was such a citizen as required by the said act of assembly. Deponent further avers that the said defendant and surety, the Union Surety & Guaranty Company, upon receipt of notice of the claims in suit, called upon and demanded of the plaintiff that the money it then had on hand, and which was due the said McLinden, be applied to the payment of said claims, or should be paid to the said surety company that the same might be so applied if required by law; and that the plaintiff declined said request, and paid said money to said McLinden, although it had on hand sufficient to pay said claims in suit." In a supplementary affidavit of defense the Union Surety & Guaranty Company averred: "Deponent is informed, and so believes, that the use plaintiffs named in the plaintiff's statement of his cause of action were general employés and laborers employed by said James McLinden, and your deponent is informed, so believes, and here avers that none of the said parties mentioned in said statement as performing the labor sued for was a citizen of the United States, as required by the ordinance of councils as of December 16, 1896, a copy of which is hereto attached and made part of this affidavit."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Alex. Simpson, Jr., and David J. Myers, Jr., for appellants. Eugene Raymond, for appellee.

'FELL, J. This action is by the city of Philadelphia, to the use of a number of persons who were employed as day laborers in grading streets. It is founded on two bonds (included in the same action by agreement of the parties) given to the city by the contractor and his surety to secure the prompt payment of all amounts due "for labor and materials furnished and supplied or performed in and about the work." The work was done in accordance with the contract, and the contractor was paid in full by the city. The surety notified the city, at a time when the amount due the contractor exceeded the amount of the claims for labor, not to pay the balance due him until he had paid the claimants. This notice was disregarded by the city. Three grounds of defense were presented by the affidavit filed by the surety: (1) That the use plaintiffs, being day laborers, were not entitled to the protection of the bond; (2) that the surety was released because of the payment to the contractor by the city after notice; (3) that

the laborers were aliens, employed by the contractor in violation of the act of assembly of June 25, 1895 (P. L. 269), and of the ordinance of December 16, 1896, and of the terms of the contract.

The ordinance of March 30, 1896, provides that all persons entering into contracts with the city for the construction or repair of public works shall give, in addition to the usual bond for the faithful performance of the work, another bond with the condition that they shall pay all persons supplying them with labor or materials; and it authorizes such persons to bring suit in the name of the city for their benefit against a defaulting contractor and his surety. The power of the city to exact the additional bond was upheld in *Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1093, in which it was decided that the condition was not *ultra vires* and contrary to public policy, as it was the right of the city to protect itself against the risk of defective materials and workmanship in the construction of its public works, against which there is no right of lien, by exacting assurance from the contractor that he will pay the debts which he incurs. It is now argued in support of the defendant's first contention that, as the purpose of the ordinance and bond is to give to those supplying materials and labor the same protection they would have if the supply had been to a private party, the construction which precludes a mechanic or laborer from maintaining a mechanic's lien should be adopted, and that it should be held that one who performs labor is not within the intent of the ordinance or of the bond given to carry out its provisions. This contention cannot be sustained. The municipal policy was to protect the city by securing the claims of those who furnished materials or labor, and the language of the bond to pay those who performed labor is too clear to admit of doubt.

The notice not to pay the contractor would have exonerated the surety if the payment was one which the city ought to have withheld; but it was not. The city was under no obligation to pay the claimants, nor to see that they were paid. They had no claim upon the fund in its possession which could be enforced, and the city could not retain the money in order that the creditors of the contractor or his surety could reach it by any process. *Lesley v. Kite*, 192 Pa. 268, 43 Atl. 959. The city had no direct financial interest in the bond, for, although it was a nominal plaintiff, it was merely a trustee for those who might become beneficially interested. *Philadelphia v. Stewart*, 201 Pa. 526, 51 Atl. 348. It is equally clear that the surety cannot set up the violation of the law and of the contract forbidding the employment of alien labor by its principal as a defense in an action on the bond.

The judgment is affirmed.

MILLER v. CURE et al.

(Supreme Court of Pennsylvania. March 9, 1903.)

EJECTMENT—INSTRUCTIONS—BOUNDARIES—PROVINCE OF COURT AND JURY.

1. Where, in an action to determine the boundaries of land, the existence of a natural object is clearly proven, an instruction that it corresponds to the description in the writing, and that the jury should so find, is properly given.

2. A deed called, as one of the boundaries of the land reserved, for an "outcrop of the conglomerate rock." There was a conspicuous ledge of such rock, over 1,000 feet in length, which closed the boundaries of the reservation. *Held* not error to instruct that this ledge was the boundary called for, though there was a small, inconspicuous ledge of the same rock, about 200 feet long, which did not close up the boundary, and which was a spur from the large ledge.

Appeal from Court of Common Pleas, Lackawanna County; Newcomb, Judge.

Action by W. G. Miller against John Cure and George W. Cramer. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. A. Vosburg, S. B. Price, and C. W. Dawson, for appellant. W. S. Diehl, for appellees

PER CURLIAM. This was an ejectment for about 18 acres of land in the borough of Blakely, Lackawanna county. Both parties claimed under one Hartwell, who on December 19, 1882, conveyed by written agreement to plaintiff a tract of 110 acres, but excepting and reserving thereout all that portion on the east corner bounded on two sides by the Oakley and Sherrard lands, and then follows this language: "And on the remaining sides by the outcrop of the conglomerate rock." Afterwards this piece reserved was, on June 2, 1888, conveyed by almost exactly the same description to defendants. When Hartwell conveyed to Miller, they went upon the land and viewed its boundaries. There was a ledge about 50 feet high, of what was undisputedly the conglomerate rock, extending for 1,300 feet, almost up to the Oakley lot. Several rods east of this there was another small ledge, apparently a spur from the larger ledge, but it only extended about 200 feet, and did not nearly reach the Oakley and Sherrard land. The identity of the boundary rock in the contract with that on the ground gave rise to the dispute. If the boundary meant in the writing was the large ledge, the reservation contained about 18 acres; if the small ledge, only $4\frac{1}{2}$.

The court decided that the large ledge was meant by the description, which, of course, gave, the verdict to defendants. It is argued that the court erred in not leaving

this question to the jury. In nearly all cases where there is a dispute, the identity of a monument on the ground with that in the deed, contract, or survey is a question for the jury; but there are exceptions. Where the existence of a natural or artificial object on the ground is undoubtedly proven or admitted, the court may say to the jury that it corresponds to the description in the writing, and they should so find. Where there is doubt as to its identity, or conflicting evidence, it is clearly a question of fact for the jury. Here the writing called for the outcrop of the conglomerate rock. The fifty-foot ledge, obviously, was the real outcrop of that rock. It was plainly in sight when Hartwell, the grantor, and Miller, the grantee, were determining the boundary to be written in the contract. Hartwell testified that was the only outcrop he saw, and the one he tried to insert in the contract. It was about 1,300 feet in length, and closed the boundaries of the reservation. While there was evidence of the small ledge, and that its composition was, geologically, conglomerate rock, it was inconspicuous, and a mere spur from the large ledge, which was the real outcrop of the conglomerate. Besides, it was only about 200 feet long, and did not reach to close up the boundary to either the Stewart or Sherrard lots. We think the court was right in holding that, on the undisputed evidence, the description in the contract could be applied only with certainty to the large ledge, and could not, except on merest conjecture, be applied to the small one, and therefore properly directed a nonsuit.

The judgment is affirmed.

LUTZ et al. v. ROYAL INS. CO. OF LIVERPOOL.

(Supreme Court of Pennsylvania. Feb. 23, 1903.)

FIRE INSURANCE—ACTION ON POLICY—DEFENSES.

1. In an action on an insurance policy covering photographic supplies there was evidence of a provision that the policy should be void if there was kept on the premises gunpowder or other explosives. It was customary for dealers in photographic supplies to sell small packages of flashlight powder, but not to manufacture it on the premises. It appeared that the firm manufactured it in a portion of the building which they occupied, without the knowledge of the insurance company. *Held*, that a binding instruction for defendant should have been given.

Appeal from Court of Common Pleas, Philadelphia County; Wiltbank, Judge.

Action by Francis A. R. Lutz and others against the Royal Insurance Company of Liverpool. Judgment for plaintiffs. Defendant appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

¶ 2. See *Boundaries*, vol. 2, Cent. Dig. §§ 42, 43.

Henry P. Brown and Thomas W. Barlow, for appellant. S. Edwin Megargee and E. Hunn Hanson, for appellees.

DEAN, J. The policy issued by defendant to plaintiffs on which this suit was brought is dated January 4, 1900, and indemnifies plaintiffs in sum of \$6,000 for one year against loss by fire on building No. 123 South Eleventh street, in Philadelphia. It was a renewal of a one-year policy on same building issued January 4, 1899. After the first policy was issued, in July, 1899, plaintiffs let three of the floors to the Thomas H. McCollin Company, a company engaged in the business of dealing in photographic supplies, and that company continued as tenants down to March 22, 1900, at which date there was an explosion, immediately followed by a fire, which destroyed the building. Charles Warren, who was an employé of the McCollin Company, and mixed explosives for that company, was on the fifth floor, at work, at the time of the explosion, and was killed. Among other articles used in the photograph business and sold by the company was a flashlight powder called "Blitz Pulver," a high explosive. The company not only dealt in and sold this powder, but also manufactured it on the floor occupied by it. For the greater part, the policy was on the usual printed form of the company, and among other printed conditions is the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if (any usage or custom of trade to the contrary notwithstanding) there be kept, used or allowed on the above described premises * * * gunpowder exceeding 25 pounds in quantity, naphtha, nitroglycerine or other explosives," etc. In addition to this printed condition, there was the typewritten provision: "Privilege to be occupied as at present or for purposes not more hazardous." It was customary for dealers in photographic supplies in Philadelphia to put up and sell in small packages the flashlight powder called "Blitz Pulver." It was not customary for dealers to manufacture it on the premises where sold.

The insurance company refused to pay the loss, on the ground that the conditions quoted had been violated, and thereupon this suit was brought. At the trial but few other material facts appeared than those already stated. The defendant requested the court to charge the jury in its second and third written points as follows: "If the jury believe that an explosive was manufactured on the premises in question at the time of the explosion, this was contrary to the contract of insurance, and avoided the policy, and there can be no recovery thereon. Answer. For answer to that point I refer you to my general charge." "Under all the evidence in the case the verdict of the jury must be for defendant. Answer. That point I refuse."

Although the learned judge of the court below left it as a question of fact for the jury to find whether the McCollin Company was at the time manufacturing the flashlight powder, the evidence that it was was practically undisputed, and he says "it would seem that there could be no question" about it. He really might very properly have instructed them that the fact was established. So we shall treat it as a fact, the same as if found by the jury. The court's reference to its general charge on the subject embraced in the second point is thus stated: "If you find that the ordinary conduct of the business in which the Thomas H. McCollin Company was engaged at the time the risk was accepted by the insurance company involved the manufacture of flashlight powder, and if, on the first point, under my instructions, you find in favor of the plaintiff, then your verdict should be for the plaintiff. If the ordinary course of the business, however, was that it involved dealing in flashlight powder, and did not involve its manufacture, then I instruct you that an explosive was kept, used, or allowed on the premises, contrary to the provisions of the policy, and that in such case your verdict should be for the defendant." This, although not a peremptory negative or affirmative, is a very clear answer, fully responsive to the points. There was a verdict for plaintiffs, and defendant appeals, and complains of the answers to the two points as error.

Counsel for appellees here rely on *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. 485, and *Lancaster Silver Plate Co. v. Fire Ins. Co.*, 170 Pa. 151, 32 Atl. 613, for the law vindicating this instruction. We think there is a clear distinction in the facts between those cases and this. In both cases cited—one a leather factory, the other a silver-plate factory—the prohibited articles, benzole and gasoline, were in constant use in the manufacture of the product of the factories, and absolutely necessary in small quantities to carrying on the business. We held that, if the use was a necessary one in carrying on the business, it must be presumed that the intent of the parties was to insure the subject of the contract as it then existed, and as it would continue to be during the life of the policy, notwithstanding the printed condition. In this case, as the learned judge said to the jury, there was no "direct evidence" that the insurance company knew that the McCollin Company was manufacturing its own flashlight powder on the premises when the policy was issued. Under the evidence it might fairly be presumed that the photograph supply company dealt in that article, and kept it in small quantities for sale on the premises. But, as there is no presumption from the nature of the business and the subject of the contract that the insurance company knew it was also manufactured on the premises, the burden was on plaintiffs to establish by

satisfactory evidence that the company actually did know. It might be presumed to know the ordinary methods and customs of such dealers and just here comes in the question, what was the custom? Not one dealer or manufacturer—and a number were called—testified that it was a necessary or usual part of the business of a dealer in photographic supplies to manufacture flash powder on the premises where sold. On the contrary, the evidence was that it was neither usual nor necessary, the custom of dealers being to buy it of manufacturers, whose factories were generally located in the suburbs of the city, in small quantities, then put up and sell it in small half-ounce packages. Not a single witness except McCollin testified it was customary for the dealer to manufacture the powder, and the substance of his testimony is that it was his custom to do it. The testimony wholly failed to show such custom, hence there could be no inference that the insurance company knew of a custom which did not exist. Nor is there any evidence, direct or indirect, that it knew as a fact at the date of the contract that the McCollin Company manufactured the powder upon the premises.

Was, then, the building at the date of the explosion and fire occupied "for a purpose more hazardous" than at the date of the policy? As before noticed from the subject of the contract, it would be fairly presumed that the insurance company knew, or ought to have known, that a dealer in photographic supplies kept on the premises and sold small quantities of flashlight powder, but there is no presumption, and no evidence, that the insured knew he manufactured it there. Then, did the use of the premises for manufacture increase the hazard, within the typewritten condition of the policy? Flashlight powder is composed of quite a number of chemical materials, which, when compounded in certain proportions, it is testified by chemists, become a high explosive. It scarcely needed further proof that the bringing together in one room of a number of materials which separately were comparatively harmless, yet together made a high explosive, greatly increased the peril of fire from explosion, though further evidence on that point by manufacturers and others was given. One manufacturer (Buchanan) testified that he had stopped manufacturing it altogether because there were too many coroner's juries to keep it up in his establishment. There was other testimony to the same effect, and there was none to the contrary. The case was well and carefully tried on the theory adopted by the learned judge of the court, but, in our view, there was not sufficient evidence to support it. The defendant's second and third points should have been affirmed without qualification.

The judgment is therefore reversed, and judgment entered for defendant.

STATE v. EATON.

(Supreme Judicial Court of Maine. Feb. 5, 1908.)

INTOXICATING LIQUORS—ILLEGAL SALES—KNOWLEDGE AND BELIEF—INTENT.

1. If a person, other than those having statutory authorization, sells liquors which are in fact intoxicating, but which he believes and has good reason to believe are not intoxicating, he nevertheless violates the statute prohibiting the sale of intoxicating liquors, and is subject to the statutory punishment therefor. The prohibition is not limited to knowingly selling without authority. It is absolute, without exception.

(Official.)

Exceptions from Supreme Judicial Court, Franklin County.

Clarence Eaton was convicted of a sale of intoxicating liquors, and excepta. Exceptions overruled.

The defendant, after conviction, was allowed a bill of exceptions as follows:

There was evidence tending to show that on July 3, 1902, the respondent put up a case of beer of some kind, and sent it to one Augustus H. Bradford; also that Bradford delivered a bottle of the same to his son, who delivered the same to one Nelson Gould, who delivered the same to Prof. W. G. Mallett, who claimed to analyze the same, and found it contained 5.44 per cent. alcohol. Respondent testified that the beer he sent to Bradford was what is known in the market as "Uno Beer," that it was not intoxicating, and that if Mallett made a correct analysis of a bottle of beer which contained 5.44 per cent. alcohol, which came from that case, there must have been some mistake in putting up the beer; that he did not intend to sell anything but Uno beer, which is not intoxicating.

On this point the presiding justice instructed the jury as follows:

"It is unnecessary, I presume, to instruct you, but I will do so, that if there was any misapprehension or error on the part of the defendant or any of his agents in delivering a strong beer, a beer unadulterated, when he intended to deliver an adulterated beer, that would not relieve him from the responsibility of selling liquor which was intoxicating, if you find it to be intoxicating in fact."

Argued before WISWELL, C. J., and EMERY, STROUT, SAVAGE, and SPEAR, JJ.

H. S. Wing, Co. Atty., for the State. H. L. Whitcomb, for defendant.

EMERY, J. The defendant was convicted of selling intoxicating liquor without any lawful license or authority therefor. He claimed that he did not know the liquor (beer) was intoxicating, had good reason to believe it was not intoxicating, and did not intend to sell anything intoxicating. The presiding justice ruled that this claim, if

established, was no defense. The defendant excepted.

The question presented is practically this: Is a person permitted by the statute to sell without license intoxicating liquor if he believes, and has reason to believe, that it is not intoxicating? Certainly not. The prohibition is not limited to knowingly selling without license. It is absolute, without exception. While many statutes make knowledge or wicked intent, or both, essential to constitute the offense forbidden, the statute forbidding the sale of intoxicating liquor does not. It is like those statutes considered in *State v. Goodenow*, 85 Me. 30, and *State v. Huff*, 89 Me. 521, 38 Atl. 1000, where the act was held to constitute the offense, though the defendants did not think they were violating the statute.

A person proposing to sell liquor must make sure, at his peril, that it is not intoxicating. If it be in fact intoxicating, his erroneous belief that it is not intoxicating, however sincere and apparently well founded, will not save him from punishment. It has been repeatedly so held in Massachusetts under similar statutes. *Com. v. Boynton*, 2 Allen, 160; *Com. v. Hallett*, 103 Mass. 452; *Com. v. O'Kean*, 152 Mass. 584, 26 N. E. 97.

Exceptions overruled. Judgment for the state.

RICH v. HAYES.

(Supreme Judicial Court of Maine. Feb. 5, 1903.)

EVIDENCE—ADMISSIBILITY—PRIVATE MEMORANDA—PRACTICE—JURIES—NEW TRIAL.

1. A written statement of a third party containing material evidence against one of the parties to a suit is not admissible in evidence.

2. If such a written statement, though not admitted in evidence, is allowed at the close of the trial to be taken by the jury to their room with other papers, it is prejudicial error, and a new trial will be granted.

3. That such written statement is upon the same paper as a statement which is admissible, and was formally admitted in evidence, and which may properly be allowed to be taken to the jury room, it must nevertheless be withheld from the jury, either by separation, or complete obliteration, or in some other effectual mode.

(Official.)

Exceptions from Supreme Judicial Court, Kennebec County.

Action by Abraham Rich against Alvah R. Hayes. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

Action of assumpsit on a promissory note. Besides the count on the note, there was a money count, with a specification making reference to the note.

The plea was the general issue, with a brief statement of special matter of defense, upon which, however, the decision in no way turned.

In addition to his bill of exceptions, the defendant also filed and argued a general motion for a new trial.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, and SAVAGE, JJ.

L. A. Burleigh and Joseph Williamson, Jr., for plaintiff. G. W. Heselton, for defendant.

EMERY, J. This was an action against an administrator representing the deceased partners of the late firm of Dingley Bros. One of the issues was whether certain indorsements or entries in the handwriting of the plaintiff upon the back of a \$3,000 note given to him by the Dingley Bros. were made accidentally and erroneously. The plaintiff claimed they were, and that he had written and personally delivered to the Dingley Bros. in their lifetime a letter stating that the indorsements or entries were erroneous, and explaining how they happened to be made, and that they orally assented to the statement and explanation as correct and satisfactory. A copy of this letter was admitted in evidence, the original not being produced in response to due notice to do so.

At the top of this copy of letter was the following memorandum, signed by R. W. Rich, a son of the plaintiff, viz.:

"The original letter from Abraham Rich to Dingley Brothers of this date of April 18th, 1895, of which this is a true copy, was handed by Abraham Rich to Fuller Dingley of Dingley Brothers in their (Dingley Brothers) office in Gardiner, Maine, in my presence at about three o'clock p. m., of this 'afternoon' of April 18th, 1895. Fuller Dingley read the letter and said, 'Your explanation in this letter of your erroneous entries on our \$3000.00 note is satisfactory to and agreed to by us, Captain.'

"Attest: R. W. Rich."

The plaintiff was known as "Captain Rich." It does not appear that this memorandum was read or offered in evidence, or used at the trial by any witness to refresh his memory.

When, at the close of the trial, the various documentary exhibits admitted in evidence were about to be passed to the jury to take to their room for use in their deliberations, the defendant objected to the above memorandum, signed by R. W. Rich, going to the jury with the copy of the letter, but, the plaintiff insisting, it was allowed to be taken by the jury to their room with the copy of the letter. The defendant excepted.

The written memorandum was merely a private one, not even made in the course of business. It contained a statement of material and damaging admissions of the defendant's intestate, yet it was allowed to go to the jury not only as evidence, but as documentary evidence, with practically more probative force than the oral testimony of R. W. Rich to the same admissions would have had. It should need no argument to

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1193.

show that this was error so prejudicial to the defendant as to require a new trial.

Exceptions sustained. New trial granted.

LOOK v. HORN et al.

(Supreme Judicial Court of Maine. Jan. 21, 1903.)

MORTGAGE—RENTS AND PROFITS—PAYMENT BY ONE JOINT MORTGAGOR—REIMBURSEMENT—EQUITABLE LIEN.

1. Where a mortgage is discharged on payment made by one of the joint mortgagors, or his successor in interest, it may be treated in equity as still subsisting for the protection of the party making payment, or the delinquent's share in the mortgaged premises may be regarded as subject to a lien for the amount paid on the mortgage for his benefit.

2. In no event can the grantee of the delinquent recover rents and profits until the parties making payment of the mortgage have been reimbursed the amount paid for the delinquent, either from the rents and profits of the delinquent's interest in the premises, or in some other manner; and the net profits received may be held towards reimbursement.

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action by Charles V. Look against Martin Horn and others. Case reported, and judgment for defendants.

Assumpsit for rents and profits of one-half of a farm in Fairfield formerly occupied by Benjamin Horn as a homestead, for the six years immediately preceding January 26, 1901.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

F. L. Ames, for plaintiff. S. J. and L. L. Walton, for defendants.

STROUT, J. On March 31, 1876, Benjamin Horn and Oliver R. Horn received conveyance of a farm in Fairfield from Samuel Kimball, and on the same day the Horns mortgaged the farm to Kimball to secure the payment of \$534.50 of the purchase money. Benjamin occupied the farm thereafter, except a piece conveyed to his son Calvin, till his conveyance to his son Martin, one of the defendants, on May 12, 1898, since which time Martin has been in possession. Benjamin and his son paid the mortgage to Kimball, and had it discharged of record on January 23, 1895. Oliver never paid anything and never occupied the farm. Oliver R. Horn, by deed of January 27, 1881, undertook to convey one-half of the farm to the plaintiff; but, the mortgage to Kimball being then in force, Oliver's deed conveyed only his one-half of the equity of redemption from that mortgage.

The plaintiff seeks in this action to recover one-half of the rents and profits of the farm from January 26, 1895, to January 26, 1901.

Benjamin Horn and his sons, having paid that portion of the Kimball mortgage which

should have been paid by Oliver, are entitled, in equity, to have Oliver's one-half of the farm subjected to its payment. This right is unaffected by the discharge of record of the mortgage. It may be treated in equity as still subsisting for the protection of Benjamin and Martin, or Oliver's one-half may be regarded as subject to a lien for the amount paid on the mortgage for Oliver's benefit. In no event can the plaintiff, as Oliver's grantee, recover rents and profits until Benjamin and Martin have been reimbursed their payment for Oliver, either from the rents and profits of Oliver's one-half, or in some other manner.

It is very clear from the evidence that the net profits from the farm for the time covered by plaintiff's claim have been little, if anything, in excess of necessary repairs and taxes—certainly wholly insufficient to reimburse the payment for Oliver on the mortgage. Whatever net profits defendants may have received from one-half of the farm, they are entitled to hold towards their reimbursement. Until that is accomplished, plaintiff can have no claim upon the rents and profits.

Judgment for defendants.

STATE v. NADEAU.

(Supreme Judicial Court of Maine. Jan. 7, 1903.)

INTOXICATING LIQUORS—ILLEGAL TRANSPORTATION—ARREST.

1. Intoxicating liquors were seized while being illegally transported on September 17, 1901, and a complaint was made against the defendant therefor six days later, when a warrant was issued for his arrest. The defendant was arrested on October 16th—29 days after the seizure, and 23 days after the warrant for his arrest was issued.

Held, that the warrant was served within a reasonable time.

2. The provisions of the statute (Rev. St. c. 27) known as the "Search and Seizure Process," and requiring an immediate arrest, do not apply to a case like this.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Alphonse Nadeau was indicted for illegal transportation of intoxicating liquors. Case reported. Judgment for the state.

Prosecution under Rev. St. c. 27, § 31, for the illegal transportation of intoxicating liquors. The defendant was convicted of the offense in the Lewiston municipal court, and took an appeal to this court at nisi prius, sitting January, 1902. After the evidence was taken out in the court below, it was agreed to report the case to the law court for determination of the question as to whether the arrest of the defendant was not unreasonably delayed.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

W. B. Skelton, Co. Atty., for the State. J. G. Chabot, for defendant.

SPEAR, J. This case comes to the law court on report, and grows out of a complaint for the illegal transportation of liquors, and the proceedings following therefrom. It is admitted that the respondent, at the time alleged in the complaint, was engaged in the illegal transportation of liquors. The liquors described in the warrant were seized on the 17th day of September, 1901. The complaint charging the respondent with the illegal transportation of the liquors seized was made on the 23d day of September, 1901, six days after the seizure, and the warrant for his arrest was issued on the same day. The respondent was arrested on the 16th day of October, 29 days after the seizure, and 23 days after the warrant for his arrest was issued.

The stipulation of the parties is: "If the law court are of opinion that the warrant was served within a reasonable time, judgment is to be rendered for the state, no other question being in issue; otherwise, complaint quashed."

The state must prevail.

The report of the evidence does not warrant the finding that the officer was either dilatory or negligent in obtaining or serving the warrant. The case shows that the offense with which the respondent was charged comes within the general principles of law applying to criminal offenses. The respondent had violated the criminal law of the state. His offense was not barred by the statute of limitations. He was properly apprehended, tried, convicted, and fined. The cases cited in the defendant's brief do not apply to the case at bar. The warrant in each case was issued under the statute relating to search and seizure. The search and seizure process is in a class by itself. The Constitution of the state has so placed it. The Bill of Rights, § 5, provides that the people shall be secure in their persons, houses, papers, and possessions from all unreasonable search and seizure; and that no search warrant shall issue without a special designation of the place to be searched and the thing to be seized. In alluding to the constitutional prohibition, our court, in *State v. Guthrie*, 90 Me. 448, 38 Atl. 368, say: "The danger of its abuse has been so clearly apprehended in this country that constitutional barriers have been erected against it. * * * Nothing in the complaint or warrant or in law concerning them indicates that, after complaint is made, the warrant is to be held by the magistrate or officer as a weapon to be used at his discretion. The very nature of the search warrant indicates that when complaint is made the warrant (if issued at all) should be promptly issued and executed. The purpose is to seize the thing alleged to be at that time in the place to be searched, to prevent its removal or further concealment. * * * Especially is this so when complaint is made for a war-

rant to issue to search for intoxicating liquors. The complaint is against the particular liquors or deposits at the date of the complaint, and the warrant, under the Declaration of Rights, § 5, can be issued against these liquors only." *Weston v. Carr*, 71 Me. 356; *State v. Riley*, 86 Me. 144, 29 Atl. 920. "The officer is expressly directed by the warrant and the statute to 'make immediate return of said warrant' and to have the respondent 'forthwith' before the magistrate for trial." *State v. Guthrie*, supra.

The reason that underlies the prohibition of unreasonable search and seizure, the protection of the people against oppression, is the very reason that urges the issue of a warrant for the apprehension of a person charged with the commission of a criminal offense.

Judgment for the state.

SMALL v. ROSE.

(Supreme Judicial Court of Maine. Jan. 29, 1903.)

BILLS AND NOTES—EVIDENCE—STATUTE OF LIMITATIONS—PARTIAL PAYMENTS—INDORSEMENTS—BOOKS OF ACCOUNT—ENTRIES AGAINST INTEREST.

1. The provisions of Rev. St. c. 81, § 100, do not prevent the admission, in accordance with established rules, of evidence of payments to take actions on bills and notes or other writings out of the statute of limitations, but merely exclude indorsements or memoranda made thereon by or in behalf of the party to whom the partial payments purport to have been made.

2. Entries in account books of a deceased testator of payments received by him on bills or notes, supported by the executor's suppletory oath, but made after the statute of limitations has run, are not entries against testator's interest; it being to his advantage to show a part payment on the note. Such entries are not admissible to prove the fact of payment.

(Official.)

Exceptions from Superior Court, Cumberland County.

Action by Henry M. Small against Albert H. Rose. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

Assumpsit on a promissory note given by defendant to plaintiff's testator. Defendant plead the general issue and the statute of limitations, by way of brief statement. At the trial the plaintiff introduced, supported by the suppletory oath of the executor, a small account book, found among the effects of the deceased, which contained, among other entries in his handwriting, under the head of money received, an item of \$25 from A. H. Rose, March 25, 1897. To the introduction of this evidence the defendant seasonably objected, but the same was admitted, and the defendant alleged exceptions.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, PEABODY, and SPEAR, JJ.

F. H. Haskell and A. F. Moulton, for plaintiff. F. W. Brown, Jr., for defendant.

PEABODY, J. This case is on exceptions of defendant to the admission of evidence. It was an action on a promissory note, bearing date December 21, 1882, given by the defendant to one O. W. Small, plaintiff's testator.

The defense is the statute of limitations. There were certain indorsements on the note, but not in the handwriting of the defendant, and it does not appear that evidence was introduced tending to show any payment on the note prior to March 25, 1897. As evidence of a payment made by the defendant on that date, the plaintiff introduced, supported by his suppletory oath, the small account book found among the effects of the deceased, in which was written in the handwriting of the deceased, under the heading of money received, and under the date of March 25, 1897, the following words: "A. H. Rose, \$25.00." This corresponded in date and amount to one of the indorsements on the back of the note. To the admission of this evidence the defendant seasonably objected and excepted.

Rev. St. c. 81, § 100, provides that "no indorsement or memorandum of such payment made on a promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made or purports to be made, is sufficient proof of payment to take the case out of the statute of limitations." This statute does not affect the admissibility of other evidence tending to show such payment, where the admission of such evidence does not conflict with the established rules. *Sibley v. Lumbert*, 30 Me. 253.

The entry in question was part of a private cash account in the back of a small diary. The account was kept with apparent regularity, and the entry would have probative force to remove the statute bar if it was apparently made by the testator against his interest.

So far as appears from the case as presented, there was no evidence to overcome the presumption which arises from the date of the note that it had become outlawed long prior to the date of the memorandum of March 25, 1897; so that, in considering the effect of a cash entry of that date, we must have in mind that at the time a payment on account of the note would have the effect not merely of reducing the indebtedness, but also of reviving the note and making it enforceable against the defendant.

Had the entry in the cashbook been made a reasonable time before the note became outlawed, its effect being an admission of the reduction of the debt, it might have been admissible if offered in evidence by the plaintiff as an entry made by a person since deceased, apparently against his interest. *Taylor v. Witham*, 3 Ch. D. 605; 1 Greenl. Evidence, § 147. But after the statutory bar had become complete, it was clearly not against his interest, but, on the contrary, to his great advantage, to show a part pay-

ment on the note. This destroys entirely the probative force of the written memorandum, and makes it inadmissible in evidence to prove the fact of the payment. *Rose v. Bryant*, 2 Camp. 321; *Wood on Limitations*, § 115; 1 Greenl. Evidence, § 149; *Libby v. Brown*, 78 Me. 492, 7 Atl. 114.

Exceptions sustained.

HAUGH v. PEIRCE.

(Supreme Judicial Court of Maine. Jan. 10, 1903.)

DOWER—VESTED RIGHTS—EQUITY.

1. While before assignment a widow's right of dower is a mere right, to be enforced in such manner as the law should prescribe, after assignment in any legal mode, whatever is lawfully assigned to her as her dower becomes a vested estate, vested in form as well as in substance, which she cannot be compelled to sell or commute.

2. Where there is lawfully assigned "in a special manner" to a widow, as her dower, out of a parcel of real estate, "the sum of two hundred dollars, to be paid annually from the rents and profits of that parcel," as a third part of the rents and profits, under Rev. St., c. 65, § 3, she thereby acquires a vested right to an annuity of \$200 from that real estate, which she cannot be compelled to release for any consideration.

3. The owner of the real estate out of which dower has been so assigned cannot maintain a bill in equity to have the real estate sold free of the widow's dower, and the present worth of the widow's annuity appraised, and paid to her out of the proceeds.

(Official.)

Report from Supreme Judicial Court, Equity Term, Waldo County.

Bill by Thomas Haugh against Carrie E. Peirce. Case reported, and bill dismissed.

Bill in equity, praying to have real estate sold free of the widow's dower, to have the present worth of the dower appraised and paid to her out of the proceeds. The dower was assigned in a special manner, to wit, the sum of \$200 annually from the rents and profits, under Rev. St. c. 65, § 3.

The defendant, besides her answer, filed a demurrer, and the case was reported to the law court.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

J. S. Harriman and Peregrine White, for plaintiff. W. P. Thompson, for defendant.

EMERY, J. The case is this: Robert F. Peirce died in 1892 seised of a parcel of real estate in Belfast upon which was a brick block. It appearing to the commissioners appointed by the probate court in November, 1892, to assign the widow's dower that a division of said parcel by metes and bounds could not be conveniently made, they assigned to the widow (the defendant in this case) her dower therein "in a special manner as of a third part of the rents and profits," and fixed as such third part "the sum of two

hundred dollars, to be paid annually from the rents and profits of said brick block." Rev. St. c. 65, § 8. This action of the commissioners, we assume, was confirmed by the probate court.

The plaintiff afterward, in 1896, acquired title to this parcel of real estate by purchase, "subject [in the language of the deed to him] to an annuity of two hundred dollars to the widow of Robert F. Pelce deceased, during her life." Later still (in 1899) the brick block on the lot was destroyed by fire, since which time the lot has remained vacant, and incapable, in its present condition, of yielding any income. The plaintiff, the owner, has now brought this bill in equity against the defendant, the widow, praying (1) that the said real estate be appraised, and the interest of the defendant therein be ascertained; (2) that the real estate be sold, and the proceeds be divided between the plaintiff and the defendant according to their rights in the premises. The defendant demurred, and also answered, saying, among other things, that she did not wish to part with her rights as assigned to her.

The bill cannot be sustained. Its plain purpose is to compel the defendant to commute her annuity for a present specific sum, and release the land from the charge thus imposed upon it. There is no law in this state requiring her to do so. Before assignment her dower was a mere right, to be enforced in such reasonable manner as the law might prescribe. After assignment in any statutory manner, whatever was lawfully assigned to her as her dower, whether one-third of the land or one-third of the rents and profits, or, as in this case, a special sum per year, payable out of the land as one-third of the rents and profits, became hers absolutely for her life, her vested estate for life, vested in form as well as in substance. She cannot be compelled to sell it or change its form against her will. It must remain in its present form a charge upon the land until extinguished by her death, or by her voluntary release, whatever the inconvenience to the landowner. This the plaintiff should have known when he bought the land. Any legislation since this dower was assigned cannot affect her estate which then vested.

Bill dismissed, with costs.

COOMBS v. MASON.

(Supreme Judicial Court of Maine. Jan. 1, 1903.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS TO JURY—EXPRESSION OF OPINION.

1. In an action for personal injuries alleged to have been caused by the defendant's negligence, the question of the plaintiff's contributory negligence is to be determined by the jury, and not by the court.

2. The negligence of the plaintiff cannot be considered as proximately contributing to the injury, if it is independent of and precedes the negligence of the defendant, and when the defendant, by the exercise of ordinary care, might have avoided the injury.

3. A requested instruction, which withdraws that question from the jury, or which is not applicable to the facts of the case on trial, may properly be refused.

4. When the jury have been instructed in full and appropriate language as to what constitutes due care and contributory negligence, it is not error to decline to instruct them further upon those subjects.

5. It is not an expression of opinion upon an issue of fact arising in the trial of a case for the presiding justice to state his recollection of the testimony. He has the same right to call the attention of the jury to the existence and nonexistence of testimony. If he is wrong in his recollection, his attention should be called to it, and the error corrected at the time.

(Official.)

Exceptions from Supreme Judicial Court, Sagadahoc County.

Action by Fred N. Coombs against William W. Mason. Verdict for plaintiff. Motion for new trial and exceptions by defendant. Overruled.

Action on the case to recover damages of defendant for injuries received by plaintiff while he was riding upon the forward step of a street car in the city of Bath on the evening of the 29th day of December, 1900. The plaintiff claimed that as he was so riding, his left foot resting upon the forward platform, his right foot resting upon the lower step leading to that platform, the hub of the hind wheel of a jigger belonging to the defendant, and under the care of a servant of the defendant, caught a portion of the calf of plaintiff's right leg which was then and there exposed by reason of its resting upon said lower and projecting step, and crushed a portion of the muscles of his leg against the end of the projecting horn or end of cross-beam which forms the extreme end of said platform and projects beyond the car fender which it supports, thereby causing an injury to the exposed limb.

The defense was twofold: First, it was not the defendant's cart which caused the injury; second, the plaintiff, by voluntarily riding in such an exposed position, and remaining there when he knew, or should have known, of the proximity of the cart and the natural dangers of his position, was guilty of such contributory negligence as to bar his recovery.

Argued before WHITEHOUSE, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

F. E. Southard, for plaintiff. C. W. Larabee and E. C. Plummer, for defendant.

POWERS, J. Case for negligence. The evidence establishes the following facts: On December 29, 1900, at about 4:40 p. m., the plaintiff boarded an electric car in Bath for the purpose of going to his home. At the time the seats, aisle, front and rear plat-

¶ 1. See Negligence, vol. 37, Cent. Dig. § 333.

forms of the car were full of passengers. The plaintiff secured a position at the forward end of the car, and stood with his left foot on the platform, and his right foot upon the single step of the car, facing the motor-man. A few minutes later, while the car was standing upon the straight part of a siding opposite the Phoenix Hotel, waiting to pass another car, a heavily loaded team of the defendant, consisting of a span of horses and double jigger, driven by his employé, passed, going in the same direction as the car, and between it and the sidewalk. The hub of the left hind wheel of the jigger scraped along the side of the car, and, the plaintiff still remaining in the same position, caught the calf of the plaintiff's right leg, pushing it against the fender of the car, and inflicting serious injuries. The car was a cut-under, and the step on which the plaintiff's foot rested was about 8 inches inside the extreme outside edge of the car, but projected about 5½ inches beyond the outside of the car at the sills. The extreme width of the hind wheels of the jigger was 8 feet from nut to nut, and the driver was seated 12 feet forward of the rear axle. From the outer edge of the step upon which the plaintiff was standing to the edge of the sidewalk there was over 11 feet of the wrought and traveled way, unobstructed, and in good condition.

Exceptions. The defendant requested the following instructions:

(1) "The objective point of the horses and jigger was to pass the car, then standing on the siding; and if, while they were passing the car, plaintiff exposed his person or his limbs beyond the lines of the body of the car, he was guilty of contributory negligence, and cannot recover."

The presiding justice said: "I give you that, but the testimony does not sustain the proposition. If he put himself in a position of danger as the horses were passing, so that it became a part of the act of collision, and it was impossible to tell whether the collision was caused by the act of the plaintiff or the defendant's servant, and the plaintiff's change of position was a negligent act, that would be contributory negligence. But the evidence here, as I understand it, and you will remember it, was that he kept the same position that he occupied from the time he got on the car, and that there was no sudden change—but that is for you to say—just as the horses were passing." The requested instruction might well have been refused, as the question whether the plaintiff was guilty of contributory negligence was to be determined by the jury, and not by the court. It is urged, however, that by giving the instruction, and then stating that "the testimony does not sustain the proposition," the presiding justice invaded the province of the jury, and expressed an opinion upon an issue of fact arising in the case. This language was qualified, however, by that which immediately follow-

ed. The presiding justice, after defining what would constitute contributory negligence, and stating his recollection of the evidence in regard to any change of position on the part of the plaintiff, expressly told the jury "you will remember it, but that is for you to say." The jury must have understood from the entire language of the charge that all questions as to the plaintiff's position and movements at the time of the injury were submitted to their determination, and that the presiding justice was not expressing any opinion upon an issue of fact, but simply stating his recollection of the evidence. If he was wrong in this, it was the duty of defendant to call his attention to it at the time, and have the error rectified then and there. A party cannot sit by in silence, and afterwards avail himself of such a misstatement of the evidence as ground for exception. An examination of the case, however, shows that the presiding justice was right in his recollection. There is not in the case either testimony, or circumstance from which it can be inferred, that the plaintiff changed his position as the team was passing. The uncontroverted evidence is that he was, at the time of the injury, in the same position as when he originally boarded the car. There was, therefore, no issue of fact arising in the case in regard to it. The statement that the evidence did not support the proposition did not require the qualification of it which the presiding justice immediately gave. He had the same right and duty to call the attention of the jury to the existence and nonexistence of evidence. If a party request instructions not applicable to the facts of the case, he cannot complain that the jury is told that there is no evidence upon which to base them.

(2) "A passenger who rides upon the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the obvious and usual perils of his position; while a person standing upon the steps of a car is obligated to a still greater degree of care, since in such a position he is subject not only to the same dangers as when standing upon the platform of a car, but is liable also to injury from collision with vehicles." This instruction was properly refused. Whatever may be thought of it in an action against a street railway company who, when its cars are full, permits, and in legal effect invites, passengers to ride upon its platforms, it would have been misleading in the present case. That a team, with ample and unobstructed room to pass, and three feet to spare, going at a walk, would be driven against the plaintiff's person, was not an obvious and usual peril. Wherever he was riding, the plaintiff was bound to prove affirmatively that he was in the exercise of due care at the time, such care as persons of ordinary prudence exercise under similar circumstances, and that no negligence on his part proximately con-

tributed to cause the accident; no more and no less. The jury were so instructed in full and appropriate language.

Motion. It is urged that the plaintiff, in riding with his foot upon the step of the car, was guilty of contributory negligence, and therefore cannot recover. Even if it be admitted that the plaintiff's conduct was negligent in this respect, still it cannot be considered as contributing to the injury, if it was independent of and preceded the negligence of the defendant, and the defendant, by the exercise of ordinary care, might have avoided the injury. *Atwood v. Bangor, Orono & Old Town Railway Co.*, 91 Me. 399, 40 Atl. 67. That the plaintiff's negligence, if he was guilty of negligence, preceded and was independent of the negligence of the defendant, cannot be questioned. It was light enough to plainly distinguish persons and objects. The defendant's team had ample room in which to pass. The teamster was seated 12 feet in front of the hub of the wheel which struck the plaintiff. He was driving at a walk. He could see the car, the people upon the platforms, and the step. Before his horses' heads reached the front platform, his jigger was scraping against the car. He could have seen the whole situation and avoided the accident by the exercise of ordinary care. Instead of that, he kept sturdily on his way, smoking his pipe, his reins hanging loosely in his hands, and apparently relying upon the strength of his jigger to sweep all obstructions from his path.

Motion and exceptions overruled.

Appeal of WARD.

(Supreme Court of Errors of Connecticut.
April 22, 1903.)

DESCENT AND DISTRIBUTION—CURTESY—SEISIN—ESTATES IN REMAINDER—DISTRIBUTION—ELECTION—ACQUIESCENCE.

1. Where on intestate's death an undivided two-fifths of certain real estate was assigned to his widow as dower, and the other three-fifths was distributed to his married daughter, who resided on the property with her husband, and died intestate prior to the death of the widow, the tenancy by curtesy of the daughter's husband in the property extended only to the undivided three-fifths of the property of which his wife was seised in her lifetime, and did not attach to the widow's dower interest on her subsequent death.

2. On the death of intestate's grandfather, two-fifths of certain real estate was assigned to the grandfather's widow as dower, and the remaining three-fifths was distributed to intestate's mother. On the death of the widow subsequent to the death of intestate's mother, two-fifths of the property was distributed to intestate as a part of the distribution of her grandfather's estate, subject, however, to a life estate in her father. This distribution was accepted by the probate court, and intestate lived with her father, and permitted him to use the property and receive the rents and profits during her life, without objection until her death, which occurred several years after her becoming of age. *Held*, that intestate thereby elected to take the property under the distribution of her grandfather's estate, and that her

administrator was therefore not liable for the rents and profits received by intestate's father after her death.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Final accounting by Frederick S. Ward, as administrator of the estate of Mabel I. Stevens, deceased. From a decree disallowing the administrator's account, he appeals. Reversed.

Samuel Fessenden and Seymour C. Loomis, for appellant. Henry O. White and John Q. Tilson, for appellees.

BALDWIN, J. The appellant's intestate was the only surviving child of Ellen M. Stevens, deceased, who was the wife of Samuel A. Stevens, and one of the three surviving children of Henry Ives, of New Haven. Henry Ives died intestate in 1859, owning several parcels of real estate. In an undivided two-fifths of one of these (a house and lot on Wall street in New Haven), dower was assigned to his widow; and the other three-fifths, under a partial distribution of his estate, became the absolute property of Ellen M. Stevens in 1864. The widow and her daughter, with the husband of the latter, to whom she was married when her father died, resided together in the house until the death of Mrs. Stevens, intestate, in 1881. One of the sons of Henry Ives died unmarried and without issue in 1871. The other (Frederick Ives) died, intestate, leaving a widow and children, in 1883. In 1886 the widow of Henry Ives died, and distributors were appointed by the court of probate for the district of New Haven to distribute what of his estate had not been previously distributed, including the proceeds of certain land sold after his death, by the widow and heirs, for \$9,278.07. They set to Mabel I. Stevens, described as "a daughter of Ellen M. Stevens, deceased, and a granddaughter of said Henry Ives, deceased," two undivided fifths of the Wall street real estate, at their appraisal of \$7,200, and \$5,539.34 of the proceeds of the lands so sold, amounting to "\$12,739.34, set to Mabel Ives Stevens, subject to the life interest therein of Samuel A. Stevens, husband of said Ellen M. Stevens, as tenant by the curtesy." To Susan J. Ives, the widow of Frederick Ives, there was set absolutely a third of the balance of the proceeds of the lands sold, and the other two-thirds was divided among and set to his children, together with a parcel of real estate on East street at an appraisal of \$9,000, in which each received an undivided interest, "subject to the dower interest therein of said Susan J. Ives." The return of this distribution was accepted in 1886 by the court of probate, and no appeal was ever taken from the decree of acceptance. Mabel I. Stevens was then a child of 13. She lived with her father, Samuel A. Stevens, in the Wall street house, until 1893, when she died unmarried and intestate. Prior to that time a brick block had been erected, at the expense of Mabel I. Stevens, on a part of the

Wall street lot not occupied by the original house. The appellant's administration account did not charge him with any of the rents and profits received from this block, and the decree of probate which is the subject of the present proceeding ordered him to change the account so as to charge himself with two-fifths of such rents and profits from the date of the death of Mabel I. Stevens. All the rents and profits had been collected, ever since the block was erected, by Samuel A. Stevens, and appropriated to his own use, under a claim of right as tenant by the curtesy; and, as to three-fifths of them, it is conceded that this claim is a proper one.

A tenancy by the curtesy does not exist in lands in which the wife had only an estate in remainder expectant upon a life estate created for the benefit of another, which did not terminate during coverture. *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693. Dower is an estate favored by the law, and may exist in equitable remainders. *Greene v. Huntington*, 78 Conn. 106, 113, 46 Atl. 883. Estates by the curtesy are not favored. *Todd v. Oviatt*, 58 Conn. 181, 20 Atl. 440, 7 L. R. A. 693. The considerations which exclude it in case of a remainder expectant upon an undetermined freehold estate apply equally to the case of a reversion. The seisin of Mrs. Stevens when occupying the Wall street property together with her mother was only such as attached to her own undivided three-fifths. Of the two fifths now in question the seisin was in the dowress. The tenancy by the curtesy, therefore, of Mr. Stevens, extended by law only to the undivided three-fifths of the Wall street property, to which his wife had an absolute title.

It does not, however, follow that he was accountable to this appellant for the rents and profits which he had collected from the tenants of the remaining two-fifths. The paper title of the appellant's intestate to that two-fifths is derived from the distribution of part of her grandfather's estate in 1886. The estate so distributed, or that in which it originally consisted, had, upon his decease, descended to his heirs at law as tenants in common, subject to his widow's claim of dower. It might have been distributed among them in severalty immediately upon the assignment of dower. *Webster v. Merriam*, 9 Conn. 225. The postponement of a distribution of the real estate until the decease of the dowress did not alter the course of descent. The distribution, whenever made, would relate back to the death of the testator; simply turning an estate in co-tenancy into an estate in severalty. All the heirs had died prior to the distribution now in question. The share which would otherwise have come to each, therefore, belonged to his estate, and should have been distributed to his estate. *Kingsbury v. Scovill's Adm'r*, 26 Conn. 849; *Holcomb v. Sherwood*, 29 Conn. 418; *Greathead's Appeal*, 42 Conn. 314; *Hewitt's Appeal*, 53 Conn. 24, 37, 1 Atl. 815; *Dickinson's Appeal*, 54 Conn. 224, 6 Atl. 422; *Hale's*

Appeal, 69 Conn. 611, 616, 38 Atl. 892. This would have involved expense and delay. It would have given rise to several questions of conflicting right. One was as to the proper division of the proceeds of the land sold, and the dower right, if any, of the widow of Frederick Ives. Another was as to the claim set up by Samuel A. Stevens to a tenancy by the curtesy in whatever land had descended to his deceased wife. Under these circumstances all the parties interested or claiming to be interested in the undistributed estate formerly belonging to Henry Ives (or those assuming to represent them) apparently concurred in the endeavor to have their respective rights settled and determined by probate proceedings in the form of a distribution of it. The result of this family arrangement was the appointment of distributors, and their return as made and accepted. By this return the share which would have been set in fee to Ellen M. Stevens, the daughter of Henry Ives, had she been living, was set in fee to Mabel I. Stevens, her sole heir at law. It was the statutory duty of that court, before accepting it, to ascertain who were the heirs of Henry Ives, and entitled to receive the estate to be distributed. *Mack's Appeal*, 71 Conn. 122, 128, 41 Atl. 242. Its acceptance imported a judicial finding that Mabel I. Stevens was one of them, and this was conclusive as to that point upon all parties in interest, unless the decree should be set aside on appeal. *Kellogg v. Johnson*, 38 Conn. 269. It had a similar effect as settling the right of the widow and children of Frederick Ives to receive what would have been set to him, had he been living.

The distributors not only set the inheritance of Ellen M. Stevens to her daughter, but set it "subject to the life interest therein of Samuel A. Stevens, husband of said Ellen M. Stevens, as tenant by the curtesy." This treated the estate distributed as subject to a burden to which it was not legally subject. Presumably, the appraisal at which the estate was set to her was reduced to the extent of the supposed incumbrance, for the whole estate to be distributed was appraised in connection with and for the purposes of the distribution, and it was the evident intent of the distributors to divide it into equal halves, between the two stocks of descent which had survived to the second generation.

There is no occasion to inquire whether the court of probate had by law jurisdiction thus to incur the Wall street property, when set to the appellant's intestate. Having done what all the parties then before it asked it to do, or acquiesced in its doing, its decree, never having been appealed from, is conclusive upon them and their privies, among whom are the appellees in the present case, who objected to the allowance of the appellant's administration account. *Gates v. Treat*, 17 Conn. 388. It is true that Mabel I. Stevens, at the date of the distribution, was a child, and presumably was represented by her father and natural guardian, whose per-

sonal interest was adverse to hers. She came of age, however, in 1894, and lived until 1898. During the entire 12 years between 1886 and 1898 the distribution stood absolutely unquestioned, and by her conduct after coming of age she sufficiently manifested her assent to the family arrangement resulting in the distribution.

Each of the parties named in the distribution as beneficially entitled, including Samuel A. Stevens, has taken and held possession under it, and according to its terms. Mabel I. Stevens lived during her whole life upon the land in question. She never, so far as appears, made any demand upon her father for an account of the rents and profits, although her money had been used to increase them. She never appealed from the decree accepting the return of distribution. She never asked a court of equity to remove what at least was a serious cloud upon her title. Both she and the appellees, or those to whom the appellees stand in privity, have received and enjoyed all that the distribution purported to give them. The appellees can claim no right which she has waived. *Brown v. Wheeler*, 17 Conn. 345, 350, 44 Am. Dec. 550. She had no title in severalty to the two-fifths interest in the Wall street land, except under this distribution. The appellees are relying upon her several title. If not a good title, by reason of the conclusiveness of the decree which gave it to her, it is under what was substantially a family agreement, to which she elected to conform. *Pomeroy's Equity Jurisp.* § 850. If she, claiming under this decree, was not bound to do as she did, and accept it in its entirety, she was bound to take steps within a reasonable time to set it aside or correct it. The time within which she could appeal expired in November, 1895. *Pub. Acts 1885*, p. 475, c. 110. The appellant filed an inventory of her estate in October, 1898, shortly after her decease, in which the Wall street property was appraised at a sum reached by deducting from its value that of a life estate in Samuel A. Stevens. So far as appears, up to that date no action for equitable relief against her father's claim to such an estate in the whole of the property had ever been instituted by her, or by her heirs or representatives; nor had any such action been instituted when the court of probate, more than three years afterwards, passed the decree appealed from. She had had a full opportunity, after coming of age, to elect whether to claim title to the premises under her mother, by proper proceedings in the settlement of her mother's estate, or under her grandfather, by the distribution of 1886. In the inventory of her mother's estate, which had been filed in the court of probate in 1881, there was no mention of any reversionary interest in two-fifths of the Wall street property. Mabel I. Stevens in 1894 could have had it inventoried. She took no steps in that direction. She manifested her election to abide by the distribution of her

grandfather's estate by her silence and inaction throughout nearly four years which elapsed between her majority and her death. Regarded as a family settlement, it could not bind her with respect to its reference to the tenancy by the curtesy, except by her express or implied consent, but with that it could. Her conduct manifested an election to give such consent, and thus secure the benefits which the distribution purported to confer upon her. Her administrator properly recognized the position which she had thus taken, by inventorying the property as subject to a life estate in her father, and his administration account must be settled on that basis.

There is error. The judgment of the superior court is set aside, and the cause remanded, with directions to reverse the decree of the court of probate. In this opinion the other Judges concurred.

CAHILL et al. v. CAHILL et al.

(Supreme Court of Errors of Connecticut.
April 17, 1903.)

For majority opinion, see 54 Atl. 201.

HAMERSLEY, J. (dissenting). The plaintiffs were bound to prove that Julia Cahill owned and possessed the locus at the time of her death. This was essential to establish that legal title in the plaintiffs, without which they cannot recover. Property may be acquired through any kind of lawful conveyance from its owner. This is the principal, and for the great mass of property the only, mode under our law of acquiring ownership. The fact of conveyance may be established by any appropriate evidence, and involves proof of the person who made the transfer, his ownership of the property, and the validity of the transfer as made. Where the conveyance is by writing, and especially where the law requires it to be by writing, it must be proved by the production of the original writing. When the writing has been lost, its existence and contents may be proved by relevant, secondary evidence. As ownership draws after it possession, and possession, especially of personal property, is often a badge of ownership, possession may become a relevant fact in proving the existence and contents of such writing. It may be that all evidence of a conveyance, primary or secondary, is wanting, and the possessor holds property without a conveyance from any one. For some cases of this kind the law provides other modes of acquiring property, viz., possession and user which is not by virtue of another's right from time immemorial, or such possession for a fixed period unbroken and unchallenged. The latter mode of acquisition is confined mainly to land; the former mainly to intangible rights in property, generally described as easements. Property in these rights may be acquired by prescription as well as by grant. The property is deemed to originate in a grant. By its very

nature it is created as property through the assent, voluntary or compelled, of the owner of the tangible thing it burdens. Ownership of the easement is acquired through a valid grant, whether recent or ancient; but such ownership may be acquired through possession for time immemorial as truly and as fully as by a valid grant. This mode of acquisition may rest in part on the effect of occupancy, which, as to movables, is the foundation of separate property rights; but some support is to be found in the elementary principle of jurisprudence which forbids the litigation of claims unsupported by facts within the memory of man. The length of this period has fluctuated, but is now for the most part an arbitrary term. Acquisitive prescription is illustrated when one prescribes in a *que estate*, but for the most part it is not used in the English law in its direct form. Its substance is secured through a legal fiction. Instead of asserting an ownership acquired by immemorial usage or possession, the owner is permitted to assert an ownership acquired by some indefinite and nonexistent grant, and the facts which establish his acquirement of ownership by possession are treated as conclusive proof of some grant which is not proved, and in most cases cannot be proved, because it never existed. Such a legal fiction does not alter the substance of things. In every such case the ownership is in reality acquired through possession, and is not acquired through a grant. Possession as a mode of acquiring property establishes ownership, when as an evidential fact it is wholly incompetent to prove an ownership acquired by grant. It happens in some cases that evidence is introduced tending to prove the existence of an actual particular grant as well as evidence tending to support the acquisition of ownership through possession. Such possibility has naturally led to some confusion between the force of possession as a mode of acquiring ownership and the evidential value of possession merely as a fact which may or may not become relevant or material in proving an actual and particular grant. The distinction, however, is real and important. A. sues B. for trespass in crossing his land. B. attempts to establish two defenses—one, ownership of a right of way, acquired through user for time immemorial (now provable by adverse possession for 15 years, or its equivalent, an indefinite and fictitious grant conclusively presumed from a possession for time immemorial); and the other, ownership of a right of way acquired through a grant from A. to B., made 10 years before the bringing of suit. User or possession of a right of way for 14 years is proved. Some evidence is produced tending to prove a grant of the way claimed, etc., made by A. to B. 10 years before, and the loss of the deed. The court charges the jury, on bearing on the first defense, that, if B. has proved the requisite possession of a right of way for 15 years, his ownership is established, but, if he has

proved such possession for 14 years only, his ownership is not established; and, as bearing on the second defense, that, if the evidence admitted as relevant to the fact of a deed made 10 years before by A. to B. granting the right of way satisfies the jury that such a grant was made, B. has established his ownership by actual grant, although the deed has been lost, and that the fact that B. actually used the way at the time of the alleged grant and afterwards might be considered, so far as that fact might be relevant to the actual making and terms of the alleged grant. Such a charge might be substantially correct, but it would be incorrect if the court should further charge that, if the jury cannot find a possession for more than 14 years, and are not satisfied that A. made a grant 10 years before, by the evidence relevant to that fact, they may consider the evidence of possession for 14 years and the evidence relevant to the unproved grant together, and from the whole evidence thus considered may presume an actual grant.

The error centers in the inaccurate use of the word "presume." Possession may confer title as truly as grant confers title. Each is a mode of acquiring ownership. But the potency of possession as a means of acquiring title, when insufficient for that purpose, cannot be used to effect the relevancy of one or more acts of ownership by the alleged grantee of a specified grant to the fact of the execution, contents, and validity of that grant. In discussing the ownership of intangible property or incorporeal hereditaments, it is often necessary to use the words "grant," "presumption," "possession," with differing meanings, indicated only by the context, and there is much excuse for the occasional confusion of things, related but really independent; but there is far less excuse for any confusion of this nature in discussing the ownership of land. Here the distinction between the acquisition of ownership through possession and its acquisition through a conveyance from a former owner to the present possessor is more clearly marked. Under the early English law, land, unlike property in intangible rights, was not the subject of prescription in any form. *Twiss v. Baldwin*, 9 Conn. 304; 2 Black. Comm. 264. Substantially the only mode by which ownership could be transferred from one owner to another was some form of conveyance. Bare possession, the apparent right of possession, and even the right of possession might be acquired without terminating ownership of land once acquired and not conveyed. This ownership might be asserted and established through the writ of right, and then the lost possession be recovered. The limitation of the writ of right to a definite period of 60 years (St. 32 Hen. viii) to a limited extent, and the adaptation of the action of ejectment to the trial of title with the limitation of the exercise of a right of entry to a period of 20 years (St. 21 Jac. I) to a greater extent, rendered the practical

acquisition of ownership by possession possible in many cases. After the passage of the statute of James I, cases might arise where the writ of right would be available to the true owner; but since the enactment of St. 3 & 4, Wm. IV, for limitations of actions relating to real property, possession for 20 years as a mode of acquiring ownership of land has been more clearly recognized, and has sometimes been termed an acquisition of ownership through legislative conveyance.

In this state, however, possession as a mode of acquiring ownership of land has been recognized from earliest days; the only other method being some form of conveyance. The first settlers claimed to have acquired absolute ownership of lands within our limits mostly by purchase from the native Indians and partly by conquest, and their ownership in fact rested on these claims until the charter of 1662, which granted and confirmed to the charter government all land within its jurisdiction, to be holden of the king in free and common socage. Subsequently lands belonging to particular persons were held according to this tenure, but the land tenures of England were in no other way ever recognized as a force within our limits. The claims of ownership and purchase by conquest were never abandoned, and in 1793 our Legislature declared that by the establishment of our independence the citizens of this state became vested with an allodial title to their lands, and therefore it declared "that every proprietor in fee simple of lands has an absolute and direct dominion and property in the same." In 1839, substantially coincident with the establishment of civil government, it was enacted that all land allotted to any particular person should be recorded. Such record, as well as the record of any subsequent sale, was compulsory, and sale without record was of no value. A certified copy of the record served the purpose of a deed. 1 Col. Rec. p. 37. In 1860 it was enacted that all future conveyances should be made by deed duly recorded, and the requisites to the validity of such deed were prescribed. 1 Col. Rec. p. 358. In 1867 it was enacted that any person then standing possessed of land and so continuing uninterrupted for the space of one year should be the owner thereof as fully as if allotted to him, with the same right to enter it for record. 2 Col. Rec. p. 67. In 1884 it was enacted that any person who has had a right of entry or action in respect of land detained from him since 1867 until the 10th of the month following the passage of the act, and neglected to enforce such right, shall hereafter be utterly excluded and disabled from such suit or entry. It was further enacted that no person having an existing right for action or entry for land detained could exercise the same unless within three years from the 10th of the following month, and that no subsequently accruing right of action or entry for land detained could be enforced unless within 15 years

from the accruing thereof. 3 Col. Rec. 146, 147. The substance of this last provision has since remained unchanged, and is found in section 1109 of the General Statutes of 1902. In 1727 it was provided that no valid conveyance of land could be made by any one ousted of possession thereof except to the present possessor. 7 Col. Rec. 105. The operation of these laws, most of which are still retained substantially in the form of their original enactment, was to establish by legislative authority possession for 15 years as a distinct means and mode of acquiring ownership of land. One reason for this operation may be found in the wide differences between the English law of real estate and our own.

In *Bush v. Bradley*, 4 Day, 306, Judge Reeve says: "We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession as much as in the other case, and whenever a right of possession is lost all title and ownership are lost. So the statute of limitations respecting lands has always been construed. The statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry. And yet this statute has been always considered as barring all claim of title, whilst the same words in the English statute have been considered, not as having any effect on the title, but only on the right of entry, and the lands may be recovered by a form of proceeding proper for such a case. The English law distinguishes betwixt a right of possession and a right of property, but our law does not. Wherever there is a right to real property, there is, of course, a right of possession, and the statute, which takes away the right of possession, takes away the right of property; and this is the reason that this statute has received a construction altogether different from the construction given to the English statute." The controlling reason is found in the fact that the legislation mentioned, extending from 1639 to 1684, must be regarded as one piece of work, whereby our system of acquiring ownership of land was developed and settled. Conveyance followed by record according to the forms prescribed for securing perpetual certainty is the normal mode of acquiring ownership. When these forms are neglected, or the owner abandons his land, occupancy or possession continued for 15 years is a distinct mode of conferring a new ownership on the person in occupation at the end of the term. *Eels v. Day*, 4 Conn. 95; *Sherwood v. Barlow*, 19 Conn. 471-477; *Price v. Lyon*, 14 Conn. 279-290; *Wright v. Wright*, 21 Conn. 329-345.

It follows (1) that in establishing a legal title to land acquired through adverse possession, evidence is directed to the nature and extent of the occupancy, to the existence of any statutory disabilities, and to the unbroken continuance of the occupancy for fifteen

years. Mere possession is in no sense evidence of a conveyance, real or fictitious; on the contrary, its efficacy depends on the assumption that the title by conveyance is in some one else. Possession of the requisite kind, for the requisite period, is the thing to be established by evidence, and, when established by evidence, this thing, viz., this 15 years of adverse possession, directly extinguishes the former ownership, and directly invests the person in occupation at the termination of the statutory period, not with the title of the former owner, but with a new ownership acquired through this distinct mode. (2) In establishing a legal title acquired through conveyance, possession, occupancy, acts of ownership may or may not, according to the circumstances of each case, be relevant to some fact tending to prove the conveyance through which ownership is claimed. In no other way is there any substantial, evidential relation between the mere fact of an actual occupation of land and the fact of a deed validly conveying that land to the occupant. This is unquestionable, unless it be true that, when a person claiming to be owner of land, but unable to produce evidence of conveyance, is in possession for less than 15 years, the natural inference is that he has received a deed of that land; but the natural inference in such case is precisely the opposite. In view of our law regulating the making and record of deeds, the probability that a man in possession of land without evidence of conveyance has not received a conveyance is strong.

Mere possession, therefore, cannot be relevant to the fact of a conveyance by deed, although it may become relevant to some one of the facts sought to be established in proving the deed, and its relevancy and weight for that purpose must be determined by the ordinary rules of evidence, and cannot be confused with the theory of an arbitrary presumption used in discussing prescription for incorporeal hereditaments. There is nothing in our decisions to justify such a confusion, although some suggestion of an excuse for it may be found in the individual opinions of Chief Justice Swift and Judge Gould, reported in *Sumner v. Child*, 2 Conn. 607, the case cited in the opinion of the majority of the court. The case is a peculiar one. From what appears to have been the substantially conceded facts, the case is this: William Dudley acquired ownership of the land in question. Upon his death his son, Joseph, entered into possession as heir, and remained in possession for 28 years, when his title passed to the defendant through the levy of an execution. The same year administration was granted on the estate of William Dudley, and in due course of proceeding the land was sold to pay William's debts. It was purchased by the plaintiff, who shortly after brought the action of ejectment. Here was no question of conveyance or adverse possession. Joseph acquired ownership by descent subject to the paramount authority of

the law to appropriate the land to the payment of debts in administering his father's estate. If the grant of administration and the proceedings under it were valid, the plaintiff had a legal title; if they were not valid, the defendant had a good title. The title depended solely on the validity of the administration proceedings. As the decrees of the probate court had not been appealed from, the defendant could not attack their validity in the ejectment suit. He therefore relied upon the claim that the long delay in taking out administration should have the same effect as a release from the creditors of Joseph, and that the fiction of an imaginary grant, proved by immemorial usage or possession, was applicable to this case, and the court in substance charged the jury that they might presume a title in the defendant from length of possession alone. A majority of the judges of this court held that such instruction was erroneous. No opinion of the court was given. Three of the judges expressed their views. The chief justice, who tried the cause below, warmly defended his charge. Judge Smith argued that the charge was erroneous, because possession had nothing to do with the title, as that must depend wholly on the validity of the administration proceedings. Judge Gould directly attacked the general proposition of Judge Swift, arguing that the jury could not presume a conveyance of land from length of possession alone, and for this reason the charge was erroneous. He also expressed his own views as to the possible relevancy of mere occupation in proving the actual conveyance of land. It is this part of his argument which the opinion of the majority restates with an implication of too broad approval. We cannot be sure what number of the judges, in granting a new trial, acted on the views of Judge Smith or Judge Gould. The case is certainly not an authority upon any question except the proposition advanced by Judge Swift. Its interest lies in the academic duel between Judges Swift and Gould, as the individual utterance of either is entitled to the greatest deference. It is idle for present purposes to discuss their differences. Each, to a certain extent, was looking at a different side of the shield, and neither kept clearly in mind the application of his general statements to the real facts of the case in hand. The confusing nature of the discussion is indicated by the last retort of Swift, uttered in his "Digest," where, referring to Gould's opinion and the distinctions drawn by him, he says with his occasional unguarded vigor: "This is a new doctrine. It was never before promulgated. No such distinction can be found in any book. It is opposed to the decision of every case that has been determined, and the dicta of every judge upon the subject." 1 Swift's Digest, 167. The general trend of Judge Gould's opinion supports the views I have expressed, but there is uncertainty in the language used in discussing the occupation of land merely as evi-

dence. If that language can fairly be treated as stating that when a legal title to land through a deed of conveyance is to be proved, the mere fact of possession or occupation of that land by the claimed grantee has any probative force except as it may be relevant to some fact in the case in accordance with the general rules for determining the relevancy of one fact to another, then the statement seems to me clearly inconsistent with sound principle, and unsupported by authority.

Applying to the facts of the present case the ordinary rules of evidence, it seems clear that the rejected evidence was immaterial, and its rejection furnishes no ground for a new trial. The facts are these: The record title to the land in question is in Wallace & Sons, through a deed to them dated August 29, 1873, from the grantee of an admitted owner. Julia and Richard Cahill, one or both, were in possession from 1873 to the death of Julia, in 1885. From his wife's death Richard was in possession, using the land as his own, and mortgaging it as his own, until his death, in 1901. The defendants are in possession as devisees of Richard. The plaintiffs claim as heirs of Julia Cahill. Richard, at the time of his death, had acquired a complete title through adverse possession since his wife's death, unless his possession was through the right of another. The plaintiffs claim that Julia at her death was owner of the land, and Richard, until his death, continued in possession as tenant by the curtesy. Their whole case rests upon maintaining this claim, for, unless tenant by the curtesy, the title in Richard at his death is certain. Their claim that Julia being in possession at the time of her death, and for a long time before, the court should presume, in the absence of countervailing testimony, a legal title in her, was properly overruled, and may be laid out of the case. They attempted to prove ownership in Julia through adverse possession, but, as there was no possession by either Julia or Richard for more than 12 years at the time of Julia's death, the court, for this reason, was compelled to find she had no ownership through adverse possession. Any rulings on evidence as applicable to her title through adverse possession are, therefore, immaterial. There remained the claim of title in Julia through a deed of conveyance, and the plaintiffs' case then rested solely on the fact of conveyance.

The fact in issue is further narrowed through the plaintiffs' introduction of evidence proving the possession by Julia at certain times between 1873 and 1885 of a document which they claim was a deed of conveyance of the land in question to Julia, and this document represented the only conveyance claimed. Unless this document is proved to have contained a valid conveyance to Julia, there is no foundation in the case for the claim of her legal title. The document was not produced, and its contents, to be proved by secondary evidence, constituted the

ultimate fact which must determine the relevancy and materiality of the evidence rejected. Upon the trial Julia's son, one of the plaintiffs, was asked whether his father had ever done anything on or about the land during his mother's life. The question was excluded as immaterial. The ruling would seem unquestionably correct. It is claimed it was relevant to the fact of possession by Julia, but testimony of every fact tending to prove Julia's possession was admitted. Mere negative testimony that some one else did nothing about the place is too remotely related to the fact of her possession to be admissible.

It is claimed that the absence of acts of ownership by Julia's husband might characterize the nature of her possession as adverse to him. Possibly such negative conduct by the husband might be relevant if the question were whether an ownership by adverse possession inured to the wife separately, or to the husband. But, as such question was excluded from the case by want of possession of any kind for the requisite period, relevancy on this ground is wholly immaterial. Whether the actual occupation by Julia was adverse to her husband or not cannot effect its relevancy to the contents of the document which was operative as a conveyance to her, or not at all.

It is suggested that the court has found that the husband was in possession, and, by inference, that the wife was not, and might not have made this finding if an answer to the question had been permitted. I think a negation of Julia's actual occupancy is not a proper inference from this finding, and that it is controlled by a theory as to the legal effect of acts of ownership by the wife, and not at all by any actual acts of ownership by the husband which were not claimed by the defendants to have been proved. But I prefer to assume that the court did find that Julia was not in possession, and that such finding might possibly have been influenced by the negative testimony excluded; for this brings me to a consideration that renders all speculation as to the possible materiality of that testimony to the fact of Julia's possession unnecessary. The fact of exclusive possession by Julia was wholly immaterial in view of the facts proved, and claimed to be proved, in respect to the document in her possession. It appears from the finding of the court, the statement of the facts on which the plaintiffs' claims of law were based, incorporated in the finding, and the plaintiffs' proposed draft for a finding, that all the subordinate facts proved or claimed to have been proved by the testimony in respect to the deed of conveyance were these: Julia on two or three occasions held in her hand a document which she said was a deed of her land. On one occasion she handed some papers to Mr. Webster to keep for her. He kept them some years, and subsequently returned them. Among these papers was a document which Mr. Webster testified was a deed to Julia. Julia was in ac-

tual possession of the land from 1873 to 1885, claiming to be owner. These bald facts are all, and are clearly insufficient to prove a conveyance from the owner of the land to Julia Cahill. It is enough that there is absolutely nothing to prove that any particular person, or any unnamed person, being owner of the land, made any conveyance of any kind to Julia Cahill. Actual possession of the land by her is immaterial, and wholly incompetent to the proof of this fact; and without this fact, as well as others that are not proved, the acquirement of ownership by Julia through a valid deed of conveyance has not been proved, and therefore the plaintiffs have not established a legal title for themselves. It follows that upon all the facts in the case, together with the fact which it is claimed the excluded testimony would prove, the judgment of the trial court is the only one that can lawfully be rendered. Under these circumstances the exclusion of the testimony, even if theoretically erroneous, furnishes no ground for a new trial.

I dissent from the opinion of the majority because I fear it is liable to raise an unauthorized and unnecessary doubt as to the clear distinctions under our law in respect to the acquirement of ownership in land through conveyance and its acquirement through adverse possession, and which control the relevancy and materiality of mere possession in proving a legal title through either mode of acquisition. I dissent from the result because it seems to me clear that it grants a new trial for the exclusion of testimony, which, if admitted, could not lawfully have induced a different judgment.

I think there is no error in the judgment of the superior court.

FLANAGAN v. HYNES.

(Supreme Court of Errors of Connecticut.
April 17, 1903.)

ELECTIONS — CANDIDATES — NOMINATIONS — BALLOTS — PREPARATION — PARTY NAME — USE.

1. Under the rules of a political party, nominations for registrar of voters were made at a special convention held in May, 1901, consisting of the members of the Democratic city committee and the Democratic holders of certain designated offices. This convention nominated defendant for such office. The first town convention after the consolidation of the city and county governments by Pub. Acts 1901, p. 1375, c. 176, was held the succeeding October, and rescinded the previous rule for the nomination of registrar of voters at a special convention, and thereafter nominated petitioner for that office. The chairman of the Democratic town committee refused to recognize petitioner's nomination, and the ballots issued by the chairman contained defendant's name only, whereupon petitioner caused other ballots to be issued, containing his name as a candidate for such office, under the title "Democratic." Held, that no provision having been made for the determination of the contest, except at the polls, petitioner was justified in offering such ballots at the poles.

54 A.—47

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Election contest by John H. Flanagan against James A. Hynes. From a judgment declaring petitioner duly elected to the office of registrar of voters for the town of Waterbury, defendant appeals. Affirmed.

John O'Neill, for appellant. Charles G. Root, Terrence F. Carmody, and John H. Cassidy, for appellee.

PRENTICE, J. At the annual town election held in the town of Waterbury on the first Monday of October, 1902, the petitioner and respondent were candidates for the office of registrar of voters. The one of them who received the larger number of votes was entitled to be declared elected. The other was not. Twelve hundred and twenty-six ballots were cast for the petitioner, of which 19 were upon pasters; 1,134 were cast for the respondent, 4 being by pasters. The respondent was declared elected. The 23 paster ballots, which were concededly valid, may, under the facts of the case, be disregarded. All the other ballots, whether cast for the petitioner or the respondent, were identical in all respects, save that the name of the petitioner appeared upon some, and that of the respondent upon others, as the candidate for registrar of voters. All of these ballots confessedly complied with the requirements of statute, and were altogether free from objection, save in one particular, which remains to be noticed. Both sets of ballots were headed with the word "Democratic." The claim was made at the count, and is now made, that this use of the word "Democratic" upon the ballots containing the petitioner's name invalidated them. The moderators in four of the six voting districts sustained this claim, and rejected all of said ballots cast therein for the petitioner as void, thus accomplishing his defeat. The judge before whom the petition was heard has declared them valid, and adjudged the petitioner elected. The single question thus presented for our decision is as to whether or not the presence of the word "Democratic" upon the petitioner's ballots rendered them void.

The objection to the rejected ballots rests upon the claim that the petitioner was not the rightful candidate of the Democratic party. The petitioner was placed in nomination at the regular convention held on October 3, 1902, for the nomination of Democratic candidates for the coming town election. This convention was duly called and constituted. It was the only convention held for the purpose, and nominated all the other Democratic candidates. The rules for the government of the party which had been adopted by the town convention held in the fall of 1901, and before the act of 1901 regulating caucuses and primaries (Pub. Acts 1901, p. 1375, c. 176) went into operation, pre-

scribed the officers who should be nominated at town conventions. The registrar of voters was not included. The rules also provided for city conventions, wherein should be nominated candidates for city offices. The power to legislate for the party was expressly reserved to the city conventions. The nomination of registrar of voters was, under the rules, to be made at neither of these conventions of delegates selected at primaries, but at a special convention to be held in May, constituted of the members of the Democratic city committee and the Democratic holders of certain designated offices. This latter body met in May, 1901, as provided by the rules, and nominated the respondent. The town convention assembled on October 8, 1901, as aforesaid, which was the first held since the consolidation of the city and town governments, and also the first held since said caucus act of 1901 went into operation. After nominating candidates for all the offices to be voted for, except that of registrar of voters, it rescinded the rule adopted by the town convention of the year previous, providing for the nomination of the registrar of voters at a special convention in May, and thereupon placed the petitioner in nomination for that office. The chairman of the Democratic town committee refused to recognize the petitioner's nomination, and recognized the respondent as the rightful candidate of the party. The ballots issued by him contained the latter's name. The petitioner, in this situation, caused the ballots to be printed and circulated which are under review.

There is no question made of the petitioner's good faith in his issuance of the ballots bearing his name and the Democratic designation; nor is any claim made that they were used or cast with any unlawful purpose, or with any intent to deceive or defraud, or in any way evade either the express provisions or the underlying purposes of the ballot law. The sole objection to the ballots is that they did not in fact comply with legal requirements, and therefore should have been rejected. A glance at the recital of the facts is sufficient to make it clear that the situation out of which the trouble arose was a factional dispute within the Democratic party organization over its nomination for an office. The petitioner and respondent each claimed, and now claim, that he was the rightful nominee. These claims have been argued before us, and on behalf of the respondent we are asked not only to decide this issue in his favor, but, having done so, to declare that the ballots for the petitioner were therefore necessarily void. This position of the respondent assumes too much. It involves a distinct misapprehension of the proper attitude of courts in interpreting and applying the provisions of ballot laws. Such laws have for their ultimate purpose the registration of the popular will upon the questions submitted for decision. Until quite

recently their provisions were comparatively few and simple, and, for the most part, were concerned with the machinery and methods for the convenient and orderly expression of the will of the voters as they should choose to express it, and safeguarding the result as expressed. Of late, legislation has sought not only to register and safeguard the will of the voters as expressed, but, as far as possible, to secure an expression which should represent the true will of the voters, unaffected by corruption, intimidation, undue influence, or deception. Such an attempt necessarily involves many commandments whose "thou shalt's" and "thou shalt not's" multiply into a more or less complicated system. These commandments, to be effective, involve penalties which oftentimes can only be imposed by a rejection of ballots. The rejection of ballots ordinarily signifies the disfranchisement of the voters whose ballots they are. Circumstances may justify this disfranchisement as a necessary incident of an attempt to obtain an honest and true expression of the popular will. The danger of such a system, however, is that the disfranchisement will extend to the honest voter, honestly attempting to exert his influence upon the election result. When such a result is accomplished, a grievous wrong is done to the citizen whose right is taken away. When it is done to any great extent, the system is put in serious jeopardy of being so used as to defeat its real ends. Statutes are to be interpreted and applied with a regard for the purposes which they are intended to accomplish, and the evils they are intended to avert. There is no kind of legislation under a popular government to which this principle should be more consistently applied than that which seeks to regulate the exercise of the right of suffrage. If there is to be disfranchisement, it should be because the Legislature has seen fit to require it, in the interest of an honest suffrage, and has expressed that requirement in unmistakable language. It should not result from doubtful judicial construction, from a too strict regard for the mere letter of the statutes or from a resort to nice or technical refinements in either interpretation or application. *State v. Bossa*, 69 Conn. 335, 37 Atl. 977.

If we look at the situation disclosed by the record, it is apparent that the ballots cast for the petitioner were issued and cast in good faith, and with no intent to violate either the letter or the spirit of the law. The refusal of the party chairman to recognize him as the party candidate compelled him to either tamely submit or do precisely as he did. The law made no provision for the timely settlement of the dispute. He made use of the party designation under a claim of right, and with a color of right. He was not a self-named nominee. He was not the nominee of a self-appointed committee, or of a faction or gathering which could have no claim to any party designation. He was not the nominee

or pretended nominee of some party organization which had no right to the Democratic name. He was placed in nomination by the regular Democratic convention, composed of delegates regularly chosen at the regular Democratic primaries of the enrolled Democratic voters of the town. His right, whatever it was, came from unquestioned Democratic sources. His claim was founded upon the action of the organization of the Democratic party. To say that under such circumstances he had no alternative but to yield to the decision of the party chairman, and that his assertion, without the chairman's consent, and in the only way open to him of his claim to the benefit of a nomination which he contended that he had rightfully received, was in violation of the law, and rendered invalid every straight ballot cast for him, is to contend for a principle of construction which might easily lead to results which would be subversive of the very purpose of the election system.

It may be that the petitioner's claim to the nomination was not technically sound. It may be that the respondent had a better right to have his name appear upon the party ticket. We have no need to decide that question. All that it is necessary to say is that under the circumstances the petitioner was fully justified in carrying his contention to the polls in the manner he did. This was a factional dispute within the party organization. Such are bound to arise. They may relate to the regularity of party organization or party action, or, as in this case, a party nomination. There is no machinery provided by our law, whether judicial or otherwise, to make a settlement, or at least a timely settlement, of many of them. The verdict of the voter must, for the most part, sooner or later decide the controversy. Meanwhile there is no law which directs that one who fairly and in good faith asserts at the polls, by the use of the party name, his claim to party regularity or a party nomination, if that claim is made honestly and upon a reasonable foundation of fact, does so at the peril of disfranchisement for himself and his supporters if a moderator, or, in the final event, a court, fails to confirm his contention.

There is no error. The other Judges concurred.

Appeal of SANFORD.

(Supreme Court of Errors of Connecticut.
April 17, 1903.)

TAXATION—REAL PROPERTY—TAXABLE INTEREST IN LAND—ESTATE FOR YEARS—NOTICE TO OWNER—WAIVER—BOARD OF RELIEF—RETURN—APPEARANCE OF NONRESIDENT OWNER.

1. Gen. St. 1902, § 2299, provides that "any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands," and is part of an act passed in 1887 entitled "An act concerning the taxation and record of

title of real estate." Pub. Acts 1887, p. 749, c. 127. Section 2322, in describing the real estate liable to taxation, provides that "quarries, mines and ore beds, whether owned in fee or leased, shall be set in the list separately, at their present true and actual valuation." Section 2341 provides that "an estate for years by gift or devise, and not by contract, shall be set in the list of the person in possession thereof." The owner of land leased the same for a term of 40 years "for the purpose of mining garnets thereon"; the lessee to pay a fixed annual rent, with the right to remove the mineral only during the term, which could be forfeited by the lessor for nonpayment of rent. *Held* not such an interest in land as, under the statutes, was taxable as the property of the lessee, the language of section 2341 clearly showing that it was not intended by the language of section 2299 to require estates for years by contract to be listed for taxation in the name of the owner of such chattel interest.

2. The voluntary appearance of plaintiff before the board of relief in response to a notice of such board that he appear and show cause why certain property should not be added to his list, where, without objection to such notice, he was fully heard on the merits of the matter in question, obviated any defect in the notice required by statute, and all evidence tending to show that plaintiff was inconvenienced by reason of the shortness of the notice was properly rejected.

3. Gen. St. 1902, § 2346, provides that the board of relief shall complete its duties by the fourth Monday of February. No other notice or announcement of the decision of the board in adding certain property to plaintiff's list was given than by returning to the town clerk's office on the 28th of February, 1902, the book prepared by the assessors as the abstract of the list of taxpayers, with the certificate of the board attached thereto, stating that the alterations, additions, and deductions made by it were as appeared in such book. *Held* not such a failure to complete its duties by the fourth Monday of February as rendered its action invalid.

4. Gen. St. 1902, § 2348, provides that the board of relief shall not reduce the list of any person not a resident of the state, who shall not appear, either in person or by his attorney or agent, and offer to be sworn before them and answer all questions touching his taxable property situate in the town. Plaintiff leased a garnet quarry for a term of years to a non-resident firm. *Held*, that the validity of the act of the board of relief in adding the quarry to plaintiff's list was not affected by the fact that it was also erased from the list of such non-resident partners, though they did not appear before the board.

Appeal from Superior Court, Litchfield County; George W. Wheeler, Judge.

Action in the nature of an appeal from the doings of the board of relief of the town of Roxbury. Judgment for defendant, and plaintiff appeals. Affirmed.

Frederic M. Williams, for appellant. Arthur D. Warner and James Huntington, for appellee.

HALL, J. In 1894 and 1895 the plaintiff, who is a resident of Roxbury, in this state, leased for the term of 40 years to one Phillips, by two written leases, containing similar provisions, about 12 acres of land in said Roxbury containing mineral deposits called "garnets." By various duly recorded assignments, H. Behr & Co., a copartnership, the

members of which resided in New York, had, prior to October 1, 1901, become the owners of all the estate, rights, and privileges granted by said leases, and had opened quarries or mines upon said land. Behr & Co. having given in no tax list for the year 1901, the following property was placed in their list as nonresidents by the assessors: One mill, \$2,500; garnet quarry, \$2,500. Said garnet quarry was upon the land described in said leases to Phillips. The plaintiff gave in a list of the taxable property owned by him October 1, 1901, one item of which was 89 acres of land, duly described, and valued by the assessors at \$3,235. Said 89 acres embraced the land described in said leases, but no quarries, mines, or ore beds were named or included in the plaintiff's list. On January 23, 1901, the clerk of the board of relief of the town of Roxbury handed to the plaintiff a writing notifying him to appear on the 27th of that month to show cause why they should not add to his list the garnet quarry (therefore listed to him, but omitted that year) at the same price it was assessed to him the previous year. The plaintiff appeared before said board at the time named, and was fully heard, and the board added the garnet quarry to the plaintiff's list, assessing it at \$2,500, which was not more than its market value, and struck the same from the list of Behr & Co. Behr & Co. did not appear before the board of relief, but the board informed the plaintiff that Behr & Co. had notified them by letter that, if the quarry was listed against them, they would not pay the tax.

The principal question raised by the plaintiff's appeal from the board of relief is whether in the year 1901 the garnet quarry or mine, upon the land described in the leases above named, should have been listed as the property of the plaintiff, or as the property of Behr & Co. Section 2299 of the General Statutes of 1902 provides that "any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town in which such real estate is situated." This section is part of an act passed in 1887 entitled "An act concerning the taxation and record of title of real estate." Pub. Acts 1887, p. 749, c. 127. It is not a provision for the listing or taxation of personal property. It means that any separately taxable interest in real estate shall be set in the list in the name of the owner of record of such interest. An estate for years in land is a mere chattel interest. *Goodwin v. Goodwin*, 33 Conn. 314, 318; *Flannery v. Rohrmayer*, 49 Conn. 27, 28. Such an interest, unless otherwise provided by statute, is generally not taxable separately from the freehold, although there may be exceptional cases where an interest in real estate, conveyed by an instrument in the form of a lease for a term of years, may for certain purposes be regarded as a fee, as in the case of *Brainard v. Col-*

chester, 31 Conn. 407, 411, in which it was held that a lease of real estate for a gross sum for 999 years was to be considered, for the purposes of that case, as practically a conveyance of a fee. Such a chattel interest is not named either in section 2322 or section 2323, which enumerate the kinds of real and personal property liable to taxation, unless, indeed, it can be said to be described by the language of section 2322 concerning quarries, mines, and ore beds, to which we shall hereafter refer, and the very fact that section 2341 provides that an estate for years by gift or devise, and not by contract, shall be set in the list of the person in possession thereof, clearly shows that it was not intended by the language of section 2299 to require estates for years by contract to be listed for taxation in the name of the record owner of such chattel interest. The interest in real estate which section 2299 requires to be listed in the name of the record owner is not a mere chattel interest in land, but a freehold interest properly termed "real estate." Section 2322, in describing the real estate liable to taxation, provides that "quarries, mines and ore beds, whether owned in fee or leased, shall be set in the list separately at their present true and actual valuation." It was not the purpose of this section to direct in whose name different items of real estate should be listed, but to provide what items of real estate should be taxed. Construed in connection with section 2299, this language means that quarries, mines, and ore beds shall be placed in the list in the name of the record owner thereof, as separate items of real estate, whether severed, or not, from the surface by a conveyance to another of such quarries and mines only. It is the quarries and mines which are to be listed, and not an estate for years in quarries and mines, separate from the freehold estate in them. The value at which they are to be listed is that of the quarries and mines themselves, and not the value of an estate in them for years. Clearly, it was not intended that the owner of an estate in them for years, for however brief a term, should be liable to be taxed for the full value of such quarries or mines, however great that value might be; nor is there any provision that quarries and mines shall be placed in the lists of both the owner and lessee for years, at separate valuations of their respective interests in them. The quarries or mines in question were therefore not properly taxable as the property of Behr & Co., unless, upon the delivery to Phillips of the leases referred to, he immediately became the owner of the unmined garnets beneath the surface of the land described in those instruments.

"Though minerals undisturbed, or in place, are a part of the freehold, and, as such, usually belong to the owner of the soil, they are capable of separate ownership and distinct possession. When there is such a severance of estates, the minerals are real estate, constituting a separate corporeal here-

ditament, capable of distinct inheritance and conveyance," and to the methods of transferring which the general rules regarding conveyances of real estate ordinarily apply. The owner of land may therefore convey the surface or soil in fee, reserving or excepting either an estate in the minerals, or a right to mine them; he may convey an estate in fee in the minerals separate from the soil; or, while retaining in himself the property in the minerals until removed and in possession of the grantee, he may either grant the right or privilege to mine for them, or may lease for a term of years the land itself, together with the privilege of mining during the term. *Barringer & Adams on the Law of Mines & Mining*, p. 35; *Adams v. Briggs Iron Co.*, 7 Cush. 361, 366; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Manning v. Frazier*, 96 Ill. 279; *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605; *Hartford & Salisbury Iron Co. v. Miller*, 41 Conn. 112, 129.

The instruments by which these several estates or interests in minerals are created are frequently, without distinction, called "mining leases," and the numerous decisions as to the respective titles conveyed by them are not entirely harmonious. Their legal effect is to be determined not so much by the name given to them, or the technical terms employed in them, as by ascertaining from the entire language of each instrument the real intention of the parties, by applying to it the ordinary rules governing the construction of written conveyances. When it clearly appears from the language of the instrument that it was intended to convey at a fixed price the whole or a specified part of the unmined minerals in a described tract of land, it is generally held that an absolute ownership in fee of such minerals in place vests in the grantee immediately upon the delivery of the conveyance, and in some cases—particularly in Pennsylvania—it has been so held when the conveyances took the form of leases for a term of years. *Chester Co. v. Lucas*, 112 Mass. 424; *Hobart v. Murray*, 54 Mo. App. 249; *Edwards v. McClurg*, 39 Ohio St. 41; *Hope's Appeal*, 29 Wkly. Notes Cas. 565; *Sanderson v. Scranton*, 105 Pa. 469; *Montooth v. Gamble*, 123 Pa. 240, 16 Atl. 594; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 203, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; *Kingsley v. Hillside Coal & I. Co.*, 144 Pa. 613, 23 Atl. 250; *Lazarus' Est.*, 145 Pa. 1, 23 Atl. 372; *Plummer v. Hillside Coal & I. Co.*, 160 Pa. 483, 28 Atl. 803.

Instruments which only give a right or privilege of entering upon land for the purpose of mining and removing the minerals therefrom are held to convey no title to or property in the minerals themselves while in the ground, and to create no greater interest in land, even though that interest be real estate, than an incorporeal right to mine, with a title in the minerals after they have been removed by the grantee. *Stockbridge*

Iron Co. v. Henderson Iron Co., 107 Mass. 290; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Kamphouse v. Gaffner*, 73 Ill. 453; *Boone v. Stover*, 66 Mo. 430; *Silsby v. Trotter*, 29 N. J. Eq. 223; *Baker v. Hart*, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60; *Gillett v. Treganza*, 6 Wis. 343; *Gaston v. Plum*, 14 Conn. 344.

The weight of authority clearly is that an instrument which purports to convey certain land at a fixed rent, for a term of years, for the purpose of mining, or with the privilege of mining during the term, or which grants merely the right or privilege to mine for a term of years upon described land, conveys no greater estate in the land or the minerals in place than a chattel interest. *Barringer & Adams on Law of Mines & Mining*, p. 51; *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535, 37 Am. Rep. 446; *Genet v. D. & H. Canal Co.*, 136 N. Y. 593, 32 N. E. 851; *Knight v. Coal Co.*, 47 Ind. 105, 17 Am. Rep. 692; *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697; *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120; *Duke v. Hague*, 107 Pa. 57; *Brown v. Beecher*, 120 Pa. 590, 15 Atl. 608; *Ganter v. Atkinson*, 35 Wis. 48; *Denniston v. Haddock*, 200 Pa. 426, 50 Atl. 197. In the case last cited, which was decided in 1901, *Mitchell, J.*, in speaking of some of the earlier Pennsylvania decisions, says that "the expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, is inaccurate as a general proposition of law, and unfortunate from its tendency to mislead," and that "the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms." A collection of cases regarding questions of title to minerals under conveyances of different characters may be found in chapter 2 of *Barringer & Adams*, above cited.

Examining the two leases before us, we find that they do not, in terms, convey either the whole or any specified part of the minerals in or under the described land. Each instrument expressly leases to Phillips, his heirs and assigns, for the term of 40 years, a described tract of land, "for the purpose of mining garnets thereon, with all the rights pertaining thereto, such as the right to mine for said garnet or the mineral product contained in said property, with privilege to cart and carry away such garnet and product from said lot, with right of way to and from." For said purpose the lessee is given the right to erect buildings and machinery, and to remove them at pleasure. He is to pay a certain rent semiannually, and also a royalty of \$2 per ton, payable monthly, upon all garnets "so mined and taken from said property." After the second year the lessee may terminate the lease by the payment of \$500. "If the rent of said property is not paid when due then and in such case the property shall revert to the party of the first

part" (the plaintiff), and the instrument is to become null and void. The leases are executed as deeds by both parties, and recorded. By these provisions the lessee does not pay any sum for the garnets in place, but pays a fixed annual rent for the property, whether he mines the garnets or not, with the right to remove the minerals only during the term, which may be forfeited for non-payment of rent or terminated by the lessee, after two years. No quarries or mines were conveyed, for none existed when the leases were executed. It is not claimed that the lessee took any greater interest in the land, apart from the minerals, than an estate for years. In so far as these instruments convey an interest in land, they are either grants of an incorporeal right to mine for a term of years, the title to the minerals to vest in the grantee only after they have been removed by him, or they are leases of the described land for a term of years, with the added right of mining during the term of the lease. In either case the interest of the grantee or lessee in either the land or minerals is but a chattel interest, and when created by contract, as this was, it is not such an interest in land as, under our statutes, is taxable as the property of Behr & Co. It does not appear that any of the buildings erected for mining purposes under said leases were placed in the plaintiff's list.

A second defense to this action alleges, in substance, that the board of relief was justified in increasing by \$2,500 the value of the land listed by the plaintiff. In sustaining the plaintiff's demurrer to this defense at a prior session, the court appears to have held it insufficient only because it appeared of record that the board of relief did not so increase the valuation of plaintiff's land, but added thereto the garnet quarry. This was not an adjudication of any question afterwards decided by the trial court.

The voluntary appearance of the plaintiff before the board of relief, where, without objection to the notice he had received, he was fully heard upon the merits of the matter in question, obviated any defect in the notice required by statute, and all evidence tending to show that the plaintiff was inconvenienced by reason of the shortness of the notice was properly rejected. *People v. Sherman*, 83 Ill. 165; *Hale v. People*, 87 Ill. 72.

The complaint alleges, in substance, that the board of relief gave no other notice or announcement of its decision than by returning to the town clerk's office on the 28th of February, 1902, the book prepared by the assessors as the abstract of the list of taxpayers, with the certificate of the board of relief attached thereto, stating that the alterations, additions, and deductions made by the board were as appeared in said book. We know of no statute which makes such a return or announcement of its decision such a failure by the board to complete its duties by the fourth Monday of February as requir-

ed by section 2346 as will render its action in adding the garnet quarry to the plaintiff's list void. Nor is the validity of the act of the board of relief in adding the garnet quarry to the plaintiff's list affected by the fact that it was also erased from the list of Behr & Co., although they did not appear before the board as provided by section 2348. *Ives v. Goshen*, 65 Conn. 456, 460, 32 Atl. 932.

As it appears from the leases themselves that the plaintiff was the owner of the quarry in question, he could not have been injured by the evidence, admitted against his objection, that he listed it as his own in 1899 and 1890.

There is no error. The other Judges concurred.

ARMSTRONG v. LITTLE.

(Superior Court of Delaware. New Castle.
Feb. 16, 1903.)

ASSAULT AND BATTERY—DEFINITION—PROVOCATION—RESISTANCE—DAMAGES—WITNESSES—CREDIBILITY.

1. An assault is an unlawful attempt to do violence to the person of another, and a battery is the unlawful commission of such violence.

2. Offensive or insulting words cannot justify an assault and battery.

3. When one is assaulted, it is his duty to escape the danger if he can without risk; but, if he cannot, he may use such force as is necessary to repel the attack.

4. The resistance or retaliation of a person assaulted and unable to escape must not be excessive or out of proportion to the provocation or danger threatened, and, if it is so, the party is guilty of an unlawful assault.

5. In a civil action for assault and battery, nominal damages may be awarded where plaintiff's injuries are so trivial as not to justify compensatory damages.

6. In judging of the weight and credibility of testimony, the jury should consider the character, intelligence, opportunity of knowledge, and interest of the witnesses, as well as evidence concerning their general reputation for truth and veracity.

Action of trespass vi et armis by Robert Armstrong against George Washington Little. Verdict for plaintiff.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Horace G. Eastburn, for plaintiff. J. Harvey Whiteman, for defendant.

SPRUANCE, J. (charging jury). This is an action of trespass brought for the recovery of damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. An assault is an unlawful attempt to do violence to the person of another, and a battery is the unlawful commission of such violence. Mere words, however offensive or insulting, cannot justify an assault and battery. When one is assaulted, it is his duty to retire beyond the reach of danger, if he can do so without the risk of injury; but, if he cannot

¶ 2. See Assault and Battery, vol. 4, Cent. Dig. § 10.

not do so, without exposing himself to the threatened violence of his adversary, he may use such force as may be sufficient to repel the attack upon him, but such resistance must be no more than is necessary to protect himself from bodily harm. If his resistance or retaliation be excessive, or out of proportion to the provocation or the danger threatened, it will not be justifiable, but will be an unlawful assault.

The plaintiff claims only compensatory damages, and expressly disclaims any right to exemplary or punitive damages. If, therefore, you should find that the defendant committed an unlawful assault upon the plaintiff, you should find a verdict in his favor for such sum, and no more, as will reasonably compensate him for his injuries occasioned by such assault, having regard to his suffering and loss in the past, and the future, if his injuries are permanent, his inability to labor, loss of time, and actual expenses incurred by reason thereof.

If you should find that the alleged unlawful assault and battery was committed by the defendant under the immediate influence of the passion provoked by insulting and offensive language of the plaintiff, this would not justify you in mitigating or reducing the compensatory damages which but for such language you may find that the plaintiff would be entitled to recover.

If you shall conclude from the evidence that the alleged personal injuries of the plaintiff were not occasioned by an unlawful assault of the defendant, but were occasioned by the carelessness or misadventure of the plaintiff, you should not regard such injuries in the assessment of the damages to be awarded to the plaintiff.

If you shall find that the defendant did commit an unlawful assault upon the plaintiff, but that the injuries to the plaintiff from such assault were so trivial as not to warrant you in awarding him damages as compensation therefor, you may find a verdict for the plaintiff for a nominal sum only.

Where the evidence is conflicting, you should reconcile it so far as it is possible; but, where you cannot do so, you should reject that which appears to be unworthy of credit, and accept that which you deem reliable.

In your examination of the testimony of witnesses, you should have regard to their character, intelligence, opportunity of knowledge, interest, and all other facts before you which may aid you in reaching a proper conclusion as to the credit to which they are entitled. In considering the weight to be given to the testimony of a witness, you should have regard to the evidence before you as to his general reputation for truth and veracity.

Your verdict should be for that party in whose favor is the preponderance or weight of the evidence.

Verdict for plaintiff for \$25.

McALLISTER v. PEOPLE'S RY. CO.

(Superior Court of Delaware. New Castle.

Feb. 27, 1903.)

CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—MOTIVE POWER—CARE REQUIRED—NEGLIGENCE—ACTIONS—ISSUES AND PROOF—DAMAGES.

1. The degree of care required of a carrier to be exercised for the safety of passengers is the same whether the motive power is steam or electricity.

2. A carrier is required to use the highest degree of care and diligence reasonably practicable in securing their safety by keeping its cars and appliances in a safe condition and at all times under the control and management of skilled and competent servants.

3. Where, in an action for injuries alleged to have resulted from a collision on a street railway, the declaration averred that plaintiff was thrown from his seat to the ground by the force of the collision, proof that plaintiff jumped from the car on which he was riding, and was injured, in his endeavor to escape the danger of the collision, would not justify a recovery.

4. In an action for injuries by reason of a street car collision, evidence that the motorman lost control of the colliding car by reason of the fact that a snap switch on the rear of the car was closed when it should have been open, was inadmissible under the declaration charging that the car was improperly equipped with a defective air brake.

5. Where a snap switch on a street car was closed when it should have been open, and by reason of its being closed, the air brake thereon failed to act effectually, which resulted in a collision, the failure of defendant's employees to discover that the switch was closed, and open the same, constituted negligence.

6. A passenger injured by a carrier's negligence is entitled to recover reasonable compensation for his injuries sustained, including pain and suffering, impaired capacity to labor since the accident, and his probable loss of time and labor in the future, resulting from his injuries; and, if the injuries are permanent in character, he is also entitled to recover for any impairment of earning capacity in the future.

Action by John B. McAllister against the People's Railway Company. Judgment for plaintiff.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

J. Harvey Whiteman, Henry C. Conrad, and Daniel O. Hastings, for plaintiff. William S. Hilles, for defendant.

BOYCE, J. (charging jury). This action was brought by the plaintiff to recover damages for personal injuries alleged to have been sustained by him by reason of the negligence of the defendant company. It is claimed by the plaintiff that he was, on the 30th day of May, 1901, a passenger on car No. 12 of the defendant company, which was then being propelled by electricity, in a westerly direction, along the track of the defendant, on Sixth street, in this city; that at the same time cars Nos. 16 and 5 of the defendant company, and in the order mentioned, were running along the same track, in an opposite direction, towards car No. 12; that the defendant company carelessly and

¶ 2. See Carriers, vol. 9, Cent. Dig. § 1067.

negligently used and operated car No. 5, in that the circuit breaker, the air brake, and hand or ratchet brake attached thereto, were defective; that the car so equipped was carelessly and negligently operated by an unfit, careless, and incompetent servant as motorman; that by reason of the defective brakes and the incompetency of the motorman, the latter lost control of the car while descending a steep grade between Broome and Madison streets intersecting Sixth street; that the car so managed collided with car No. 16, driving the latter car with great force against car No. 12, upon which the plaintiff was riding, between Madison and Monroe streets; and that the plaintiff was thereby thrown out of the car upon the ground with great force, whereby he sustained great and permanent bodily injuries. The plaintiff further alleges that he was, at the time of the accident, in the exercise of due care and caution.

The defendant company, on the other hand, while admitting that car No. 5 collided with car No. 16, which in turn collided with car No. 12, denies having previous knowledge of the alleged defects in car No. 5, and of the alleged incompetency of the motorman in charge of the car; and claims that at the time of the accident the car was nearly new, and was equipped with the best and safest appliances, and was operated by skillful and competent servants; that their servants exercised due care and diligence in attempting to avoid the collision, and that the accident was not due to any neglect or fault on the part of the defendant company, or any of its servants; that shortly before and after the accident the circuit breaker, air brake, and hand or ratchet brake were in good condition; that the defendant was not thrown out of the car by reason of the collision, but that he jumped from the car while it was in motion, and before the collision; and that the plaintiff has not sustained any permanent injury by reason of the accident complained of.

It is admitted that the defendant company is a common carrier, engaged in the business of conveying passengers over and along its roadway, and that the plaintiff was rightfully a passenger on car No. 12, immediately preceding the time of the accident.

The gist of an action for personal injuries is negligence. Negligence is never presumed; it must be proved. It is therefore incumbent upon the plaintiff in this action to satisfy you by a preponderance of the evidence that the accident complained of was the result of the negligent conduct and management on the part of the defendant company; and, if the plaintiff has failed to so prove the negligence of the company, he cannot recover. The law imposes upon common carriers of passengers the duty of providing safe cars, machinery, and appliances, and of keeping them in good repair and safe condition; and of providing competent and careful motormen and servants, and to see

that they use reasonable care in operating the cars so as to avoid danger; and to do all and every the things with respect to these matters that may be reasonably necessary to secure the safe transportation of its passengers. *Maxwell v. Wil. City Ry. Co.*, 1 *Marv.* 199 (206), 40 *Atl.* 945. In the case of *Flinn v. P., W. & B. R. R. Co.*, 1 *Houst.* 469 (499), this court said: "Common carriers of passengers are responsible for any negligence resulting in injury to them, and are required in the preparation, conduct, and management of their means of conveyance to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely, as far as human care and foresight will reasonably admit. A railroad company, using as it does the powerful and dangerous agency of steam, is bound to provide skillful and careful servants, competent in every respect for the posts they are appointed to fill in their service; and is responsible not only for their possession of such care and skill, but also for the continued application of these qualities at all times." The degree of care required in these matters is the same whether the motive power be steam or electricity. A common carrier is not an insurer of the safety of its passengers, but it is required to exercise the highest degree of care and diligence that is reasonably practicable in securing their safety by keeping its cars and appliances in a safe condition, and at all times under the control and management of skilled and competent servants. There is at the same time a duty resting upon the passenger to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and, if his negligent act contributes to bring about the injury of which he complains, he cannot recover. *Betts v. Wil. City Ry. Co.*, 3 *Pennewill*, —, 53 *Atl.* 358.

Evidence that the plaintiff, to escape the danger of a collision between cars Nos. 16 and 12, jumped from the car upon which he was riding, will not support any count contained in the plaintiff's declaration, it being averred in some of the counts therein to the effect that he was thrown from his seat; in others, that he was thrown out of the car upon the ground. *Higgins v. Mayor and Council of Wil.*, 3 *Pennewill*, —, 51 *Atl.* 1. The plaintiff has failed to make any allegation that he received any injury by jumping from the car, or that he did in fact jump from the car, and there is no count in the declaration which would support the proof, if there be any, that the plaintiff jumped from the car. If, therefore, you find that the plaintiff received no injury except by jumping from the car, and that whatever injury he did receive was occasioned by jumping from the car, he cannot recover.

Evidence to the effect that the motorman

lost control of car No. 5, causing the collision between cars Nos. 16 and 12, because the snap switch on the rear of the car was closed, when it should have been opened, will not support those counts in the declaration which aver, in effect, that the car was improperly equipped with a defective air brake. But if you find that the switch was closed, without regard as to how or when it was closed, if by the exercise of due care and caution the servants of the company might or should have discovered that it was closed, and that by reason thereof the air brake failed to act effectually, as it was designed to act, and that the resultant failure so to act was due to the carelessness, incompetency, or negligence of the servants of the defendant company in not discovering that the switch was closed, and that, as a result of the failure of the air brake to work, the motorman lost control of car No. 5, and by reason thereof car No. 16 was forced against car No. 12, causing the plaintiff to be thrown therefrom and injured, then the failure to make the discovery and open the switch would constitute negligence. If you find that the servants of the defendant company negligently and carelessly permitted car No. 5 to be overcrowded, and that by reason thereof they lost control of the car; and that the plaintiff was injured by being thrown from car No. 12 upon the ground because of the failure of the servants of the company to control car No. 5 as a consequence of the overcrowding of the car, then the defendant company was negligent. If the injuries alleged to have been sustained by the plaintiff were occasioned by the negligence of the defendant company, or its motorman, servants, or any of them, and without the fault or negligence of the plaintiff contributing thereto, then he would be entitled to recover. But, if the negligence of the plaintiff contributed to and proximately entered into the accident which resulted in the injuries complained of, he cannot recover.

Where there is conflict in the testimony, you should reconcile it if you can. If you cannot, you should give credit to and be governed by the testimony, which, in your judgment, is most worthy of belief, taking into consideration the intelligence, apparent truthfulness, bias, and impartiality of the witness. The weight and value of the evidence so determined by you is to be your guide in reaching your verdict. And governed by this instruction you should decide this case in whose favor there is a preponderance of the evidence. If you should find for the plaintiff, your verdict should be for such a sum as will reasonably compensate him for the injuries which he has sustained, including therein his pain and suffering, his impaired power to perform labor in the past, since the accident, and such as may come to him in the future, his loss of time and labor as a result of his injuries; and if, under

the evidence, you find that his injuries are of a permanent character, such as to cause any impairment of ability to earn a living in the future, you should consider that fact in determining the amount of damages, otherwise you should not award damages for permanent disability.

Verdict for plaintiff for \$1,800.

STATE v. GEORGE.

(Court of General Sessions of Delaware.
New Castle. May 22, 1902.)

CRIMINAL LAW—MINOR DEFENDANT—GUILTY KNOWLEDGE—BURDEN OF PROOF—EVIDENCE.

1. Where, on a criminal prosecution, the accused is under 14 years of age, it is incumbent on the state to show that the accused committed the crime with a guilty knowledge that he was doing wrong.

2. Such guilty knowledge may be shown by the apparent intelligence of the minor and from his acts and conduct in connection with the crime, together with any other circumstances that will throw light on the subject.

Ezekiel R. George was convicted of arson.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Herbert H. Ward, Atty. Gen., for the State.

LORE, C. J. (charging jury). Ezekiel R. George is charged with feloniously, willfully, and maliciously setting fire to and burning the barn of Samuel Logan, in Mill Creek hundred, this county, on or about the 7th day of April, 1902. It is admitted that the prisoner is under 14 years of age, and, where a prisoner is thus a minor, it is incumbent upon the state to show, first, that the accused committed the act charged, and, secondly, that he did it with a guilty knowledge that he was doing wrong. That guilty knowledge may be shown by the apparent intelligence of the accused minor, and from his acts and conduct in connection with the crime, and any other circumstances that will throw light upon that subject. The principle of law governing cases of this kind, where the person charged is an infant, is very clearly stated in 3 Greenleaf on Evidence, § 4, as follows: "With respect to infants, the period of infancy is divided by the law into three stages. The first is the period from the birth until seven years of age, during which an infant is conclusively presumed incapable of committing any crime whatever. The second is the period from seven until fourteen. During this period the presumption continues, but is no longer conclusive, and grows gradually weaker as the age advances towards fourteen. At any stage of this period the presumption of incapacity may be removed by evidence showing intelligence and malice; for malitia supplet aetatem; but the evidence of that malice which is to supply age ought to be strong and clear beyond all reasonable doubt. * * * The third commences at fourteen; the pre-

sumption of incapacity arising from youth being then entirely gone, and all persons of that age and upwards being presumed, in point of understanding, capable of committing any crime, until the contrary be proved." You have the law as thus stated by Greenleaf, and if, under the circumstances of this case, you believe that the prisoner committed the offense, and that at the time he had sufficient intelligence to know that he was doing a wrong act, and did it willfully and maliciously, then your verdict should be, "Guilty in manner and form as he stands indicted." If you should have a reasonable doubt upon any of the material elements of the crime charged, your verdict should be, "Not guilty"; the doubt should enure to his acquittal. The court charges you thus with respect to the possession of criminal capacity because we find in the case of *State v. Jackson*, 8 Pennewill, 15, 50 Atl. 270, that the case is inaccurately stated through inadvertence, and we take this method of correction.

Verdict, "Guilty," with a recommendation to the mercy of the court.

KARCZEWSKI v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware. New Castle.
Jan. 8, 1902.)

INJURIES TO SERVANT—NEGLIGENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE—MASTER'S DUTY—DANGEROUS EMPLOYMENT—YOUTH—INEXPERIENCE—RULES—MEASURE OF DAMAGES.

1. A master owes its servant the duty of providing a reasonably safe place to work in, and reasonably safe and proper tools.

2. It is a master's duty to a servant to keep its premises and tools in a reasonably safe condition.

3. Where a servant is young or inexperienced, it is the duty of the master to inform him of the dangers incident to his employment.

4. A servant must obey and follow the instructions of his master as to the work he is employed in.

5. It is the duty of both master and servant to exercise reasonable care and diligence to avoid accident, varying according to the dangerous nature of the employment.

6. Plaintiff in an action against a master for injuries has the burden of proving defendant's negligence.

7. Plaintiff in an action against a master for personal injuries cannot recover if guilty of contributory negligence.

8. In an action for personal injuries, plaintiff can recover for loss of time and wages, past and future pain and suffering, and for resulting impairment of ability to earn a living.

Action by Francis Karczewski against the Wilmington City Railway Company. Verdict for plaintiff.

Action on the case for damages for personal injuries alleged to have been occasioned by receiving a shock of electricity whilst employ-

ed as a servant of the defendant company in cleaning a car of the said defendant at its car barn in the city of Wilmington. The narr. consisted of eight counts. The first count contained the following allegation with respect to the injuries to the plaintiff, viz.: "Yet the said defendant, not regarding its said duty as aforesaid, negligently and carelessly omitted to provide a reasonably safe place in which to work, for the said Francis Karczewski, in that it carelessly and negligently passed a dangerous current of electricity through the wires in and about a certain car in which the said plaintiff was then and there working for said defendant, so that he the said plaintiff, who was then and there, to wit, on the 2d day of July, A. D. 1900, at New Castle county aforesaid, in the exercise of due care and caution on his part, engaged in the scrubbing or cleaning for the said defendant of the said certain car, stored in or near said car barn, was, by reason of the defendant's omission to provide a reasonably safe place in which to work as aforesaid, greatly shocked, burned, and injured by an electric current, by reason of touching or coming in contact with an exposed wire in said car, charged by the said defendant with a dangerous current of electricity, and was thereby violently thrown, hurled, or caused to fall to the floor of the said car, or on the seat thereof; that by reason of said shock from said current of electricity the plaintiff was greatly pained, burned, wounded, and injured, and also, by means of the premises, the said plaintiff became and was sick, sore, burned, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which said time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs and business, by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits, and advantages which he might and otherwise would have derived from the same, and also the said plaintiff was forced and obliged and did then and there pay, lay out, and expend divers large sums of money, to wit, one thousand dollars, in and about the endeavoring to be cured of the burns, bruises, and injuries so received as aforesaid, whereby the said plaintiff saith that he is injured and hath sustained damages in the sum of twenty thousand dollars, and therefore he brings his suit." The remaining counts, while varying in the phraseology as to the negligence of the defendant, made substantially the same allegations as contained in the first count with respect to the injuries sustained by the plaintiff. The defendant filed a general demurrer to the above declaration as insufficient, and contended that the injuries were not stated in the narr. with sufficient particularity. After hearing argument, the court overruled the demurrer; and, upon

¶ 3. See *Master and Servant*, vol. 24, Cent. Dig. § 314.

application of defendant's counsel, judgment of respondeat ouster was entered.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Levin I. Handy, for plaintiff. Walter H. Hayes, for defendant.

LORE, C. J. (charging jury). This is an action on the case to recover damages for personal injuries. Francis Karczewski, the plaintiff, claims that about June 27 or 28, 1900, he was in the employ of the defendant company, at their carshops in this city, as a scrubber and cleaner of cars; that on that day he was set to work scrubbing and cleaning a summer car while the trolley pole was in contact with the feed wire; that, while he was cleaning the top of the car with a wet sponge, his hand came in contact with the end of a live wire hanging down from the top of the car; that thereby he received an electric shock, was knocked down, became insensible, and his hand injured and permanently disabled, and was otherwise hurt; that he was ignorant of the danger, and had received no warning or proper instructions at the hands of the defendant company. The defendant company claims, on the other hand, that he was specially warned and instructed not to work upon a car while the trolley was in contact with the feed wire; that, if he received any shock and injury, it resulted from a disregard of such instructions, and was the result of his own negligence; further, that the alleged injury to the hand was not in fact caused by an electric shock, but in using a chisel in work at his own home. It is for you to determine which of these contentions is true. There are no new questions of law raised in this case. It is mainly a question of fact for you to determine from the evidence, and we shall charge only upon the questions of law raised by the prayers of the parties.

It is conceded on both sides that at the time of the accident the relation of master and servant existed between the defendant company and the plaintiff. Where such relation exists, there are certain legal duties imposed upon each party. It is the duty of the master to provide for the servant a reasonably safe place in which to work; and also reasonably safe and proper tools with which to perform such work, and to keep both place and tools in such reasonably safe condition. Where the employment is dangerous, it is the master's duty, either by general rules or special instructions, to warn and inform his servant of the danger, if by reason of youth or inexperience the servant is unacquainted therewith. The measure of such instructions should be gauged in all cases by such youth or inexperience. It is the duty of the servant to obey and follow the instructions of the master as to his work. The servant assumes the ordinary and usual risks of his employment, whatever they may be. He also assumes such risks, whether patent

or latent, as are within his knowledge, or with which he may become acquainted with the ordinary use of his faculties. It is the duty of both master and servant to exercise reasonable care and diligence to avoid accident. Such care and diligence must be greater or less according to the danger of the employment in each case. This action is based upon the negligence of the defendant company. The burden is upon the plaintiff to show such negligence by a preponderance of proof. The injury must be the result of the negligence of the defendant only. If the plaintiff contributed proximately in any way to the accident, he cannot recover, as the law will not attempt to measure the extent of such contribution. Governed by these simple rules of law relating to master and servant, you are to reach your verdict in this case.

If you should find for the plaintiff, your verdict should be for such reasonable sum of money as will compensate him for his injuries; including therein his loss of time and wages, his pain and suffering in the past, and such as may come to him in the future, resulting from this accident, and also for any impairment of ability to earn a living in the future, resulting therefrom.

Verdict for plaintiff for \$400.

BLUMENTHAL v. BOSTON & M. R. R.

(Supreme Judicial Court of Maine. Jan. 1, 1903.)

RAILROAD — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE — NONSUIT.

1. While the plaintiff was attempting to drive over the defendant's railroad at a highway grade crossing, he was struck by a freight train of the defendant and sustained serious bodily injury. The collision occurred upon the last, as the plaintiff was driving, of the railroad company's three tracks at this crossing. The southerly rail of this last track was about 25 feet northerly of the northerly rail of the first track.

Giving the plaintiff the benefit of the most favorable construction possible to the evidence, it may be assumed that, as he was approaching the crossing, his view of the track, in the direction from which the train was coming, was entirely obstructed by buildings, and, perhaps by a board fence which extended along the southerly side of the railroad, until he reached a point inside of this board fence. But the end of this fence, at the street, was 30 feet southerly of the southerly rail of the track upon which the collision occurred. From this point he had an unobstructed view of the railroad in the direction from which the train was coming, for a distance of at least 300 feet, and from the first of the three tracks his view was unobstructed in the same direction for nearly 400 feet.

The plaintiff was driving, as he says, at a fast walk, and the speed of the freight train, as estimated by plaintiff's witnesses, was from 15 to 20 miles an hour. Consequently, when the plaintiff was upon the first track, with an unobstructed view of between three and four hundred feet, the train was in plain view, and only from 125 to 150 feet distant from the crossing, since the speed of the train was only

five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of 25 feet.

Held that, as there was no controversy as to any of these facts, it was proper for the presiding justice to refuse to submit the case to the jury and to order a nonsuit. That from these uncontroverted facts one of these two conclusions is irresistible: Either the plaintiff failed to take such precautions as to looking and listening, before attempting to cross the third track, as have been laid down by all authorities as indispensable to his right of recovery; or else he did look and saw the approaching train, and took his chance of safely crossing in front of it. That in either event his negligence contributed to the accident, and, in accordance with the well-settled law of this state, will prevent his recovery.

2. Although the question of negligence, either of plaintiff or of defendant, is one of fact for the jury, when the facts and circumstances are in controversy, and even when they are not, if fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from such facts, it is not a question of fact for the jury, but one of law for the court, when the facts are undisputed and but one inference can properly be drawn therefrom.

3. It is undoubtedly true that, where the determination of an issue of fact depends upon the credibility of witnesses, and where a jury would be justified in coming to a conclusion either way as to the credence to be given to the witnesses upon the one side or the other, it is the duty of the court to submit such an issue to the jury, however firmly convinced the presiding justice may be that there is no doubt as to where the truth lies. And, even where the surrounding circumstances merely make the story of a witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the tribunal created by the Constitution and the laws for the determination of such questions. But this is not so when the undisputed circumstances show that the story told by a witness upon a material issue cannot by any possibility be true, or when the testimony of a witness, necessarily relied upon, is inherently impossible.

4. Under the circumstances of this case, it does not help the plaintiff that he testified that he did look and did not see the approaching train; nor did this testimony, under the circumstances of the case, raise an issue of fact which should have been submitted to the jury.

(Official.)

Exceptions from Superior Court, Cumberland county.

Action by Hyman Blumenthal against the Boston & Maine Railroad. Judgment of nonsuit, and plaintiff excepts. Overruled.

Case to recover damages sustained by the plaintiff when driving over the defendant's railroad at a highway grade crossing at Central street in Westbrook. The plaintiff claimed that the collision was caused by the negligence of the defendant's employes in the management of its train.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Wm. Lyons, E. Foster, and O. H. Hersey, for plaintiff. J. W. Symonds, D. W. Snow, C. S. Cook, and C. L. Hutchinson, for defendant.

WISWELL, C. J. While the plaintiff was attempting to drive over the defendant's railroad at a highway grade crossing, he was struck by a freight train of the defendant and sustained serious bodily injury. Claiming that this collision was caused by the negligence of the defendant's employes in the management of the train, he brought this action to recover damages for the injuries sustained by him. At the trial, upon the conclusion of the plaintiff's testimony, the court ruled that a prima facie case had not been made out, and ordered a nonsuit. The case comes to the law court upon the plaintiff's exception to this ruling.

In accordance with familiar principles, which have been so frequently laid down by this court that reference to the authorities is unnecessary, it was incumbent upon the plaintiff, in order to entitle him to have the case submitted to the jury, to introduce testimony tending to affirmatively prove two propositions—the negligence of the defendant in some of the respects complained of, and that no failure upon his part to exercise due care contributed to the accident; and it was as essential for him to affirmatively prove the exercise of due care upon his part as to show negligence upon the part of the defendant.

So far as the first proposition is concerned, it is sufficient to say that we think that the evidence introduced by the plaintiff, uncontradicted, was sufficient to justify a jury in finding that there was negligence upon the part of the defendant's employes. It therefore becomes necessary to consider whether, in accordance with the well-established rules as to when the question of negligence is one of fact for the jury and when one of law for the court, the uncontradicted evidence in behalf of the plaintiff in support of his second proposition, that no want of due care upon his part contributed to the accident, was sufficient to entitle him to have this question submitted to a jury.

The plaintiff was a dealer in junk. Upon the morning of the day of the accident, April 30, 1900, he had driven with his own horse and express wagon from Portland to Westbrook. During the greater part of the forenoon he had gone about from house to house in the latter city, plying his trade. Shortly before noon he turned into Central street and drove northerly along that street towards the grade crossing of the defendant's railroad, his destination being a grain store beyond the railroad crossing, where he intended to buy grain for his horse.

At this highway crossing there were three tracks of the defendant's railroad. A board fence extended along the southerly side of the railroad from Brackett street to the easterly line of Central street, a distance of about 300 feet. The end of this fence at the Central street line was 30 feet southerly from the southerly rail of the third or last track at the crossing, and the northerly rail of the first track, in the middle of the street,

¶ 1. See Negligence, vol. 37, Cent. Dig. §§ 290, 293.

was about 25 feet southerly of the southerly rail of the third track. The plaintiff crossed the first two tracks safely, and was struck while attempting to cross the third and last track.

As the plaintiff drove northerly along Central street, from the point where he entered that street until nearly to the first track, his view of the railroad on the easterly side of the street—the direction from which the train was coming—was more or less obstructed by buildings, and some of the witnesses think that it might also have been obstructed by the board fence above referred to. Giving the plaintiff the benefit of the most favorable construction possible to the evidence in regard to these obstructions to his vision, it may be assumed that the plaintiff's view of the track in this direction was entirely obstructed until he reached a point inside of this board fence.

But it is made absolutely certain by the plan which was furnished by the defendant, but which was used by the plaintiff and brought to the law court as a part of the case, and as to the accuracy of which no question is raised, that, after the plaintiff reached a point inside of this fence, he had an unobstructed view of the railroad easterly for a distance of at least 300 feet. The plaintiff himself repeatedly testified, upon cross-examination, that from both of the first two tracks that he crossed he could see easterly along the railroad for several hundred feet. The plan shows that the view from the first track easterly was unobstructed nearly, if not quite, to Brackett street, a distance of about 390 feet, without any portion of the fence, even if that was high enough to be an obstruction, coming within the line of vision.

The plaintiff, according to his own testimony, was driving at a fast walk, and witnesses for the plaintiff testified that in their judgment the speed of the freight train was from 15 to 20 miles an hour. Assuming these estimates to be correct, when the plaintiff was upon the first track, with an unobstructed view of the railroad easterly for a distance of between 300 and 400 feet, the train was only from 125 feet to 150 feet distant from the crossing, because the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of 25 feet. Consequently, when the plaintiff was upon the first track, 25 feet distant from the place of collision, he had an unobstructed view of the approaching train, which was not more than 150 feet distant on the track from the crossing. If the relative speed of the freight train was not as great as the witnesses have estimated, then, of course, the train was still nearer the crossing at the time the plaintiff was upon the first track.

There is no controversy about these facts. They are shown by the testimony introduced by the plaintiff, and by the plan which the

plaintiff used and which is made a part of the case. From these facts one of these two conclusions is irresistible: Either the plaintiff failed to take such precautions as to looking and listening, before attempting to cross the third track, as have been laid down by all authorities as indispensable to his right of recovery; or else he did look and saw the approaching train, and took his chance of safely crossing in front of it. In either event his negligence contributed to the accident, and, in accordance with the settled law of this state, that negligence will prevent his recovery. When upon the first track, where his view of the railroad was unobstructed for a much greater distance than was necessary to see the approaching train, he had ample opportunity to stop his horse or to turn aside. Instead of affirmatively proving due care upon his part, he has conclusively proved a want of such care, which contributed to the accident.

Although the question of negligence, either of plaintiff or of defendant, is one of fact for the jury, when the facts and circumstances are in controversy, and even when they are not, if fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from such facts, it is not a question of fact for the jury, but one of law for the court, when the facts are undisputed and but one inference can properly be drawn therefrom. The following are a few of the very numerous authorities in support of this principle: *Romeo v. Boston & Maine Railroad*, 87 Me. 540, 33 Atl. 24; *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Kilpatrick v. Grand Trunk Railway Company*, 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; *Tully v. Philadelphia, Wilmington, and Baltimore Railroad Company*, 2 Pennw. 537, 47 Atl. 1019, 82 Am. St. Rep. 425; *Heilmann v. Kinnare*, 190 Ill. 156, 60 N. E. 215, 52 L. R. A. 652, 83 Am. St. Rep. 123. As we have already seen, this case belongs to the latter class, because from the undisputed facts the inference of contributory negligence upon the part of the plaintiff is the only one that can be drawn. It was therefore the duty of the court at nisi prius to take the case from the jury and order a nonsuit.

But it is urged that the above doctrine is not applicable to this case, because the plaintiff testified that before attempting to cross the railroad track he both looked and listened for an approaching train, and did not see or hear the one that came into collision with him until he was on the last track and just before the train struck him. It is claimed that, by reason of this testimony of the plaintiff, an issue of fact was raised which he was entitled to have passed upon by a jury.

It is undoubtedly true that where the determination of an issue of fact depends upon the credibility of witnesses, and where a

jury would be justified in coming to a conclusion either way, as credence be given to the witnesses upon the one side or the other, it is the duty of the court to submit such an issue to the jury, however firmly convinced the presiding justice may be that there is no doubt as to where the truth lies. And, even where the surrounding circumstances merely make the story of a witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the tribunal created by the Constitution and the laws for the determination of such questions.

But this cannot be so when the undisputed circumstances show that the story told by a witness upon a material issue cannot by any possibility be true, or when the testimony of a witness, necessarily relied upon, is inherently impossible. In this case, as we have seen, the plaintiff, when he was 25 feet distant at least from the place of the collision, and when he had ample opportunity to stop or turn aside, could have seen the approaching train if he had looked, as was his duty. As we have already said, he either did not look, or did look and saw the approaching train, but attempted to cross, regardless of it. Under these circumstances, it does not help him that he testified that he did look and did not see the train; nor did this testimony, under the circumstances of the case, raise an issue of fact which should have been submitted to the jury.

Exceptions overruled.

LEWISTON & A. R. CO. v. GRAND TRUNK RY. CO. OF CANADA.

(Supreme Judicial Court of Maine. Jan. 1, 1903.)

LEASE—INTERPRETATION—RAILROADS—TAX—FRANCHISE—CONTRACT—PAYMENT OF TAXES—DEDUCTION FROM RENT.

1. In determining the intention of the parties to a contract, the interpretation which they themselves by their own acts put upon it is justly entitled to great weight.

2. The court will not adopt a construction of a contract which does not comport with the interest of either party at the time it is made, unless expressed in clear terms.

3. The plaintiff agreed with the defendant to construct and build the plaintiff's road as described in its charter, in a substantial and permanent manner, with suitable station grounds and buildings, and with the necessary sidings at its terminus in Lewiston. By a subsequent indenture the defendant agreed to construct and complete the railroad as already located and partially constructed in a substantial manner, and in all respects in accordance with the previous agreements of the plaintiff. The next day the plaintiff leased the road to the defendant for 99 years, with full power to finish and complete it as previously agreed between the parties, and to make and construct any new buildings and tracks necessary and beneficial to be used for the working of the railroad. A rental of \$9,000 was to be paid every six months, and the lease provided that all taxes which might lawfully be assessed upon the corporate property or fran-

chise of the lessor during the period of the lease might be paid by the lessee and deducted from the rent. Within a few months after the execution of the lease the defendant purchased for \$92,215.10 certain parcels of land in Lewiston adjoining, but without the location of the plaintiff's road. On this land railroad sidings have been constructed and buildings erected, either leased to the patrons of the road, or built upon portions of the premises leased to said patrons. The defendant took the title to this real estate in its own name, enjoys the income from it, and for 23 years paid the taxes upon it without making any claim to deduct such taxes from the rent.

Held that, construing the two indentures and lease together, the defendant was not bound to acquire this land for the plaintiff; that it is not the corporate property of the plaintiff, within the true intent and meaning of the lease; and that the taxes so paid cannot be deducted from the rent therein reserved.

4. For 18 years the defendant paid taxes lawfully assessed upon the corporate property of the plaintiff, but did not deduct them from the rent.

Held, that they cannot be deducted now; that the true intent and meaning of the lease is that as fast as the taxes are paid they should be deducted from the installment of rent falling due next after such payment, and, if not deducted then, they cannot be taken out at all.

5. The defendant has paid an annual franchise tax to the state, assessed upon the basis of the gross earnings of all the leased lines operated by it within the state, divided by the total number of miles so operated.

Held, that this is not a tax upon the franchises of such leased roads alone; that it is either a tax upon the franchise of the defendant alone, or upon its franchise and the franchise of its leased roads. If the latter, it is incapable of apportionment in this case, and no part of the tax so paid can be deducted from the rent reserved.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Action by the Lewiston & Auburn Railroad Company against the Grand Trunk Railway Company of Canada. Case reported. Defendant defaulted. Damages to be assessed at nisi prius.

Action to recover the sum of \$18,000, with interest, alleged to be due from the defendant to the plaintiff as rental for the plaintiff's railroad, station grounds, buildings, sidings, etc., and the property and estate of every kind belonging to the plaintiff, appurtenant to and designed for the purposes of maintaining and operating the plaintiff's railroad; the allegation being that the rental is due under the terms of a lease from the Lewiston & Auburn Railroad Company to the Grand Trunk Railway Company dated March 25, 1874.

The defense was based upon a provision in the lease that "all taxes which may be lawfully assessed upon the property or franchises of the lessors during the period of their lease may be paid by the lessee, and, if so paid, shall be deducted from the rent herein covenanted to be paid by said lessee." The defendant claimed to have paid taxes, and to be entitled to deduction of taxes of the nature referred to in the lease to an amount considerably in excess of any rentals claim-

ed to be due, and that, with such deductions made, no balance was due the plaintiff.

Argued before EMERY, STROUT, POWERS, PEABODY, and SPEAR, JJ.

H. W. Oakes, J. A. Pulsifer, F. E. Ludden, W. H. Newell, and W. B. Skelton, for plaintiff. C. A. & L. L. Hight, J. W. Symonds, D. W. Snow, C. S. Cook, and C. L. Hutchinson, for defendant.

POWERS, J. Assumpsit for two semi-annual installments of rent, of \$9,000 each, from June 10, 1898, to June 10, 1899, under a lease from the plaintiff to the defendant.

The plaintiff corporation was organized under a special charter (Laws 1872, c. 88, approved February 10, 1872), which empowered it to locate, construct, and complete a railroad from some point in the city of Lewiston to a point of connection with the Atlantic & St. Lawrence Railroad, otherwise known as the Grand Trunk Railroad, within the limits of the city of Auburn. It was also authorized to lease its road, either before or after its completion, upon such terms as it might be able to agree with the Grand Trunk Railway Company. August 27, 1872, the plaintiff and defendant entered into an indenture, by which, in consideration of the defendant's agreeing, among other things, to take a lease of the road, when completed, for the term of 99 years, the plaintiff agreed to proceed with all diligence to construct and build the road, in a substantial and permanent manner, with suitable station grounds and buildings, and with the necessary sidings at the terminus at Lewiston. March 24, 1874, the parties entered into another written agreement, by which the defendant, in consideration of \$220,000 in cash and bonds paid to it by the plaintiff, agreed to "proceed with all diligence to construct and complete the railroad, known as the Lewiston and Auburn Railroad, as already located and partially constructed, in a substantial manner, and in all respects in accordance with the obligations, promises, and agreements" of the plaintiff contained in the indenture of August 27, 1872, to which reference is expressly made.

The next day, March 25, 1874, the lease was executed. By it the plaintiff leased to the defendant "the railroad of the said Lewiston and Auburn Railroad Company as now chartered, located and constructed, extending from the city of Lewiston to its point of junction with the Atlantic and St. Lawrence Railroad in the city of Auburn, together with all its station grounds and buildings, and all its rights of way and other easements and rights, and all the property and estate of every kind belonging to said Lewiston and Auburn Railroad Company, appurtenant to and designed for the purpose of maintaining and operating said railroad, * * * with full power and authority to finish and complete said railroad, as heretofore agreed between the respective parties hereto." The

lessee was further authorized "to make or construct any new buildings or tracks necessary and beneficial to be used for the working of said railroad." The lease provided that all taxes which might lawfully be assessed upon the corporate property or franchise of the lessor during the period of the lease might be paid by the lessee, and, if so paid, they should be deducted from the rent covenanted to be paid by the lessee.

Immediately upon the execution of the lease the Grand Trunk Railway Company took possession of the property and franchises of the Lewiston & Auburn Railroad Company, and proceeded to construct and complete said railway in accordance with the agreement and obligation existing between the parties. While the work of construction was in progress, and before the completion of the road, the Grand Trunk Railway Company, on July 17, 1874, purchased for the sum of \$2,215.10 certain parcels of land, and on November 20, 1874, another parcel of land for the sum of \$90,000, all situated in the city of Lewiston, adjoining the original location of the Lewiston & Auburn Railroad Company. The defendant took and still retains the title to all land so purchased. On this land certain railroad sidings have been constructed, and certain buildings erected. Some of these buildings have been built by the defendant, and leased to the patrons of its leased road, the Lewiston & Auburn Railroad. Others have been built by the patrons of said leased road upon portions of said premises leased to them by the defendant. The lease and the two written contracts named are all parts of the same transaction, and are to be construed together.

1. During the period of the lease, and previous to the date of the writ, the defendant has paid taxes to the amount of \$31,427.75 legally assessed by the city of Lewiston, from 1875 to 1898, inclusive, upon the land so purchased in July and November, 1874. These taxes the defendant claims the right to deduct from any rental accruing under the lease. The question is, are they taxes upon the corporate property of the plaintiff? In other words, is the land so purchased by the defendant, the title to which is now held by it, and of which it has the exclusive use, benefit, and control, the corporate property of the plaintiff, within the true intent and meaning of the lease? We cannot believe that such was the intention of the parties. It is true that by the indenture of August 27, 1872, the plaintiff agreed to construct and build the road, with suitable station grounds and buildings, and with the necessary sidings at the terminus at Lewiston, and that it was necessary to acquire a part at least of the land purchased, in order to provide suitable station grounds and necessary sidings and terminal facilities. When, however, this obligation to so construct and complete the road passed from the plaintiff to the defendant, as it did by the indenture of March 24, 1874,

it was therein confined to the road "as already located and partially constructed." In the first indenture there is no reference to any location, and, being executed but a few months after the granting of the charter, it is probable that none had been made. The road is therein described in general terms, following the language of the charter, which at that time afforded the best and only description of it. When, however, the second indenture was entered into, the road had been located and partially constructed. By it the defendant was to construct and complete the road, not in the vague and general terms of the charter, but, specifically, "the Lewiston and Auburn Railroad as now located and partially constructed." These words "as now located" modify all that follows, including the reference to the prior agreement, and must have been used for the purpose of limiting the obligation of the defendant within some bounds capable of being readily ascertained and accurately defined. If not so intended, they are meaningless. The construction contended for by the defendant wholly ignores them, and makes its obligation apply to the road as described in the prior agreement. The same may be said of the lease. It is "the railroad of the said Lewiston and Auburn Company as now chartered, located and constructed" that is leased to the defendant. There is no claim that the lands purchased are within the location of the plaintiff's railroad, or covered by any plans for its construction and completion in existence at the time that the lease was executed.

Again, it is difficult to believe that the parties ever understood or intended that the defendant was bound to acquire for the plaintiff land of the value of \$92,000. If such an onerous obligation were intended to be imposed, we should expect to find it set forth in clear and specific terms, and not left to inference from general language relating to other subjects. By giving force to the words "as already located," the rights and duties of the parties become fixed, certain, definite—the very object, we have no doubt, for which the words were used. By disregarding them, and adopting the construction for which the defendant contends, its obligations would be vague, uncertain, indeterminate, a fruitful source of litigation—the very things which such solemn indentures are intended to avoid.

Perhaps, however, the most satisfactory, as it is the most conclusive, answer to the defendant's contention, is found in its own conduct. In determining the intention of the parties to a contract, the interpretation which they themselves by their own acts put upon it is justly held entitled to great weight. The defendant purchased the land with its own money. It took and still retains the title in its own name. For 23 years it paid taxes upon this land, aggregating in all nearly \$30,000, without making any claim that it was entitled to have them deducted from the

rental under the lease. The first tax was assessed in 1875. The terms of the contract must then have been fresh in the minds of the parties. Yet this claim was allowed to slumber for 23 years, until the amount paid in taxes on the property aggregated many times the amount of the semiannual rental. Such conduct can be accounted for on only one rational theory—that the parties never intended that this land should be considered the corporate property of the plaintiff, within the true intent and meaning of the lease.

2. It is admitted that from 1880 to 1898, inclusive, the defendant paid annual taxes lawfully assessed by the city of Auburn upon the corporate property of the plaintiff to the amount of \$1,585.25. The defendant claims that it should be permitted now to deduct these taxes; that its right to make such deduction is a continuing one, and may be exercised at any time during the period of the lease. We do not think such was the intention of the parties. They must have known that the taxes would be assessed and payable annually. The lease states that, if the taxes are paid by the lessee, they "shall be deducted from the rent herein covenanted to be paid by said lessee," and the lessee covenants to pay the rent semiannually. We think this plainly imports that, as fast as the taxes were paid, they should be deducted from the installment of rent falling due next after such payment, and, if not deducted then, they could not be taken out at all. The defendant could have desired at the time no other contract, for the sooner the tax was deducted the better it would be for the lessee. The plaintiff must have desired and intended to secure from the rental some kind of a fixed and certain income for its stockholders. The lease was for 99 years, and if the taxes could be allowed to accumulate for half a century, more or less, and be deducted any time at the will and pleasure of the lessee, it is evident that such great uncertainty in regard to the amount to be received on any pay day—in fact, in time as to whether anything at all would be received at the time for the next semiannual payment of rent—would most seriously and injuriously affect the market value of the defendant's stock. Such an intention, which does not comport with the interest of either party to the lease at the time it was executed, should be expressed in clear terms. It cannot be deduced from the language here used. The case does not clearly show whether any of these taxes were paid after the last payment of rent was made on June 10, 1898. If so, they should be deducted from the amount of the rental which fell due next after this payment.

3. From 1889 to 1893 the state assessed a franchise tax against the plaintiff corporation, which was paid by the defendant. The construction, already given to the lease above, in regard to the taxes in Auburn, renders it unnecessary to determine whether this tax

was lawfully assessed. Not having been deducted from the rental falling due next after their payment, they cannot be deducted now.

From 1894 to 1898, both inclusive, the state tax has been assessed directly against, and paid by, the defendant. In making up the taxes for these years the gross earnings of all the lines operated by the Grand Trunk in this state, the Atlantic & St. Lawrence Railroad, the Norway Branch Railroad, and the plaintiff's road, have been taken together, and divided by their total mileage in Maine, to get the gross earnings per mile upon which to base the tax.

The question presented is whether the defendant's proportionate part of the tax constitutes a tax upon its franchise, within the intent and meaning of the lease. It is settled that the tax is a franchise tax. *State v. M. O. R. Co.*, 74 Me. 376; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994. Whose franchise is taxed—that of the lessor or of the lessee; of the plaintiff, who owns the road, or of the defendant, who operates it? Under the statute, the tax can only be assessed against the corporation, person, or association operating the road. "Every corporation, person or association, operating any railroad in the state under lease or otherwise, shall pay to the Treasurer of the state for the use of the state, an annual excise tax, for the privilege of exercising its franchises and the franchises of its leased roads in the state." Rev. St. c. 6, § 41; Laws 1897, c. 75. This tax was assessed against the corporation operating the road "for the privilege of exercising its franchises and the franchises of its leased roads." It is as plain as language can make it that this is not a tax upon the franchises of the leased road alone. The most that can be contended for is that it is a tax upon the franchises of both the lessor and the lessee, because the tax is assessed for the privilege of exercising the franchises of both. By what rule can it be apportioned in the present case? Not pro rata by the mileage, for upon that basis, after deducting the tax upon franchises of the plaintiff, the Atlantic & St. Lawrence Railroad, and the Norway Branch Railway, no tax would remain against the Grand Trunk for the privilege of exercising its franchises. Neither would it be just that the tax upon the franchise of one road should be increased or diminished, as would be the case here, by the amount of business done by other roads, in which it has no interest, and over which it has no control, simply because they are all operated by the same lessee. The manner in which the amount of the tax is determined precludes the conclusion that the franchises of the lessor and lessee are or can be taxed separately. Every railroad corporation must annually make a return to the railroad commissioners "of its operations." Rev. St. c. 51, § 60. Its gross transportation receipts thus returned are to be divided by "the number of miles of railroad operated" (*Id.* c. 6, § 42),

and from the result thus obtained the amount of the tax is determined by a scale of varying percentages on the gross receipts per mile operated. No distinction is made between the receipts of one leased line and of another, or between these and those of the operating road. They all go in together to make up the total of gross receipts, which in like manner is divided by the total number of miles operated, to get the one sum which fixes the rate of taxation. In short, there is but one tax. It is assessed against the operator upon the basis of all its operations on all its operated roads within this state. Where the operator is a corporation, it must be regarded either as a tax upon its franchises alone, or as a tax upon its own franchises and those of its leased roads, and in the last case it is incapable of apportionment. In either event the defendant's contention cannot be sustained.

As the case leaves it uncertain whether the defendant has paid any taxes to the city of Auburn since June 10, 1898, and prior to June 10, 1899, which it is entitled to have deducted, the defendant should be defaulted, and damages assessed at nisi prius in accordance with this opinion.

So ordered.

POOR v. CHAPIN.

(Supreme Judicial Court of Maine. Feb. 9, 1903.)

ATTACHMENT—CORPORATIONS—LEVY AND SALE ON EXECUTION—VESTED RIGHTS—PRACTICE—TITLE ACQUIRED.

1. By Rev. St. 1883, c. 46, § 20, the real and personal property of any corporation is liable to attachment on mesne process, and levy on execution, however it may have been under the earlier statutes.

2. By the repeal of the former limitations upon the right of attachment and seizure and sale on execution of lands of corporations, and the substituted provisions in Rev. St. 1883, it is evidence that the Legislature intended to subject corporate lands to the same liability to attachment on mesne process as those owned by natural persons.

3. After a first valid attachment of real estate has been made, followed by subsequent proceedings to judgment and sale according to law, a second attaching creditor takes nothing by purchase on his execution at a sheriff's sale, unless, perhaps, the right of redeeming from the sale on execution under the first attachment.

4. It is more necessary that the name of the party whose estate is attached should be correctly shown by the records in the registry of deeds than that of the attaching creditor.

5. Where the officer's return of an attachment of real estate filed in the registry of deeds gave the name of the defendant correctly, but gave only the initials to the plaintiff's name, held, that this was a sufficient compliance with the statute to create an attachment lien.

6. After an action has been defaulted and continued for judgment, and is continued on the docket from term to term for several subsequent terms after judgment has been entered, and so remains on the docket in fact, it will be presumed that there is sufficient reason for its so remaining on the docket.

7. There is no vested right in a particular form of remedy. There can be no cause of com-

plaint if a substituted remedy is given which does not abridge the usefulness of that existing at the time the right accrued. *Held*, that a sale of land on execution under Pub. Laws 1899, p. 119, c. 115, is valid, although the action was brought and the attachment made in 1896.

8. The plaintiff claimed title to land by virtue of a sale on execution in favor of the National Hide & Leather Bank against the Monson Maine Slate Company made February 9, 1900. Real estate was attached on the writ in that case on March 23, 1898.

The defendant claimed title to the same land by virtue of a sale on execution in favor of Rodney C. Penney against the Monson Maine Slate Company made June 11, 1900. Real estate was attached on the writ in that case on September 14, 1896.

As the attachment in the Penney suit had not been lost at the time of the sale on execution in that case, the sale related back to the attachment, and operated to carry the title then existing; and, as the attachment antedated that in the bank suit, *held*, that the defendant acquired title superior to that of plaintiff.

(Official.)

Report from Supreme Judicial Court, Piscataquis County.

Action by Joseph H. Poor against Albert W. Chapin. Case reported, and judgment for defendant.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and PEABODY, JJ.

J. B. Peaks, for plaintiff. Henry Hudson and J. F. Sprague, for defendant.

STROUT, J. This is a writ of entry to recover several parcels of land. Demandant claims title by virtue of a sale on execution issued upon a judgment in favor of the National Hide & Leather Bank against the Monson Maine Slate Company, made on the 9th day of February, 1900. Real estate was attached upon the writ on March 23, 1898. Defendant claims title to the same lands by virtue of a sale on execution issued upon a judgment in favor of Rodney C. Penney against the Monson Maine Slate Company, made on the 11th day of June, 1900. Real estate was attached upon the writ on September 14, 1896. The right of redemption from this sale had expired before the present suit was instituted. If the attachment in the Penney suit was duly perfected and is valid, and the subsequent proceedings were according to law and while the attachment was subsisting, the demandant took nothing by his purchase from the sheriff, unless, perhaps, the right of redemption from the subsequent sale on the Penney execution.

It is very ably argued by the plaintiff's counsel that the statute in force when these attachments were made did not authorize an attachment of real estate of a mining and manufacturing company, which the slate company is.

The right to attach real estate upon a writ is purely a statutory right. Chapter 60, § 2, of the Laws of 1821, provided that "rights in equity of redeeming lands mortgaged, reversions or the remainders," and the lands

of "any turnpike, bridge, canal or other company incorporated by law with power to receive toll," might be attached on mesne process; but that statute included no other corporation, and, by section 13, lands of incorporated banks could be taken on execution and sold, but an attachment of these on mesne process was not authorized. By the general repealing act in 1840 this statute was repealed, and in the chapter relating to corporations (Rev. St. 1841, c. 76, § 17) it was provided that "the corporate property of any company incorporated in this state" "shall be liable to attachment on mesne process, and to be levied upon by execution," in the manner provided by chapters 94, 114, and 117. Chapter 94, § 34, provided that "the lands belonging to any manufacturing corporation" "may be seized and sold on execution." Chapter 114, § 30, provided that all real estate liable to be taken on execution according to chapter 94 may be attached on mesne process.

In the revision of 1857 all these statutes were repealed, and it was then provided that "all real estate liable to be taken on execution" may be attached on mesne process. Rev. St. 1857, c. 81, § 28. But in the chapter on corporations (chapter 46, § 32) it was provided that an officer having an execution against a corporation could not levy upon its real estate until he certified thereon that he was unable to find personal property of the corporation. Under these provisions it may well be doubted whether an attachment of the land could be made on mesne process. These provisions appear in substantially the same language in Rev. St. 1871, c. 46, § 32, and *Id.*, chapter 81, § 54.

But these provisions were repealed in the revision of 1883, and by chapter 46, § 20, on corporations, it is provided that "the property of any corporation" "are liable to attachment on mesne process and levy on execution for debts of the corporation in the manner prescribed by law." This statute was in force when these attachments were made. By the repeal of the former limitations upon the right of attachment and seizure and sale on execution of lands of corporations, and the substituted provision couched in such broad language, it is evident the Legislature intended to subject corporate lands to the same liability to attachment on mesne process as those owned by natural persons. This intention is so manifest that we are not authorized to import into the language any of the conditions or limitations contained in previous statutes.

It is urged that the officer's return of attachment to the registry of deeds was insufficient to create a lien upon the land. The suit was in favor of Rodney C. Penney. The return to the registry followed the statute in every respect, except that it gave the name of the plaintiff as R. C. Penney. The object of the return is to give notice to parties investigating title of an attachment.

This return showed an attachment of the real estate of the Monson Maine Slate Company—the important fact to the party examining the title of the slate company. When the examiner went to the clerk's office to ascertain if the suit on which the attachment was made was pending, he would find a suit against the company in favor of Rodney C. Penney. It can hardly be conceived that in such case the seeker would be deceived. On the contrary, he would have ample notice of the attachment of the real estate of the slate company, and a pending action. This is all the statute contemplates, and all that is useful to the investigator. The cases cited are of wrong names of the defendant. It is much more necessary that the name of the party whose estate is attached should be correctly shown by the records in the registry of deeds, than that of the plaintiff. Whose estate is attached is the vital question. It is immaterial by whom it was attached, if enough is stated to enable the suit to be understandingly traced on the docket of the court. We think this condition was met by the return here, and that the attachment was perfected.

Judgment in the Penney suit was rendered at the April term of the Supreme Judicial Court, 1900. Execution duly issued, and the officer seized the lands on the 4th day of May, 1900, within 30 days after the rendition of judgment, and, after giving the notices required by law, sold them to the defendant on the 11th day of June, 1900, and gave a deed thereof in due form, which was duly recorded.

It is objected that as the defendant was defaulted at the January term, 1897, and the action was thence continued for judgment to the succeeding term, in April, and no docket entry of farther continuance for judgment at that term, the judgment should have been rendered then. If it had been, the lien of the attachment would have expired before the seizure was made on the execution in 1900. The docket shows that the action was upon it at the January term, 1900, and thence continued for judgment to the April term following, when judgment was in fact entered. The statute preserves an attachment for 30 days after judgment. For what reason the action remained on the docket from the April term, 1897, to the April term, 1900, does not appear, but it must be presumed that there was a sufficient reason for it. It did in fact so remain, for which various legal causes may be supposed. We cannot assume that it improperly remained.

It is also objected that the sale on the execution was made under chapter 115, p. 119, Pub. Laws 1899, which was not in force when the attachment was made; and it is urged that the remedy existing at the time of the attachment was a vested right in the plaintiff, which must be preserved on the final process. It is sufficient to say that the officer, in making the sale, followed the di-

rection of Rev. St. c. 76, § 33. The sale of land on execution was authorized by section 42 of the same chapter.

But if the sale had been under the act of 1899 it would be good. There is no vested right to a particular form of remedy. If a substituted remedy is given, which does not abridge the usefulness of that existing at the time the right accrued, there is no cause for complaint. The act of 1899 in no way defeated, limited, or abridged the creditor's remedy existing under the law when his attachment was made. *Somerset Railway v. Pierce*, 88 Me. 91, 33 Atl. 772; *Atkinson v. Dunlap*, 50 Me. 116; *Oriental Bank v. Freeze*, 18 Me. 109, 112, 36 Am. Dec. 701.

The sale on the Penney execution related back to the date of attachment on the writ, which was long prior to the attachment on the writ of the Hide & Leather Bank. Under it the defendant acquired title, and the demandant has none.

Judgment for defendant.

Appeal of ABBOTT.

(Supreme Judicial Court of Maine. Jan. 9, 1903.)

PROBATE—RIGHT OF APPEAL—PLEADING.

1. The right of appeal from any decree or order of the probate court is conferred by statute, and is, therefore, conditioned upon a compliance with all its requirements.

2. No person has the right of appeal unless he has a pecuniary interest in the subject-matter of the decision or decree by which he claims to be aggrieved.

3. In order to establish by proof, if denied, such interest as entitles the appellant to appeal, it must be alleged in his petition or reasons of appeal.

4. The statement that he is interested as brother in the estate of the deceased is not a sufficient averment of legal interest, as there may be classes of nearer kindred entitled to the whole estate.

5. *Held*, that the court under this allegation had no authority to consider the merits of the case, and the appeal in this case should be dismissed, because the record of the proceedings fails to show that the appellant has the right of appeal.

(Official.)

Appeal from Supreme Judicial Court, Knox County.

In the matter of the estate of C. B. Abbott, deceased. Appeal of Alton O. Abbott from a decree granting an allowance to Hattie N. Abbott, widow of the deceased. Appellee excepted. Appeal dismissed.

Argued before WISWELL, C. J., and EMERY, STROUT, PEABODY, and SPEAR, JJ.

J. H. Montgomery, for appellant. R. L. Thompson and E. K. Gould, for appellee.

PEABODY, J. This case is on exceptions by the appellee, Hattie N. Abbott, to the ruling pro forma of the presiding justice overruling two motions to dismiss the appellant's appeal from a decree of the judge of probate for the county of Knox, granting

her an allowance as widow of Calvin B. Abbott, deceased.

1. The ground of the first motion is that the appeal recited that the appellant, Alton C. Abbott, appealed from said decree of the probate court "to the Supreme Judicial Court, being the Supreme Court of Probate, to be held at Rockland within and for the county of Knox on the 3d day of September, A. D. 1901." There is no term of said court held on the 3d day of September, but the term of said court at which the appeal, if valid, was cognizable was held on the third Tuesday of September.

2. The ground of the second motion for dismissal is that neither the appeal nor the reasons of appeal show any right of appeal on the part of the appellant, and that they are, therefore, insufficient in law.

We think it unnecessary to decide the technical point presented in the first motion. The appellee was in court, and seasonably made the second motion, and the conclusion we reach upon the question thereby raised is decisive of the case.

The statute provides, with reference to appeals from decrees of the probate court, as follows:

"Any person aggrieved by an order, sentence, decree or denial of such judge * * * may appeal therefrom to the Supreme Court to be held within the county, if he claims his appeal within twenty days from the date of the proceeding appealed from." Rev. St. c. 63, § 23.

The right of appeal from any decree or order of the probate court is conferred by statute, and is, therefore, conditioned upon a compliance with all its requirements. Bartlett, Appellant, 82 Me. 210, 19 Atl. 170; Moore v. Phillips, 94 Me. 421, 47 Atl. 913; 2 Woerner's Am. Law of Adm. § 543.

No person has the right of appeal unless he has a pecuniary interest in the subject-matter of the decision or decree by which he claims to be aggrieved. This interest must be shown, or the appeal will be dismissed. Briard v. Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526; Pettingill v. Pettingill, 60 Me. 411; Deering v. Adams, 34 Me. 41; Norton's Appeal, 46 Conn. 527; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; 2 Woerner's Am. Law of Adm. § 544.

In order to establish by proof, if denied, such interest as entitled him to appeal, it must be alleged in his petition or motion claiming an appeal. Zumwalt v. Zumwalt, 3 Mo. 269; Jenks v. Howland, 8 Gray, 536; Briard v. Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526.

In Deming's Appeal, 34 Conn. 201, it is held that the interest of the appellant must either appear on the face of the proceedings in the probate court, or it must be averred in the notice of appeal.

In Veazie Bank v. Young, 53 Me. 535, Barrows, J., says: "It is the duty of every appellant from a decree of a probate judge, as

the preliminary proceeding, to establish his interest in the subject-matter of the decree from which he claims an appeal."

The appellant has not, either in his reasons of appeal or notice, affirmatively alleged such facts as, if proved, would show that he is aggrieved within the meaning of the statute as construed by the decided cases. In his reasons of appeal he states that "any allowance is an injury to the balance of the estate," but he does not show that he is interested in the estate. In his notice of appeal he states that "he is interested as brother in the estate" of the deceased, but this is not a sufficient averment of a legal interest, as there may be several classes of nearer kindred.

At the hearing on the appeal the appellant offered to show that he was an heir to the estate, but the presiding justice upon this motion to dismiss properly declined to consider evidence affecting the validity of the decree of the judge of probate. The court had no authority, under the allegation, to proceed to consider the merits of the case. The appeal should be dismissed because the record of the proceedings fails to show that the appellant has the right of appeal. Moore v. Phillips, 94 Me. 421, 47 Atl. 913; Briard v. Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526; Gray v. Gardner, 81 Me. 554, 18 Atl. 286; 2 Woerner's Law of Adm. § 544.

We do not decide whether the reasons of appeal might be amended in accordance with the reasoning of the court in Smith v. Chaney, 93 Me. 214, 44 Atl. 897, for that question is not presented. No amendment was offered.

Exceptions to ruling on the second motion sustained.

Appeal dismissed, with costs for appellee.

EVELETH v. GILL.

(Supreme Judicial Court of Maine. Feb. 11, 1903.)

FORCIBLE ENTRY AND DETAINER—PLEADING—FORFEITURE—NUISANCE—REPORTED CASE.

1. In a case reported to the law court on the pleadings and the evidence, judgment cannot be rendered for the plaintiff unless the declaration contains allegations showing a cause of action, and the evidence amounts to proof of the particular cause of action alleged.

2. Rev. St. 1883, c. 17, § 3, authorizing the owner of a building or tenement to maintain the summary process of forcible entry and detainer to eject a lawful tenant or occupant because of his using the premises for any purposes denominated a common nuisance in section 1 of the same chapter, is a statute penal in its nature, and requires strictness of allegation and proof in the use of such summary process.

3. A mere general statement in the declaration in a forcible entry and detainer process that the defendant had lawful entry into the lands and tenements of the plaintiff, and that his "estate in the premises was determined" on a given date, is not a sufficient statement of a case under the statute above cited.

4. Even if the evidence adduced under such a defective declaration amounts to proof of a case under the statute, it cannot be given effect, for want of necessary allegations in the declaration. (Official.)

Report from Supreme Judicial Court, Piscataquis County.

Action by Hattie Eveleth against Louis Gill. Case reported, and plaintiff nonsuit.

Forcible entry and detainer begun in the Dover municipal court to recover possession of the St. Germain House, in Greenville. The defendant pleaded the general issue, and, by way of brief statement, that he held a lease of the land, upon which the rent had been fully paid, and was owner of the building; and, second, that Rebecca W. Crafts was owner of two-thirds of the real estate, and that he was occupying under her. Judgment having been given for the defendant, the plaintiff appealed to this court, sitting at nisi prius.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

O. W. Hayes and W. H. Powell, for plaintiff. Henry Hudson, for defendant.

EMERY, J. The case is this: John H. Eveleth in his lifetime executed to the defendant, Gill, a written agreement to sell and convey to him a building in Greenville for \$1,628, to be paid in monthly installments, with interest, and also to lease to him the land upon which the building stood, for 15 years, at a rental of \$10 per year. Also, by the terms of the agreement, Mr. Gill was to have possession of the premises until he failed to perform the conditions of the agreement. Mr. Gill immediately entered into possession of the premises under this agreement, which was dated May 1, 1895, and had made all the payments called for by the agreement up to the beginning of this litigation.

John H. Eveleth died November 7, 1899, and the plaintiff, Hattie Eveleth, became the owner of the one-third of his interest or title in said building and land. February 21, 1900, the plaintiff began this process of forcible entry and detainer against Gill in the Dover municipal court to remove him from the premises. Judgment was rendered for the defendant in that court, and the plaintiff appealed; and the whole case, with the pleadings and evidence, is reported to the law court for determination.

The plaintiff's declaration is as follows: "In a plea of forcible entry and detainer, for that the said Louis Gill, at said Greenville, on the 15th day of February A. D. 1900, having before that time had lawful and peaceable entry into the lands and tenements of the said Hattie Eveleth, situated in said Greenville, to wit, a certain building situated on the south side of West street in said Greenville, and known as the 'St. Germain House,' and the land on which said

building stands, and whose estate in the premises was determined on the 15th day of February A. D. 1900, then and still does forcibly and unlawfully refuse to quit the same."

The plaintiff thus acknowledges that the defendant was originally in lawful possession under a lawful estate, but alleges that his estate was terminated on February 15, 1900. To prove such estate and termination thereof, the only evidence adduced by her was that on the day named the defendant was using the building or tenement, or some part thereof, for one of the purposes forbidden by section 1, c. 17, Rev. St. (the Nuisance Act). The plaintiff contends that upon such evidence she is authorized to make immediate entry without process, or to avail herself of the process of forcible entry and detainer provided by Rev. St. c. 94, and cites section 3, c. 17, Rev. St., as follows:

"If any tenant or occupant, under any lawful title, of any building or tenement not owned by him, uses it or any part thereof for any purpose named in section one, he forfeits his right thereto, and the owner thereof may make immediate entry without process of law, or may avail himself of the remedy provided in chapter ninety-four."

Granting her contention as to her rights under section 3, c. 17, we think it clear that, in resorting to the legal process authorized only by the statute, she must state, as well as prove, a case within the terms of the statute, and this she has not done.

The summary process of forcible entry and detainer at common law was a criminal or quasi criminal process, and was only allowed where the entry and detainer were with force—the strong hand. The legislature of this state has devised a process of the same name, but now purely civil in form and nature, for the cases specified in the statute. It follows, under the general law of pleading, that the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used. Thus it was said by this court in *Treat v. Bent*, 51 Me. 478, "This process of forcible entry and detainer is one created and regulated by the statutes, and, in order to be maintained, must come clearly within their provisions." In that case the process was quashed because it did not "disclose enough upon its face to give the court jurisdiction." In *Woodman v. Ranger*, 30 Me. 180, the second section of Rev. St. 1841, c. 128, authorized the process for a forcible entry or forcible detention. The fifth section authorized the process for a landlord whose tenant unlawfully refused to quit after his tenancy had been terminated by a 30-days notice in writing. The plaintiff apparently alleged a case under the second section, but was unable to prove that case. He then offered to prove a case under the fifth section, but was nevertheless nonsuited because he had not alleged a case under that section.

In the case at bar it is clear that the plaintiff has not alleged a case under section 3, c. 17, Rev. St., which is the only case she has adduced any evidence of. There is in her declaration no allegation that the defendant is a "tenant" or "occupant," no allegation of what particular purpose named in section 1 he had used the building for, and, indeed, no allegation that he had used it for any of those purposes. There is no allegation to apprise the court or the defendant that evidence will be offered of a case under that statute. The statute is highly penal. It works a forfeiture of possibly valuable rights purchased by large expenditure. There should therefore be full particularity and certainty of allegation in all legal proceedings to enforce it. The statutory case should be fully and clearly stated. Want of allegations necessary to show a case within the terms of the statute is as fatal as want of evidence of such a case.

True, the language of the statute is "may avail himself of the remedy provided in chapter ninety-four," but the language quoted only designates the process. It does not prescribe the allegations to sustain it. It does not imply that the process provided in chapter 94 may be framed to describe the cases heretofore named in that chapter, and yet be sustained upon evidence of an entirely new and different case not named in that chapter. On the contrary, the effect of the language is to make section 3, c. 17, an addition to chapter 94. By the new section thus added, the process is authorized upon another state of facts, different from all those before specified. As stated in *Woodman v. Ranger*, supra, there must be allegations of these facts to authorize evidence of them, and a judgment thereon, and this even though the case is reported to the law court on the evidence. *Loggie v. Chandler*, 95 Me. 220, 229, 49 Atl. 1059.

It should be observed that the variance is not a mere technical one, which would ordinarily be waived by reporting a case to the law court. *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94. The variance here is wide and substantial. The declaration, if of any case at all, is of a case under one statute. The proof is of a different case under a different statute.

For want of necessary allegations to which the evidence can be applied, the entry must be:

Plaintiff nonsuit.

SMALL v. CLARK.

(Supreme Judicial Court of Maine. Feb. 10, 1903.)

FORCIBLE ENTRY AND DETAINER—LEASE—FORFEITURE—EVICITION—DAMAGES.

1. If the forfeiture of a lease by using the premises for the unlawful sale or keeping of intoxicating liquors, as provided by Rev. St. c. 17, § 3, be not taken advantage of by the lessor,

the lessee's continued occupation is lawful, and the subsequent grantee of the lessor cannot maintain forcible entry and detainer based upon such forfeiture.

2. It is the owner of the premises at the time of the forfeiture who may bring forcible entry and detainer, and he alone.

3. Such a lease will remain in force until he who is owner at the time of forfeiture determines the right of possession by entry or notice or suit within seven days, under Rev. St. c. 94, § 1.

4. The word "forfeited," in Rev. St. c. 17, § 3, has the same meaning and effect which the common law gives the same word in leases. Hence, if a lessee "forfeits" his lease under Rev. St. c. 17, § 3, the lease is not ipso facto absolutely void, but is voidable at the option of the lessor or owner.

5. When a lease for a term of years provides that "if either party should see fit to terminate this lease before it expires he shall pay the other fifty dollars," held, that either party has a right to terminate the lease by paying \$50 to the other.

6. Held, that the evidence in this case fails to show that the lease in question was so terminated.

7. Also, that the lessor, after he had conveyed the premises, had no power to terminate the lease, unless he in some way still had an interest in the lease, or acted by authority of the owner, of neither of which facts is there any proof.

8. The plaintiff obtained judgment in the lower tribunal against the defendant, and the defendant having recognized to the plaintiff as provided in Rev. St. c. 94, § 8, the plaintiff recognized to the defendant as provided in section 9 of the same chapter, whereupon a writ of possession was issued, and the defendant was removed from the premises. Subsequently the buildings which were the subject of the lease were destroyed by fire. Held, that a writ of restoration ought not to issue.

9. Held, that the defendant is entitled to recover as damages for his unwarrantable eviction the difference between the rental value of the premises and the rent reserved, from the date of the eviction to the end of the term, or to the termination of the lease otherwise.

(Official.)

Report from Supreme Judicial Court, Waldo County.

Action by Allen M. Small against Daniel H. Clark. Case reported, and judgment for defendant.

Forcible entry and detainer for the purpose of obtaining possession of a hotel called the "Lake House," in Freedom.

The trial justice found for the plaintiff, and issued a writ of possession, upon which the defendant was ejected from the premises. From the proceedings of the trial justice the defendant appealed to this court, sitting at nisi prius; and, after the testimony before the jury had been taken out, the case was, by agreement of the parties, reported to this court.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

R. F. Dunton, for plaintiff. C. E. & A. S. Littlefield, for defendant.

SAVAGE, J. Action of forcible entry and detainer. April 3, 1901, J. I. Watts, then the

owner of the premises in question, leased them to the defendant for the term of four years at a rental of \$130 a year. The lease contained the following stipulations, among others: "Be it understood and agreed that, if either party should see fit to terminate this lease before it expires, he shall pay the other fifty dollars, and the said Clark shall have the first refusal when sold;" also "be it further understood that said house shall not be used for any other purpose than a hotel, and no intoxicating liquors shall be sold on the premises." The other provisions in the lease are unimportant here. Watts conveyed the premises to the plaintiff July 8, 1901. On July 10, 1901, the plaintiff gave notice to the defendant, in writing, that his tenancy in the premises would terminate August 10, 1901. This action was commenced August 19th following, was heard before a trial justice, and judgment was rendered for the plaintiff. The defendant appealed to the Supreme Judicial Court, and the case is now before us on report.

The plaintiff seeks to maintain this action, notwithstanding the defendant was occupying the premises under a lease for a term of years, upon two grounds:

1. He contends that the defendant's right to the premises as tenant or occupant had been forfeited by him, prior to the commencement of the action, by using it or a part of it as a liquor nuisance, contrary to the provisions of Rev. St. c. 17, § 1. The lease itself stipulated that no intoxicating liquors should be sold on the premises, and that the lessor might enter and expel the lessee if he should violate any of the covenants of the lease. Rev. St. c. 17, § 3, provides that "if any tenant or occupant, under any lawful title, of any building or tenement not owned by him, uses it or any part thereof for any purpose named in section one, he forfeits his right thereto, and the owner may make immediate entry, without process of law, or may avail himself of the remedy provided in chapter ninety-four," which is forcible entry and detainer.

Waiving the questions whether the plaintiff's pleadings should not have set forth specifically the statutory ground on which his claim is based, and whether proof of forfeiture, under the statute is not a fatal variance from the allegations in the declaration before us (*Eveleth v. Gill*, 97 Me. 315, 54 Atl. 756), we are of opinion that the plaintiff must fail upon this statutory ground for want of proof. The only evidence in the case having any tendency to prove that the defendant used any part of the premises as a liquor nuisance relates to June 14, 1901, while Watts was still the owner, and 25 days before the plaintiff purchased the hotel. After that, and while Watts continued to own the premises, the latter did no act to terminate the tenancy, either under the provisions of the lease or under the statute.

The remedy by forcible entry and detainer given by the statute may be maintained with-

out notice, if commenced within seven days from the forfeiture of the term. Rev. St. c. 94, § 1. But the plaintiff does not seek to maintain the action under that clause. The only other provisions in chapter 94 which can by any construction of its terms afford a lessor a remedy in cases of this sort is that which relates to tenants at will, and of these we shall speak hereafter.

Assuming that the defendant forfeited the lease as claimed, while Watts was the owner, unless he became ipso facto a mere tenant at will, Watts alone could take advantage of the forfeiture, and his right would not pass to his grantee by conveyance of the premises. *Fenn v. Smart*, 12 East, 444; *Bennett v. Herring*, 3 C. B. (N. S.) 370; *Trask v. Wheeler*, 7 Allen, 109; *Rice v. Stone*, 1 Allen, 566. The statute says the tenant "forfeits his right thereto." The more explicit language of the original act (St. 1858, c. 54, § 3) says, "Such use shall annul and make void the lease or other title under which said occupant holds, and without any act of the owner shall cause to revert and vest in him the right of possession thereof." The earlier phrase means no more, we think, than the later one. In either case it is the "owner" who may make immediate entry—entry immediately upon the forfeiture; that is, when the forfeiture becomes effective. It is the "owner" at the time of the forfeiture, not his subsequent grantee. It is the "owner" who may make immediate entry, or may have the alternative remedy of forcible entry and detainer. The statute does not read that the "owner" may make immediate entry, or his grantee may resort to forcible entry and detainer. It is the owner at the time of forfeiture all the way through. This appears to be so from the language of the statute. Extraneous considerations support this position. The statute we are discussing was enacted in pari materia with that other which makes the lessors of buildings used as liquor nuisances liable, under some conditions, to indictment, fine, and imprisonment. And one purpose of section 3 undoubtedly was to enable the landlord to dispossess his liquor-dealing tenant immediately upon discovery, and thereby avoid the risk of prosecution himself. *Way v. Reed*, 6 Allen, 364. And this reason would not apply to a subsequent grantee.

Moreover, although the lease is forfeited or annulled and made void by the act of the tenant, the owner is not compelled to take advantage of it. He is not compelled to act. He is not obliged to make immediate entry. He may never resort to the remedy by forcible entry and detainer. He may waive the forfeiture, and waive the privilege of ousting the tenant. He may be content that the tenant shall remain, and, if he is content, no one else can complain. And if he permits the tenant to remain, the tenant's occupation is lawful. The tenant's occupation is at no time unlawful unless and until

the "owner" determines the right of occupation.

At this point it becomes necessary to examine with more particularity into the precise status of the lease after forfeiture. Thus far we have assumed that it remains in force until the owner, during his ownership, takes advantage of the forfeiture, and determines the right of possession. We have said that the owner may waive the forfeiture. But the statute says the right under the lease is forfeited. The old statute said that it is annulled and made void. Is the statute to be construed as making the lease absolutely void and of no effect whatever, whether the owner takes advantage of it or not? If so, it may follow that if the tenant remains after the forfeiture, with consent, express or implied, of the landlord, he remains as tenant at will, and that forcible entry and detainer will lie after 30 days' notice, such as was given in this case. And if the tenancy becomes thus a tenancy at will, by force of the statute forfeiture, and the lease is no longer in effect, then, of course, the grantee of the landlord, finding a tenant at will in occupation of the premises, may elect to regard the tenancy as terminated by the alienation, and bring forcible entry and detainer without giving the 30-days notice (*Seavey v. Cloudman*, 90 Me. 536); or he may give the notice, and then bring his action. The plaintiff in this case seems to have proceeded upon the theory that the defendant was a tenant at will, merely, at the time of the alienation, and he gave the statutory notice.

If this construction of the statute is the correct one, what will be some of the consequences? The first and foremost one, and the only one we need to notice, will be to deprive the statute of much of its apparent beneficial effect—so much so that the court may well pause and inquire whether the Legislature intended such an effect. Unless the forfeiture becomes effective only by some act of the lessor taking advantage of it, such as entry or notice or suit within 7 days, under chapter 94, it must become effective by some act of the tenant, and that act must be the act causing forfeiture. If that be so, the lease is forfeited, and the rights under it are ended by the act of forfeiture. The only summary remedy of the landlord, however—the only remedy which involves no notice and no delay—is forcible entry commenced within 7 days after the forfeiture. But it is safe to say that innocent landlords, for whose benefit, in part, at least, the statute was enacted, ordinarily do not and cannot know within 7 days that forfeiture has been incurred. They are therefore remitted to a slower and waiting process. If not able to bring action within 7 days after forfeiture, they must give 30 days' notice before suit, unless the forfeiting tenant can be regarded as a disseisor, and we think he cannot be so regarded merely because of the forfei-

ture. This construction certainly robs the statute of much of its supposed efficacy.

The inquiry suggests itself in this connection, whether the Legislature did not intend to give to the word "forfeited" and the phrase "make void" the same meaning and effect which the common law gives to similar expressions in leases. We think such was the intent. "The modern decisions," says Mr. Taylor in the work on *Landlord and Tenant*, § 492, "establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only in cases where the condition is intended for his benefit, and he actually avails himself of his privilege." The editor of the *Am. & Eng. Ency. of Law* lays down the doctrine (book 18, p. 380, 2d Ed.), which seems to be supported by the authorities cited, that the construction of provisions for forfeiture of a lease for nonperformance by the lessee of conditions is that the lease is voidable only at the election of the lessor, and is not rendered absolutely void, though it provides that it shall be null and void in case of such breach. And this rule applies to leases by the crown, and when the provision is by statute (page 381).

That such a construction is the one properly to be given to a statute like the one under consideration has been decided by the courts of other states in well-considered opinions. In Rhode Island a statute phrased in almost the identical language used in our act of 1858 was under consideration. The court said: "We think that under Gen. St. R. I. c. 73, § 4 [the statute in question], a mere use of leasehold premises for the purposes prohibited in section 1 [like Rev. St. c. 17, § 1] does not, ipso facto, render the lease absolutely void, but that section 4 was intended for the benefit of the lessor, and that he alone can take advantage of the avoidance, at least unless he has been cognizant of the illegal use and has consented to it." *Almy v. Greene*, 13 R. I. 350. The case of *Trask v. Wheeler*, 7 Allen, 109, is on all fours with the one at bar. In it the lessor had conveyed the premises after forfeiture had been incurred under a statute like our Rev. St. c. 17, § 3, and the grantee sought to take advantage of the forfeiture in his action to recover possession. The court said: "If it were to be held that the lease is thus made void, against the will of the landlord, any tenant desiring to get rid of his lease might do so simply by violating the statute. The provision must be regarded as made for the benefit of the landlord, who may avail himself of it, but is not obliged to do so. Though the lease is declared void, yet it belongs to the class of things which are said to be void only as to some persons. *Bac. Ab. 'Void and Voidable,' B.* The landlord had a right to treat it as void, and to enter and expel his tenant. But he might also refrain from this exercise of his rights, and, so long as

he did so refrain, the lease would continue to be valid against the tenant and all other persons; and it would continue valid till he should do some act to avoid it."

We are entirely satisfied with this exposition of the law. We think it is the only reasonable and proper interpretation of the statute. It follows that the lease was in force at the time of the sale to the plaintiff, and he could not oust the defendant for a forfeiture under Rev. St. c. 17, § 3, which occurred before he became owner, and of which the former owner had taken no advantage. The same result would follow, were we to consider the provision in the lease concerning the sale of intoxicating liquors. The lessor might have had the right to enter, and expel the lessee, and terminate the tenancy, but he did not do so.

2. The plaintiff also contends that the lease was terminated by the parties to it under that clause which stipulated that "if either party should see fit to terminate this lease before it expires he shall pay the other fifty dollars." It is not denied that, by a proper construction of this clause, either party had a right to work a termination of the lease by paying \$50 to the other. The only question is whether the lease was so terminated. And here, also, the plaintiff fails in proof. Watts, the lessor, testified that he paid the defendant \$50 for the purpose of terminating the lease. This is now denied. It is true, the defendant was not asked to testify upon this point. But we think that he might be well content to stand upon the evidence put in by the plaintiff. A careful examination of the evidence leads us to conclude that whatever payment Watts made to the defendant was made August 22d, three days after this suit was commenced, when Watts and the defendant settled their mutual accounts, and that it is highly improbable, notwithstanding the testimony of Watts, that any payment was then made to terminate the lease. If the payment was made August 22d, though in other respects made as claimed by the plaintiff, it would not support an action brought August 19th. But however this may have been, Watts then was not the owner of the premises, and, so far as appears, had no interest in the lease. Unless he had such interest, or unless he was acting for the owner, of which there is no proof, he no longer had authority to terminate the lease by payment. He could not by his acts control or affect the lease. It should be said, also, that we do not think the evidence shows that the defendant assented to any termination of the lease.

The defendant, therefore, is entitled to judgment. That being so, it is agreed by the parties that the law court shall assess the damages, and determine whether justice requires a writ of restoration to issue. The case shows that after the trial justice had rendered judgment for the plaintiff, and the defendant had appealed and recognized to the

plaintiff as provided in Rev. St. c. 94, § 8, the plaintiff recognized to the defendant as provided in section 9 of the same chapter. Thereupon the trial justice issued a writ of possession, which was executed, and the defendant and his property by means of the writ removed from the premises August 27, 1901. It also appears that subsequently, in August, 1902, the hotel which was the subject of the lease was destroyed by fire. It is clear, therefore, that justice does not require a writ of restoration to issue, but the contrary.

In assessing damages for the unwarrantable eviction of the defendant, it must be considered that his legal rights under the lease now exist in full force, and will continue for the full term of the lease, or until April 3, 1905, unless sooner terminated in accordance with the provisions of the lease. The court may suppose that the plaintiff, upon being advised of his liability, will avail himself of his contract right to terminate the lease by the payment of \$50, but we cannot know judicially that he will do so. The damages, therefore, should be assessed in the alternative.

The measure of damages is what the use of the premises may be deemed reasonably worth from the date of eviction to the end of the term, or to the termination of the lease otherwise. The ordinary rule is to allow the difference between the rental value of the premises for the term and the rent reserved. 3 Sedgwick on Damages, §§ 944, 1022. The burden is upon the defendant. He can recover no more damages than he has proved. In this case, for want of data, it is difficult to estimate what was the reasonable worth of the legitimate use of the premises.

The defendant, perhaps to his disadvantage now, kept no books of account. He relies upon estimates chiefly. Into these estimates have crept, we think, some elements not proper for consideration, such as the income he received for carrying the mail under an independent contract, and his own personal labor and the labor of others in his family, which belonged to him, and it may be other matters. It is to be presumed that he still has the benefit of his own labor and that of his family, so far as it belongs to him.

Taking into account all the considerations which arise in the case, the court is of opinion that the defendant is entitled to recover damages at the rate of \$20 a month.

No allowance is to be made on account of the burning of the hotel. Non constat that it would have burned if the defendant had been allowed to retain possession. The plaintiff took the responsibility of ousting the defendant. He took the possession of the property into his own hands, and he must now be held accountable for the use of it as it was when he took it.

Judgment for defendant. No writ of restoration to issue. If the plaintiff shall, within 30 days after rescript is filed, terminate

the defendant's tenancy by paying \$50 to the clerk for the use of the defendant for that purpose, defendant's damages are assessed at \$20 a month from August 27, 1901, to the time the tenancy is so terminated; otherwise defendant's damages are assessed at \$20 a month from August 27, 1901, to April 3, 1905. Judgment and execution accordingly.

MCGRAW v. GREAT NORTHERN PAPER CO.

(Supreme Judicial Court of Maine. Feb. 23, 1903.)

INJURY TO EMPLOYE—PLEADING—DECLARATION—SPECIAL DEMURRER—NEGLIGENCE—MACHINERY—BARKER.

1. In a declaration to recover for injuries claimed to have been received by plaintiff in defendant's pulpmill while operating a machine called a "barker," an allegation, "that said barker was then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards," is too general and indefinite.

2. Where the injury complained of is charged to the falling of the "attachment" of the barker, the declaration should contain some allegation that the attachment was defective, or to show that falling was not its normal action.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by John J. McGraw against the Great Northern Paper Company. Demurrer to declaration overruled, and defendant excepts. Exceptions sustained.

Case brought by plaintiff to recover damages for an injury suffered by him while employed in defendant's pulpmill at Madison on or about September 13, 1901. At the return term of the writ, defendant filed a special demurrer, which was joined, but no hearing was then had thereon. At a succeeding term of the court at nisi prius the demurrer was heard by the presiding justice and overruled, and defendant then noted an exception. In overruling the demurrer the presiding justice gave notice that, if requested, he should require the plaintiff to file a specification of what acts or omissions or conditions he relied upon as showing the defendant to be negligent. Subsequently the plaintiff filed a specification. The defendant, however, insisted upon its exceptions, and seasonably presented the same, which were allowed and filed.

Plaintiff's declaration was as follows:

"In a plea of the case, for that the said defendant corporation on the 13th day of September, 1901, and for a long time prior thereto, was the owner and operator of a certain mill in said Madison, used for the manufacture of pulp, and that in said mill at said time the said defendant corporation owned, and operated certain machines and machinery, with their appurtenances and appliances, run by water power, and particularly a certain machine called a 'barker,' which was

used by said defendant for the purpose of peeling or shaving bark from certain sticks of wood; and the plaintiff avers that on the 13th day of September, 1901, and for a long time prior thereto, he was an employé and servant of said corporation for wages and hire, and on said 13th day of September he was set to work by said defendant upon said barker to use and operate same in the shaving of bark as above described; and the plaintiff avers that he was then inexperienced in the use and working of said barker, and that said barker was then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards, all of which were well known to said defendant, and was not known to said plaintiff; and the plaintiff further avers that he was set to work on said barker then and there by said defendant without any instructions as to how to operate said barker, and without any warning or information as to the dangers and risks attending the operation of said barker, and without any instructions, information, or warning as to the defective condition of said barker, and as to its being out of repair, and the plaintiff further avers that while he was there operating said barker, and while in the exercise of due care, and without fault on his part, the attachment on said barker suddenly fell and caught the right hand and arm of the said plaintiff, and drew the same with great force and violence into certain revolving knives in said barker, thereby lacerating, cutting, and mutilating the said plaintiff's hand so that the hand and part of the said plaintiff's arm had to be amputated, whereby the plaintiff has suffered great pain, and has been permanently injured in the loss of his hand and arm, and has been put to great expense for medicine and medical treatment, whereby an action hath accrued to the plaintiff to have and recover from said defendant his damages in this behalf sustained, to the damage of the said plaintiff, as he says, the sum of ten thousand dollars."

Plaintiff's motion to amend was as follows:

"And now comes the plaintiff in the above-entitled action, and asks leave to amend the declaration in his writ by adding after the word 'barker,' in the thirty-first line of said declaration, the following words, to wit: 'by reason of its defective condition and want of repair.'"

Defendant's special demurrer was as follows:

"And now the defendant comes and defends and demurs to the plaintiff's declaration, and says that said declaration is not sufficient in law, and for special cause of demurrer says:

"That said declaration is insufficient for the following reasons:

"Because the plaintiff does not allege what duty the defendant was under to the plaintiff, or that it was under any duty.

"Because the plaintiff does not allege wherein the machine of which he complains was defective or out of repair, or wherein it was dangerous, or whether its danger was because of its defective condition.

"Because the plaintiff does not allege wherein the defendant was negligent.

"Because the plaintiff does not allege wherein the machine called a 'barker' was dangerous, or attended with great danger, or whether in perfect condition said machine was so dangerous.

"Because the plaintiff does not allege that the injury to him was because of any negligence of the defendant.

"Wherefore the defendant prays judgment and for its costs."

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

D. J. McGillicuddy and F. A. Morey, for plaintiff. O. E. & A. S. Littlefield, for defendant.

STROUT, J. This is an action on the case for an injury suffered by plaintiff while in defendant's employ. A special demurrer to the declaration was filed and overruled, and the case is here upon exceptions to that ruling.

The declaration alleged that plaintiff was set to work upon a machine called a "barker," and the defendant is charged with negligence, in "that said barker was then and there defective and dangerous and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards."

It is objected that this allegation is too general, and fails to point out the defect in the machine which caused the injury. We think the objection is well taken. There is no specification of any particular defect in the barker, nor of any special danger in its operation. It is alleged that while the plaintiff was operating it "the attachment on said barker suddenly fell and caught the right hand and arm" of plaintiff, and inflicted the injury complained of. There is no allegation that this attachment was in any manner defective, nor that such falling was not its normal and intended action. For aught that is alleged, the attachment may have been in perfect order, and its fall may not have been the result of any fault in the barker, or the barker may have been defective in some particular which did not cause or contribute to the fall of the attachment. The declaration fails to apprise the defendant of the particular fault complained of, or the specific negligence which resulted in the injury.

Good pleading requires in such case a definite statement of the particular defect, so far as it may be practicable to state it, which caused the injury, to the end that the defendant may know what claim he is to meet, and to which the evidence is to be di-

rected. There may be cases of a complicated machine, where it may not be practicable, or even possible, to allege with certainty the identical defect causing the injury; but even in such case it may be stated in sufficiently specific terms to indicate to the defendant the charge he is called upon to meet, or the difficulty may be obviated by several counts, with such variations as circumstances may require.

In this case the injury is charged to the falling of the attachment, and not to anything else, but it is not alleged that the attachment was in any manner defective. There certainly could be no difficulty in alleging, if true, in what respect this attachment was defective and out of repair, or whether it fell as the result of any imperfection in the barker itself. The declaration should state the facts—the actual condition of the machine and attachment—and from these facts the jury are to determine whether it was defective or not. The allegation here is too general and indefinite to comply with legal requirements. *Boardman v. Creighton*, 93 Me. 23, 44 Atl. 121.

The exceptions are to the overruling the demurrer. Consequently the specifications subsequently filed, or the amended declaration offered, but not allowed, cannot be considered.

Exceptions sustained; demurrer sustained; declaration adjudged bad.

RAMSDELL v. GRADY.

(Supreme Judicial Court of Maine. Feb. 13, 1903.)

PHYSICIAN—NEGLIGENCE—DAMAGES.

1. A physician who fails to exercise reasonable care and diligence in the treatment of his patient is liable for malpractice, and in finding the defendant thus liable in this case it is not clear to the court that the jury erred.

2. The defendant undertook the case of the plaintiff's intestate on Monday. The patient died on the following Saturday. The only damages of any amount which the deceased sustained were those resulting from mental and bodily pain. In an action by his administratrix it is held that under the evidence in this case a verdict of \$3,000 is unmistakably too large.

3. Only such damages can be allowed as the deceased sustained in his lifetime. Nothing can be allowed for his loss of life, nor for what he might have earned had he lived longer.

4. Damages in such a case can include only such loss, expense, and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated.

(Official.)

On motion from Supreme Judicial Court, Washington County.

Action by Abble D. Ramsdell, administratrix, against James B. Grady. Verdict for plaintiff. Motion for new trial. Overruled.

Action on the case, brought to recover damages on account of the negligence of the de-

¶ 4. See *Physicians and Surgeons*, vol. 20, Cent. Dig. § 46.

fendant, a physician, in the treatment of the plaintiff's intestate, Henry F. Ramsdell, during his last sickness, which commenced on Saturday, November 24, 1900, and terminated fatally on Saturday, December 1, A. D. 1900.

The plaintiff's contention was that the disease from which Mr. Ramsdell suffered and died was diphtheria; that it was a typical case, having all the characteristic symptoms; that it was not a disease difficult to diagnose; that it should have been discovered by physicians of ordinarily good standing as to their qualifications, and who, in the care and treatment of the case, exercise that diligence, care, and attention that the seriousness of such a case called for and required; that the defendant, as a physician, treated plaintiff's intestate, Mr. Ramsdell, from Monday, November 26th, until the latter part of the following Friday afternoon, and, although he saw Mr. Ramsdell seven times during the five days that he treated him, did not discover the presence of diphtheria, and consequently did not treat him for diphtheria; that on Friday night, after having treated him for five days, he sent him from Eastport to the Eastern Maine General Hospital in Bangor, a distance of 135 or 140 miles, in the nighttime, in the winter, unattended by a physician or nurse, for the purpose of having a surgical operation performed upon his throat; that on account of his failure to discover the disease from which he was suffering, and to administer the proper treatment for it, and on account of sending him from Eastport to Bangor in such condition, he not only suffered great pain, but that he suffered a great deal more than he otherwise would had the defendant discovered the presence of diphtheria when he should have discovered it, and administered the proper and well-recognized and universally adopted remedy for that disease.

The case was tried to a jury, who returned a verdict for the plaintiff of \$3,000.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

F. J. Martin, H. M. Cook, G. M. Hanson, and A. St. Clair, for plaintiff. W. R. Pattangall, L. D. Lamond, and G. A. Curran, for defendant.

SAVAGE, J. Case against physician for negligently and unskillfully diagnosing the disease with which the plaintiff's intestate was ill, and of which he died, and for negligent and unskillful treatment of the same. After a verdict for the plaintiff the case comes here on motion for a new trial. The grounds relied upon are that the verdict is contrary to the evidence, and that the damages awarded are excessive.

1. The plaintiff contends that her intestate was ill with diphtheria; that the defendant was called as attending physician; that he should, by the exercise of reasonable skill and care, have diagnosed the case as diph-

theritic, but that he negligently and unskillfully failed to do so, or to administer proper treatment, in consequence of which the patient became increasingly ill, and died five days after the defendant was first called. It appears that the defendant was first called on Monday, and treated the case during the week until Friday afternoon, when the patient, upon his recommendation, was taken from his home in Eastport to a hospital in Bangor, where he died Saturday afternoon. It is claimed that even the removal of the patient was improper under the circumstances.

The defendant contends that the disease was not diphtheria, or, if it was, that it did not present any apparent symptoms of diphtheria; that, if it was diphtheritic at all, it was laryngeal, and of a kind the distinctive symptoms of which might not be discoverable by the diagnosis of an ordinarily skillful and careful physician; and the defendant contends that in all respects he exercised reasonable care and skill.

No questions of law are in dispute. The liability of a physician for malpractice is based upon his implied agreement with his patient that he possesses the ordinary skill of a physician under like conditions, that he will use his best skill in determining the nature of the malady and the best mode of treatment, and that he will exercise reasonable care and diligence in the treatment. *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Cayford v. Wilbur*, 86 Me. 414, 29 Atl. 1117. The facts are seriously in dispute. There is much evidence upon both sides. An analysis of it here would not be useful. It is sufficient to say that it has not been made to appear that the jury manifestly erred concerning the defendant's liability. The verdict in that respect must stand.

2. But the amount of damages awarded is, we think, unmistakably too large. The counsel do not disagree as to the rule of damages. Only such damages can be allowed as the deceased sustained in his lifetime. Nothing can be allowed for his loss of life, nor for what he might have earned had he lived longer. The administratrix is entitled to recover, for the benefit of the estate, such damages as the deceased suffered up to the last moment of his life, and no longer. These principles are regarded as well settled, notwithstanding some dicta apparently to the contrary in *Welch v. Maine Central R. R. Co.*, 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658. See *Bancroft v. Boston & Worcester R. R. Corp.*, 11 Allen, 34; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Clark v. Manchester*, 62 N. H. 577. This rule may include loss of earnings, though in this case that was inconsiderable. It does include expense to which the deceased was put, or for which he became liable, on account of the wrong of the defendant. It also includes mental and bodily suffering up to the moment of death. It only includes,

however, such injury, expense, and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated.

It is very difficult for the nonprofessional mind to grasp and apply the distinction between a loss which ends at death and a loss which ensues in consequence of death, or to exclude loss of life as an element of damages, no matter how well it may have been instructed. It is believed that the jury in this case erred in this respect. The only damages of any amount which the deceased sustained were those resulting from mental and bodily pain, and for these \$500 a day were awarded. It is conceded that there is no precise way by which the pecuniary compensation for pain can be estimated, and that latitude in judgment must be allowed to the tribunal which determines it. Yet it is the duty of the court to see that what should be regarded as the ultimate bounds are not greatly overstepped.

The deceased was ill and under the defendant's care from Monday morning until Friday afternoon. He died the next day. He was unable to lie down or to sleep much. He found difficulty in breathing, and occasionally had strangling spells. He was very weak. He could eat or drink only with great difficulty. There is a strong probability that at times he was in apprehension of death, though the evidence bearing upon this point is chiefly inferential. These are some of the chief features presented in the evidence. We need not particularize further. Taking into account all of the evidence, viewed as liberally in support of the verdict as it may properly be, we think the verdict should not be allowed to stand for more than \$1,500.

If, within 30 days after rescript is filed, the plaintiff remits all of the verdict in excess of \$1,500, motion overruled; otherwise motion sustained, new trial granted.

AMBURG v. INTERNATIONAL PAPER CO.

(Supreme Judicial Court of Maine. Feb. 23, 1903.)

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT.

1. The master's duty to provide reasonably safe appliances and instrumentalities with which the servants are to do their work is fully discharged if he has furnished a sufficient supply of suitable appliances, with competent men to use them, and it was understood that the servants themselves were to select such appliances from time to time as the particular occasion demanded.

2. In such case, if by use or lapse of time an appliance becomes unfit for use, the master has a right to assume that the servants will use the means for renewal and repair which the master has placed at their hands, or that other appliances will be selected, in the place of those which have become unfit, out of the supply furnished by the master.

3. If the servant whose duty it is to make the selection is negligent in so doing, it is not the negligence of the master, but of a servant, for which the master is not responsible.

4. *Held*, that there is no evidence to support the contention that the rope in question, the breaking of which caused the plaintiff's injury, was actually furnished by the defendant for the specific use to which it was put. But, if it were a fact that it had been so used by servants before the time it broke, the master would be no more responsible for its condition and use at the time of the injury than if it had then been so used for the first time. It would simply be a case where the foreman, who was a fellow servant of the plaintiff, having the right and being under the duty of selecting a suitable rope, selected one lying on the floor, instead of a larger and stronger one placed at his command by the defendant; and, if there was any negligence in its selection and use, it was not the negligence of the defendant, but of the plaintiff's fellow servant. Upon the evidence, this raises an insuperable bar to the plaintiff's right to recover.

(Official.)

On Motion from Supreme Judicial Court, Androscoggin County.

Action by Angus Amburg, pro ami, against the International Paper Company. Verdict for plaintiff. Motion for new trial. Granted.

Action for personal injuries sustained by the plaintiff while in the employ of the defendant corporation. The jury returned a verdict of \$587.50 for the plaintiff.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

D. J. McGillicuddy and F. A. Morey, for plaintiff. G. D. Bisbee and R. T. Parker, for defendant.

SAVAGE, J. The plaintiff, a servant of the defendant, was injured in the following manner: The defendant's foreman, with a crew of men of whom the plaintiff claimed to be one, were engaged in the defendant's machine shop, removing a heavy iron press roll from a lathe to the floor. The roll was first lifted by the use of double chain falls, or a chain fall at each end, until it cleared the lathe. Then the foreman tied an inch rope, which he says was found lying there on the floor, around the middle of the roll, and attached it to a single chain fall which hung about four feet from the lathe. By operating this single fall, the roll, still suspended by the double falls, was pulled away from the lathe so far that practically one-half of the weight of the roll was sustained by the single fall and inch rope. While the roll was being lowered to the floor, the inch rope broke, the roll swung back towards the lathe, hit another roll lying upon the floor, and forced it against the plaintiff, causing the injury complained of.

The plaintiff's sole contention is that the defendant was negligent in not providing a reasonably safe, strong, and suitable rope for use with the single fall, in that the rope at-

¶ 3. See Master and Servant, vol. 34, Cent. Dig. § 392.

tached to that fall was "weak, defective, and unsuitable" for the purpose for which it was used, and "suddenly broke because of its defective, unsuitable condition." The defendant, on the other hand, contends, among other things, that, if the rope was weak and unsuitable, and if the use of it under the circumstances was an act of negligence, the negligence was not that of the defendant, but that of the foreman, the plaintiff's fellow servant. And here is the only issue necessary to be considered.

It is the duty of the master to exercise reasonable care to provide reasonably safe machinery, appliances, and instrumentalities with which the servant is to do his work. It was the duty of the defendant in this case to exercise that care in providing reasonably safe ropes to be used by its servants in handling the roll in question. But that duty was fully discharged if the defendant had furnished a sufficient supply of suitable ropes, with competent men to use them, and it was understood that the servants themselves were to select such ropes from time to time as the particular occasion demanded. *Rounds v. Carter*, 94 Me. 535, 48 Atl. 175; *Pellerin v. International Paper Company*, 96 Me. 388, 52 Atl. 842. In such case the defendant could not be deemed to have assumed the responsibility of selecting suitable ropes for each occasion. That duty and responsibility would fall upon the servants who used the ropes. It would naturally be expected that, by time and use, ropes would become worn, and perhaps rotten, as it is claimed this one was, and that they would need to be replaced or renewed. It is to be assumed in such case, and the master has a right to assume, that the servants will use the means for renewal and repair, which the master has placed at their hands, and that, if ropes become worn and unsuitable, others will be selected in their stead out of the supply furnished for them by the master. *Johnson v. Boston Tow-boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *Oregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854. And if the servant whose duty it is to make the selection is negligent in so doing, and selects an unsuitable or unsafe one, it is not the negligence of the master, but it is the negligence of a servant, for which the master is not responsible.

These general principles, however, are not in dispute. Nor is it disputed that they apply generally to the facts in this case, for the evidence is clear and undisputed that the defendant had furnished a sufficient supply of suitable ropes for the use of its servants, and that they were at liberty to make selections from them according to their own judgment. But, notwithstanding this, the plaintiff contends that the rope in question was actually furnished by the defendant for the specific use to which it was put, and that there is sufficient evidence to warrant a jury in so finding; and if so, it is argued, the defendant was bound to use due care to supply a reason-

ably safe and suitable rope. But we do not think there is any evidence to support this contention. The only evidence is that the rope was found lying on the floor. There is no evidence that it was a part of the chain fall, or that it was designed to be used with the fall, or that it had ever been used with the fall before. But if we assume, as the plaintiff does, that it had been so used, the only proper inference to be drawn under the circumstances is that some servant or servants of the defendant at some time or times had selected it for that use, and had so used it. But this will not aid the plaintiff. It would only be such a selection and use by servants as was to be expected by the master when it furnished a sufficient supply of suitable ropes. The single fact, if it is a fact, that it had been so used by servants before, would no more make the master responsible for its condition and use than if it had been so selected and used for the first time at the time when the plaintiff was injured.

The case, then, is simply one where the foreman, who was a fellow servant of the plaintiff, having the right and being under the duty of selecting a suitable rope, selected one lying on the floor, instead of a larger and stronger one placed at his command by the defendant. If there was any negligence in its selection and use, it was not the negligence of the defendant, but that of the plaintiff's fellow servant. Upon the evidence before us, this raises an insuperable bar to the plaintiff's recovery. The verdict for the plaintiff is manifestly wrong.

Motion sustained. New trial granted.

LEWIS v. WASHINGTON COUNTY R. CO. (Supreme Judicial Court of Maine. Feb. 28, 1903.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—NEW TRIAL—CONFLICTING TESTIMONY—VERDICT AGAINST EVIDENCE.

1. Even when there is strong doubt of the actual occurrence or existence of a fact found by a jury, if the evidence is conflicting their finding will not be disturbed on that ground.

2. But when, in an action to recover for the defendant's negligence, from the testimony of the plaintiff himself and the undisputed facts in a case, it is clear that the plaintiff failed to exercise that degree of care which common prudence, as well as the law, requires, and that his negligence and want of care not only contributed to the injury, but was its proximate cause, a verdict finding no negligence on the part of the plaintiff will be set aside.

(Official.)

On Motion from Supreme Judicial Court, Washington County.

Action by Charles W. Lewis against the Washington County Railroad Company. Verdict for plaintiff. Motion for new trial. Granted.

Action on the case for injuries claimed by plaintiff to have been received by him in a

¶ 2. See *New Trial*, vol. 37, Cent. Dig. § 125.

collision between one of defendant's locomotives and plaintiff's team at a railroad crossing in Eastport, on the Washington County Railroad, on January 8, 1901.

There was no flagman at the Washington street crossing, where the accident is claimed to have occurred, to warn persons using the highway of the approach of trains.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

L. H. Newcomb, G. M. Hanson, A. St. Clair, and W. R. Pattangall, for plaintiff. G. A. & B. Y. Curran, for defendant.

STROUT, J. Plaintiff claims that he was injured by collision of a locomotive of defendant with his team at the crossing of the railroad over Washington street in Eastport. He had a verdict, and the case is here on motion to set the verdict aside as against evidence. A careful examination of the evidence raises a serious doubt whether any collision in fact occurred, but the evidence on that point was conflicting. It was peculiarly within the province of the jury to determine that question, and we are not disposed to disturb the verdict on that ground.

Whether the negligence of the plaintiff contributed to the accident is a more serious question. He says he came up the county road from Perry, and turned into Washington street; that he there saw a locomotive backing down on the eastern side track of defendant; that when he saw it he slowed down his horse to a walk, and walked around the corner; that he drove along down Washington street toward the crossing, and kept watching for a train; he started his horse into a trot of about 6 miles an hour, and kept on at that rate, without seeing or hearing the locomotive, till his horse was over the first two tracks, when he saw it approaching the street at a distance, he judged, of about 90 feet; he then started up his horse to get across.

It is important here to take into account the location of the tracks, certain distances, and the surrounding circumstances. From the turn into Washington street to the western side track is 240 feet. Next easterly of this track is the main line. Next easterly the station, southerly of Washington street, and distant 105 feet from the center of the street at the main-line crossing. Next easterly is another track, on which this locomotive was running. Between the western rail of this latter track and the eastern rail of the main line is 35 feet in the center of the street, and 33 feet on the northerly side of the traveled part. Standing in the center of Washington street, at the crossing of the main line, a person can see up the extreme eastern side track past the northeast corner of the station, a distance of 75 feet. These distances are given by the engineer from actual survey, and are not disputed.

When plaintiff was at the corner of the county road and Washington street, and saw the locomotive backing up on the siding, he had reason to believe that it would soon return. That he did so regard it is evident, as he says he "slowed his horse down to a walk and walked around the corner," and he "kept watching for a train," and after he turned the corner, which was 225 feet from the main line, he started his horse into a trot of about 6 miles an hour, and kept that pace until he was on the main line. Here he was 35 feet from the siding on which the locomotive was, and he then saw it—at a distance probably of 75 feet, but which plaintiff estimated to be 90 feet. Instead of stopping, as he certainly could have done if his horse was under control (and he says it was), or turning in the street, which at that point was 18 to 20 feet wide in the traveled part, he says, "I started my horse—hollered at my horse and started him up to get across." It is in evidence, uncontradicted, that the horse was a spirited one, had run away at least once before that, and was nervous and restless at a train. It is manifest that either from fear of his horse, or a desire to save time, and a probable miscalculation of the distance of the locomotive or its speed, he rashly attempted to cross the track in advance. If he had been looking and listening, as he should have been, it is incredible that he would not have heard the engine before he saw it.

Under these circumstances, we cannot doubt that the plaintiff failed to exercise that degree of care which common prudence, as well as the law, requires, and that his negligence and want of care not only contributed to the injury, but were its proximate cause.

This conclusion is reached from the evidence introduced by the plaintiff, and upon the theory that defendant was negligent. But in fairness it ought to be said that the positive evidence introduced by the defendant that the locomotive bell was ringing, and that it was running at a slow rate of speed, is hardly overcome by the opposing negative evidence of witnesses who say that they did not hear the bell, and the judgment of inexperienced persons as to the speed.

Motion sustained. Verdict set aside. New trial granted.

WILLIAMS v. WATTERS.

(Court of Appeals of Maryland. April 1, 1903.)

CORPORATIONS—STOCK SUBSCRIPTIONS—CALLS—ENFORCEMENT—LIMIT ON LIABILITY—LIMITATIONS—DEFENSES—PLEADING—OVER-RULING DEMURRERS.

1. Where there was but one count in a declaration, and several pleas were filed, to some of which demurrers were interposed, it was not error to enter final judgment on overruling the demurrers, notwithstanding there were issues of fact joined on the other pleas, unless the demurrers ought to have been sustained.

2. A statute which enacted that the capital stock of a certain corporation should not be

liable for further assessments after 50 per cent. of the par value had been paid, and that the holders of stock so paid up should not be liable for debts of the company contracted after the passage of the statute, could not impair the right of creditors whose claims existed prior to the statute to pursue the stockholders for the amount of their subscriptions over 50 per cent. of the par value.

3. As against a creditor whose claim existed prior to the statute, limitations would run in favor of the stockholder from the time that he was in default on payment of the installment of subscription under the original subscription contract and charter of the corporation.

4. The proviso to Act Va. Dec. 22, 1897 (Acts 1897-98, p. 16, c. 20), declared that where chancery suits were pending at the time of the passage of the act, in which it was sought to recover unpaid stock subscriptions, the statute of limitations should not run as to any alleged subscription during the time which should elapse between the institution of suit and one month after the order should have been entered authorizing a common-law action, as provided in the act, for the recovery of such a subscription. *Held*, that a chancery suit by a creditor of a corporation against it, in which no relief was sought against the stockholders, was not within the proviso.

5. Act Va. Dec. 22, 1897 (Acts 1897-98, p. 16, c. 20), enacts that all suits for the recovery of unpaid stock subscriptions shall be brought in the courts of common law, which shall have exclusive jurisdiction to determine the validity of the subscriptions, and that, where resort to a court of equity is necessary to wind up a corporation, the court shall direct the trustee or receiver to sue at law to recover any call or assessment, and that all defenses admissible if the company were solvent shall be equally admissible in the action at law. *Held*, that where a decree of a Virginia chancery court made a call for unpaid subscriptions, and ordered the receiver of the corporation to sue stockholders at law for unpaid subscriptions, in such an action by him in Maryland any defense to the validity of the call could be set up.

Appeal from Baltimore City Court.

Action by E. R. Williams, as receiver of the Lexington Development Company, against William J. H. Watters. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

J. Hanson Thomas, for appellant. Randolph Barton and Redmond C. Stewart, for appellee.

McSHERRY, C. J. This suit was brought on the 19th day of September, 1902. On the 20th day of October, 1890, the Lexington Development Company, one of the numerous speculative ventures which sprang into existence in the state of Virginia about the same period, was incorporated in the Thirtieth Judicial District of that state, under the general incorporation laws. By the terms of the prospectus issued by the company, and in accordance with which subscriptions to its capital stock were received, it was provided that the company would offer for sale 60,000 shares of stock, of the par value of \$10 per share; \$1 per share to be paid at the time of subscription, \$1 per share upon

the call of the board of directors, and \$1 per share each 60 days thereafter until by a sale of the lots owned by the company such payments should be declared unnecessary by the board of directors. The appellee subscribed for 50 shares of the capital stock upon the terms just above set forth. On the 11th of November, 1890, the board of directors adopted a resolution fixing December 20, 1890, as the time for the payment of the second installment of \$1 per share; and thereupon, according to the terms of the prospectus above alluded to, the subsequent installments of \$1 per share became due and payable on February, April, June, August, October, and December 20, 1891, and February and April 20, 1892. The appellee paid the several installments due on his subscription up to and including August 20, 1891, by which time he had paid 50 per cent. of the amount subscribed by him. No other installments were paid by the appellee, and the sequel will show the reason. On the 18th of November, 1891, at a meeting of the stockholders of the company, it was determined that the stock subscribed for could be finally paid by dividends from the earnings of the company, and at the same meeting the solicitor for the company was instructed to secure from the Legislature of Virginia an amendment of the company's charter declaring the stock fully paid and nonassessable on the payment of 50 per cent. thereof. On the 9th of January, 1892, the Legislature of Virginia enacted an amendment of the charter (Acts 1891-92, p. 69, c. 38), whereby, in effect, it was declared that the capital stock should not be liable for further assessments after 50 per cent. of the par value thereof had been paid, and that, upon the payment of 50 per cent. of the stock then subscribed or that might thereafter be subscribed, the development company should be authorized to issue full-paid certificates for the par value of the stock to the subscribers; and it was distinctly declared that the holders of such certificates should not be liable for further assessments thereon for the debts or liabilities of the company contracted after the passage of that statute. The amendment of the charter was accepted by the company, and in conformity to its terms a full-paid certificate for 50 shares of capital stock was issued to and accepted by the appellee, which it is claimed was a new and materially modified contract of subscription, in the place and stead of the original contract of subscription hereinabove set forth. The declaration avers that, "as changed and modified, said contract is a conditional contract to pay the balance remaining unpaid upon said defendant's original contract of subscription only in the event of said balance being called for by the board of directors of said company for the purpose of discharging the debts or liabilities of said company contracted prior to the passage of said act, or subsequent to the passage of

said act, and without notice thereof." Right here is the pivotal point of the case, as will appear a little later on.

On the 19th of January, 1893, after the occurrences thus far narrated had taken place, the Glasgow Manufacturing Company filed a creditors' bill against the development company in the circuit court for Rockbridge county, in the state of Virginia, alleging that it was a creditor of the development company to the extent of \$19,356, and praying that the assets of the latter company be subjected to the payment of its debts; but it is not stated in the declaration filed in the pending case whether the Glasgow Company became such creditor prior or subsequent to the adoption of the statute of January 9, 1892, to which allusion has just above been made. The development company was duly summoned to appear and to answer that proceeding, and, upon failure to answer, a decree pro confesso was entered against it, whereby the amount of its indebtedness to the Glasgow Company was established. The proceedings seem to have then slumbered until 1898, when the Glasgow Company filed an amended bill in the same court, and alleged that all the tangible property of the development company had been sold, and that nothing could be realized to pay the Glasgow Company's claim unless resort were had to the 50 per cent. of the unpaid subscriptions, which had never been called by the development company, and which was still due by the stockholders. The amended bill set forth that the stockholders claimed immunity from liability on account of the terms and provisions of the Virginia statute of January 9, 1892, and the action of the board of directors thereunder, which action, the bill alleged, was nugatory. On September 20, 1899, a decree pro confesso was taken on the amended bill against the development company, and in the decree a call was made for the payment by the stockholders of the development company of the 50 per cent. remaining unpaid upon their several subscriptions, and a receiver was appointed to sue for and collect such unpaid sums. Under that decree the pending suit was brought by the receiver to recover the unpaid 50 per cent. of the appellee's original subscription. To the declaration, which sets out in detail, in a single count, what has been, in substance, up to this point recited, the appellee interposed seven pleas, and in addition quite a lengthy plea on equitable grounds. The first plea is the plea of the statute of limitations; the second and third are that the defendant never promised as alleged, and that he was never indebted as alleged; and the others are quite lengthy, and need not be stated, except the seventh, inasmuch as we shall not have occasion to consider any of them, other than it. By the seventh plea it is alleged that the development company had long prior to January, 1892, entered into a contract with the Glasgow Company for the building by the latter

of a hotel for the former, and that the Glasgow Company had proceeded with the execution of the contract until the latter part of 1891, when it stopped work on the hotel, and received payment in full for all that had been done and all that was then due to it, and abandoned its contract, the Legington Company consenting thereto; that thereafter, and after the adoption of the Virginia statute of January 9, 1892, and after the appellee had fully paid up 50 per cent. of his original subscription, the Glasgow Company, for whose sole use the pending suit was brought, with full knowledge of the Virginia act of Assembly, entered into a new contract with the development company to complete the hotel, and that any indebtedness that may be due by the development company to the Glasgow Company was incurred under that new contract. Upon the second and third pleas the plaintiff joined issue, and to all the others he demurred. The Baltimore city court overruled the demurrers, and at once gave judgment for the defendant, the appellee, and from that judgment the receiver has appealed.

As there is but one count in the declaration, there was no error in the court's action in entering final judgment on overruling the demurrers, notwithstanding there were issues of fact joined on the second and third pleas (*Boehm v. Mayor, etc., Balto.*, 61 Md. 259), unless the demurrers ought to have been sustained.

There are a number of interesting questions presented by the record, and they were very admirably argued at the bar; but we do not find it necessary to go into a consideration of them, for the reason that before they can be reached there are two defenses lying at the threshold, and decisive of the controversy; and to them we will confine the few observations we feel called on to make.

If it be assumed, though it is not distinctly alleged in the declaration, that the Glasgow Company, for whose sole use, according to the concessions of the demurrers to the pleas, the pending suit was brought, was a creditor of the development company prior to the adoption of the Virginia act of January 9, 1892, then it is obvious that that act cannot impair the right of the creditor to pursue the stockholder. If the stockholder was liable to a subsisting creditor to the extent of the amount subscribed by the former, then no enactment of the Legislature could interfere with that right, if the contract between the creditor and the company had been in fact made upon the faith of that liability. It would then result that, so far forth as concerned the antecedent creditor, the act of January 9, 1892, would be inoperative; and such, in plain terms, is the declared policy of the act, for it specifically provides in its last clause that it shall have relation to debts or liabilities of the company contracted after the passage of the act. On the assumption that the debt of the Glasgow Company was con-

tracted prior to January 9, 1892, the act of that date would have no efficacy. Having no efficacy, the original charter of the company would control. Under that and the resolution of November 11, 1890, the installments of stock were distinctly payable at intervals of 60 days; and as the last installment was due on April 20, 1892, it is obvious that much more than the statutory period of limitations elapsed between that date and the date of the bringing of this suit, and therefore the first plea of the appellee, relying on the bar of the statute, was a complete defense to the action. Nor did the filing of the bill by the Glasgow Company against the development company in January, 1893, arrest the running of the statute, for it is not averred in the declaration that that proceeding sought to subject to any liability the stockholders who had paid 50 per cent. of their subscriptions, or that it sought to recover from them any part of the unpaid 50 per cent.; and therefore there was no cause pending which involved a demand for the unpaid 50 per cent. until the amended bill was filed, in August, 1898, when the bar of the statute, as respects the original installments, had completely attached. The proviso to the original act of December 22, 1897 (Acts 1897-98, p. 16, c. 20), does not rescue the suit from the bar of the statute of limitations. That act will be found set out later on in the margin. It is declared in the proviso that where chancery suits are pending at the time of the passage of the act, in which it is sought to recover unpaid stock subscriptions, the statute of limitations shall not run as to any alleged subscription during the time which shall have elapsed between the institution of such suit and one month after an order shall have been entered authorizing a common-law action as provided in the act for the recovery of such a subscription. As just above observed, there was no chancery suit pending for the recovery of the unpaid 50 per cent. of the stock subscriptions when the act of December 22, 1897, was passed, nor until the amended bill was filed in August, 1898; and therefore the saving in the proviso has no application.

If, however, it be true that the claim of the Glasgow Company originated after the adoption of the act of January 9, 1892, and that the Glasgow Company knew of that act, as the seventh plea alleges, and the demurrer thereto admits, then it is obvious that the claim must be treated as having arisen in subordination to the terms of that enactment; and, inasmuch as the appellee had fully paid in 50 per cent. of his subscription, the creditor must be held to have entered into its contract with the development company upon the basis that stockholders who had in fact paid 50 per cent. of their subscriptions would not be liable to pay more. Therefore the creditor cannot repudiate the provisions of the act, and claim that the stockholder shall be required to pay that which he was not liable to pay when the contract between the com-

pany and the creditor was entered into. The decree of the chancery court must be read in the light of these circumstances, and restricted in its application by them.

Under the case of *Glenn v. Williams*, 60 Md. 98, the questions we have been considering might be regarded as closed, were it not for the Virginia statute of December 22, 1897 (Acts 1897-98, p. 16, c. 20), which is set out in the pleas, and thus brought before us. It will be found in the margin.¹ By that statute it is enacted that all suits for the recovery of unpaid subscriptions to the stock of any joint-stock company shall be brought in the courts of common law, and that said courts shall have exclusive jurisdiction to hear and determine questions involving the validity of such subscriptions; that in all cases where it shall be necessary to resort to a court of equity to settle and wind up the affairs of insolvent corporations, or to make assessments on unpaid stock subscriptions, the courts shall direct the trustee, assignee, or receiver to sue at law to recover any call or assessment, and that the defendant shall be entitled to a jury trial; that all pleas, defenses, and evidence which would be admissible if the company were solvent shall be

¹An Act to Prescribe and Regulate the Procedure by Which Unpaid Subscriptions to Joint Stock Companies may be Recovered by Said Companies, Their Creditors, Receivers, Trustees, Assignees, or Any Other Person.

Section 1. Be it enacted by the General Assembly of Virginia, that the title and sections one and two of an act entitled "An act to prescribe the mode by which unpaid subscriptions to joint stock companies, may be recovered by said companies, their receivers or assignees," approved December 19, 1896, be amended and re-enacted so as to read as follows:

"§ 1. All suits or motions for the recovery of unpaid subscriptions to the stock of any joint stock company shall be brought in the courts of common law of this commonwealth in the county or corporation where the defendant resides, if he be a resident of this state, or in the case of a joint or partnership subscription, then in the county or corporation in this state in which either of the joint subscribers or any member of the partnership subscribing shall reside; and said courts shall have exclusive jurisdiction to hear and determine all questions involving the validity of such subscriptions, but nothing herein contained shall be construed to deprive courts of chancery of their jurisdiction to settle and wind up the affairs of insolvent corporations or to make assessments on unpaid stock subscriptions.

"§ 2. In all cases where it is necessary to resort to a court of equity for the purposes aforesaid, the court shall direct the trustee, assignee, or receiver, as the case may be, to sue at law, when necessary to recover any call or assessment, and the defendant shall be entitled to a jury where the amount involved exceeds \$20, and said suits shall be governed in all respects by the provisions of this act. All pleas, defenses, and evidence which would be admissible if the company were solvent shall be equally admissible and shall have the same effect in law in any action brought after the insolvency of any such company, except where the defence relied upon is an agreement on the part of the corporation not to assess the face value of the stock subscribed, and such agreement was unknown to the creditor at the date of his contract; and this act shall apply to all suits heretofore or hereafter brought where no final judgment or decree on the merits has been rendered; provided, that where chancery suits are pending at the time of the passage of this act, in which it is sought to recover unpaid stock subscriptions, the statute of limitations shall not run as to any alleged subscription, during the time which shall have elapsed between the institution of such suit, and one month after an order shall have been entered authorizing a common law action, as provided in this act for the recovery of such subscription."

Sec. 2. This act shall be in force from its passage.

equally admissible and shall have the same effect in law in any action brought after insolvency; and that the act shall apply to all suits heretofore or hereafter brought, where no final judgment or decree on the merits has been rendered. The purpose of the enactment was to do away with the doctrine that the corporation represented the shareholders. The chancery courts of Virginia are by the act stripped of the power they formerly possessed, and, whilst they are still permitted to make assessments, the receiver is required to bring suit in a court of law to recover; and the decree fixing the assessments has, in cases to which the act applies, no longer the conclusiveness and force attributed to it heretofore. The utmost which a Virginia chancery court can now do is to order an assessment, but when ordered the decree so ordering it can only be enforced by a suit at law, in which suit all defenses as to the validity of the subscription, and therefore, as to the liability of the subscriber, are open to inquiry if the amount in controversy exceeds \$20. If the act limits the conclusiveness of the Virginia equity courts' decree, that decree can have no greater force in Maryland than it would have in the state where it was passed; and, as in the latter it would not preclude the stockholder from setting up the defenses here interposed, so neither can it be invoked to prevent the same defenses from being relied on in our courts, for the very manifest reason that the act goes to the jurisdiction of the Virginia courts to pass a final decree binding the stockholders by representation. If such a decree, under the terms of the Virginia statute, be not final there, it cannot be final here, for the decree can have no greater effect here than it has in the jurisdiction where it was rendered.

Without considering the demurrers to the other pleas, we are of opinion that the rulings in respect to the demurrers to the first and seventh pleas were correct, and the judgment must therefore be affirmed. Judgment affirmed, with costs above and below.

MOSHASSUCK ENCAMPMENT, NO. 2, et al., v. ARNOLD & MAINE.

(Supreme Court of Rhode Island. March 18, 1903.)

LANDLORD AND TENANT—EXPIRATION OF LEASE—SUBLETTING—LIABILITY OF SUBLESSEE TO TENANT—LEASE BY SUBLESSEE FROM LANDLORD—EFFECT ON LESSEE—ATTORNEYMENT—PLEADING—SET-OFF.

1. Where plaintiffs' lease expired June 30th, but contained a clause that they should give up possession when the value of the building which they had erected thereon, decided by arbitration, should be paid them by the lessors, plaintiffs' right to possession and right to recover rent from subtenants at the rate paid by them to June 30th continued until they were paid the value of such building.

2. Where plaintiffs' lease expired June 30th, but contained a clause that they should give up possession when the value of the building

which they had erected thereon, decided by arbitration, should be paid them by the lessors, and defendants, in possession as subtenants, had previous to June 30th procured a lease running for 20 years from that date, and on October 9th furnished the owners money to pay for plaintiffs' building, such transactions on their part with the lessor, being subject to plaintiffs' lease, which was of record, did not relieve them from liability for rent to plaintiffs for the time intervening between June 30th and October 9th.

3. Where plaintiffs had not attorned to defendants as landlords, defendants could not sue them for rent in their own names, and hence their claim could not be pleaded in set-off.

Assumpsit by Moshassuck Encampment, No. 2, and others, against Arnold & Maine. On petition of defendants for new trial. Petition denied.

The following is the opinion below of Douglas, J.:

"The plaintiffs in this case were owners of a building standing on leased land. Their lease expired June 30, 1899, but contained a clause providing that they should give up possession when the value of the building, to be decided by arbitration, should be paid them by the lessors. The defendants were tenants of a part of the building by lease from the plaintiffs, which expired June 30, 1899. On October 9, 1899, the plaintiffs were paid the appraised value of the building, and gave up possession of the estate. The defendants, without any agreement with the plaintiffs, continued to occupy the part of the building they had leased after their lease expired, and until the plaintiffs vacated. April 20, 1899, the defendants procured a lease of the land from the owners; beginning its term on the 1st day of July, and running for twenty years. On the 9th day of October the defendants, by arrangement with the owners of the land, supplied the money which was paid for the building, and became the owners of it. This suit was brought to recover rent of the defendants from July 1st to October 9th at the rate formerly paid under their lease. The defendants deny their liability to pay the rent, and plead in set-off a claim to all rents received by the plaintiffs after June 30.

"Both parties agree that the clause in the lease from the owners of the land to the plaintiffs which determines when the plaintiffs shall surrender possession of the premises, viz., when they shall be paid for the building, gives the plaintiffs the right of possession until that time. This interpretation is also sustained by authority. *Van Rensselaer's Heirs v. Penniman*, 6 Wend. 569; *Boulton v. Shea*, 22 Can. Sup. Ct. 742; *Holsman v. Abrams*, 2 Duer, 435; *Ecke v. Fetzer*, 65 Wis. 55, 28 N. W. 266; *Mullen v. Pugh*, 16 Ind. App. 337, 45 N. E. 347. The plaintiffs were therefore entitled to hold the land and building, as against their lessors, and all parties claiming under these lessors, until October 9th. They had the same right that they had before to collect rent or recover for the use and occupation of the premises by the defendants,

or any other persons whom they (the plaintiffs) permitted to occupy portions of the premises. The very contention advanced by the defendants' plea, that the plaintiffs should be held responsible for rents and profits during this occupation, assumes that the plaintiffs had the right to let and recover rent during that period. The defendants, therefore, as lessees holding over their specified term, were liable, at the option of the plaintiffs, to pay rent at the same rate as before. *Providence County Savings Bank v. Hall*, 16 R. I. 154, 18 Atl. 122.

"I am unable to see how the defendants' transactions with the owners of the land alter their relations to the plaintiffs. The owners of the land could not sell the building to the defendants till they had paid for it themselves. Neither could they put defendants in possession of the land until their own right of possession had accrued. Their lease to the defendants was subject to the recorded lease to the plaintiffs, and could not operate to annul any of its provisions. It was itself a nullity so far as it assumed to convey an interest in land adversely held by others by recorded grant from the lessors. If we concede that, as between the owners of the land and the defendants, the new lease operated as an equitable assignment of the ground rents accruing, it still is true that the plaintiffs were not privy to this contract, nor, so far as appears, even informed of it. The defendants cannot sue the plaintiffs for their rents in their own names, since the plaintiffs have never attorned to them as landlords. *Comstock v. Cavanagh*, 17 R. I. 235, 21 Atl. 498. Hence the claim cannot be pleaded in set-off under our statute.

"As the liability of the plaintiffs to pay for the continued possession from July 1st to October 9th is entirely to their lessors, and not to the defendants, it is not pertinent to this case to consider whether such liability is to pay ground rent at the former rate, or to account for all rents and profits received; but inasmuch as the question is raised by the plea, and was argued to the court, it may be observed that the cases cited by the defendants do not support the larger claim. *Franklin v. Card*, 84 Me. 528, 24 Atl. 960; *Scruggs v. Railroad Co.*, 108 U. S. 368, 2 Sup. Ct. 780, 27 L. Ed. 756. The first case allows the landlord ground rent only. In the second the question for the court's decision was limited, by agreement of counsel, to the time after the ascertainment of the amount of the value of the estate. Counsel agreed, by stipulation filed in the case, that, up to the making of the award, the tenant was liable for ground rent at the stipulated rate. After that the court held her to be, like a mortgagee in possession, entitled to interest, and answerable for rents and profits accruing from the estate. In that case the tenant unwarrantably delayed the transfer of possession, by unfounded demands, during a long litigation. In the case at bar the arbitration

does not appear to have been unreasonably delayed by either party, and the money was paid and possession transferred as soon as the amount was ascertained. My decision, therefore, is that the plaintiffs are entitled to recover for three months' rent, and that the defendants are not entitled to any sum in set-off.

"Decision for plaintiffs for \$1,522.40 and costs."

Argued before STINESS, C. J., and TIL-
LINGHAST and BLODGETT, JJ.

Cooke & Angell, for plaintiffs. Dexter B. Potter, for defendants.

PER CURIAM. The court is of opinion that the rulings of Mr. Justice DOUGLAS were correct, and adopt his decision as the opinion of the court.

POOLE v. FELLOWS et al.

(Supreme Court of Rhode Island. March 16, 1903.)

MECHANIC'S LIEN — NOTICE — "OWNER" — RECORDING COPY — WAIVER — DEMURRER.

1. The word "owner," in Gen. Laws 1896, c. 208, § 5, in the provision relating to giving notice of a mechanic's lien to the owner of property to be affected, means the owner of the estate to be affected, whether it be the fee or a leasehold, or less interest.

2. Where the purchaser of materials is a lessee, his term is the property to be affected by a mechanic's lien, and not the reversion of the landlord.

3. As no notice of a mechanic's lien need be given to an owner of property where he is also the purchaser of the material for which the lien is sought, no copy of the notice is required to be recorded.

4. Where property against which the enforcement of a mechanic's lien is sought is located in two towns, and the account for which the lien is claimed has not been filed in one of the towns, the petitioner has waived his right to a lien on the land in that town.

5. A waiver of the right to a mechanic's lien on such of the property as is situated in one town, the balance being in another, is not a ground for demurrer to the petition for the enforcement of the lien.

Petition in equity by William H. Poole against Rufus I. Fellows and others to enforce a mechanic's lien. Demurrer to petition overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Charles E. Salisbury, for petitioner. Page & Page and Mr. Cushing, for respondents.

PER CURIAM. We think the word "owner," in section 5 of chapter 208 of the General Laws of 1896, in the phrase "owner of the property to be affected by the lien," means the owner of the fee when the fee in land is to be affected, and the owner of a leasehold or less interest when such less interest is to be affected. In this case the purchaser of the materials was a lessee, and his

¶ 2. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 21, 72, 333, 334.

term, not the reversion belonging to his landlord, was the property to be affected. Of this property he was the owner, and, as he was likewise the purchaser of the materials, no notice to him was required. As no such notice was required, no "copy of said notice" was required to be recorded.

The objection that part of the land lies in the town of Johnston, and no notice was filed in that town, we understand to mean that the account for which the lien is claimed was not filed in Johnston. This omission waives the petitioner's right to a lien upon so much of the land as lies in that town, but is not effective as a ground of demurrer to the petition.

Demurrer overruled.

STATE v. HUNT.

(Supreme Court of Rhode Island. March 18, 1903.)

ASSAULT—SIMPLE ASSAULT—INSTRUCTIONS.

1. Under an indictment for simple assault, a refusal to charge that the bullet must have gone in the direction of the person assaulted, or there could be no assault with a dangerous weapon, was right.

James T. Hunt was convicted of simple assault, and petitions for new trial. Petition denied.

Argued before STINESS, O. J., and TILLINGHAST and DOUGLAS, JJ.

The Attorney General, for the State. Franklin P. Owen, for defendant.

PER CURIAM. The only ruling of the court to which the defendant excepted is the refusal to charge that "the jury must find that the bullet went in the direction of the said Herbert W. Root, or there can be no assault with a dangerous weapon." It is clear that this refusal was right. "An assault consists in an offer to do bodily harm, made by a person who is in a position to inflict it," as the court below charged. The accuracy or inaccuracy of aim does not determine guilt or innocence of the offense. The evidence may properly have left in the minds of the jury a reasonable doubt of the commission of the whole offense charged in the indictment, but it fully justified their verdict that the defendant was guilty of simple assault.

Petition for new trial denied, and case remitted to the common pleas division for sentence.

MASON v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 23, 1903.)

MUNICIPAL CORPORATIONS—ACCIDENT TO PEDESTRIAN.

1. In an action to recover against a city for injuries caused by slipping into an open gutter formed by two parallel lines of curbing, evidence examined, and held that nonsuit was properly granted, it being apparent that the

accident was caused by an unfortunate slip on the part of plaintiff.

Appeal from Court of Common Pleas, Philadelphia County.

Action by George R. Mason against the city of Philadelphia. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Arthur S. Arnold and Edmund W. Kirby, for appellant. Thomas D. Finletter, Joseph P. Rogers, and John L. Kinsey, for appellee.

POTTER, J. The error assigned in this case is the entry of a compulsory nonsuit by the trial judge and the refusal to take it off. Plaintiff was injured by slipping into an open gutter, which was formed by two parallel lines of curbing set about 10 inches apart. The inner line was the ordinary curbstone at the edge of the sidewalk. The outer line was so placed as to support the raised grade of the street at that point, which had there been suitably arranged for a driveway or entrance from the street into a stable. The method of construction used was an ordinary and usual one for an approach from the street to a stable. When it was so used, the gutter was covered with a plank, in order to make a smooth crossing for vehicles. The use of the premises for a stable was abandoned years ago, and dwellings were erected upon the site. The reason for maintaining the crossing over the gutter at this particular point then ceased, and the plank seems to have been removed, leaving an open waterway, which differed from the rest of the gutter along the street only in the fact that it was for a short distance curbed upon both sides. The evidence does not indicate that this arrangement was in any way unsafe, or that it constituted a nuisance to the public. It was not at a crossing of the street, but extended only along the front of one or two houses. At the time of the accident the plaintiff drove up to the place in the early evening, stepped out of his wagon upon the pavement, and, intending to go to the rear of the wagon, stepped across the gutter with his left foot, and followed it with his right. A drizzling rain was falling at the time, and freezing as it fell, which made the curbstone slippery. Plaintiff failed to notice that the gutter was curbed upon both sides, and did not step far enough to clear it with his right foot, but planted it so near the edge, that it slipped from the curb into the gutter in such a way as to catch and become wedged, so that in falling his leg was broken.

The facts of the case were undisputed, and the question of negligence was, therefore, for the court to decide. The trial judge held that the city was not bound to pave the street, or put in curbs in any particular way; and, as there was neither allegation nor proof of any negligence in the way in which the curbing and paving was done, he entered a judgment of nonsuit.

We do not find any evidence that there was any need of repair. The only respect in which the gutter at the time of the accident differed from its condition as originally constructed was in the absence of the plank cover, and this was no longer needed to bridge the gutter for crossing purposes when the property ceased to be used for stabling. That left it simply an open gutter, and as such it remained for years, without any ill consequences, and apparently without protest or complaint upon the part of any one. The city had no occasion to anticipate danger to the public from the maintenance of an open gutter at that point. Its right to make use of that form of construction is fully vindicated in *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096. The discretion properly exercised by the municipality "is not to be held subject to the verdicts of juries." *Horne v. Philadelphia*, 104 Pa. 542, 54 Atl. 330. The streets of a city cannot be maintained at a dead level. There must be some inequalities and offsets here and there. To hold the municipality responsible for missteps or slips by the users of the streets would be to make it an insurer. As was said in *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364: "Persons using public streets ought also to exercise some little caution. Without it there is hardly a street * * * where, by reason of some slight inequality in the pavement, a trifling hole, or a loose stone, the passer-by may not fall, and sustain injury." In the present case the accident was the result of an unfortunate slip by the plaintiff. In consequence of his failure to step entirely across the gutter, he did not secure a good foothold upon the icy edge of the outer curb, and his foot slipped back into the gutter at an angle which wedged it crosswise in the 10-inch space. If he had slipped outwardly from the inner curb, there would have been no suggestion of a right to recover. As it was, he slipped back and inwardly from the outer curb.

We think the learned court below was justified in refusing to take off the nonsuit. The assignments of error are overruled, and the judgment is affirmed.

GRAY v. HOWELL.

(Supreme Court of Pennsylvania. March 23, 1903.)

CONTRACT—ACTION FOR BREACH—DAMAGES—AUTHORITY OF ATTORNEY.

1. Damages in an action for breach of parol contract for the sale of land are limited to the purchase money paid and expenses incurred, and no recovery can be had for the loss of the profits.

2. An attorney is without authority to compromise an action, or to accept land instead of money in satisfaction of a judgment.

3. An attorney has no authority to authorize the sale of his client's land in payment for services to be rendered.

¶ 1. See *Attorney and Client*, vol. 5, Cent. Dig. §§ 200, 209.

Appeal from Court of Common Pleas, Philadelphia County; Finletter, Judge.

Action by Mabel Ella Gray against Lillian B. Howell. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The statement of claim set out an agreement between the plaintiff and defendant by which the latter agreed in parol to execute a release of dower in a property owned by the plaintiff if the plaintiff would assist the defendant in obtaining testimony adverse to certain claims made against the estate of the defendant's late husband. Plaintiff's counsel made the following offer: "I offer to prove by Mr. Kern, to be followed up by other proof, that Mr. Bernard Gilpin was counsel for the defendant; that Mr. Gilpin agreed with the witness Mr. Kern, in pursuance of a written undertaking on the part of Mr. Kern on behalf of his daughter, Mrs. Gray, the plaintiff, that Mrs. Howell (she then was), the widow of William H. Kern, would execute that release of dower in the property, 210 North Thirty-Sixth street, if Mr. Kern would undertake to aid in procuring the testimony relating to various suits brought against William H. Kern, or his estate, on claims connected with the William H. Baeder Glue Company or himself; that subsequently to the offer, Mr. Bernard Gilpin having accepted the undertaking on the part of Mr. Kern, prepared, in pursuance of the contract, a release of dower; that Mr. Kern carried out his agreement on behalf of Mrs. Gray by obtaining the testimony which was sought for; and that subsequently Mrs. Howell, formerly Mrs. Kern, the widow, declined to execute the release. That is my offer." Offer overruled. Exception.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

N. Dubois Miller, for appellant. William H. Stakke, for appellee.

FELL, J. The nonsuit entered at the trial cannot be sustained on the ground that the contract for the release of the defendant's dower in her husband's estate was not in writing. An action may be maintained for the breach of a parol contract for the sale of land, but damages in such an action are limited to the recovery of the purchase money paid, or the value of the consideration given, and the expenses incurred, and do not include the loss of the bargain. *Dumars v. Miller*, 34 Pa. 319. The plaintiff's case was, however, fatally defective for want of proof of the authority of the alleged agent of the defendant to make the contract. Of this there was no evidence, nor offer of evidence. The offer was to show that the attorney of the defendant verbally agreed to sell her dower interest in consideration of services to be rendered by the plaintiff in procuring testimony to enable her to defend an action against her husband's estate, and his power to bind her rested wholly on his presumed authority as an attorney at law.

Such an agreement, if made, was not within the scope of the authority of an attorney. The implied authority of an attorney at law in this state is very broad as to those things which arise in the regular course of litigation and pertain to the conduct of an action, but he is without authority to compromise an action or to accept land instead of money in satisfaction of a judgment. *Huston v. Mitchell*, 14 Serg. & R. 307, 16 Am. Dec. 506; *Dodds v. Dodds*, 9 Pa. 315; *Klassick v. Hunter*, 184 Pa. 174, 39 Atl. 83. His authority cannot, by implication, be extended to authorize the sale of his client's land in payment for services to be rendered.

The judgment is affirmed.

EVANS et ux. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 23, 1903.)

MUNICIPAL CORPORATIONS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

1. Where a wife goes for provisions to the grocery, she is not chargeable with contributory negligence in keeping on an icy pavement, where she could not have reached the store without passing over ice and without encountering danger of the same character in any direction.

Appeal from Court of Common Pleas, Philadelphia County; Davis, Judge.

Action by George W. Evans and Sarah E. Evans against the city of Philadelphia. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James H. Young, for appellants. Robert Brannan and John L. Kinsey, for appellee.

BROWN, J. Sarah E. Evans, the plaintiff below, lived at 406 Dickinson street, in the city of Philadelphia. At the southwest corner of that street and Fourth there was a grocery store, and between it and the home of plaintiff an alley ran north and south, in which there was a drain carrying off water from the properties fronting on Fourth street. On February 22, 1901, the day the plaintiff fell and was injured, and for some time previous, this drain had been clogged with ice, which extended out over the sidewalk on the south side of Dickinson street, and out into the street as far as the car tracks. A ridge of ice extended from the building line to the curb, and from the curb to the car tracks. About 4 o'clock in the afternoon the plaintiff went from her home to the grocery store, passing safely over the ice on the pavement; but on her return she slipped and fell, sustaining the injuries for which she is now seeking compensation. There was ample evidence of the city's negligence in allowing the side-

walk to remain in its dangerous condition; and, in directing a judgment of nonsuit, the learned trial judge, though not assigning any reason for doing so or for refusing to take it off—as is too frequently the case with some courts—manifestly regarded the plaintiff as guilty of contributory negligence. Questions which he asked indicate that he felt there was a safer way of going to and returning from the store, which the plaintiff ought to have taken; but, even if there was such a way, it is clear, from the testimony of the four witnesses called, that it was for the jury, and not for the court, to pass upon the plaintiff's negligence. The danger was manifest, and it was the duty of the plaintiff to have avoided it, if she could have done so by the exercise of proper care under the circumstances, which would have been to take a safe way to the store, if one existed. If she could have avoided the danger on the pavement by going out into the street beyond the car tracks, or even crossing over to the other side and then recrossing to the store, it was her duty to do so. *City of Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Fleming v. City of Lock Haven*, 15 Wkly. Notes Cas. 216. But no matter where she turned, there was no safe path for her. Ice was around and about her on every side, and, though the danger might have differed in degree, she was bound to encounter the same kind wherever she turned. Whether she went directly to the store, or crossed over to the other side of the street, or even went around a square through Greenwich street, which was south of and parallel to Dickinson street, she could not have reached the store without passing over ice, and without encountering the same danger that was before her on the sidewalk. From her testimony we extract the following: "Q. Mrs. Evans, supposing you had gone out on the street in order to avoid the ice at the alley, and gone in the car track, could you have gotten to the store at Fourth and Dickinson without going over ice? A. No, sir. Q. Could you have gone around up Dickinson and down Fifth and around Greenwich? A. I would have had to go over ice to get around there. Q. If you had gone up Dickinson to Fifth and to Tasker, would you have gone over ice? A. Yes, sir. * * * Q. Where was that ice? A. All right around the store; right around the curb before you come to the store. Q. Around the curb where? A. Right near the store. Q. At the corner of Fourth and Dickinson? A. Yes, sir. * * * Q. Now, then, what was the condition of Dickinson street, on the north side, where you say there was only snow? I mean going down over the crossing of Fourth street on the north side of Dickinson. A. There was ice all along there at that time. Q. Ice where? A. All along on Fourth street. Q. Was the crossing at Fourth street covered with ice? A. Yes, sir. * * * Q. There was no possible way for you to have gone around on the north side of Dickinson street, crossing

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1679.

Fourth and going to that store, without going over ice? A. No, sir; not without going over ice. Q. Was there a continuous lot of ice from the time it left that alley, where the accident occurred, extending over the pavement down to the gutter and down to Fourth and down to Greenwich? A. Yes, sir." Harry F. Wilgus testified as follows: "Q. If she had gone out in the street from her house on Dickinson street, and avoided the ice which went to the car track, and gone around and tried to reach your store by any means, could she have done so without going over ice equally as dangerous? A. No, sir. Q. She would have had to cross over ice? A. She could not go there without crossing ice, no matter what direction she would go. Q. She would have crossed ice equally dangerous? A. Yes, sir. * * * Q. What was the condition of the crossing leading over Fourth street from your store to the east side of Fourth street? A. There was ice around there, too. There was ice there down to Greenwich on that gutter." Ida M. Bowen was asked: "Q. If Mrs. Evans had gone out in the street from her house, and had gone onto the other side, as you have heard described there was snow at that time, could she have regained the sidewalk at Fourth and Dickinson without passing over ice which was equally dangerous? A. I hardly think so." And the same witness further testified: "Q. There was no way of getting from her house to the grocery store at Fourth street unless she went a square out of her way, and then, you think, she would meet the same conditions? A. Yes, sir." There is nothing in the testimony of Frederick J. Rudlinger, the last witness called by the plaintiff, to show that on the day of the accident there was a safe route that she might have taken; for even he admits she would have encountered ice in taking any other route, though perhaps not in the same quantity or so slippery as at the alley.

To relieve herself from the imputation of contributory negligence, the plaintiff was not required, with danger around her on all sides, to select from all the dangerous paths the one which she ought to have known was the least so. Nothing more was required of her than ordinary care, and whether she had exercised it, under the circumstances, by going over the pavement from the store to her home, instead of by some other route, on which there was the same danger, differing only in degree, was for the jury. Nor was she bound to remain in her house because the city, by its negligence, had made it dangerous for her to go out on the street in search of recreation and pleasure, or when called to do so by duty. "It is not the law that a resident in a city must remain continuously on his property, when the city grossly neglects the repair of its streets, under pain that if he ventures on the streets or walks, and suffers injury resulting from the city's default, he can recover nothing." City

of Altoona v. Lotz, 114 Pa. 238, 7 Atl. 240, 60 Am. Rep. 346. In this case the plaintiff, as the housewife, went to her grocer for provisions for her family; and, under the testimony to which attention has been called, the court could not, as a matter of law, have pronounced her negligent for having kept to the pavement."

Judgment reversed and procedendo awarded.

MIHLBAUER et al. v. INFANTRY CORPS OF STATE FENCIBLES et al.

(Supreme Court of Pennsylvania. March 23, 1903.)

CORPORATIONS—LEASE—PARTIES.

1. An unincorporated military body had a membership and purposes similar to, and nearly identical with, an incorporated civil body. A lease was made by a city to the corporation, which was executed on its part by the president and secretary of the corporation, and sealed with the corporate seal, giving exclusive possession of an armory in the city of Philadelphia. These officers were also officers of the military organization. The unincorporated military body was thereafter attached to a regiment of the National Guards of Pennsylvania. *Held*, that the lease would be sustained in favor of the corporation; it having been recognized by the city for 18 years, and the evident intent having been to lease to it.

Appeal from Court of Common Pleas, Philadelphia County; McCarthy, Judge.

Bill by J. Harry Muhlbauer and others against the Infantry Corps of State Fencibles and others. Decree for defendants, and plaintiffs appeal. Affirmed.

The court below found the facts to be as follows:

"(1) In 1818 was formed a military body named the Infantry Corps, State Fencibles. It consisted of one company of infantry, commanded by a captain and other company officers.

"(2) On March 11, 1876, a charter was granted incorporating the 'Infantry Corps of State Fencibles.' The purposes of the corporation, as expressed in the charter, are 'to aid and benefit its members and to secure their proficiency in the military science and for social enjoyments.' The members of the corporation were, first and principally, active members, who were the members of the military body; secondly, contributing members, who were not members of the military body; and, thirdly, honorary members.

"(3) In 1878, under authority from the commonwealth, the corps recruited three additional companies, and thereafter was known as the 'Infantry Battalion of State Fencibles.' The organization then consisted of four companies of infantry, designated as 'Company A,' 'Company B,' 'Company C,' and 'Company D,' respectively; each company being commanded by its captain and other company officers, and the whole battalion being under command of a major, and

possessing a staff of officers, commissioned and noncommissioned.

"(4) At the time of or shortly after the formation of the battalion, a mistake arose as to the name of the corporation, which became inveterate, and has been perpetuated to the present time. The word 'Battalion' was substituted for 'Corps' in the name of the corporation, which was thereafter known, as well to its members as to the community in general, by the erroneous designation of 'Infantry Battalion of State Fencibles.' This substitution appears in the seal of the corporation, in the book printed by the corporation and offered in evidence, containing a copy of the charter, in the by-laws printed in the same volume, in the bonds issued by the corporation, and in the bill and answer in this case, as originally filed.

"(5) There was not only confusion of the names of the two bodies, but a confounding of their identity, so that the field, staff, non-commissioned staff, and company officers of the military body, under the designation of 'Board of Officers of the State Fencibles Battalion,' assumed to act as the corporate body, enacted by-laws, elected officers, held meetings, and generally conducted the business of the corporation.

"(6) On June 16, 1883, was approved an ordinance passed by the select and common councils of the city of Philadelphia, authorizing the commissioner of markets and city property to demise to the 'Infantry Battalion of State Fencibles, National Guard of Pennsylvania,' the city armory for ten years, at a nominal rental, with privilege of extending the lease for ten years additional, and the proviso that the building should not be used 'for other than military purposes.'

"(7) On October 1, 1884, a lease in writing was executed between the city of Philadelphia and the 'Infantry Corps of State Fencibles, National Guard of Pennsylvania,' a body corporate of the state of Pennsylvania, reciting the aforementioned ordinance, and demising the city armory to the said 'Infantry Corps of State Fencibles' for the term and rental and with the privileges and restrictions set forth in the ordinance. On behalf of the lessee, this instrument was signed by John W. Ryan, president, and Charles Berger, secretary, of the corporation, and it was sealed with the corporate seal. John W. Ryan at that time was also major of the battalion.

"(8) Upon the execution of the lease the battalion and the corporation took possession of the armory, and have ever since occupied and used it—the battalion, for drill, for storage of arms and equipments, as headquarters, and for other military purposes; the corporation, for meetings and transaction of corporate business.

"(9) On May 1, 1900, general orders No. 17 issued from headquarters National Guard of Pennsylvania. It begins:

"I. The following assignment of companies of the State Fencibles Battalion Infantry, is hereby made: Company A, State Fencibles Battalion Infantry, Philadelphia, Captain Frederick G. Zeh, to be Company K, Sixth Regiment Infantry."

"In three succeeding paragraphs it makes the like assignments of Companies B, C, and D to be Companies M, L, and E, Sixth Regiment, respectively. It then directs commanding officers to report to commanding officer of the Sixth Regiment, and continues:

"II. Commanding officers of former companies of State Fencibles Battalion Infantry will immediately return cap ornaments to State Arsenal, Harrisburg, accompanied by proper invoice, and forward requisition through channels for supply of cap ornaments, with regimental number and new company letter."

"This order did not assign the commanding officer of the battalion or the staff officers, commissioned and noncommissioned.

"(10) A large majority of the members of the battalion (being nearly three-fourths of the whole number) were dissatisfied with general order No. 17, and resigned, refusing to obey it. Among the number was the commanding officer of Company A. After his resignation, the members of Company A who continued in the command and obeyed the general order, becoming thereby Company K, Sixth Regiment Infantry, elected the plaintiff, Mihlbauer, to be their commanding officer, and he was afterward commissioned as captain of Company K, Sixth Regiment. Mihlbauer was formerly commanding officer of Company A of the State Fencibles Battalion, but he resigned in 1894, and had not since been connected with the organization.

"(11) The four companies assigned by general order No. 17, and thereby designated as Companies K, M, L, and E, Sixth Regiment Infantry, respectively, were, after assignment, organized into a new battalion, designated as the Third Battalion, Sixth Regiment; and Major Lumb, a member of the Sixth Regiment, was assigned to command the new battalion.

"(12) After May 1, 1900, the members of the Infantry Battalion of State Fencibles who resigned renewed their organization in four companies, with the old letter designations, 'A,' 'B,' 'C,' and 'D,' respectively, and renewed also the battalion organization under the old commanding officer and under the old name of 'Infantry Battalion, State Fencibles'; dropping, however, the addition of 'National Guard of Pennsylvania,' which had been used formerly as part of the designation of the military body. The organization now musters 185 officers and men. It is not connected in any way with the National Guard. One of the companies has had several drills at the armory, but the four companies of the Sixth Regiment have continued to use and occupy the building with their company and battalion drills, so that all the nights of the week are engaged by them, and the State

Fencibles Battalion have found it impossible to drill there under the present condition of affairs. The companies assigned to the Sixth Regiment have continued to use the armory since their assignment in much the same way as before, and the evidence does not sustain the averments of the bill that the plaintiffs have been excluded from the armory, or interfered with in the use of it for military purposes. On the contrary, it appears that they have materially interfered with the use of the building for military purposes by the military body adhering to and maintained by the corporation, and that they have been treated, notwithstanding this, with commendable forbearance.

"(13) In December, 1900, the plaintiffs, or some of them, with their associates, caused an application to be made to city councils for the passage of an ordinance to revoke the existing lease of the city armory, and to authorize a new lease of the same to be made, granting the use of it to the Sixth Regiment. The bill being referred to the joint committee on city property, several hearings were had before that committee, which reported the bill to councils with a negative recommendation; and, after discussion in councils pro and con, the report of the committee was adopted, and the ordinance failed to pass.

"(14) Since May 1, 1900, neither the plaintiffs, nor those on behalf of whom they sue, have, either individually or collectively, made any contribution whatever for the payment of the rent and cost of maintenance of the city armory."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Leoni Melick and Samuel F. Clevenger, for appellants. Emanuel Furth, Jacob Singer, and George S. Graham, for appellees.

FELL, J. The bill in this case was filed by the captains of four companies that now constitute the Third Battalion of the Sixth Regiment, National Guards of Pennsylvania, to establish the right of the battalion to the exclusive possession of an armory leased by the city of Philadelphia. The lease was made in 1884 to "the Infantry Corps of State Fencibles, National Guard of Pennsylvania, a body corporate of the state of Pennsylvania." The corporation was chartered in 1876 for the purpose of aiding and benefiting its members, of securing their proficiency in military science, and for social enjoyment. Most of its members were members, also, of an independent military company, which was originally formed in 1813, but all of them were not. Three additional companies were recruited in 1873, and a battalion formed, which was known as the "Infantry Battalion of State Fencibles." From that time the management of the civil and military bodies was practically in the same hands, and the word "Battalion" was substituted for "Corps" in speaking of the corporation. The finding of

fact is that "there was not only a confusion of the names of the two bodies, but a confounding of their identity, so that the field, staff, noncommissioned staff, and company officers of the military body, under the designation of 'Board of Officers of the State Fencibles Battalion,' assumed to act as the corporate body, enacted by-laws, elected officers, held meetings, and generally conducted the business of the corporation." As the memberships and interests of the two bodies were nearly identical, there was no occasion to distinguish them until in 1900, when the four companies were assigned to the Sixth Regiment. The order assigning these companies did not include the commanding officer of the battalion and his staff. These officers, with some of the company officers who resigned after the transfer, formed new companies; and thus there became two bodies with antagonistic interests, each claiming the right of possession of the armory. The ordinance of councils authorizing the lease was passed in 1883, at which time the civil and military bodies were both known as the "Battalion." It directed a lease to be made to "the Infantry Battalion of State Fencibles, National Guard of Pennsylvania." The lease was in fact made to "the Infantry Corps of State Fencibles of the National Guard of Pennsylvania, a body corporate of the state of Pennsylvania." Apparently this change was made by the city solicitor when he drew the lease. The lease was executed on the part of the lessee by the president and secretary of the corporation, and was sealed with the corporate seal. These officers were also officers of the battalion, but they executed the lease in their official capacity as officers of the corporation; thus clearly drawing the distinction between the two bodies, and designating the one which was to become the lessee. The city for 18 years has recognized the validity of the lease, and, on application, has refused to terminate it and to authorize a new lease to the four companies. These facts and others established at the hearing fully sustain the finding by the court that the intention was to lease to the incorporated civil body, and not the unincorporated military body. This finding is conclusive of the rights of the parties.

The decree is affirmed at the cost of the appellants.

WIEDER v. BETHLEHEM STEEL CO.
(Supreme Court of Pennsylvania. March 23, 1903.)

INJURY TO EMPLOYEES—PARTY LIABLE.

1. Plaintiff was injured while in the employ of an iron company. After the injury the iron company leased its property to a steel company, which made formal announcement of such fact, and that the officers and employees of the iron company would be continued with the steel company. The lease, which was recorded, provided that the transfer should be regarded as taking effect prior to the date of the accident,

and that all business transacted by the iron company after such date should be for the use and on account of the steel company. *Held*, that an action against the steel company for the injuries received would not lie.

Appeal from Court of Common Pleas, Philadelphia County; Biddle, Judge.

Action by Frank H. Wieder against the Bethlehem Steel Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

At the trial, plaintiff was asked this question: "Q. Very well. I will change the form of the question. When did your employment by the Bethlehem Iron Company cease, and you become an employé of the Bethlehem Steel Company? A. On the last day of April, 1899, I ceased to be employed by the Bethlehem Iron Company, and on the 1st day of May, 1899, I went into the employment of the Bethlehem Steel Company, by reason of a lease. Mr. Johnson: I ask that that shall be stricken out. He says that on the last of April he went out of the employ of one company, and went into the employ of another one, by reason of a lease. I ask that that statement shall be stricken out, because the witness cannot testify as to that. The Court: No; he cannot testify as to that. (Defendant's motion allowed. Exception.) Q. Do you know that you were transferred as an employé by the Bethlehem Iron Company to the Bethlehem Steel Company in any way outside of the lease? A. Yes, sir. I knew it before the time came. I knew it before the 1st day of May that I was going over, because all the papers of Bethlehem announced it. Mr. Johnson: I ask that that be stricken out. The Court: Motion allowed. (Exception.) Q. What date do you refer to? A. The 1st of May—the day that the papers announced that the change would take place. Mr. Johnson: I ask that that be stricken out. (Motion allowed.) Q. On what date did the change take place? A. May 1, 1899. Q. What other evidence did you see? A. I saw the names on the locomotives changed from the Bethlehem Iron to that of the Bethlehem Steel Company. Mr. Johnson: I object to the question, "What date did the change take place?" and ask that the answer be stricken out. Motion allowed. (Exception.) Q. Were the names on anything about these works changed about the 1st of May, 1899, for the first time, to indicate to you that there was a change of employer? Objected to by Mr. Johnson. (Objection sustained. Exception.)"

The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George Demming, for appellant. John G. Johnson and W. E. Doster, for appellee.

POTTER, J. The plaintiff in this case was employed for several years by the Bethlehem Iron Company, at its works in the borough of South Bethlehem. In the spring of 1899 an impression became current in that com-

munity that on or about May 1st the plant of the Bethlehem Iron Company and the control and operation of its works would pass into the hands of another corporation, to be known as the Bethlehem Steel Company. The plaintiff never received any definite notice as to any such change upon the part of his employer, but was under the prevalent impression in that regard. He met with an accident upon May 17, 1899, which he alleged was due to the negligence of his employer; and, under the belief that he was at the time of the accident in the employ of the Bethlehem Steel Company, he brought this action against it to recover damages for his injury. At the trial the plaintiff offered in evidence a certified copy of the lease between the Bethlehem Iron Company and the Bethlehem Steel Company, dated May 25, 1899, but not executed or acknowledged until June 24 and June 26, 1899. At the close of the plaintiff's testimony the trial judge held that the terms of the lease were controlling as to the date of the transfer between the two companies, and that, from the lease itself and the evidence in the case, it appeared that on May 17, 1899, there had been no transfer whatever to the Bethlehem Steel Company. He therefore entered a judgment of compulsory nonsuit.

The first and principal error here assigned is the refusal of the court below to take off the judgment of nonsuit. Error is also assigned to the exclusion as testimony of the statements of the plaintiff that he went into the employment of the Bethlehem Steel Company on May 1, 1899, by reason of the lease; that he knew that he was transferred as an employé from the iron company to the steel company upon that date, because the newspapers of Bethlehem announced the change would be made at that time; and for the further reason that he saw that the names on the locomotives and on other places about the works were changed about the 1st of May.

These statements were properly rejected. The opinion of the plaintiff with regard to the change in ownership was immaterial. His bare belief with regard to the fact, even though founded upon reasonable cause, could not make the defendant liable. His first statement, which was stricken out, was based upon his own construction of the meaning and terms of the lease. There is no evidence to show that he ever saw the lease until long after the accident, and, in any event, its interpretation, and the effect to be given to it, were for the court.

In entering the judgment of nonsuit, the trial court was controlled by the fact that the lease was not executed for several days after the accident, and by the evidence of the officers of the steel company, called by the plaintiff, from which it appeared that the steel company did not take possession of the works of the iron company until the final execution of the lease, in the latter part of June.

It is undisputed that at the time when the accident occurred, the change was in contemplation, and had been for some time previous. Such a change, however, in so far as its physical aspect was concerned, could not be made at once. The properties of a large plant were to be transferred, and the change in name upon signs here and there, and upon the stationery, was of no importance, in so far as indicating the precise date of the transfer was concerned. That remains as a simple question of fact, and with respect to it we can find nothing in the evidence from which it may be fairly inferred that the steel company was in control of the plant, or that plaintiff had entered into its employment, at the time of the accident. The testimony of the officers and directors of the steel company who were examined by the plaintiff with regard to the execution of the lease shows that it was not executed until after the day of its date, which was May 25th. Their testimony was also uniformly to the effect that the iron company continued to operate the plant until the execution of the lease. The official notice of the change was issued upon June 28, 1899, in which it was announced that the Bethlehem Steel Company had taken the lease of all the property of the Bethlehem Iron Company, and that all officers, employes, and agents of the iron company would be continued by the steel company, with their present powers and duties, until further notice. The lease itself had been placed of record in the recorder's office of Northampton county upon June 30, 1899, and was open to the inspection of the plaintiff. He did not begin this action for more than a year thereafter. If he was then in any doubt with regard to the identity of his employer at the time of the accident, it would have been but the part of ordinary prudence to have made inquiry as to the fact from the defendant company. If he had done so, and had been misled in any way by the reply, the question of estoppel might have arisen. But he did not do this, and the defendant company was not bound to assume that he was ignorant of the true situation. The lease was a matter of public record, and there was no duty upon the part of the defendant company to volunteer further information to one who had the means of access to the record. The plaintiff had been for years in the employ of the Bethlehem Iron Company, and it is admitted that he had never received any notice, direct or indirect, from his employer, as to any change taking place. He would therefore have been perfectly justified in assuming that no change had occurred at the time of the accident, and in holding the Bethlehem Iron Company responsible for any neglect of duty to him in the course of his employment at that time.

It is true that the twelfth clause of the lease provides that the transfer of the possession of property under it shall be regarded as taking effect on May 1, 1899, and that

all business transacted by the said iron company on or after that date shall be for and on account of the said steel company. But this cannot be regarded as in any way shifting the liability of the iron company for a tort committed by it. Nor did it relieve the iron company of its primary responsibility for any act of negligence upon its part. It was nothing more than an agreement that, as between the two companies, the rental accrued to the iron company from May 1st, and the profits from the business went to the steel company from the same date, and that the latter company was bound to assume the obligations of the iron company and pay for all damages occasioned by the operation of the works after that date. This twelfth clause of the lease did not create any contractual relation of employer and employe between the plaintiff and the steel company. He remained in the employ of the iron company until the actual transfer occurred. If there was negligence resulting in injury to the plaintiff upon May 17th, it was that of the iron company, and was something for which it must respond directly in an action of tort.

We know of no authority which would justify the bringing of an action of tort against any other than the party which committed it. Agreements to indemnify against legal liability for the commission of a tort are common, but the legal liability must be established by suit brought directly against the wrongdoer. We cannot find in this case anything more than the surmise of the plaintiff to justify him in believing that any change in his employer had occurred at the date of the accident. For years previously he had been employed by the Bethlehem Iron Company. He had received no notice of any change. Why should he then assume the fact of a change? Had he made his claim against his old employer, everything would have favored the correctness of his assumption as to its liability. With his eyes open, and in the exercise of his own discretion, the plaintiff chose between the iron company and the steel company, and saw fit to make the latter defendant in this suit. The result was unfortunate, for the evidence failed to vindicate his choice. It was not shown that the steel company was his employer at the date of the accident, or that it owed him any duty at that time. Manifestly the wrong company was named as defendant.

The assignments of error are all overruled, and the judgment is affirmed.

DOWD v. CROW.

(Supreme Court of Pennsylvania. March 23, 1903.)

RELEASE — IMPEACHMENT — CONTEMPORANEOUS PAROL AGREEMENT — SHERIFF — SALE — DISTRIBUTION OF PROCEEDS.

1. A building contractor contracted with a trust company to advance money on a first

mortgage, the contractor to obtain a release of liens from subcontractors. Held that, where the contractor secured an unconditional release from certain subcontractors, one of them could not allege that he signed under a parol agreement that the paper should not be binding unless all signed, where the evidence showed that the contractor in so doing acted for himself, and not for the trust company.

2. In an action by plaintiff against a sheriff for wrongful distribution of the proceeds of a sheriff's sale plaintiff must show not only that he had a lien on the property, but also a right to participate in the profits, and the payment by the sheriff to persons not entitled to receive it.

3. Where a subcontractor releases his lien, and subsequently the sheriff, after sale of the property, in reliance on the lien, makes a distribution of the proceeds, the subcontractor has no ground of complaint against the sheriff.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Patrick Dowd against Alexander Crow, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

W. S. Roney and Joseph A. Robbins, for appellant. Frank P. Pritchard, Malcolm G. Campbell, and John G. Johnson, for appellee.

BROWN, J. This is a suit against the sheriff of Philadelphia county for damages which the appellant alleges he sustained by that officer's wrongful distribution of the proceeds of the sale of certain real estate. His claim is that of a mechanic's lien creditor, and he claims that his lien ought to have been paid out of the proceeds of the sheriff's sale. The sheriff, in the absence of any notice to the contrary, made the distribution himself, as was his right, without paying the money into court; but he, of course, did so at his own risk. *Franklin Township v. Osler*, 91 Pa. 160. In the distribution the claim of the appellant was ignored, because, with a number of other subcontractors, he had entered into a written agreement with the Integrity Title, Insurance, Trust and Safe Deposit Company, in consideration of its promise to advance \$20,000 to the contractor, that they would not file any liens or claims which would affect the first mortgages given to secure the said company for its advancement. The fund produced by the sale was insufficient to pay these first mortgages and other mechanic's lien creditors who had not waived their right to file liens, and the sheriff distributed the money, first, to those mechanic's lien creditors who had not waived their rights, and the balance proportionately to the mortgages, the proceeds being insufficient to pay them in full.

To avoid the effect of his agreement not to file a mechanic's lien, the appellant undertook to prove that it had been executed under a cotemporaneous parol agreement, which was the inducement to him and the others to sign it, that it should not go into effect un-

less all persons entitled to file mechanics' liens should sign it, and that, all such persons not having signed it, it was inoperative. Without passing upon the sufficiency of his proof to establish the alleged parol agreement, it is clear he was bound by the written one, because there was no proof that the oral one had been made with the Integrity Title, Insurance, Trust and Safe Deposit Company. True, the offer was to show that the appellant was induced to sign the agreement, and did sign it, "on the understanding, on the part of the Integrity Title, Insurance, Trust and Safe Deposit Company and its agent, that it should not be binding unless all the lien creditors assented to it"; but the proof submitted was otherwise. Franz Hoppe, the witness called to sustain the parol agreement, was the contractor who undertook the construction of the houses against which the mechanic's lien was filed by the appellant. He testified that he was to build 13 houses, and that the Integrity Title, Insurance, Trust and Safe Deposit Company had agreed to advance to him \$20,000 on first mortgages, but that, having heard its security might be affected by mechanics' liens, it demanded from him as additional security an agreement that their first mortgages should not be affected by such liens, and required the one upon which the appellee now relies. The company demanded it from Hoppe, and, that he might get the money promised to him, and without which he could not have gone on, he went to the different subcontractors, and asked them to sign the agreement, telling them that, if they did not all sign it, it would amount to nothing. It is clear he was acting only for himself, to enable him to get the money which the trust company had agreed to give him. When asked for whom he was acting, he did not say it was for the trust company, but answered: "Thirteen houses were to be built, and the Integrity Trust Company was to advance \$20,000 on first mortgages, and a \$10,000 bond was given by us to the Integrity Trust Company for the completion of the houses. Afterwards there was a complaint that their security was affected by some liens filed on previously built houses. They demanded as additional security that their first mortgages should not be affected by mechanics' liens, and they demanded the signing of this agreement." He does not say he was acting for the trust company, or that he had been authorized by it to say anything at all to the subcontractors. He simply states that the company demanded the agreement, and he procured it for his own purposes, as just stated. On its face it is absolute and unconditional. There is nothing in it which could possibly have indicated to the company that when it was signed by the different subcontractors any condition had accompanied their execution of it; nor was there any reason why the company should not have regarded it as having been executed

by all of the subcontractors, for it is a paper purporting in its first lines to have been signed by those who had "agreed to furnish the material and to do the work in the erection and construction" of the buildings. It was placed in Hoppe's hands by those who had signed it for the express purpose of enabling him to procure money from the company, and, in the face of his absolute agreement not to file a lien, the plaintiff cannot now he heard to say he is not bound by it in this suit against a public officer who acted upon it by paying the very parties it was intended to protect. If any wrong has resulted to the appellant, he made it possible by allowing Hoppe to make an improper use of the paper, if such use was made of it. "The true doctrine on this subject is," as was said in *Pennsylvania Railroad Company's Appeal*, 86 Pa. 80, "that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act." The jury were properly instructed that the agreement was valid, and could be enforced against the plaintiff.

But, even if the appellant could avoid the effect of his agreement, he failed to make out a case in the court below entitling him to recover. The action was originally in assumpsit, but on the trial was changed to trespass against the sheriff for a wrongful distribution; in other words, for negligence in the discharge of an official duty. In support of his claim that the distribution was improper, and that he ought to have been paid, the plaintiff proved nothing more than that certain properties, against which he had filed an apportioned lien, had been sold by the sheriff, and the proceeds had been distributed by that officer among certain other lien creditors, to the exclusion of himself. His position, as we understand it, is that, because he proved he had filed a lien against the properties sold, he had made out a prima facie case, and the burden was then upon the sheriff to show that the distribution had been properly made. That officer was not called upon to prove anything until the plaintiff had proved what he had charged in his statement as his cause of action. It was that the sheriff had not regarded his duty, and had not paid to the plaintiff a portion of the proceeds of the sale, but, on the contrary, had paid the same to persons who were not entitled thereto. The complaint is not that the officer had made distribution, but that he had made an improper one. There was no presumption that it was improper, and in this action, brought against the sheriff for his alleged tort, the rule is, as in all such cases, that the person charged with the wrongdoing is not called upon to prove anything until his adversary charging the tort has first proved it. The burden was upon the plaintiff to make out his case by showing, not only that he had a lien against the property sold, but that he had a right to participate in

the proceeds, and that the sheriff had paid the money to others who were not entitled to receive it. In the absence of any evidence that an improper distribution had been made, and that the lien creditors who were paid should not have received the money, this plaintiff could not have recovered, even if his agreement not to file his lien had not been in his way.

Judgment affirmed.

GAMBLE v. ELKIN et al.

(Supreme Court of Pennsylvania. March 23, 1903.)

BANKRUPTCY — ILLEGAL PREFERENCE — KNOWLEDGE OF CREDITOR—AFFIDAVIT OF DEFENSE.

1. A preference is voidable under the bankruptcy act if the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable ground to believe that it was intended thereby to give a preference.

2. A trustee in bankruptcy sued to recover an alleged preference received from a bankrupt. A statement alleged that defendant knew of the insolvency of the bankrupt at the date of the alleged preference. Held, that an affidavit of defense was sufficient which denied knowledge on the part of the defendant or agents of the insolvency, and reasonable cause to believe that the transaction was intended as a preference.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert G. Gamble, trustee of Hugh B. McKean, bankrupt, against Mark Elkin and others, to recover an alleged preference. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The statements of claim set out that the defendants and their agent well knew and had reasonable cause to believe that the transaction, of which complaint was made, was intended to give defendants a preference, and that the defendants and their agent knew that the bankrupt was insolvent.

Defendants in their affidavits of defense denied knowledge that the bankrupt was insolvent, and that the transfer was for the purpose of giving them a preference.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Ira Jewell Williams, for appellants. Julius C. Levi, for appellee.

POTTER, J. Recovery is sought in this case upon the ground, as set forth in the statement of claim, that the defendants obtained from Hugh B. McKean a preferential transfer of certain assets within four months of the time of the filing of a petition in bankruptcy against the said McKean. Under the national bankruptcy law, such a preference is voidable by the trustee in bankruptcy if the person receiving it, or to be benefited thereby, or his agent acting therein, shall

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 254-255.

have had reasonable cause to believe that it was intended thereby to give a preference. The plaintiff's right to recover therefore depends upon his ability to prove not merely that the transaction was a preference, but that the defendants or their agents had reasonable cause to believe that it was intended as such. This involves knowledge upon the part of the defendants of the insolvency of the bankrupt. The statement of claim therefore consistently charges that at the date of the transaction the defendants knew, and had reasonable cause to believe, that at that time, and for a long time prior thereto, the said Hugh B. McKean was insolvent. The affidavit of defense squarely meets and contradicts this essential averment. It denies knowledge of the fact of the insolvency at the time of the transfer. It avers that neither of the Dennys referred to in plaintiff's statement was acting as the agents for the defendants. It avers that the transaction was conducted in entire good faith, and with no intention to obtain any advantage or priority over any other creditor in violation of the bankruptcy law. It denies knowledge that the assets so transferred were the whole of the bankrupt's assets. The record shows a plethora of statements of claim and of affidavits of defense. This was, perhaps, owing in part to the lack of candor upon the part of defendants with regard to the constituency of their firm. But in the last of the series of affidavits of defense, while there is an apparent misprint, yet, as we understand it, the sweeping averment is made that neither the defendants, nor any of their agents, had knowledge of the insolvency of the bankrupt McKean. But in any event, in view of the numerous, and, as we think, sufficiently explicit, denials by the defendants of all knowledge upon the part of themselves or agents of the insolvency of McKean, and of reasonable cause to believe that it was intended to create a preference, the court below could not properly have refused to discharge the rule.

The judgment is affirmed.

PENNSYLVANIA R. CO. v. PENNSYLVANIA CO. FOR INS. ON LIVES & GRANTING ANNUITIES.

(Supreme Court of Pennsylvania. March 23, 1903.)

RAILROADS—PLEDGE OF STOCK—SUBSTITUTION OF COLLATERALS.

1. Where a railroad company deposits with a trustee, under a written agreement, stock of another railroad company, reserving to itself all the rights, powers, and privileges appertaining to the ownership of the stock, including the right to vote it, the railroad company can exact from the trustee a proxy in order to vote the stock for a merger of the railroad company, whose stock is deposited with another company, as authorized by law, though the trustee will be compelled to receive back, instead of the stock of the original company, stock in the consolidated company.

Appeal from Court of Common Pleas, Philadelphia County; Davis, Judge.

Bill by the Pennsylvania Railroad Company against the Pennsylvania Company for Insurance on Lives & Granting Annuities. Decree for plaintiff, and defendant appeals. Affirmed.

The trial court found the facts to be as follows:

"(1) Shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company to the number mentioned in the bill, belonging to the Pennsylvania Railroad Company, were deposited with the defendant, as stated in the bill, at the time therein stated, as collateral security for the performance by the railroad company of the agreement attached to the bill as Exhibit A.

"(2) Upon said deposit, said defendant company did issue its certificates in the form and to the extent set forth in the bill.

"(3) Certificates by the defendant company as trustee are now outstanding to the amount set forth in the bill, and there are now on deposit, under the terms of agreement with the corporation defendant as trustee, the number of shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company—part of those originally deposited—stated in the bill.

"(4) The holders of shares of stock of the Baltimore & Potomac Railroad Company and of the Philadelphia, Wilmington & Baltimore Railroad Company, representing almost the entire holding in each, have determined and are of the opinion that it will be beneficial to both of said railroad companies that they should be consolidated into a new company, to be called the Philadelphia, Baltimore & Washington Railroad Company, in the way and manner and under the terms and conditions set forth in the bill.

"(5) The Pennsylvania Railroad Company owns a much larger proportion of the shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company than of the Baltimore & Potomac Railroad Company, in which latter company there is a considerable holding—to the extent of nearly twelve per centum—by the Northern Central Railway Company.

"(6) The matter of the propriety of the consolidation of said railroad companies into the one railroad company upon the terms set forth in the bill is a question of judgment, fairly determinable by the holders of the shares of the respective companies.

"(7) By the terms of agreement under which said shares of Philadelphia, Wilmington & Baltimore Railroad Company are held by the corporation defendant it is, *inter alia*, provided: 'Until default shall be made in the payment of interest and minimum sinking fund or principal, as hereinbefore provided, the said trustee, or the trustee or trustees for the time being, shall permit and suffer the said party of the first part to retain all the rights, powers, and privileges belonging or

incident to the ownership of the stock hereby deposited, except as hereinbefore provided; and the said trustee, or the trustees or trustee for the time being, shall and will execute and deliver to the said Pennsylvania Railroad Company, or to such person or persons as may be designated either by its board of directors or by the president thereof, such powers, authorities, proxy or proxies irrevocable, from time to time, as may be necessary or expedient for carrying into full effect the powers hereby expressly retained and reserved by the said Pennsylvania Railroad Company, including, amongst other things, the right to appear at all stockholders' meetings and at all elections of the said Philadelphia, Wilmington & Baltimore Railroad Company, and to vote upon said shares of stock at such meetings or elections as fully as if these presents had never been made.'

"(8) The corporation plaintiff has demanded from the corporation defendant that the latter shall give to the former a proxy, which will enable it to vote at a meeting of the stockholders of the Philadelphia, Wilmington & Baltimore Railroad Company intended shortly to be held, in favor of the said consolidation with the Baltimore & Potomac Railroad Company.

"(9) The corporation defendant has refused to give the proxy because of its averment that there is no right on the part of the corporation plaintiff to demand the giving of such proxy, and because the result of giving the same, if the consolidation be voted, will be that the corporation defendant will be compelled to take in exchange for shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company, now held by it, shares of stock such as would be allotted in lieu thereof in the Philadelphia, Baltimore & Washington Railroad Company.

"Conclusions of Law.

"(1) Under the reservation of right to demand proxy, and to vote thereon, made by the corporation plaintiff when it deposited the shares of the Philadelphia, Wilmington & Baltimore Railroad Company with the corporation defendant, it is the duty of the latter to give the demanded proxy to the corporation plaintiff.

"(2) There was the fullest possible reservation on the part of the corporation plaintiff in the agreement to retain, until default, all rights, powers, and privileges belonging or incident to the ownership of the stock, saving the matter of payment of dividends thereon. There was also fullest reservation of a right to demand from time to time proxy such as might be necessary or expedient 'for carrying into full effect the powers' thus retained and reserved by the Pennsylvania Railroad Company, including the right to appear at all stockholders' meetings, and to vote upon the said shares of stock at such meetings, as fully as if the agreement had

never been entered into, or the stock deposited.

"(3) It is the right of the corporation plaintiff, under said reservation, to attend with a proxy to be given to it by the corporation defendant, and to vote in accordance with its own judgment upon the question of consolidation of the two railroad companies into the Philadelphia, Baltimore & Washington Railroad Company.

"(4) If at the meetings of the stockholders of the two companies a consolidation be ordered in accordance with law, it will be the duty of the corporation defendant to accept, in lieu of the shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company now held by it, the shares of stock in the new or consolidated company which shall be issued in lieu or place of the shares now deposited."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John C. Bell, for appellant. John G. Johnson, for appellee.

DEAN, J. At the argument of this case we had doubts whether the agreement of July 1, 1881, broad as is its language, implied a power to exact a proxy from the trustee, authorizing plaintiff to vote the remaining 160,000 shares of stock in favor of a merger of the Philadelphia, Wilmington & Baltimore Railroad, with two other railroads, into a new railroad corporation, to be known as the Philadelphia, Baltimore & Washington Railroad Company; that is, whether it could be fairly implied from the agreement that the trustee was bound to give to plaintiff a proxy, by which, in case the proposed merger should be accomplished, it was the duty of the trustee to accept, in lieu of the original shares, 240,000 shares of the stock of the new company. By so doing, the original subject of the contract, the Philadelphia, Wilmington & Baltimore Railroad, although physically the same, would, as a corporation, pass out of existence, and, although not destroyed, would lose its identity as a distinct and independent company, and the new certificates received would no longer represent, as a security, the old Philadelphia, Wilmington & Baltimore Railroad, but a new corporation, theretofore without existence—the Philadelphia, Baltimore & Washington Railroad Company. We concede that to carry the implication thus far is somewhat startling, yet a careful analysis of the agreement renders it inevitable. The sixth clause of the agreement reads thus: "Sixth. Until default shall be made in the payment of interest and minimum sinking fund or principal, as hereinbefore provided, the said trustee, or the trustees or trustee for the time being, shall permit and suffer the said party of the first part to retain all the rights, powers and privileges belonging or incident to the ownership of the stock hereby deposited, except as hereinbefore provided;

and the said trustee, or the trustees or trustee for the time being, shall and will execute and deliver to the said P. R. R. Company, or to such person or persons as may be designated either by its board of directors or by the president thereof, such powers, authorities, proxy or proxies irrevocable, from time to time, as may be necessary or expedient for carrying into full effect the powers hereby expressly retained and reserved by the said P. R. R. Company, including, amongst other things, the right to appear at all stockholders' meetings and at all elections of the said P. W. & B. R. R. Company, and to vote upon said shares of stock at such meetings or elections, as fully as if these presents had never been made." It will be noticed that the railroad company retains "all the rights, powers and privileges belonging or incident to the ownership of the stock, * * * except as hereinbefore provided." The right of the owner to vote the stock as he chose, unless restricted by public policy or legislation, was undoubted. No public policy forbade him to vote for the merger or consolidation of his company with one or more others. Express legislation authorized him to so vote. The title of the trustee was created, defined, and limited only by the agreement under which it held possession of the stock, subject to the rights of plaintiff to demand proxies for the exercise of all the rights incident to ownership. If the owner could exercise the right to vote for a merger, the plaintiff could demand from the trustee a proxy authorizing it to appear at a stockholders' meeting of the Philadelphia, Wilmington & Baltimore Company to vote upon the question of merging this company with two others into a new company. This was a right, by the express terms of agreement, incident to ownership. The trustee was bound to give it, although such purpose was not specially mentioned in the agreement. If it desired to withhold this extreme exercise of power, it should have so restricted the sweeping general language of the agreement by expressly prohibiting the right to vote, to destroy the identity of the old corporation. But the trustee reserved the right to refuse the proxy upon but one contingency—default of the railroad company to pay interest, sinking fund, or principal. It is not alleged that there was default in either particular.

As if to guard against any liability of the trustee because of the immense powers retained by the railroad company in the sixth clause, before quoted, the ninth clause is inserted, thus: "It is hereby further covenanted and agreed and this trust is accepted upon the express condition, that neither the said trustee, nor any successors in the trust, shall incur any responsibility or liability, by reason of permitting and allowing the said Pennsylvania Railroad Company to retain and reserve the power and authorities, heretofore provided for in regard to the stock of

the said Philadelphia, Wilmington & Baltimore Railroad Company."

The argument of appellant's counsel tending to show that a trustee has no right to sell or pledge the trust estate, or to vote it out of existence, in the shape it came into his hands, does not meet the point. The argument and the authorities cited in support of it are pointedly applicable to simple trusts. They demonstrate in such case the power of the trustee and the rights of the cestuis que trustent, and show that the power of the trustee extends only to the preservation and protection of the trust property, and without the consent of the cestuis que trustent he cannot incumber, sell, exchange, or convert the trust property. But this is not a simple trust. Every word of the agreement in which it had its inception, and without which it does not exist, shows it was a special trust, created by the parties for a special purpose, and so accepted by the trustee. The duties of the latter were fixed by the contract, and its liabilities defined by the contract, and that is all we can look to, to ascertain them.

We think the court below was right in its decree, and we therefore overrule all the assignments of error, and affirm it.

SHATTUCK v. AMERICAN CEMENT CO.
(Supreme Court of Pennsylvania. March 23, 1903.)

CORPORATIONS—TRANSFER OF STOCK—RIGHTS OF BONA FIDE HOLDERS—FRAUDULENT PLEDGE—SALE.

1. Where a certificate of stock, with power of attorney to transfer, is duly executed, but is blank as to the date and the name of the transferee, it puts the holder in a position to complete a sale by delivery of the certificate and transfer of the stock.

2. Where the owner of a stock certificate, with a power of attorney to transfer, has duly executed it, except as to the date and name of the transferee, he is estopped to assert title to it as against a third person who has in good faith purchased it, for value, from the apparent owner.

3. Where an owner of stock voluntarily gives to his brokers certificates of stock owned by him, but standing in the name of other parties, with blank assignments and power to make transfers, indorsed by the registered owners, and the brokers fraudulently pledge them, one who purchases from the pledgee may hold as against the original owner.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank R. Shattuck against the American Cement Company. Judgment for plaintiff. Defendant appeals. Reversed.

The case stated was as follows:

"On September 7, 1899, plaintiff purchased from Jamison Bros. & Co. 1,500 shares of the stock of the American Cement Company; being certificates Nos. 483 to 491, inclusive, and Nos. 503 to 508, inclusive; making, in

¶ 2. See Corporations, vol. 12, Cent. Dig. § 539; Estoppel, vol. 19, Cent. Dig. § 192.

all, fifteen certificates, for 100 shares each; each certificate being in form as follows:

"Temporary Certificate.

"No. 100 Shares.

"Capital Stock, \$2,100,000.

"210,000 Shares of \$10.00 Each.

"American Cement Company,

"Incorporated under the laws of the state of New Jersey.

"This certifies that Jamison Bros. & Co. is the owner of 100 shares of the capital stock of the American Cement Company, transferable only on the books of the company by the holder hereof in person or by duly authorized attorney on surrender of this certificate properly indorsed.

"Witness the seal of the company and the signatures of the duly authorized officers, affixed this sixth day of January, 1899.

"O. D. Van Duyn,

"President.

"J. S. Jenks, Jr.,

"Treasurer.

"Countersigned and registered.

"The Investment Company of Philadelphia,

"Jno. J. Collier,

"Secretary."

"These certificates were in the name of Jamison Bros. & Co., and contained upon the back a blank assignment and power of attorney, in the following form:

"For Value Received ——— hereby sell, assign and transfer unto ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ——— attorney to transfer the said stock on the books of the within-named company, with full power of substitution in the premises.

"Dated September 6, 1899.

"Jamison Bros. & Co. [Seal]

"Sealed and delivered in the presence of J. T. Biles."

"Each blank assignment and power to transfer was signed by Jamison Bros. & Co., and the certificates of stock, with the power of attorney and assignment thereon, so executed in blank by Jamison Bros. & Co., were delivered by them to the plaintiff.

"Plaintiff had been in the habit of transacting business with the firm of Stahl & Straub, of Philadelphia, who were bankers and brokers having an office at No. 505 Chestnut street, in the city of Philadelphia; the said firm being composed of Gustav Stahl and Joseph H. Straub. Plaintiff was attorney for the said firm, as well as a customer; and there was in the safe of Stahl & Straub, in their office, a large pocketbook or wallet, in which they were in the habit of keeping securities which belonged to their customers, and in this wallet was a large envelope, marked with the name of plaintiff, and in that envelope were a number of shares of stock and other securities which belonged to plaintiff and other persons, and which were

kept there, in the course of business, for safety. On September 7, 1899, plaintiff, having the fifteen certificates of stock in the American Cement Company above mentioned in his possession, while passing the office or place of business of said Stahl & Straub, stopped there, and handed the fifteen certificates of stock to a clerk in the office named Justus Straub, and instructed him to put the fifteen certificates of stock with the other securities belonging to plaintiff; and the said Justus Straub did then and there place the securities in the envelope marked with plaintiff's name, which was in the wallet or pocketbook which was in the safe in the office of the said Stahl & Straub. That no written or verbal authority was given by plaintiff to said firm of Stahl & Straub, or to either of the members thereof, or to any other person whomsoever, to use the said certificates of stock, or transfer the same, or take possession of the same, in any way, manner, or form, for any purpose whatsoever; and neither was any written or verbal authority given by plaintiff to Stahl & Straub, authorizing them to sell the same at any price, or to make delivery of the same to any person; and they had no right, title, or interest therein, nor any person any title or interest therein, except the plaintiff herein, Frank R. Shattuck. That Gustav Stahl, one of the partners in the said firm of Stahl & Straub, on September 12, 1899, without the knowledge or consent of his copartner, Joseph H. Straub, or of the plaintiff, removed the said fifteen certificates of stock from the envelope in which they had been placed, and, without any authority whatever from any person, took ten of the said certificates of stock, to wit, certificates Nos. 483 to 490, inclusive, and certificates Nos. 507 and 508 (each being for 100 shares, and amounting altogether to 1,000 shares), and removed the same from the said envelope, without any authority whatever to do so, and without the knowledge and consent of his copartner, Joseph H. Straub, and delivered the same to the Corn Exchange National Bank, who thereupon made a loan to the said Gustav Stahl of \$7,000, in the name of Stahl & Straub, upon the security of said shares, repayable on demand, with interest, and received from said Gustav Stahl the said ten certificates of stock assigned in blank by Jamison Bros. & Co. This loan was made by the bank in good faith, in the regular course of business, without any notice of the right, title, or interest of the plaintiff in the shares, and the said certificates were in nowise pledged to secure the payment of any antecedent indebtedness. On December 26, 1899, default having been made in the payment of the said sum of \$7,000, and interest, the said Corn Exchange National Bank, through Chandler Bros. & Co., brokers, sold 200 of the said shares at the Philadelphia Stock Exchange, for the sum of \$8 a share, to Charles D. Barney & Co.; and on December 23, 1899, at the same

place, sold 800 more of the said shares to Edward B. Smith & Co. for the price of \$8 per share.

"That the plaintiff herein, having ascertained on December 27, 1899, that his certificates had disappeared, sent a note to the defendant company, of which the following is a copy:

"December 27, 1899. American Cement Company—Gentlemen: In August of this year I purchased through B. K. Jamison 1,500 shares of stock of the American Cement Company, being certificates Nos. 483 to 491, inclusive, and Nos. 503 to 508, inclusive, which certificates of stock were left for safe-keeping only, with Stahl & Straub, bankers and brokers, they having no interest whatever in the same, nor any claim whatever upon the stock. Shortly afterwards, I sold 300 shares and three of these certificates were delivered to the purchaser, the numbers of which, however, I am at present unable to give. The other twelve certificates, amounting to 1,200 shares, have been stolen and are now in the possession of some person or persons to me unknown. You are therefore notified and required not to permit any transfer to be made upon your books of any of these certificates without notice to me, and if any person applies for a transfer of any of these certificates, I require that you shall give me notice, in order that I may take proper legal steps for securing possession of the same.

"Yours truly, F. R. Shattuck."

"In response to this letter, said defendant company, under date of December 28, 1899, wrote to the plaintiff as follows:

"December 28, 1899. Mr. Frank R. Shattuck, Philadelphia—Dear Sir: In response to your note of December 27, 1899, stating that certain certificates of stock of this company have been stolen from you, and notifying us not to transfer the same without previous notice to you, we notify you that application was made December 27, 1899, by C. D. Barney & Company, bankers of this city, for the transfer of certificates 488 and 489 which are as yet not transferred. We desire to know immediately whether either of these certificates are those you state as having been sold by you, or whether they are included in those you allege to have been stolen.

"We further advise you, certificate No. 491 was transferred last September 26th to C. F. Osgood Company, and the following certificates were transferred in November: Certificate No. 503 to Jos. S. Lovering; No. 504 to Jos. S. Lovering; No. 505 to Wm. J. Baldy; No. 506 to W. H. Castle.

"We further suggest that you communicate immediately with our counsel, Mr. Henry C. Boyer, No. 537 Chestnut street, and give him fuller particulars respecting the loss of your certificates.

"Yours truly,

"American Cement Company,

"R. W. Lesley, President."

"And under date of December 29, 1899, plaintiff replied in a letter addressed to Henry C. Boyer, Esq., of which the following is a copy:

"December 29, 1899. Henry C. Boyer, Esq., No. 537 Chestnut Street—Dear Sir: On the 27th inst. I addressed a letter to the American Cement Company in regard to some stock and in reply they have referred me to you as their attorney.

"The facts in this matter are as follows:

"When the original subscriptions to the stock of the American Cement Company were offered to the public I personally subscribed to 1,500 shares upon the subscription list held by Jamison Bros. & Company. I subsequently paid them \$15,000 and received 15 certificates of 100 shares each in the name of Jamison Bros. & Company, and by them indorsed; the certificates were numbered 483 to 491 and 503 to 508.

"All of these certificates I deposited for safe-keeping with Messrs. Stahl & Straub. Subsequently I sold 300 of these shares but do not know the numbers of the certificates delivered to the purchaser.

"Since the failure of the firm of Stahl & Straub, I find that they deliberately stole the remaining 12 certificates, and on the 27th inst. I notified the American Cement Company of this fact and requested them not to transfer the stock without notice to me.

"I am now informed that on the same day two of these certificates were presented for transfer by C. D. Barney & Company and your clients desire instructions as to what to do.

"I am making further inquiry and using my best efforts to identify the actual certificates legitimately sold, and the numbers of the ones stolen, and will furnish you with this information as soon as I obtain it.

"Yours very truly, F. R. Shattuck."

"Under date of January 2, 1900, said Henry C. Boyer, Esq., attorney for the defendants, wrote a letter to the plaintiff, of which the following is a copy:

"January 2, 1900. Frank R. Shattuck, Esq., No. 800 Betz Building—Dear Sir: I am advised by the American Cement Company that certificates of the stock of that company, Nos. 483, 484, 485, 487, 490, 507 and 508, and which correspond with certain numbers of certificates which you allege to have been stolen from you, were to-day presented by Edward B. Smith & Company, the Bourse, for transfer, and transfer was refused in accordance with my instructions upon your notice.

"This leaves out but one certificate, No. 486, unaccounted for, and I now insist that the company be relieved from further embarrassment in this matter by your immediately filing a bill in equity to restrain the transfer.

"Yours truly, Henry C. Boyer."

"And on January 4, 1900, the defendant company, having been indemnified by the Corn Exchange National Bank for any loss

or damage which they might sustain by reason of such transfer, permitted the ten certificates of stock, for 100 shares each, to be transferred upon the books of the company, and new certificates issued for the same. That the market price of the said stock between December 26, 1899, and January 5, 1900, was as follows:

		High.	Low.
1899.			
December	26.....	7 $\frac{3}{4}$	7 $\frac{3}{4}$
	27.....	8 $\frac{1}{2}$	8
	28.....	8 $\frac{1}{2}$	8 $\frac{1}{4}$
	29.....	8 $\frac{1}{2}$	8
	30.....	9	8 $\frac{1}{2}$
January	2.....	8 $\frac{1}{2}$	8 $\frac{1}{2}$
	3.....	8 $\frac{1}{2}$	8 $\frac{1}{2}$
	4.....	8 $\frac{1}{2}$	8 $\frac{1}{2}$
	5.....	9	8 $\frac{1}{2}$

"If the court be of the opinion that, under the facts above stated, the plaintiff is entitled to recover the value of said stock, then judgment to be entered for the plaintiff for the value of the same as of the date that his right of action began, with interest thereon to date of judgment. If the court be of opinion that plaintiff is not entitled to recover, then judgment to be entered for the defendant. Each party reserves the right to appeal from the judgment of the court hereon."

The court, without filing an opinion, entered judgment for plaintiff for \$10,250.62. Defendant appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richard C. Dale, Henry C. Boyer, and Samuel Dickson, for appellant. E. O. Michener and John G. Johnson, for appellee.

BROWN, J. It seems to be useless for us to call the attention of some of the lower courts to the propriety of an opinion containing the reasons for entering a judgment where reasons manifestly ought to be given. In the present case, reasons for the judgment entered certainly ought to have been given, and it is to be regretted that the learned court withheld them.

When the appellee purchased the stock from Jamison Bros. & Co., they handed to him proper certificates, with an assignment and power of attorney on the back of each, signed by them in blank. They parted with all their interest in the stock, and, when they delivered the certificates to their vendee with their signatures to the blank assignments and powers of attorney, they gave authority to him to insert his own or any other name as the transferee of the stock, and to designate any one as the attorney to make the formal transfers on the books of the American Cement Company. That the stock was transferable only on the books of the company by Jamison Bros. & Co., to whom the certificates had been originally issued, was a condition inserted in the certificates only for the convenience and protection of the corporation itself (*Commonwealth v. Watmough*, 6 Whart. 117), and in

no manner affected the title of Shattuck, which was absolute upon the delivery of the certificates to him. There was nothing either on the face or back of any one of them to indicate that they belonged to him. The evidence of the ownership of the stock, as gathered from each certificate, was that it had been originally issued to Jamison Bros. & Co.; that, for a valuable consideration, they had sold it to an unnamed vendee; and that whoever might have possession of the certificates as the purchaser directly from the firm, or through some one to whom they had sold and delivered them in the first instance, should be regarded and dealt with as their owner. The evidence of Shattuck's title was not a transfer to him, but was his possession of the certificates, which, it is to be fairly presumed, were handed to him by the brokers from whom he had purchased, with the transfers in blank, because he had so requested for his own convenience, if he should wish to dispose of them to others without going through the formality of transfers upon the books of the company. Instead of having himself named as transferee, he saw fit to take the certificates in the shape in which they are usually handed over to purchasers from brokers, knowing that his possession of them would be regarded as the evidence of his title and his authority to insert proper names in the blank transfers and blank powers of attorney. Upon presentation of them to the company by himself, or others acquiring title through him, he or they at any time could have demanded and would have received new certificates in their own names. If he had sold his stock to another, nothing more would have been required of him than a mere delivery of the certificates to the vendee, and so they could have passed from hand to hand; each succeeding vendee having implied authority from Jamison Bros. & Co., the original holders, to fill up the blanks, though there was no necessity, either in law or according to the usages of trade, to do so, until some purchaser wished to keep them as a permanent investment, or feared to allow them to remain in a condition which might cause serious consequences if they should get into hands for which they were not intended. With the certificates in this shape, Shattuck intrusted them to the safe-keeping of his brokers, and the question is whether he shall suffer the consequences of their bad faith to him, or the same shall fall upon another, who acted in good faith with the brokers as the holders of the certificates, possessing, according to the usages of trade, the indicia of ownership of the stock. The appellee could have absolutely protected himself from the loss which has befallen him through the perfidy of Stahl by having had his name inserted as the transferee of the stock, but he did not do so. He followed one of the well-settled usages of the financial world, by taking a blank transfer

of the stock, which, with the delivery of the certificates to him, was all he needed for the purpose of acquiring the absolute title to the securities. As a rule, stocks are so sold and bought in this busy age, and pass from seller to buyer, quasi negotiable. Occasionally real owners of certificates of stock so transferred to them in blank may be, as in this case, the victims of those to whom they are intrusted in confidence that there will be no abuse of the indicia of ownership; but, notwithstanding such abuse, those who sell and buy stocks in financial communities will continue to sell and buy them as they were sold and bought here. The convenience and necessities of commercial centers will always require such a usage. With full faith in the integrity of Stahl & Straub, bankers and brokers, with whom the plaintiff below had been in the habit of transacting business, he left his certificates of stock with them for safe-keeping. He had been not only their customer, but had acted as their attorney, and there was nothing to lead him to think that the certificates would not be returned to him whenever he should call for them. Instead of keeping them safely, Stahl took them from the envelope in which they had been placed, and pledged them to the Corn Exchange National Bank, which, in good faith, made a loan to him in the name of Stahl & Straub; and the only question is whether this bank, which has indemnified the American Cement Company, or the appellee, shall bear the loss caused by the bad faith of Stahl. Upon principle and authority, the question can hardly be regarded as an open one.

As applicable to the facts in this case, we adopt the language of our Brother Mitchell in his dissenting opinion in *Ryman v. Gerlach*, 153 Pa. 197, 25 Atl. 1081, 26 Atl. 302, which is in harmony with the view entertained by the majority of the court: "A certificate of stock, with a power of attorney to transfer, duly executed, but in blank as to date and name of transferee, is in the position of merchandise prepared for market. That is the way sales and transfers of stock are usually made, and the presumable intent of executing the power to transfer is to put the holder in position to complete a sale by delivery of the certificate and transfer of the stock. Such transfer carries *prima facie* a good title. The business of a stockbroker is to buy and sell stock, and, when a certificate and power to transfer are put into a broker's hands, the situation is exactly analogous to that of goods or merchandise of any kind prepared for market, and put into the hands of a dealer in that particular article. The presumption which would arise in the case of an ordinary agent or holder is re-enforced by the nature of this particular agent's business." When the certificates of stock, with the transfers in blank indorsed upon them, were placed in the hands of Stahl & Straub by Shattuck, he acted innocently and in good faith, but another, equal-

ly innocent, dealt with one of the men to whom he had intrusted his stock with all the indicia of ownership; and, if one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer for the consequences of the wrongdoing. *Bank of Kentucky v. Schuylkill Bank*, 1 Pa. Eq. Cas. 248; *Burton's Appeal*, 93 Pa. 214; *Ryman v. Gerlach*, *supra*; *Goodwin v. Roberts*, L. R. 1 App. Cas. 476. There was nothing to indicate to the Corn Exchange National Bank that Stahl & Straub were not the owners of the certificates. They presented them in the regular course of business to the bank for the purpose of procuring money upon them, and there was nothing to put the bank on inquiry as to the right, title, or interest of the plaintiff below, or any one else, in the shares of stock. The bank took them in good faith, and its title to them cannot now be impeached by the unfortunate appellee. "The rights of a bona fide holder, as against the true owner of the stock, to whom the apparent owner has either sold or pledged, do not depend on a negotiable character in the certificates, but rest on another principle, 'namely, that one who has conferred upon another, by a written transfer, all the indicia of ownership of property, is estopped to assert title to it as against a third person who has in good faith purchased it for value from the apparent owner.' As a general rule, the vendor or pledgor can convey no greater right of title than he has. Simply intrusting the possession of a chattel to another as a depositary, pledgee, or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. The mere possession of chattels, without evidence of property or authority to sell from the owner, will not enable the possessor to give good title. But if the owner intrusts to another the possession of property, and also written evidence of title and power of disposition over it, as respects innocent third persons, he is deemed as intending it shall be disposed of at the pleasure of the depositary. If there be conditions on which this apparent right of control is to be exercised, not expressed on the face of the instrument, the case, in principle, is like that of an agent who receives secret instructions qualifying or restricting an apparent absolute power. If the owner of the stock voluntarily gives certificates, with blank assignment and power to make transfers, to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers whose money the brokers were thereby enabled to obtain. The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security till his debt be paid. 'A person loaning money on such

certificate and power has a right to believe that the borrower from whom he receives them has an absolute right to pledge the stock.' By commercial usage, a certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. *Moore v. Metropolitan National Bank*, 55 N. Y. 41 [14 Am. Rep. 173]; *McNeil v. Tenth National Bank*, 46 N. Y. 325 [7 Am. Rep. 841]; *Prall et al. v. Tilt et al.*, 28 N. J. Eq. 479; *Bridgeport Bank v. New York & New Haven Railroad Co.*, 30 Conn. 275; *Mt. Holly, etc., Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Wood's Appeal*, 92 Pa. 379, 37 Am. Rep. 694.

We need not pursue this discussion further than to say that *Pennsylvania Railroad Company's Appeal*, 86 Pa. 80, is conclusive that the judgment below should have been in favor of the defendant. In that case, Samuel P. Fearon in 1860 pledged certain shares of stock as collateral security for a loan, transferring the certificates in blank. At the maturity of the loan he paid the debt, and the shares were returned to him, but the blank transfers and powers of attorney, as executed, were never canceled. Five or six years after his death his executrix took the certificates of stock, and deposited them for safe-keeping with her lawyer, a member of the bar in good standing. Creeley, the lawyer to whom they had been intrusted, used them to secure a personal loan; and Shultz, to whom he delivered the certificates of stock, had the same transferred to himself on the books of the company. On a bill to require the *Pennsylvania Railroad Company* to issue to the executrix of Samuel P. Fearon duplicate originals of the certificates of stock so transferred to Shultz, the court below directed a decree in favor of the plaintiff. In reversing that decree, while attention was called to the negligence of the railroad company, we said: "But there certainly was negligence on the part of the appellee. As executrix, she placed the certificates in the hands of Creeley, as her attorney, with the blank powers indorsed, uncanceled. Thus by her act he was enabled to commit this fraud. The equities of the respective parties are not equal. Where one of two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As Judge King has well expressed this principle in *The Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 248: 'The true doctrine on this subject is that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences

of the act.' The appellee in this case selected the attorney. She had entire confidence in him. She placed these certificates, with the blank powers, in his hands. He proved unworthy of the trust reposed in him. He perpetrated a gross fraud, by which he converted this property to his own use. That he was an attorney at law in good standing does not help her case. He added to the crime of which he was guilty that of moral perjury, by the violation of his official oath. On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent? This important element in the case was entirely overlooked by the learned master and the court below; and we think, applying it to the undisputed facts of the case, the appellee's bill, as to the appellants, ought to have been dismissed."

In the present case there was no negligence on the part of the *Corn Exchange National Bank*. It is conceded that it took the stock from *Stahl & Straub* in good faith, in the regular course of business, without any notice of the right, title, or interest of the plaintiff in the certificates. Indeed, there was nothing that the *Corn Exchange National Bank* could or ought to have done that it did not do. If, in the exercise of extraordinary caution, which was not required of it, it had gone and made inquiry of the only persons who could have informed it as to whom the stock had been sold, it would have been informed by *Jamison Bros & Co.* that they had parted with all interest in the securities, and had sold them to Mr. Shattuck, with authority in him to pass them by delivery to any one who might have purchased them from him. As stated, the question raised on this appeal is no longer debatable.

The judgment of the court below is reversed, and the record remitted, with direction to enter judgment in favor of the defendant.

THURBER v. SMITH.

(Supreme Court of Rhode Island. March 2, 1903.)

MORTGAGES—PAYMENT BEFORE MATURITY—CONSIDERATION—OFFER AND ACCEPTANCE—TENDER—WAIVER.

1. A mortgagee's agreement to receive less than the amount due, in full payment in consideration of the mortgagor's satisfaction of the mortgage before maturity, is based on a sufficient consideration.

2. Where a mortgagee promised to accept less than the amount due, in consideration of the mortgagor's payment of the mortgage before maturity, but before such payment was made the mortgagee notified the mortgagor that he had sold the mortgage for its face, such notice constituted a waiver of a tender by the mortgagor as a condition precedent to his right to recover for breach of contract.

3. Where a mortgagee agreed to receive less than the amount due, for payment before ma-

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 242.

turity, but before his offer was accepted he notified the mortgagor that he had sold the mortgage for its face, such notification constituted a withdrawal of his offer.

4. Where a mortgagee offered to receive less than the amount due, for payment before maturity, and the mortgagor answered that he would like to accept the offer, and expected to have the money to do so in about two weeks, such answer did not constitute an acceptance of the offer.

Exceptions from District Court, Providence County.

Action by Walter Thurber against Hallis N. Smith. On exceptions to ruling of the district court. Judgment for defendant.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Huddy & Easton, for plaintiff. Frank H. Wildes, for defendant.

STINESS, C. J. The plaintiff gave a mortgage to the defendant for \$200, due March 19, 1902. August 1, 1901, the defendant wrote to the plaintiff as follows: "Providence, R. I., August 1, 1901. Walter Thurber—Dear Sir: Your mtge. calls for interest less than I generally get, and knowing I can let the money out to better advantage if I could get it in, I am willing to allow you \$20 discount, if you can raise the money or find somebody else to take it up this month. I have offered this same com. elsewhere, and give you the same opportunity. Very truly, H. N. Smith." The plaintiff replied on the 8th day of August, A. D. 1901, by letter: "I would like to accept the offer, and expect to have the money for it in about two weeks." August 21, 1901, the defendant notified the plaintiff, by letter, that he had sold the mortgage for its face. August 30, 1901, the plaintiff went to the defendant and offered to pay the \$180, but made no formal tender of that sum.

Upon these facts the court ruled that there was consideration for a contract in obtaining the \$180 before it was due; that the letter of August 8th was not such an acceptance by the plaintiff that the defendant could sue for its breach, and therefore not a technical acceptance; that the defendant's notice of a sale of the mortgage to a third party did not act as a withdrawal of the offer; that the offer was open on August 30th; that the plaintiff's statement on that day was an acceptance; and that the statement of the defendant that he had sold the mortgage, and that it was too late to accept the offer to take it up, was a waiver of objection to the form of tender. The defendant took exception to these rulings, except that on the letter of August 8th, and the court gave judgment for the plaintiff in the sum of \$32.

It is an elementary principle that the payment of money before it is due is a good consideration for a contract. *Righter v. Stall*, 3 Sandf. Ch. 608; *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88; *Bowker v. Childs*, 3 Allen, 434. The latter decision quoted from Pin-

nel's Case, 5 Coke, 117, as follows: "In the case at bar it was resolved that the payment and acceptance of parcel before the day, in satisfaction of the whole, would be a good satisfaction in regard of circumstances of time; for, peradventure, parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material." This is exactly the consideration set forth in the defendant's letter of August 1, 1901. The exception to the ruling of the court below as to consideration of the contract is overruled.

The court also ruled that the notice of a sale of the mortgage operated as a waiver of objection to the form of tender. The defendant's letter was express notice that he no longer had the mortgage to deliver. His statement to the plaintiff on August 30th that it was "too late to accept Mr. Thurber's offer to take up the mortgage" was an express declination to perform the offer, and this would excuse the plaintiff from making a tender. *Bicknell v. Waterman*, 5 R. I. 43; *Lee v. Stone*, 21 R. I. 123, 42 Atl. 717; *Holmes v. Holmes*, 9 N. Y. 525; *Lake Shore v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.

The ruling that the offer was still open on August 30th, when the plaintiff offered to pay the \$180, was, in our opinion, erroneous. The court must have held that there was no withdrawal because the notice did not make an express statement to that effect. Such a construction of the letter is too strict. The letter must be taken as it would ordinarily be understood in business affairs. It is possible to infer that, although the defendant had sold the mortgage, he might be able to buy it back again, and so comply with his offer; still this would not be the natural construction. If A. offers to sell a horse to B. within 10 days, and, before the offer is accepted, notifies B. that he has sold the horse, we can hardly conceive that this would not be regarded as a revocation of the offer. The fact of a sale would show that the person giving the notice no longer had the power to carry out the offer. If such was not the purpose of the notice, it would be meaningless. We think that its purpose and effect was a revocation of the defendant's offer. If this be so, judgment should have been for the defendant, for, before acceptance, he had the right to withdraw his offer.

The ruling that the plaintiff's letter was not an acceptance was not excepted to by the defendant, being in his favor, and is not before us on exception. It is proper to add, however, for further proceedings in this case, that we think that this ruling was correct. The letter did not accept the offer expressly or impliedly. The words, "I would like to accept," and "expect to have the money for it in about two weeks," imply a willingness to accept, but a doubt as to ability. Suppose, upon the ground of a completed contract for earlier payment, the defendant had

sought to foreclose his mortgage or to sue upon the note. The defendant could have urged with much force that he had not accepted the offer, but had simply expressed a desire to do so. An acceptance of an offer must be definite, unambiguous, and unqualified—such as to complete a contract. In *Martin v. Northwestern Co.* (C. C.) 22 Fed. 596, an offer of coal upon specified terms was replied to as follows: "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week." This was much more definite than the letter in this case, but it was held that there was no definite contract and acceptance thereof. *Brewer, J.*, said: "It is not 'I accept your offer,' but 'You may consider the coal sold.' It is not, perhaps, a natural expression when a definite acceptance of an offer is intended. It is more equivalent to this: 'There is so little to be settled, and I am so sure that all can be arranged, that you are safe in looking at the sale as closed, and prepare to make your arrangements accordingly.'" In *Potts v. Whitehead*, 23 N. J. Eq. 512, to an offer to sell land the reply was: "Have twice attempted the tender of the first payment of \$500 upon the agreement made between us on the 7th December last. I will meet you," etc., "when I shall be ready to make tender of the money and execute the proper agreements thereupon." It was held that this letter was not, either in terms or substantially, an acceptance of an offer, and concluded no contract. In *Myers v. Smith*, 48 Barb. 614, an offer of malt "delivered on boat" was accepted as "deliverable on boat," and it was held that this was not an acceptance of the offer. In *Havens v. American Co.*, 11 Ind. App. 315, 39 N. E. 40, the words, "I am prepared to make the arrangement with you," were held not to be an unqualified and unequivocal acceptance. In *Carr v. Duval*, 4 Pet. 77, 10 L. Ed. 361, the rule is stated that if it be doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance. In *Hutchinson v. Bowker*, 5 M. & W. 535, an offer was made of a quantity of good barley, with terms stated. The reply was: "Of such offer we accept, expecting you will give us fine barley and full weight." The jury found that there was a distinction in the trade between good and fine barley, but that it was not applied in the letter in that particular sense. The court held that the meaning was ambiguous, and hence no acceptance. See, also, *Isham v. Therasson*, 53 N. J. Eq. 10, 30 Atl. 969; *Marschall v. Eisen*, 7 Misc. Rep. 674, 28 N. Y. Supp. 62.

We think the terms of the letter in the case at bar were ambiguous, and so no acceptance, from which it follows that the defendant had the right to revoke his offer, which he did by his notice of sale of the mortgage, and therefore judgment should have been for the defendant.

Exceptions sustained, and case remitted to the Sixth District court, with direction to enter judgment for the defendant.

GRANITE BLDG. ASS'N v. GREENE et al. (Supreme Court of Rhode Island. Feb. 14, 1903.)

LANDLORD AND TENANT—COVENANTS—USE OF PREMISES—SALE OF LIQUOR—CONTINUING COVENANTS—BREACH—WAIVER—FORFEITURE—ACTIONS—EVIDENCE.

1. Where, in an action to recover possession of a rented tenement for breach of covenant, the evidence failed to show that one of the defendants was ever in possession of the premises, or that he took any part in subletting them for a purpose prohibited by the lease, a nonsuit as to him was properly granted.

2. Where, in an action to recover possession of leased property for breach of a covenant prohibiting the use of the same for the selling of liquors, defendant's surety on a statutory bond, given in the course of the trial, collected from defendant and paid to the plaintiff the rent accruing during the time liability on the bond continued, and the receipts given by plaintiff to such surety for the rent contained a provision that the money so paid was received without prejudice to plaintiff's right to eject defendant for breach of such covenant, defendant was entitled to prove the relations existing between him and his surety, for the purpose of showing that the latter had no authority to bind defendant by the agreement expressed in the receipts.

3. Where a lease provided that no part of the premises should be used for the sale of intoxicating liquors, and a subsequent assignee of the lease, notwithstanding the lessor's refusal to waive the covenant, rented a part of the property to a licensed liquor seller, who maintained a saloon therein, such act constituted a continuing breach of the covenant; and the landlord's acceptance of rent, with knowledge of the facts, only constituted a waiver of the breach of covenant which had accrued up to that time, and did not deprive him of the right to declare a forfeiture of the lease for a subsequent breach.

Action by the Granite Building Association against William R. Greene and another. Verdict in favor of defendants, and plaintiff moves for a new trial. Granted.

Argued before TILLINGHAST, ROGERS, and DOUGLAS, JJ.

William A. Morgan, for plaintiff. Irving Champlin, for defendants.

TILLINGHAST, J. This is an action of trespass and ejectment, and is brought to recover possession of stores Nos. 15 and 16 on Market Square, in the city of Providence. The following facts appeared in evidence at the trial of the case in the common pleas division: On the 1st day of April, 1898, the plaintiff leased to George N. Harris and Henry L. Greene the two stores upon the first floor of the Granite Building located at the corner of North Main street and Market Square, in the city of Providence, numbered 15 and 16 on said Market Square, together with the basements or cellar rooms directly

† 3. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 345.

beneath said stores, for the term of 10 years, at a yearly rental of \$4,000, payable in monthly installments of \$333.33 on the first business day of each month, in advance. The lease contained a covenant that it should be terminated, at the option of the lessor, in case of breach by the lessees of any of their covenants therein contained. One of the covenants of the lessees was that they would not sell liquor upon said premises, except in the due course of their business as druggists. The lessees took possession under the lease, and carried on the business of druggists until some time in January, 1901, when they sold out and assigned their interest in the lease to the defendants, as claimed by the plaintiff, while the defendants claim that said sale and assignment was made to the defendant William R. Greene individually. Immediately after the sale said William R. Greene took possession of the leased premises, and carried on a drug business at No. 16 Market Square; paying rent regularly to the treasurer of the plaintiff corporation by his personal check, the receipts for which rent were given to him personally. About August, 1901, the store No. 15 Market Square became vacant; and the defendant William R. Greene requested Frank P. Comstock, who was a director in the plaintiff corporation, to waive the covenant against liquor selling, so that he might sublet the store as a liquor saloon, but said Comstock refused this request. Said William R. Greene, however, did sublet store No. 15 to one Charles N. Denault, to be used for the sale of intoxicating liquors; and the plaintiff contends that said subletting was in violation of the covenant of the lessees, and entitles it to recover possession of the premises discharged from the lease.

The case now before us was brought in the district court of the Sixth Judicial District (the writ having been issued on the 2d day of August, 1902), where, upon trial, the defendant George C. Greene was adjudged to be not in possession of the premises in question, and decision was rendered in his favor for costs. Decision was rendered for the plaintiff, however, against the defendant William R. Greene, for possession and costs, whereupon the defendant William R. Greene claimed a jury trial, and the case was certified to the common pleas division. The record shows that the plaintiff also claimed a jury trial as against the defendant George C. Greene, who was held not to have been in possession of the premises, by the district court, as aforesaid. At the trial of the case in the common pleas division, the presiding justice granted a nonsuit as to the defendant George C. Greene, and allowed the case to go to the jury as to the liability of the defendant William R. Greene. The jury returned a verdict in favor of the defendant William R. Greene, and the case is now before us upon the plaintiff's petition for a new trial upon the grounds (1) that the presiding justice

erred in nonsuiting the plaintiff as to the defendant George C. Greene; (2) that he erred in admitting certain testimony offered by the defendant; (3) that he erred in his charge to the jury; and (4) that the verdict was against the evidence, and the weight thereof.

1. An examination of the evidence fails to show that the defendant George C. Greene was ever in possession of the premises in question, or that he took any part in subletting them to Denault for use as a liquor saloon. The nonsuit as to him, therefore, was properly granted.

2. The second ruling complained of was that the defendants' counsel was permitted to interrogate William R. Greene as to the relations existing between himself and one William H. Shaw, as to certain receipts given to the latter by plaintiff's attorney after the commencement of proceedings to eject the defendants from said premises. It appears that Shaw was surety on a statutory bond given by William R. Greene on his claim for a jury trial in a prior action brought by the plaintiff against these defendants for the possession of the premises in question, in which action the plaintiff was nonsuited, and also that said Shaw was surety on the statutory bond of William R. Greene on his claim for jury trial in the present action, and that, in view of the liability thus incurred by Shaw, he took care to protect himself by collecting from the defendant William R. Greene and paying to the plaintiff the amount of the rent which accrued during the time that this liability on said bonds continued. The object of the defendant's counsel in interrogating said William R. Greene in relation to the receipts referred to was to show that the latter had not made or agreed to, and had not authorized his bondsman, Shaw, to make or agree to, the reservations contained in the receipts offered in evidence, which reservations were to the effect that the rent or money received by the plaintiff from Shaw for the use and occupation by the defendants of said premises was received without prejudice to the rights of the plaintiff to eject the defendants for the breach of their covenant aforesaid. We think the testimony was properly admitted for the purpose of showing or tending to show that the defendant William R. Greene was not bound by the acts of his bondsman in the premises.

3. The third ground upon which the plaintiff moves for a new trial is that the presiding justice erred in charging the jury that they were to determine whether or not the plaintiff, by reason of its having accepted an installment of rent from the defendants in January, 1902, had waived its right to terminate the lease under which the defendants were tenants of the plaintiff, on account of the breach by the defendants, who were the assignees of the lessees, and hence bound by the terms of the lease, of the covenant not to sell liquor upon the premises. In charging

the jury, the court said: "There is practically but a single issue for you to consider: * * * The lease in question contains a clause that the selling of intoxicating liquors shall not be carried on there, except in the ordinary course of the druggist's business. It is conceded at the present time that the business of a licensed liquor seller is carried on. That would make a forfeiture of the lease, irrespective of the fact that the rent had been paid, unless there had been some acts on the part of the plaintiff which amount to a waiver of the right to insist upon that forfeiture; and that is the only question for your consideration. And as you find upon this question of the waiver or no waiver will your verdict be either for the plaintiff or defendant. * * * It is for you to decide whether or not there has been a waiver of the right to insist upon a forfeiture, and, so far as rent is concerned, you will go no further than the 1st day of February, and for this reason: Since February it is testified that rent has been paid under this agreement—that the rights of the parties should be preserved as they were on the 1st day of February. So taking rent since the 1st day of February is not to be construed as binding one side or the other. When you come to consider the evidence, if you are of the opinion that the corporation had notice in December when this man went in there, and waived its right to insist upon the forfeiture contained in the lease, then, if that right was waived, it is still waived. If they did not waive it then, they have not waived it since, for the purposes of this case, and you will proceed to give your verdict accordingly. The question of rent is not to be considered by you since the 1st day of February, because that was paid under an agreement which protects the rights of the parties as they were on the 1st day of February." The plaintiff's counsel took an exception to that part of the charge which was to the effect that the jury were to determine whether the acceptance of rent in January, 1902, was a waiver of the plaintiff's right to insist upon a forfeiture of the lease. That is to say, as we understand it, the exception was to the instruction that it was competent for the jury to find that if the plaintiff accepted the rent for January, 1902, after knowledge on its part of the violation by defendants of the covenant aforesaid, it had waived its right to insist on the forfeiture of the covenant in the lease; the court saying "that, if the right was then waived, it is still waived." In view of the facts which appeared in evidence relative to the continued violation by the defendants of the covenant in question, we are of the opinion that the rule as thus laid down by the court was too narrow. For while it is doubtless true that, as a general rule, a waiver of a forfeiture occurs by an acceptance of rent which became due after a breach of covenant by the lessee, which breach was known to the lessor at the time of accepting

the rent (Taylor's Landl. & Ten. Ed. § 497; McGlynn v. Moore, 244 N. E. 2d 101), the rule that there are "exceptions to such rule. And one of the exceptions is where there is a continuing breach of forfeiture. In such case the lessor is precluded from taking advantage of the forfeiture by having received rent which accrued after the breach was originally committed. An example of a case of this sort which bears directly on the case at bar is that given by Mr. Taylor, supra (section 500), where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease. The user under such circumstances in the cases relied on by the author in support of the text was held to be a continuing breach, and the landlord was allowed to recover after receiving rent, provided the user continued after such receipt. Thus in Doe v. Gladwin, 6 Q. B. 953, it was held that where a tenant, who is bound to keep the premises insured at all times during the demise, leaves them uninsured for a time, the receipt of rent is only a waiver of that portion of the breach which has occurred at the time the rent is received. See, also, Block v. Ebner, 54 Ind. 544; Farwell v. Easton, 68 Mo. 446; Ambler v. Woodbridge, 9 B. & C. 376. In Manice v. Millen, 28 Barb. 41, Mitchell, P. J., in delivering the opinion of the court, said: "The acceptance of rent is generally a waiver of a previous cause of forfeiture, if that cause were known to the landlord. But this rule does not apply to cases of 'a continuing breach.' Arch. Land & Ten. pp. 98-101. So, where there was a covenant that rooms should not be used for certain purposes, and they were so used, and afterwards the landlord accepted rent, and the tenant continued after that to use them for the same forbidden purposes, ejectment could not be brought for the misuser prior to the payment of rent, but was sustained for the subsequent continuance of the same misuser." In Am. & Eng. Ency. of L. (2d Ed.) vol. 18, p. 388, under the caption "Continuing Causes of Forfeiture," the law is stated as follows: "Some covenants and conditions are susceptible of a continuing breach. In such case a waiver of a breach extends only to past breaches, and will not preclude the lessor from taking advantage of a forfeiture incurred subsequently to such waiver. Thus a covenant to keep in repair, to keep the premises insured, to plant and keep replaced fruit trees upon the demised premises, and to pay taxes, as well as restrictions upon the use of the premises, have been held to be continuing, so that a waiver of one breach would not preclude a forfeiture for a subsequent breach." See cases cited in support of these propositions. In short, the rule seems to be well settled that, where a condition in a lease is single, it is wholly discharged by one waiver. See Smith v. Edgewood Club, 19 R. I. 628, 35 Atl. 884, 36 Atl. 128. But if it be continuous, the waiver only discharges

particular breach. Under the law as applied, it is clear that the breach of the covenant in question by the lessees was a continuing one, and that the acceptance of the bill of particulars by the plaintiff for the month of January, 1882, even if it had knowledge of the breach at that time, was not a waiver of its right to maintain its present action for a subsequent and continuing breach of said covenant.

As a new trial must be granted on account of the error above referred to, there is no occasion for us to consider the fourth and last ground for a new trial, namely, that the verdict is against the evidence.

Several other questions have been quite fully and learnedly discussed by counsel both at the hearing and in their briefs, but, as they are not involved in the case as presented by the record, anything which we might say relating thereto would be mere dictum, and hence we refrain from discussing them at the present time. The plaintiff's petition for a new trial upon the grounds therein set forth raises all the questions which we can now properly decide.

Plaintiff's petition for new trial granted.

MacDONALD v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. Feb. 14, 1903.)

RAILROADS—FIRES—EVIDENCE—BILL OF PARTICULARS—SUFFICIENCY—INSTRUCTIONS.

1. In an action against a railroad for damages by fire, a bill of particulars showing the number of acres of each kind of wood burned, the years of growth, the kinds of fence destroyed, etc., was sufficient, without showing the value of the wood growing on certain oak-sprout land, the value of a certain pine grove, the value of wood growing on certain pasture land, the value of a rail fence, and the value of other wood claimed to have been destroyed by the fire.

2. In an action against a railroad for damages by fire, evidence of fires originating prior and up to the time of the fire in issue, of cinders lying along defendant's tracks, and as to whether or not defendant's locomotives were in the habit of throwing off sparks and cinders prior to the time of the fire in issue, and whether these cinders and sparks were of such a nature as to be able to ignite fires, was admissible on the issue of the cause of the fire.

3. Evidence that some of defendant's own land had been burned over was admissible on the same issue, though defendant had a right to intentionally do what it chose with its own property.

4. In an action against a railroad company for damages by fire, the admission of evidence as to who owned the land lying between plaintiff's land and the right of way, and on which the fire was supposed to have originated, was harmless to defendant.

5. In an action under R. I. Acts & Res. June Sess. 1836, p. 3, § 2 (being an act to incorporate the New York, Providence & Boston Railroad Company, and providing that that corporation should be liable to the owner for all damages arising from the burning of property by fire communicated from its engines), the plan and report of relocation of the company mentioned, filed for record in the court of com-

mon pleas, and purporting to be filed by the executive committee, stated that it was filed by the railroad in compliance with the act of 1836. It appeared that the persons signing the report as executive committee of the company were dead, and the defendant company, which was the successor of the New York, Providence & Boston Company, did not deny that the relocation was in fact made, and offered no testimony on that question. Held, that the report was properly admitted, without specific proof that the persons who signed it as executive committee were such in fact.

6. Refusal to charge in the exact words of a request is not error, where the point presented is covered in other instructions.

7. In an action against a railroad for damages by fire, refusal to permit defendant to ask what plaintiff paid for his farm was not error.

Action by James N. MacDonald against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff. Heard on petition of defendant for a new trial. Petition denied.

Argued before STINESS, C. J., and TIL-
LINGHAST and ROGERS, JJ.

James C. Collins, Jr., for plaintiff. John W. Sweeney, for defendant.

ROGERS, J. This is the defendant corporation's petition for a new trial, after a verdict for the plaintiff, of an action of debt brought under section 2 of an act entitled "An act in amendment of an act entitled 'An act to incorporate the New York, Providence & Boston Railroad Company' passed at June session, A. D. 1836" (R. I. Acts & Res. June Sess. 1836, p. 3), which reads as follows, viz.: "Sec. 2. And be it further enacted, that said corporation shall be liable to pay to the owner or owners for all damages which may arise from the burning of houses, wood, hay, or any other substance whatever, by fire communicated from the engines, cars or other vehicles of said corporation, or by those in their employ, damages equal to the value thereof, with all the lawful costs; to be recovered in an action of debt, in any court competent to try the same." The defendant had succeeded the said New York, Providence & Boston Railroad Company, and was liable in this case to all the duties, liabilities, and obligations imposed by said act upon said last-named corporation.

There were 23 grounds alleged for a new trial, many of which were practically duplicates. The first ground was that the trial court erred in not requiring the plaintiff to state in his bill of particulars the value of the wood growing upon said oak-sprout land, value of the pine grove, the value of the wood growing on the pasture land, the value of the rail fence, and the value of the wood claimed to have been damaged, injured, or destroyed by the fire. The defendant had asked for a bill of particulars in extremely minute detail; and the plaintiff had furnished many particulars, giving the number of acres of each kind of wood burned, the years of growth, the kind of fence, etc.; and the

trial court ruled that the order for a bill of particulars had been sufficiently complied with. We think that ruling was a proper exercise of that court's discretion. The purpose of a bill of particulars is to give the defendant such information as will enable it intelligently to prepare its defense and to guard against surprises; but, as said by Durfee, C. J., in *Cox v. Providence Gas Co.*, 17 R. I. 200, 21 Atl. 344: "The rule of certainty in pleading is not too rigid to be reasonable. It was designed to further, not to defeat, the ends of justice, and it is elementary that it requires no more particularity than the nature of the thing pleaded admits." In *Lee v. Reliance Mill Co.*, 21 R. I. 323, 43 Atl. 536, this court said: "The rules of pleading require reasonable certainty in the statement of essential facts, to the end that the adverse party may be informed of what he is called on to meet at the trial, and to this end the allegations should be as precise and definite as the nature of the case will reasonably permit." See, also, *Sullivan v. Waterman*, 21 R. I. 72, 41 Atl. 1006. In *Muller et al. v. Bush, etc., Mfg. Co.*, 15 Abb. N. C. 90, Dykman, J., said: "The plaintiff has commenced this action to recover damages sustained by reason of injuries to his house from an explosion in the defendant's oil-works. The complaint states the injuries with considerable particularity, and the amount of damages sustained. The defendant, desiring a bill of particulars of the items of damages, made a motion therefor to the special term, which was denied, and an appeal is brought from the order of denial. This is not a case where the plaintiff should be required to furnish particulars. The action is for damages which the plaintiff cannot specify with certainty. The amount will depend on proof to be furnished after examination of the injuries, and may well consist of the testimony of experts. Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence. It is usually impossible for a plaintiff to know with any degree of precision what the proof will be, and the bill of particulars would in most cases of that character be an instrument of embarrassment and injustice." Although the case at bar is not one of negligence, yet it approximates sufficiently to it to come within the application of the learned judge's words. In the case at bar the declaration gave the gross amount of damage claimed, and the bill of particulars gave various other details sufficient to inform the defendant for all the purposes of defense.

A class of exceptions relating to the admission of testimony of fires originating prior and up to the time of the fire in this case, or of cinders lying alongside of the track, either inside of the railroad company's land or outside of it, or as to whether or not locomotives on the road of this defendant were in the habit of throwing off sparks and

cinders prior to May 4, 1901, the date of the fire in this case, or whether these cinders and sparks are capable of igniting fires, or of such a nature that they could and do ignite fires, form eight grounds for the petition for a new trial.

It devolved upon the plaintiff, in order to entitle him to recover, to show that the damage complained of was caused by fire communicated from the engines, cars, or other vehicles of the defendant, or by those in their employ, but whether with or without negligence was quite immaterial. *MacDonald v. N. Y., N. H. & H. R. Co.*, 23 R. I. 577, 51 Atl. 578. As there are few, if any, cases where persons see the fire directly communicated, proof of the communication must necessarily be more or less circumstantial. As tending to show that the fire was set by the defendant, it has been held competent to prove that at various times before the fire occurred the engines of the company set out fires along its line in the vicinity, and it has also been held competent to show that coals of fire had previously been dropped or been found on the track at or near the place where the injury occurred. See 3 *Elliott on Railroads*, § 1243, and notes 1 and 3 on page 1939, and 1 and 3 on page 1940. In *Smith v. Old Colony, etc., R. Co.*, 10 R. I. 22, 27, Durfee, C. J., said: "A second purpose for which such testimony might be admissible is this, namely, to show the possibility of communicating fire by sparks from a locomotive, if any question were made upon that point, and for this purpose it would be immaterial whether the testimony related to fires of an earlier or later date than the one in question. If, however, the possibility were not questioned, and especially if it were admitted that the fire so originated, testimony relating to fires of a later date should be carefully excluded, as being irrelevant, and as having a tendency to excite prejudice against the company." In the case at bar the defendant did not admit anything. By his plea of the general issue the defendant held the plaintiff up to strict proof, and the record of the trial shows no oral admissions as to how the fire originated, or as to the possibilities in relation thereto, and the presiding justice excluded all testimony as to any such fires subsequent to the date of the fire complained of in this case. In *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221, where it was shown that a fire sprang up just after a train had passed, and that there was no other fire on the premises before, and no other apparent cause for the fire, it was held that the evidence was sufficient to warrant a finding that it was set by the passing train. See, also, *A., T. & S. F. R. Co. v. Gibson*, 42 Kan. 34, 37, 21 Pac. 788. We think the testimony showing the circumstances referred to was competent, as tending to show the origin of the fire in this case.

As to a lot of the defendant corporation's

land inside its fence being burned over, we think it comes within the rule laid down as to other lands just passed on, for it was apparent that the sole purpose of the question was as to the possibility of the defendant's engines igniting fires, and not as to the right of the defendant to intentionally do with its own property what it chose.

The several grounds of exceptions relating to the questions of damage do not seem to us sustainable. What the defendant corporation is liable for under the act is "for all damages which may arise from the burning of houses, wood, hay, or any other substance, * * * damages equal to the value thereof." The declaration alleges the damage to be \$2,000, and the declaration and bill of particulars give many details of the kind and amount of damage done, and we think that is a sufficient allegation to support the verdict. In *Spink* against this same defendant (24 R. I. 560, 54 Atl. 47), this court, in construing this act, said the terms of the act making the company liable for damage caused by fire from its engines, embracing the burning of "houses, wood, hay, or any other substance whatever," are broad enough to cover all kinds of property. It is to be noted that the act under which the action in this case is brought has no clause providing for the railroad company's insuring property against the liability entailed by said act, as the statutes in some other states do. So the reasoning of the courts of some of those states, predicated upon such an insurance provision, has no force here.

The eighteenth ground for asking for a new trial is because the trial court, it is alleged, erred in admitting the question to the plaintiff as to who owned the land south of the railroad fence, where the fire is supposed to have originated, and his answers thereto, because it was irrelevant and immaterial. Though the defendant would be liable for damages to the plaintiff if it set out the fire that caused the damage on his land, whether with or without negligence, whoever owned the intervening land, yet we cannot say that the question of ownership of such intervening land would necessarily be so irrelevant and immaterial as to afford sufficient ground for a new trial. Under some circumstances, it might be highly relevant; and though, in the circumstances of this case, we fail to see the materiality of the ownership of that intervening land, yet we think its admission was utterly harmless to the defendant, and could not have confused the jury or have prejudiced the jurors against said defendant, and hence we think it does not form a sufficient ground for granting a new trial.

The nineteenth ground alleged for a new trial is that the trial court erred in admitting the report of location or relocation of the New York, Providence & Boston Railroad filed in the court of common pleas for Washington county on October 17, 1836, without first proving that S. F. Denison and Ephraim

Williams, who signed it as executive committee of said New York, Providence & Boston Railroad Company, were the executive committee of said company. The liability under which the defendant was sued in this case arose under section 2 of the amendment of June 25, 1836, of the charter of the New York, Providence & Boston Company. The declaration does not formally state that "within ninety days from the rising of this General Assembly" (viz., the one that passed the said amendment) the corporation did "signify in writing to the secretary of this state, their assent to the requirements and provisions of this act," as provided for in section 10 of said act; but it did set out, step by step, the proceedings under said act by said New York, Providence & Boston Railroad Company, and, among other things, its relocation of said road as authorized under said section 10, and which relocation was tantamount to an acceptance. On demurrer to the plaintiff's declaration, this court so decided, and that the acceptance was sufficiently alleged. See 23 R. I. 558, 51 Atl. 578. The defendant's contention now seems to be that the relocation is not sufficiently proved. We think the plan and report of the relocation of the New York, Providence & Boston Railroad Company, filed for record in the court of common pleas for Washington county October 17, 1836, was properly admitted. It purports to be filed by the executive committee of said railroad, which had not then completed its formal organization. It states that it is filed by said railroad, and in compliance with the amending act of 1836. These are all formal acts necessary for the preservation of its charter, and were performed nearly 70 years ago. It is stated that Messrs. Denison and Williams are now dead, and it is not denied. The defendant does not deny that the relocation was made in 1836, and its charter thus preserved—in fact, it more than half admits it—but contends that strict proof of the agency must be shown. It offers no testimony itself upon the matter, though it must have succeeded to its predecessor's books and papers and to this relocation. It takes but slight evidence to make out a *prima facie* case under circumstances like these, where the defendant has such ample and exclusive means of protecting itself against possible error; the best evidence being exclusively within its own control. We think there is a presumption that an official report like this, of such paramount importance to this defendant and its predecessor, filed officially in court in compliance with a legislative act, is done with authority. The age of the writing should cause it to be taken for what it purports to be until the contrary is shown. The authority of these members of the executive committee is of cardinal importance to this defendant and its predecessor, for it goes to the base of its organization. The defendant offered no evidence to rebut it in any way, and we think

that, under the circumstances, the evidence is at least prima facie admissible and sufficient, in the absence of any proof to the contrary.

The twentieth ground alleged for a new trial is the court's alleged refusal to charge in the defendant's exact words in defendant's third request as to the value of oak sprouts, as requested. We think the court had substantially covered the question of the value of oak sprouts previously in its charge, and that there was no reversible error there.

In the refusal of the court to allow the defendant to ask the plaintiff what he paid for his farm, we find no error. It is utterly immaterial what the plaintiff paid for it, and the price would not shed, nor tend to shed, any light upon the question at issue.

As to the other grounds alleged for a new trial, all of which we have carefully considered, we fail to find any sufficient to warrant us in granting a new trial. The verdict does not seem to us to be against the law and the evidence, and the weight thereof; nor does the verdict, \$982.13, seem to us to be excessive.

For the reasons above set forth, the defendant's petition for a new trial is denied and dismissed, and the case is remitted to the common pleas division, with directions to enter judgment on the verdict for the plaintiff.

McKINNIE v. POSTLES.

(Superior Court of Delaware. New Castle.
Dec. 17, 1901.)

ASSOCIATIONS—CONTRACTS—COMMITTEES— PERSONAL LIABILITY.

1. Where defendant acted as the committee of an unincorporated association having no legal status in the execution of a contract for the renting of certain rooms in a hotel to be occupied by delegates and members of the association, which contract defendant signed in his own name, he was personally liable thereon.

Action by Malinda McKinnie, as executrix of the estate of Henry McKinnie, deceased, against James Parke Postles. On demurrer to the declaration. Overruled.

The third count of the declaration was as follows:

"And also for that whereas, to wit, on the 21st day of July, A. D. 1897, the said Henry McKinnie, in his lifetime, and the said defendant, entered into an agreement in the following words and figures, to wit:

"Contract for Quarters During the Knights Templar Conclave, to be Held in Pittsburgh, Pennsylvania, October, 1898.

"This indenture, made in duplicate this 21st day of July, in the year of our Lord one thousand eight hundred and ninety seven, between Henry McKinnie, Proprietor Hotel Anderson, Pittsburgh, Pa., of the first part, and J. Parke Postles, Committee of, and representing St. Johns Commandery No. 1,

Knights Templar, stationed at the City of Wilmington, in the State of Delaware, of the second part:

"Witnesseth, that the said party of the first part, for and in consideration of one dollar (\$1.00) part payment, receipt of which is hereby acknowledged, to be kept and performed by the said party of the first part, their heirs, executors, administrators, and assigns, has leased and demised, and does hereby lease and demise unto the said party of the second part, as hereinafter mentioned, lying and being in the City of Pittsburgh, County of Alleghany, State of Pennsylvania, as follows, to wit:

"For Sleeping Rooms Nos. 250, 252, 253, 254, 255, 256, 258, 260, 263, 262, 264, 266, 267, 268, 269, 270, 272, 279, 281, 283, 293, 295, 297, 298, 299, in the Hotel Anderson, located at Penn Avenue and Sixth Street, in the City of Pittsburgh aforesaid, from October 10th to October 14th, 1898, inclusive, same being five days; it being understood that said 25 sleeping rooms will be made to accommodate One Hundred and Seven people comfortably in beds and cots.

"For the above sleeping rooms and meals, the said party of the second part agrees to pay to the said party of the first part Four (\$4.00) Dollars each person per day for One Hundred and Seven People.

"It is further understood and agreed that the said Four (\$4.00) Dollars per day includes all charges for rooms and meals.

"It is further understood and agreed that in case the said party of the second part should wish to remain in possession of the rooms for any number of days in excess of the five days mentioned, that the same rate per day will be made to apply to the actual number of people accommodated, whether the excess shall be before, or after, the dates mentioned.

"It is further understood and agreed that the above compensation pays for the actual service, in all particulars, of a first class hotel, i. e. chambermaids, porters, towels, hot and cold water for baths, etc.

"In case this 27th Triennial Conclave of Knights Templar for any reason, should not be held in Pittsburgh, Pa., thirty (30) days' notice in advance to be given, and this contract will be null and void; otherwise to remain in full force and effect.

"In witness whereof, the parties above named have hereunto set their hands and seals the day and year first above written.

"Henry McKinnie.

"J. Parke Postles.

"Witness: W. W. Colville."

"That the said St. Johns Commandery No. 1, Knights Templar, for which said defendant in the making of said agreement is described as the "committee of" and as "representing," is an unincorporated association having no corporate or legal status, and said agreement was entered into and executed in the state of Pennsylvania. That, although

the said Henry McKinnie, from the time of making the said agreement or lease, was, during his lifetime, and the said plaintiff since his death, always ready and prepared to fulfill all things on the part and behalf of the said Henry McKinnie agreed to be performed and fulfilled, to wit, at New Castle county aforesaid, yet the said defendant, contriving and wrongfully intending to injure the said Henry McKinnie in his lifetime and the said plaintiff since his decease, did not nor would perform any of said promises or undertakings mentioned in said agreement, and did not nor would permit or suffer the said Henry McKinnie at any time during his lifetime, nor the said plaintiff since his death, to perform and fulfill any of the things to be performed and fulfilled under said agreement or lease on the part of the said Henry McKinnie, and then and there wholly hindered and prevented the said Henry McKinnie and said plaintiff from so doing, and thereby then and there wrongfully discharged the said Henry McKinnie in his lifetime, and said plaintiff since his decease, from the performance or completion of any of the aforesaid promises and undertakings of the said Henry McKinnie, whereby the said Henry McKinnie, in his lifetime, and said plaintiff since his decease, lost and were deprived of all the profits and advantages which said Henry McKinnie or said plaintiff otherwise might and would have derived and acquired from the performance and fulfillment of his said promises and undertakings, to wit, at New Castle county aforesaid, to the damage of the said plaintiff of twenty-five hundred dollars; and therefore she brings her suit," etc.

To the above count the defendant's counsel filed a general demurrer.

Argued before SPRUANCE and GRUBB, JJ.

Harry Emmons, for plaintiff. William T. Lynam and Herbert H. Ward, for defendant.

LORE, C. J. We overrule the demurrer. Upon election of defendant's counsel, let judgment of respondent ouster be entered.

PERRINE v. NORTH JERSEY ST. RY. CO.
(Supreme Court of New Jersey. April 9, 1903.)

CARRIERS—STREET RAILWAYS—EJECTION OF PASSENGER—TRANSFERS—TIME LIMIT—ERRORS OF ISSUING—CONDUCTOR—ACTIONS EX DELICTO.

1. Where a passenger on a street car was entitled to continue his journey for the same fare on a connecting line within 10 minutes after leaving the original car at the junction, and he was ejected from the connecting car, which he had boarded within the time, by reason of the failure of the conductor of the first car to correctly punch the time of plaintiff's leaving the car on his transfer, such passenger

was not limited to an action for breach of contract, but was entitled to recover for his expulsion in an action of tort, unless by his own fault or negligence he aided in producing the situation which led to the expulsion.

Error to Circuit Court, Essex County.

Action by James H. Perrine against the North Jersey Street Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Argued November term, 1901, before GAR-RISON, GUMMERE, and COLLINS, JJ. •

Van Buskirk & Parker, for plaintiff in error. Charles L. Borgmeyer, for defendant in error.

PER CURIAM. This was an action of tort for the wrongful ejection of the plaintiff from a trolley car of the defendant company. It appears from the evidence that the plaintiff took passage on one of the cars of the company, which ran over what is known as its "South Orange Line," for the purpose of going to Bayonne. To reach his destination, it was necessary for him to transfer to another car of the defendant company, which ran over its New York line. By paying his fare on the first car, he was entitled to ride not only on that car, but also on the New York car, provided he transferred to the latter within 10 minutes after disembarking from that which he first took; and he was entitled to receive a transfer ticket as an evidence of his right to do so. When he paid his fare he demanded of, and received from, the conductor of the South Orange car a transfer ticket to the New York line. He left the South Orange car at the junction point of the two lines, and boarded the next New York car which came along. He tendered the transfer ticket to the conductor of the latter car, but it was refused upon the ground that the time within which it was required to be used (that is, 10 minutes after leaving the South Orange car) had expired. Declining to pay an additional fare, he was then expelled from the car.

The rules of the company required that a conductor issuing a transfer ticket should punch upon it the time at which the passenger left the car, and that no other conductor should receive it in lieu of fare unless it was tendered within 10 minutes after the time punched upon it. The uncontradicted testimony of the plaintiff is that he boarded the New York car not more than 2 or 3 minutes after leaving the South Orange car. The uncontradicted testimony of the conductor by whom the transfer ticket was refused was that much more than 10 minutes had elapsed between the time punched on the ticket and the time when it was offered to and refused by him. It would seem to follow from this testimony that the conductor of the South Orange car had, by mistake, wrongfully punched the time on the ticket; thereby making it valueless as an evidence of the plaintiff's right to transportation on the New York

¶ 1. See Carriers, vol. 9, Cent. Dig. §§ 1423, 1427, 1462.

car. It appears from the testimony that the plaintiff did not know of the existence of the rule which required the transfer ticket to be used within 10 minutes after the time punched upon it. Whether or not notice of this rule was printed upon the ticket, does not appear.

On these facts the trial court charged the jury that "if the difficulty was due wholly to the mistake of the conductor of the South Orange car, and if the ten-minutes regulation was a reasonable one, then the verdict ought to be for the defendant, for in that case the plaintiff will have to sue the company under another form of action, in an action upon the contract, and not in this action, an action in tort." This instruction was erroneous. If the plaintiff was, by his contract with the company, entitled to ride upon the New York car without the payment of an additional fare, provided he boarded that car within 10 minutes after leaving the South Orange car, and was entitled to a proper transfer ticket as an evidence of his right to do so, then an action of tort will lie for his wrongful expulsion, unless by his own fault or carelessness he aided in producing the situation which lead to that expulsion. Consolidated Traction Co. v. Taborn, 58 N. J. Law, 1, 82 Atl. 685. If inquiry on his part would have informed him of the rule which made it necessary that the transfer ticket should be used within 10 minutes of the time punched upon it, and if due care on his part required that he should make such inquiry, then his failure to do so would have been a contributing cause to the injury which he complains of, and would be a bar to his right to recover.

The judgment under review should be reversed.

ATLANTIC CITY v. GROFF.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

DEDICATION—QUESTION FOR JURY—EVIDENCE.

1. The words in a deed, "to the intended New York avenue line, thence (2) southwardly along said intended New York avenue line," are not of themselves sufficient, in law, to amount to a dedication by the grantor of the deed of other of his lands for a public street which shall be an extension of the street named.

2. In such case dedication is a conclusion of fact to be drawn by the jury from the circumstances of each particular case, and the deed mentioned, with the language therein used, is one of the circumstances to be submitted to the jury upon the question of dedication.

Magie, Ch., and Van Syckel, Garrison, and Hendrickson, JJ., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by Atlantic City against Catherine Groff. Judgment for defendant, and plaintiff brings error. Affirmed.

Godfrey & Godfrey, for plaintiff in error.
George A. Bourgeois, for defendant in error.

GARRETSON, J. The plaintiff in error brought ejectment against the defendant in error to recover a piece of land 50 feet wide by 200 feet long, being an extension of New York avenue northerly from the north line of Baltic avenue. Prior to March 1, 1894, New York avenue extended to the northerly line of Baltic avenue, and the plaintiff in error claims that by virtue of a deed given on that day the owner of the locus in quo dedicated it to public use for a street as an extension of New York avenue. This deed, with various acts of the then owner, was introduced in evidence to prove dedication, and the defendant, on her part, also introduced in evidence acts by the owner of the locus in quo tending to show the exercise of ownership, and a purpose inconsistent with its dedication; and this evidence, being submitted to a jury, resulted in a verdict for the defendant, and this writ of error brings up the judgment entered upon this verdict.

It appears from the evidence that October 19, 1882, Richard Hackett and wife conveyed to Edward Champlon a tract of land on the northerly side of Baltic avenue, 165 feet by 200 feet, the easterly 50 feet of which is the locus in quo. In 1884 Champlon moved a building about 18 or 20 feet long upon the land in question, which he used for some years as a carpenter shop, and did subsequently rent it to an upholsterer, and then for a grocery. In 1885 Champlon built a house fronting on Baltic avenue, and near the westerly line of what would be New York avenue, if extended northerly, and in 1888 altered it so that the rear part might be used by a separate family, and made an entrance to it from what would be New York avenue. March 1, 1894, Champlon and wife conveyed to Justus Siebert a lot of land in the rear of the house which he had built, by the following description: "Beginning at the northeast corner of Justus Siebert's land on the line of Daniel Morris' land and runs from thence eastwardly along Daniel Morris' line 66 feet more or less to the intended New York avenue line, thence (2) southwardly along said intended New York avenue line 120 feet to a post, thence (3) westwardly along the line of Edward Champlon's land 58 feet to the line of Justus Siebert, thence (4) northwardly along said Siebert's line 120 feet more or less to the place of beginning." The claim of the plaintiff is that the words, "to the intended New York avenue line, thence (2) southwardly along said intended New York avenue line," operated as a dedication by the grantor in that deed, and the owner of the premises in question, of the locus in quo to public use as a street. That the plaintiff did not regard these words as a complete dedication appears from the fact that it introduced evidence of other facts and acts by the grantor in that deed while still owning the locus in quo, from which, with this deed, the jury was asked to infer the dedication.

If it is unequivocally manifested by the

instrument or act under which dedication is claimed that it is the intention of the then owner to dedicate, it will be for the court to so declare; but, if not, dedication is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway. 9 A. & E. Enc. of L. (2d Ed.) 34. The facts and circumstances relied upon to prove the existence of an intent to dedicate on the part of the dedicator must be of a positive and unequivocal character. If the dedication is made to depend upon a written instrument, the language of the instrument must positively and distinctly show an intention to dedicate, and the dedication must arise at once from the dedicatory act, or, if some time be specified, then at that time. The language used in the deed is not positive and unequivocal. "The intended New York avenue line" might mean that at some future time the grantor in the deed would dedicate the locus in quo for a public street. It might also mean that the public authorities were intending to extend New York avenue northerly beyond Baltic avenue, so as to embrace the locus in quo, or this language might be regarded merely as a description. A mere reference to a street or road, or a recital of its existence, simply for the purposes of location and description, or to give the boundaries of the land conveyed, is not sufficient to make a dedication. In the present case the description in the deed given by Champlon to the defendant, "beginning in the northerly line of Baltic avenue where the same would be intersected by the easterly line of New York avenue if continued across said Baltic avenue," is only description, and not dedication. We think, therefore, that this description in the deed from Champlon to Siebert was a fact, with other facts offered in evidence, to be submitted to the jury, to determine whether when this language was used the grantor in that deed, and the then owner of the locus in quo, intended by it to dedicate the premises in question for a public street.

Siebert, the grantee in the deed in which it is claimed that the dedication arises, was asked "What conversations, if any, did you have with Mr. Champlon [the grantor in that deed] subsequent to the time of taking your deed, about the sidewalk on New York avenue, if extended?" This question was excluded, and its exclusion assigned for error. Declaration by Champlon while he owned the locus in quo would be competent, but declarations made after he had conveyed to the defendant would be hearsay, so that the question was too broad. But subsequently the same witness was asked the question, "What conversations, if any, did you have with Mr. Champlon just subsequent to your buying this land, after you got your deed?" An objection to it being overruled, answer: "I don't think

I had any more conversation after that in regard to the land in question; that is, with the street—the intended New York avenue. We had no more talk over that, only what we had before." We therefore find no error in the exclusion of the question.

Exception was also taken to the admission of the deed from Champlon to Groff, the defendant, for the locus in quo. This was the foundation of the defendant's title, and was a fact bearing upon Champlon's intention to dedicate, and so was competent.

Other exceptions were taken to the admission of testimony to rebut the evidence of dedication upon the ground that the deed from Champlon to Siebert, of itself, dedicated the land for a public street; but, as that deed was itself only one fact going to show dedication, all evidence of facts by the grantor tending to show no dedication were competent evidence for the defendant.

We find no error, and the judgment below is affirmed.

MAGIE, Ch., and VAN SYCKEL, GARRISON, and HENDRICKSON, JJ., dissent.

RICCIO v. MAYOR, ETC., OF CITY OF HOBOKEN.

(Supreme Court of New Jersey. March 30, 1903.)

PUBLIC SCHOOLS—CONSTITUTIONAL LAW—UNIFORMITY OF PROVISIONS—GENERAL LAWS.

1. In so far as the Legislature relegates to the various municipalities of the state the management and support of free public schools within their borders, that subject becomes part of the internal affairs of the respective municipalities; and a law, which confers the same powers and imposes the same duties respecting that subject upon any constitutional class of municipalities, is general, in the constitutional sense.

2. "An act to establish a system of public instruction," approved March 26, 1902 (P. L. p. 69), is not rendered unconstitutional by the fact that its provisions respecting the support and management of free public schools in cities differ from its provisions on that subject in other municipalities.

(Syllabus by the Court.)

Certiorari by Michael Riccio against the mayor and council of the city of Hoboken to review an ordinance. Affirmed.

Argued February term, 1903, before GARRISON, SWAYZE, and DIXON, JJ.

Francis H. McCauley, for prosecutor. Thomas N. McCarter, Atty. Gen., for the State.

DIXON, J. In pursuance of a resolution of the board of education of the city of Hoboken, and of a determination by the board of school estimate, the mayor and council of the city, in October last, adopted an ordinance providing for the issue of city bonds to the amount of \$130,000, to meet the expense of purchasing land and erecting thereon a new schoolhouse. These proceedings

are based on the act to establish a system of public instruction, approved March 28, 1902 (P. L. p. 69), and their legality is now assailed on the ground that that act is unconstitutional.

The pertinent provisions of the Constitution are found in article 4, § 7, the sixth paragraph of which requires the Legislature "to provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years," and the eleventh paragraph of which forbids the Legislature to pass local or special laws "regulating the internal affairs of towns and counties," or "providing for the management and support of free public schools." These paragraphs became part of the Constitution in the year 1875. The particular objection urged against the act of 1902 is that its provisions respecting the management and support of free public schools in cities differ from its provisions on the same subject in other municipalities, and therefore are special. The chief reliance of the objector is found in the opinion delivered for the Court of Errors in *Lowthorp v. Trenton*, 62 N. J. Law, 795, 44 Atl. 755. That opinion, however, was deprived of much of the force otherwise attributable to it by the later decision of the same court in *Hermann v. Guttenberg*, 63 N. J. Law, 616, 44 Atl. 758. As a decision, the *Lowthorp* Case is scarcely relevant, for it was only to this effect: that the mere form of municipal government cannot be coupled with population to make the basis of a statutory classification for enactments regarding the support and management of public schools. In the present case we are required to consider, not a statutory classification, but what, in *Hermann's* Case, was declared to be a classification adopted by the Constitution itself, according to which cities, boroughs, towns, townships, and villages form distinct classes for legislation respecting their internal affairs. The present question, therefore, is whether the Legislature can employ this constitutional classification in legislating for public schools.

In considering this question, attention may first be given to the paragraph of the Constitution prohibiting local and special laws concerning the internal affairs of towns and counties. If the management and support of free public schools can be included among such affairs, then the broad rule laid down in *Hermann's* Case would fully support the position that a law prescribing the mode in which all cities should deal with the subject would not violate that prohibition. It must be remembered that the Constitution is a practical instrument, and therefore an important element in its correct interpretation and construction will be found in the usages prevailing when its provisions were adopted. Examined from this point of view, it seems reasonably clear that the support and

management of public schools were, previous to the year 1875, committed to the various municipalities of the state as part of their internal affairs. As early as September, 1682, an island in the Delaware river was given by the assembly of West Jersey to the town of Burlington for the maintenance of a public school (Grants & Concessions of N. J. p. 445), and in 1693 and 1695 the inhabitants of each town within the province of East Jersey were empowered to maintain a school within the town by public tax (Id. 328, 358). In 1820 the inhabitants of each township in the state were authorized to raise by tax such sum of money as the town meeting should vote, to be expended under the direction of the town committee for the education of poor children residing in the township. Elm. Dig. 577. In 1829 "An act to establish common schools" provided for the division of the state appropriation among the townships of the state, and the control of common schools by the township, or by school districts created by the township authorities. P. L. 1828-29, p. 105. In 1831 this act was repealed, and a new statute substituted, but, although the school district was given a more independent character, the state funds were still apportioned among, and the local funds were raised by, the several townships. P. L. 1830-31, p. 145. Similar conditions were preserved in the act of 1837-38 (P. L. p. 246), and continued until 1867 (see Nix. Dig. 733). Concurrently with these general statutes, various local charters were enacted conferring upon particular cities special powers for the maintenance of public schools. In the act of 1867 (P. L. p. 360) a system of state control was established, which, however, still recognized townships and cities as possessing special powers and duties in reference to the common schools within their borders, and in the numerous municipal charters passed between 1867 and the adoption of the constitutional amendments in 1875 will be found special provisions for particular municipalities on that subject. Indeed, it may be truthfully said that at no time prior to the adoption of the amendments of 1875 can anything be discovered in our legislative history on the subject of public education which does not point to the support and management of common schools in cities and in other municipalities as a matter more or less of local concern. While the state made some provision for their support, it was confessedly inadequate, and the determination of the additional means to be furnished was treated as an internal affair of each locality, which was likewise charged with the responsibility of the proper expenditure of all the funds appropriated. Consequently, notwithstanding the general interest of the state at large in the education of its citizens, I think that the support and management of public schools may be treated by the Legislature as an internal affair of the various municipalities denominated towns in

this paragraph of the Constitution. Certainly the education of youth concerns the local community as much as does the prosecution of those who violate the laws of the state, and an important incident of such prosecution was made by legislation an internal affair of the counties. *Passaic v. Stevenson*, 46 N. J. Law, 173. A like power must exist in the Legislature respecting schools.

If, therefore, we had to deal only with the clause requiring the internal affairs of towns to be regulated by general laws, there could be no hesitation in holding that under the *Hermann Case* a statute providing, for each of these classes of municipalities, a different method of managing and supporting public schools, would be constitutional. But it is urged that the clause which forbids local or special laws providing for the management and support of public schools places this subject outside of the internal affairs mentioned in the other clause, and requires it to be dealt with on a footing different from municipal classification; otherwise, it is argued, the school clause is rendered meaningless, as mere tautology. This argument has, however, but little force in the construction of fundamental laws. Prof. Story justly said: "Another rule of interpretation of the Constitution . . . is that the natural import of a single clause is not to be narrowed . . . simply because there is another clause . . . which might otherwise be deemed . . . within its scope," and he quotes from the *Federalist* that "tautologies . . . are to be ascribed sometimes to the purposes of greater caution, sometimes to the imperfection of language, and sometimes to the imperfection of man himself." 1 Story's *Com. Con.* § 449. But on closer examination it will be perceived that the view above favored by us does not reduce the school clause to a pleonasm. The education of children is a matter which concerns the state at large, as well as the local community in which they dwell, and may, therefore, reasonably be regarded in either aspect. As a concern of the local community, it falls within the clause for the regulation of internal affairs, while as a concern of the whole state it falls within the other clause. The Legislature has dealt with it from both points of view. The state appropriations treat it as involving the good of the state, while the local provisions treat it as of narrower moment. But in either aspect the laws relating to it are required by the Constitution to be general, and what we are now deciding is simply that legislation treating it as a matter of local concern is general if it applies to every member of any single class of municipalities as defined by the Constitution. The decision in *Hermann's Case* seems to afford direct support for this conclusion. Beside the inhibition of special and local laws for regulating the internal affairs of towns and counties stands the inhibition of such laws for laying out, opening, altering, and working highways;

but in the case cited the law under consideration was one relating to street improvements, and limited to towns *eo nomine*. Nevertheless, that law was maintained as general, because it applied to an entire constitutional class. By parity of reasoning, a law relating to the support and management of public schools will be general if it applies to such a class. See, also, *Lewis v. Jersey City*, 66 N. J. Law, 582, 50 Atl. 346, and *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 362.

There remains to be noticed the sixth paragraph of the Constitution, above cited, enjoining upon the Legislature the duty of providing a thorough and efficient system of free public schools for the instruction of all the children of the state between specified ages. While this clause is mandatory, it is not prohibitive. It points out the object at which the Legislature should aim, but it does not invalidate efforts that fall short of the desired result. If the system devised be inefficient and partial, this clause will not render it utterly abortive. Alongside of this imperative duty to enact a perfect and universal system, there still remains the power to do that which, although inadequate, is useful. This constitutional duty does not interfere with the validity of a general law which deals with free public schools as state institutions, or which authorizes any constitutional class of municipalities to deal with them as local institutions.

Our conclusion is that there is no sufficient reason given for holding the statute unconstitutional, and the proceedings under review should, therefore, be affirmed, with costs.

LAMPREY et al. v. WHITEHEAD.

(Court of Chancery of New Jersey. April 14, 1903.)

WILLS—NATURE OF ESTATE—DEED BY DEVISEE.

1. Under a devise to which the provisions of section 10 of the descent act (1 Gen. St. p. 1195) apply, while an estate in the lands devised vests in any child of the devisee for life, it is an estate which will be divested by the death of such child, leaving issue, during the life of the devisee for life.

2. A title made by a conveyance executed during the life of the devisee for life, from a child having a vested estate under the provisions of that section, being subject to be divested in the event of the death of such child, leaving issue, during the life of the devisee for life, is not a marketable title which a purchaser ought to be compelled to take by a decree for specific performance.

(Syllabus by the Court.)

Bill by Jennie T. Lamprey and C. P. Lamprey, her husband, against Henry C. Whitehead. Dismissed.

Thomas M. Moore, for complainants. Arthur S. Corbin and John R. Beam, for defendant.

MAGIE, Ch. The bill in this cause seeks a decree compelling the specific performance

by the defendant of a contract in writing made by him with the complainants for the purchase of certain lands in the city of Passaic. By the terms of the contract, complainants agreed to convey to the defendant the said lands in fee simple, free from all incumbrance, except the right, if any, of any child born to one Evaline Brainerd (a former owner of the premises) after the date of the contract; and the defendants agreed to pay complainants, on delivery of the deed for said lands, the sum of \$8,000. The complainants aver that they tendered to defendant a conveyance which would have vested in him a title to the lands in question in fee simple, free from any incumbrance except that mentioned in the contract, and that defendant refused to accept the same, or to pay the consideration which he had agreed to pay therefor.

The defendant, by his answer, admits the making of the contract, the tender of the conveyance to him, and his refusal to accept the same and pay the consideration. He asserts that he ought not to be compelled to accept the conveyance or to pay the consideration, because the title which would have been vested in him by the conveyance is not one of a merchantable character. The precise point of his objection is that the title which he would thereby acquire is subject to be divested by the happening of a certain contingency.

The complainants, by their bill, set up their title to the premises thus: The lands were owned in fee simple by Nathan Stevens, who died seised thereof in 1885, leaving a last will and testament, executed so as to pass the title to real estate, and bearing date July 1, 1880. By the sixth section of that will, he devised to his daughter, Evaline Brainerd, "for and during her natural life * * * two vacant lots of land * * * in the city of Passaic in the state of New Jersey and upon the death of Evaline A. Brainerd leaving issue, I give and devise all the above mentioned real estate to such issue, and in case there should be no issue her surviving, then I give and devise * * * said lands at Passaic to my sons Melvin Stevens and Clarence Stevens as tenants in common." The two lots which were thus devised comprise the lands which were the subject of the contract in question.

Evaline A. Brainerd had two children, Grace E. Brainerd and Allen W. Brainerd, who in 1894 were both of age. On the 22d day of November, 1894, the said children, Grace E. and Allen W. Brainerd, and Melvin Stevens, all being unmarried, conveyed all their right, title, and interest in said lands to the said Evaline A. Brainerd, and on November 26, 1894, Clarence Stevens, also unmarried, conveyed his right, title, and interest in the said lands to Evaline A. Brainerd. On November 23, 1894, Evaline A. Brainerd and her husband, by a deed with warranty,

conveyed said lands to the complainant Jennie T. Lamprey.

The bill asserts that Allen W. Brainerd afterward died unmarried; that Grace E. Brainerd, after the execution of her deed to Evaline A. Brainerd, intermarried with one John T. Underwood, and is now living with her said husband, with possibility of issue hereafter to be born.

The defendant admits, by his answer, the facts asserted in the bill above mentioned, and contends that if Grace E. Underwood should die before her mother, Evaline A. Brainerd, leaving issue, such issue would become seised of the said lands, and that the title made by the conveyance from Grace E. Brainerd to Evaline A. Brainerd would be wholly defeated by the happening of such contingency.

It does not admit of any doubt that the devise in the will of Nathan Stevens is one which falls within the provisions of the "Act further regulating the descent of real estates," passed June 13, 1820, and which have been in force since the passage of that act, and are now included as sections 10 and 11 of the "Act directing the descent of real estates." 1 Gen. St. p. 1193. The devise is a counterpart, in all respects except two, of the devise considered in the celebrated case of *Hopper v. Demarest*, 21 N. J. Law, 525; *Demarest v. Hopper*, 22 N. J. Law, 599. The devise in that case was to testator's daughter Catharine, for and during her life, and after her death the lands devised were to be equally divided among her heirs. The devise before us is to testator's daughter Evaline for life, and upon her death to such issue as she may leave surviving her, with the condition of a devise over in case of no issue surviving her.

The section of the act of 1820, which is now section 10 of the descent act, was admitted to be applicable to the devise which was the subject of consideration in *Hopper v. Demarest*, both in the Supreme Court and in the Court of Errors. The provisions of that section are equally applicable to the case in hand. It is thereby enacted that if any lands are thereby devised to any person for life, and, "at the death of the person to whom the same shall be devised for life, to go to his or her heirs or to his or her issue," then "said lands shall go to and be vested in the children of such devisee equally, to be divided between them as tenants in common in fee." In expressing the opinion of the Supreme Court upon the construction of this statute, in its application to the devise considered in *Hopper v. Demarest*, Chief Justice Green, with the concurrence of Justices Whitehead and Randolph, declared that the devise in the will then in question would have given to the daughter, to whom the testator devised it for life, an estate in fee simple, by virtue of the rule in *Shelley's Case*. He further held that the first section of the act of 1820, now section 10 of the descent

act, entirely abolished the rule in Shelley's Case, and gave to the devise therein described a statutory significance and meaning. He also held that the estate, which, by the meaning which that statute required the court to attribute to such language in the will then in question, went to the children of the tenant for life, was not a vested, but a contingent, estate. This construction, though admitted by the learned chief justice to be apparently counter to the purpose of the Legislature, was deemed to be rendered necessary by the language of the last clause of the section, which provided that the children of the devisee for life should take the lands as tenants in common in fee, but, if only one child, then that one should take the lands in fee, and, if "any child be dead, the part which would have come to him or her shall go to his or her issue in like manner." The last clause was deemed to be clearly indicative of a legislative intent that the lands, or some part thereof, should go to the issue of a child, if such child had died in the lifetime of the tenant for life. The declaration of the distinguished chief justice that the legislation thus construed entirely abolished the rule in Shelley's Case was correct in its application to the case then under consideration, but it has been since pointed out that the legislation in question is limited to cases within its terms, and that in other cases the rule in Shelley's Case is still in force in this state. *Lippincott v. Davis*, 59 N. J. Law, 241, 28 Atl. 587.

When the case of *Hopper v. Demarest* was reviewed in the Court of Errors, the applicability of the provisions of the act of 1820 to such a devise as was then in question was admitted, both by Chancellor Halsted, who delivered the prevailing opinion of the court, and by Justice Carpenter, whose dissenting opinion closely followed the lines of Chief Justice Green's opinion in the Supreme Court. But Chancellor Halsted, with the concurrence of a majority of the court, gave a construction to the statute which was different from that given in the Supreme Court. He concluded that the estate, which, under the statute, devolved upon the children during the lifetime of the tenant for life, was not a contingent estate, but was a vested estate. This decision, for obvious reasons, was much criticised at the time it was pronounced, but it has been frequently recognized since as laying down the rule which must be followed in respect to the transmission of property by devises of this sort. In the *Matter of Heaton*, 21 N. J. Eq. 221; *Ross v. Adams*, 28 N. J. Law, 160; *Lippincott v. Davis*, *ubi supra*; *Zabriskie v. Wood*, 23 N. J. Eq. 541.

But the case of *Hopper v. Demarest* did not require the consideration of the question which is presented here. In that case it appeared that the daughter of the tenant for life, whose conveyance of the title had been made during the lifetime of the tenant for life, had in fact survived her mother. The

estate which by the devise had become vested in her, under the construction given to the statute by Chancellor Halsted, was therefore not divested by the contingency provided for in the last clause of the section in question. But in the case before me the title conveyed by Mrs. Underwood before her marriage was such title as she acquired by the devise in Nathan Stevens' will, construed in conformity with the provisions of section 10 of the descent act. It was undoubtedly a vested title, which she might alienate and convey. But if she had conveyed the same, and had died, leaving issue, during the lifetime of her mother, Evaline A. Brainerd, the question is whether her title, although vested as above stated, would not thereby be divested in favor of such issue. If her title would be thereby divested, then the title of her grantee would also be divested upon the happening of that contingency. As the grantor is yet married, and of an age rendering it possible that issue may be born to her, and it is possible that she may die before her mother, the further question is whether a purchaser whose title to a material part of the lands is derived from her conveyance should be compelled to take a title subject to such contingency. I do not think that there is the least doubt that if, under the proper construction of the statute applicable to this devise, the title of Mrs. Underwood or that of her grantee would be divested by her death, leaving issue, in the lifetime of her mother, it would not be equitable to compel the purchaser to take the title upon her grant.

I have been unable to discover any authoritative exposition of the statute in question in respect to the point now presented. In *Hopper v. Demarest*, the Supreme Court construed the last clause of the section, now section 10 of the descent act, as giving to the issue of a child deceased during the life of the tenant for life an estate in the lands, and, upon the ground that the event upon which such issue was to take could not be determined before the death of the tenant for life, it was held that the estate of any of the children was contingent and not vested. In the prevailing opinion in the Court of Errors, the construction given to the last clause of the section, as effective in determining the legislative intent of the enactment, was repudiated. What the true construction of that clause was the court was not called on to declare, for the reason above given, viz., that the child whose conveyance was then in question had in fact survived her mother, and the contingency, consequently, had not happened. Chancellor Halsted, however, admitted that the clause was open to two constructions. This was his language: "And if this last clause can be construed as doing anything more than declaring what would be the result in case the person in whom the remainder was vested had not conveyed it, and had died leaving children; if it can be considered as legislating an additional limitation to the

estate—my opinion is that it is a limitation by way of executory devise. If it is an executory devise, then the person to whom Maria, in Catharine's lifetime, conveyed, took subject to be defeated of her estate by the happening of that contingency on which the executory devise was to take effect."

It will be perceived that by one suggested construction the last clause of the section in question is treated as a mere legislative declaration of the mode in which the title of a child, dying in the lifetime of the tenant for life, leaving issue, would devolve, if the child had not previously disposed of the title. By the other suggested construction the title of a child is subjected to a limitation over to his or her issue in the event of death, leaving issue, in the lifetime of the tenant for life. Whether the interest or estate thus limited over is properly called an executory devise, it is immaterial to inquire.

A construction of this legislation which attributes to it an intent to vest in the child of the devisee for life an indefeasible estate seems to me entirely inadmissible. In the first place, the last clause of the section expressly declares that the child's estate, in the event of death, leaving issue, during the life of the devisee for life, shall devolve, not on the heirs at law, but on the issue. *Lippincott v. Davis*, ubi supra. And, if there is to be attributed to the word "issue," as so used, the meaning of "heirs at law," the clause was wholly unnecessary, and might have been omitted from the act. For, without that clause, an estate which was vested and would devolve upon heirs at law in the absence of conveyance or devise, would have resulted from the previous enactment. Whether, as was suggested by Chief Justice Green, the last clause of the section was inserted by inadvertence or design, it is a part of the legislative act, to which the rules of construction require a court to attribute some meaning, if a reasonable meaning, consistent with the rest of the section, can be discovered therein. That distinguished jurist found in the language of that clause a legislative intent to limit over the estate of a child to his or her issue in the event of death, leaving issue, during the lifetime of the devisee for life, and on that ground pronounced the child's estate to be a contingent remainder. The Court of Errors, while denying the effect held by the Supreme Court to have been produced by his construction, admitted that the language, under that construction, could be held to limit over the estate of a child to his or her issue in the event of death, leaving issue, during the lifetime of the devisee for life.

In my judgment, there is no possible meaning to be given to the last clause of the section in question other than that which defeats the estate of a child of the devisee for life in the event mentioned, and vests that estate, upon the happening of that event, in the issue of the child. The result is that, while the conveyance tendered to the defendant will

vest in him a title to the lands which he contracted to buy, that title, in respect to so much of the estate as Mrs. Underwood has therein, would be subject to the possibility of its being divested in case she died before her mother, leaving issue. This liability will undoubtedly affect the marketable value of the estate, and I do not think that a purchaser should be compelled to accept a title affected thereby.

The bill must be dismissed.

SMITH v. SHEPHERD et al.

(Court of Chancery of New Jersey. April 14, 1903.)

DEAD BODIES—REMOVAL—GROUNDS.

1. A widow, who buried the remains of her deceased husband in a burial plot belonging to his sister, with the consent of the latter, and who prepared the grave for the reception of her own remains after death, with like consent, knowing that the said plot was so occupied that no consent would be given for other interments therein, is not entitled to require the owner of the plot to permit her to remove the remains merely because his children by a former wife (also buried therein) and his children by her cannot be buried there.

2. The fact that the sister, the owner of the plot, refuses to consent to the removal of her brother's remains from said plot for the purpose of burying the same in a plot belonging to the widow, and also refuses to consent to the removal of the remains of the first wife of the deceased for the purpose of burying the same in the plot of the second wife, now his widow, raises no equity justifying a decree requiring her to give such consent in either case.

3. The right of the widow, in respect to access or care or adornment of the grave of her deceased husband, is not involved in or decided in the present case, and the dismissal of the bill is without prejudice to her seeking relief hereafter, if her rights in those respects, if any, shall be interfered with.

(Syllabus by the Court.)

Bill by Elenore Smith against Emma Shepherd and others to permit complainant to remove the body of her late husband. Dismissed.

Florence Rose, for complainant.

MAGIE, Ch. The bill in this cause was filed by Elenore Smith, the widow of Edwin Smith, and its purpose is to obtain a decree permitting her to remove the body of her late husband from a lot in Fairmount Cemetery, in the city of Newark, in which it was buried, to another lot in the same cemetery, and enjoining the defendants from preventing such removal. There is also a prayer for an injunction against the defendants preventing complainant from visiting the grave in which the remains of complainant's husband now are, and planting flowers upon it, and keeping it decorated. The defendants to the bill are the Fairmount Cemetery Association and Emma Shepherd, the owner of the lot in which the remains of complainant's husband are now buried. The Fairmount

Cemetery Association filed an answer, submitting itself to the judgment of the court. The defendant Emma Shepherd filed, pro se, a paper presumably intended to be an answer. Upon exceptions filed thereto, the answer was found insufficient, and liberty was given to file another answer. The defendant did not avail herself of the permission, and a decree pro confesso was made against her, and the complainant was ordered to produce proofs to sustain the allegation of her bill of complaint. Proofs having been taken, the matter was brought to hearing ex parte, and an application was made for a decree in conformity with the prayer of the bill.

The rights of parties and the powers of this court in respect to matters such as are the subject of this bill have been so recently and carefully considered and expounded in this court that it is only necessary to refer to the principles which have been, in my judgment, correctly settled. It is thus settled that there is no property right in a dead body; that upon the death of a married person the surviving husband or wife is entitled to the custody of the dead body, and charged with the duty of furnishing proper burial; that when that duty has been discharged, and the remains of the dead have been buried, the right of custody in the surviving husband or wife at once ceases, and it may properly be said that the dead body thereafter is in the custody of the law, because the disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it. *Peters v. Peters*, 43 N. J. Eq. 140, 10 Atl. 742; *Toppin v. Moriarty*, 59 N. J. Eq. 115, 44 Atl. 469. In *Peters v. Peters*, supra, upon these doctrines, a widow was enjoined from removing the remains of her deceased husband from the cemetery lot belonging to his father, in which he had been buried with her consent. In *Toppin v. Moriarty*, supra, the court enjoined a husband from interfering with and preventing the removal of the remains of his deceased wife, which had been buried, with his consent, in the cemetery lot of her father, and its reburial in another lot in the same cemetery, provided by her father. The ground upon which the court exerted its authority in that case was that the original interment of the wife's body in a lot procured by her father was consented to by her husband, in conformity with the request of his wife, before her death, that she should be buried in a lot in which her father and mother were afterwards to be buried, and that the father, after the interment, had arranged to exchange the lot in which the remains were buried for another lot, which was deemed a better one, which arrangement was with the consent of the husband, and the father had, with the knowledge of the husband, and without any objection from him, expended a large sum of money in preparing the lot which he obtained in exchange for his burial plot, and

with the known intention to remove thereto the remains of his daughter.

The problem in this case is whether, upon the circumstances presented by the proofs, the relief asked, or any part of it, should be granted. The proofs disclose that the complainant was the second wife of the deceased, Edwin Smith, and that he was a brother of Emma Shepherd, the defendant. At some time, not clearly fixed by the evidence, the defendant became the owner of this burial plot in Fairmount Cemetery, and her brother, afterwards complainant's husband, agreed with her that he would take one-half of the lot, and pay one-half its cost. This arrangement was made at the time of the death of the brother's first wife, and she was buried in that plot. The brother thereafter married the complainant, and at his death left her surviving, with three children, the offspring of his first wife, and three other children, the offspring of complainant. He had not then paid to his sister, the defendant, the one-half of the cost of the cemetery plot, or any part of the cost. When, upon his death, it became necessary to arrange for his burial, the complainant proposed to the defendant to pay the one-half of the cost of the burial plot, which she was aware had not been paid by the deceased. Defendant then informed her that she had been obliged to sell two spaces in that plot, that she intended reserving two other spaces, and that there remained but a single vacant space therein for a grave, but that complainant might make use of that space for the burial of her husband. Complainant accepted this permission, and it was further agreed between them that the grave might be so constructed that the complainant, upon her death, might also be interred therein. By the direction of the complainant, the grave was so prepared, and the remains of the husband were placed therein. The expenses of the interment were paid by the complainant. Since that time the complainant and the defendant Emma Shepherd have become estranged from each other. The complainant thereupon became desirous of removing the remains of her husband from the spot in which they were buried to another plot in the same cemetery, and applied to the defendant for permission so to do, which permission was refused, and thereupon this bill was filed.

Upon these proofs it is impossible to conclude that at the time of the burial there was contemplated a mere temporary interment of the remains. In *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, the Supreme Court of Massachusetts held that a surviving husband was entitled to such order of the court, sitting as a court of chancery, as would permit him to remove the body of his deceased wife from the lot of another person in which it had been buried, when the court might find from the evidence that he had not consented to its burial there with the intention that it should be her final resting place. But in

this case nothing can be clearer from the complainant's proofs than that the burial of her husband's remains in the burial plot of his sister was done by her with the purpose that it should be their final resting place. This is clear from the fact that she had the grave prepared for her own interment in the same. In this respect this case resembles that which was presented to Vice Chancellor Bird in *Peters v. Peters*, *ubi supra*. It is true that the complainant asserts that she was, at the time this arrangement was made, much broken by her grief at the loss of her husband, and "didn't think much over" the matter; but it is impossible, upon her own testimony, to fail to recognize that in consenting to the interment in the sister's plot she knew that none of the children of the deceased, either those by the first wife or those who were her own children, could be buried there, and was content to have the grave adapted only for her own interment after her death.

I am unable to discover any ground for equitable relief arising out of the circumstances under which the complainant originally arranged for and consented to the burial of her husband in defendant's lot.

No subsequent agreement between the parties is disclosed, and it only remains to consider whether circumstances since occurring have altered the situation, or present equitable grounds for the relief prayed for. The bill charges that the defendant, at the time of the burial, agreed that complainant should have the right to visit the grave, to plant flowers upon it, and keep it decorated, and that she has broken her agreement, and refuses to allow complainant to decorate the grave. It also charges that defendant has desecrated the grave by leveling it, and disturbing the flowers planted by complainant, and that defendant has made known to complainant that she will not allow complainant to be buried in the grave with her husband at her death. There is no proof of any special agreement between the parties in respect to access to or care of the grave. Nor is there any sufficient or competent proof that the defendant refused to allow complainant to decorate the grave, or that she has desecrated it as charged. The testimony of complainant on these matters was evidently not given as the result of personal observation, but from reports and statements of others. The complainant admits that she has never made to the defendant any compensation for the use, present and prospective, of the burial plot. It would seem to have been within the contemplation of the parties that such compensation should be made. But complainant admits that defendant sent her a bill, charging her with certain sums for the space occupied by the remains of the first wife and the space occupied by the remains of the husband, and the future right of the complainant to be buried in the latter space. This bill complainant admits she refused to pay; but she has not

made it appear that she has offered to pay any sum as reasonable compensation for the right to maintain her husband's remains in the lot of defendant, and to have her own remains deposited there. It is clearly shown that defendant has absolutely refused to comply with the request of complainant to consent to the removal of the remains of complainant's husband from the lot in which they were buried to another lot. It is fortunately unnecessary for me to determine who has been at fault in the disagreement between these parties. It is obvious, however, that the complainant's request was not one which the defendant might not decline to accede to without being charged with unfairness. The demand was that she should consent that the remains of her brother should be removed to another lot. They were resting in the same plot with those of his first wife, and presumably by her side. There was no reason why the second wife should require the sister of her deceased husband to consent to the removal of the remains which were thus interred. It is true that complainant states that she further offered to remove the remains of the first wife, and reinter them in her own lot, along with the remains of her husband. But the defendant, who had consented to the burial of the first wife in her own plot, might well hesitate to consent that those remains should be removed by a second wife, and reinterred in a plot belonging to her. The unfortunate disagreement between these parties cannot blind us to the unfairness of requiring the defendant's consent under such circumstances.

The complainant insists that the defendant has desecrated the grave, and is preventing her from showing proper respect to her husband in planting flowers and decorating it. In the course of her proofs complainant showed that her counsel had made a written demand upon defendant for permission to remove the remains of her deceased husband, and presented a letter, signed by defendant, or in her name, and apparently in response to the demand, in which defendant refused compliance, on the ground that "experience has taught me not to grant any more permits either to inter or to disinter in my property." She added, "My brother's remains were placed there not for any temporary purpose, and I decline to sell them." She further added: "She [evidently meaning the complainant] has my permission to place any flowers, but mine must not be mutilated. That is my property, to do with as I please." While this letter indicates no little bitterness of feeling, I think that it disposes of the charge that defendant is prohibiting complainant from placing flowers upon her husband's grave. Under the circumstances, I fail to find any support for the complainant's claim that defendant's conduct justifies her in demanding the removal of her husband's remains.

The result is that complainant has failed

to show that she is entitled to the relief asked for, and her bill must be dismissed. The defendant the Fairmount Cemetery Association is entitled to costs.

As the right of the complainant to visit the grave of her deceased husband, and to place flowers thereon, has not been found to be involved in the present case, and therefore no opinion has been expressed in regard to it, the dismissal will be without prejudice to her filing a bill for relief hereafter if she should be interfered with in that respect.

PASSMAN v. WEST JERSEY & S. R. R.
(Court of Errors and Appeals of New Jersey.
March 9, 1903.)

**RAILROADS—ACCIDENT AT CROSSING—
OBSTRUCTIONS.**

1. A traveler on a highway, about to pass over a railroad track, must make reasonable use of his senses to ascertain if such crossing can be safely made, before attempting it. If his failure to do so contributes to his injuries, he cannot recover damages therefor.

2. The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, where the view of the other tracks is partially obscured thereby, is not an invitation to the public to cross without using ordinary precaution to ascertain if such crossing can be safely made.

3. A traveler on a bicycle is required to use the same care and prudence before passing over a railroad as is required of a pedestrian.

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by Laura H. Passman, administratrix of William Passman, deceased, against the West Jersey & Seashore Railroad. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Wescott, for plaintiff in error.
Joseph H. Gaskill and Nelson B. Gaskill, for defendant in error.

VOORHEES, J. It is necessary in the decision of this case to consider only the assignment of error directed to the instruction of the court to the jury to find a verdict for the defendant. The action was brought by the administratrix of William Passman to recover damages for his death, which was caused by one of the engines of the defendant company colliding with him as he was attempting to cross its tracks on Ohio avenue, in Atlantic City, on a bicycle. The testimony developed the fact that the deceased had for several months prior to the accident been employed by a lumber dealer whose office was less than 100 feet from the crossing, and that in the ordinary business of his employment, and in going to and coming from his home, which was in the southern part of the city, on the opposite side of the track from the place of his employment, he necessarily passed over this crossing several times a day, and was presumably acquainted with the times and manner of running trains thereover. The railroad and Ohio avenue cross

each other at this point at nearly a right angle; the avenue extending north and south, and the railroad east and west. At the time of the accident the railroad had four tracks across the avenue. The two nearest the deceased's place of employment were sidings or tracks used for the shifting and storing of cars. The two furthest were the regular express or incoming and outgoing tracks. Just prior to the accident a train of empty cars had been drilled upon the siding tracks, and it was in evidence, although denied by some of the witnesses, that this train had been cut, leaving some cars to the east and some to the west of the avenue; thus permitting passage over the avenue for vehicles and pedestrians. A witness who was walking on the avenue in a southerly direction, toward the crossing, saw the deceased just before the accident standing with his bicycle at the door of the office where he was employed, talking with some one. This witness proceeded on his way towards the crossing, and when between the empty cars, or on approaching the lower track, seeing the regular evening express of the defendant company coming at a high rate of speed on the southerly or incoming track, turned and shouted to the deceased to warn him of the danger, and then tried to "grab" him, and, if possible, prevent by force his proceeding in front of the train. In this he was unsuccessful. He says the deceased was almost upon him when he turned; was riding on his bicycle at a moderate rate of speed, and going directly in front of the train, by which he was struck and instantly killed.

It was contended by the counsel of the plaintiff that the empty cars left on the side track obstructed the view of the incoming train; that the cutting of this train of empty cars was an implied invitation to the public and to the plaintiff's intestate that the tracks could be crossed in safety; and also that none of the statutory signals were given by the defendant of the approach of its train, and therefore it was liable in damages for his death. No negligence, however, on the part of the railroad employes, would excuse the plaintiff's intestate from exercising reasonable and ordinary care in approaching this crossing, which was a place of obvious and known danger, so that his failure to observe such care would preclude the plaintiff's right of recovery. The cutting of the train was not an invitation to cross without exercising reasonable care. It was only for the purpose of furnishing an opportunity to those who might desire to cross while using the ordinary prudence required by the law under the circumstances apparent from the condition of the crossing. The absence of the statutory signals did not justify the deceased in assuming that it was safe for him to cross. He should have used reasonable care for his own preservation, and, failing therein, he cannot shift the sole responsibility upon the company. If by taking ordinary

care he could have avoided the danger, his failure to do so negatives the plaintiff's right of recovery. One cannot recover for the breach of duty of another when he is lacking in ordinary prudence himself.

The respective rights of railroad companies and persons attempting to pass over their tracks at regular crossings are reciprocal. The company has the right of way. It must, however, give the statutory signals of the approach of its trains. A person about to cross a railroad track on a highway is presumed to know the danger, and, while he may reasonably expect to be warned by the prescribed signals of an approaching train, he cannot justify himself in risking the danger unless he has exercised the senses nature has given to protect him from harm; and he must exercise such faculties in the manner that an ordinarily prudent person would exercise them under similar circumstances. The greater the difficulty of discovering the danger, as apparent from the surroundings, the greater is the care required; and, if the circumstances are such that one sense is rendered less reliable, the others must be used to a correspondingly greater extent. As early as 1854, in *Moore v. Central R. Co.*, 24 N. J. Law, 268, Justice Potts, in speaking for the Supreme Court, said, "I am certainly of opinion that the plaintiff was bound to show that he used all ordinary care, all reasonable caution, to avoid the collision." This was a crossing case. The plaintiff was seriously injured. On the trial he did not prove any negligence on the part of the defendant, or the exercise of ordinary prudence on his own part. This case was before the Supreme Court on a rule to show cause, and was afterwards affirmed by this court, on a writ of error, in 24 N. J. Law, 824, wherein Justice Haines said the court intended to adopt the principle laid down by the Supreme Court. Negligence is a fault, and will not be presumed against either litigant in the absence of proof. *Pennsylvania R. Co. v. Middleton*, 57 N. J. Law, 154, 31 Atl. 616, 51 Am. St. Rep. 597. The proper caution to be exercised before attempting to pass over a railroad crossing has been clearly defined in this state by a large number of decisions. A few only are cited here: *Haslan v. Morris & Essex R. Co.*, 33 N. J. Law, 147; *Pennsylvania R. Co. v. Righter*, 42 N. J. Law, 180; *Central R. Co. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695; *Green v. Erie R. Co.*, 65 N. J. Law, 301, 47 Atl. 418.

The plaintiff's intestate in this case was riding on a bicycle—a vehicle propelled by his own power, over which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing, where the view of the track is in any way obscured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross; and, while his acts may vary in certain details, the law re-

quires of him practically the same reasonable care as is required of a pedestrian. *Robertson v. Pennsylvania R. Co.*, 7 Am. & Eng. R. R. Cas. (N. S.) 606.

The deceased was guilty of contributory negligence. There was no error in the order directing a verdict for the defendant, and the judgment thereon should be affirmed.

TEN EYCK et al. v. SAVILLE et al.
(Court of Chancery of New Jersey. April 18, 1903.)

HUSBAND AND WIFE—SALE OF LAND BY WIFE—CONTRACT—ACKNOWLEDGMENT—SPECIFIC PERFORMANCE—SUBSEQUENT GRANTEE WITH NOTICE—LIABILITY.

1. Under P. L. 1898, p. 670, § 39, providing that every conveyance by a married woman, acknowledged by her apart from her husband, and every instrument set forth in section 21, including agreements for the sale of land, so acknowledged by a married woman, shall be good to convey or affect the land, or her interest therein, an unacknowledged contract by a married woman to convey her land was unenforceable.

2. Where a married woman executed a contract to convey land to plaintiff, which was unenforceable by reason of her failure to acknowledge the same as required by P. L. 1898, p. 670, § 39, the purchaser under such contract was not entitled to compel a conveyance by a subsequent grantee of such feme covert, who took with notice of plaintiff's contract.

Bill by John V. Ten Eyck and others against Edith Saville and others. On demurrer to bill. Sustained.

Theodore Strong, for complainants. Geo. S. Silzer and John W. Beekman, for demurrants.

STEVENS, V. C. The defendants demur to complainants' bill for specific performance of an agreement to convey land, on the ground that the agreement was made by a married woman, and that it has not been acknowledged. I think the demurrers must be sustained. In *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827, I examined the law on the subject, and came to the conclusion that a married woman's agreement, though concurred in by her husband, if unacknowledged, is not enforceable against her. Since that decision was made the conveyance act has been revised (P. L. 1898, p. 670), and sections 21 and 39 have been construed by Pitney, V. C., in *Goldstein v. Curtis* (N. J. Ch.) 52 Atl. 220. He comes to the conclusion that, whatever may have been the law prior to the passage of the act of 1898 as to acknowledged agreements of married women, since that act went into effect such agreements are enforceable. I think that the language of those sections plainly requires this construction. Section 39 provides that agreements for sale made by married women, duly acknowledged, "shall be good and effectual to convey or affect the lands * * * thereby intended to be conveyed or affected." Pitney, V. C., says: "Now, a

familiar way to 'affect' the interest of a person in land is to contract to convey it, and the only mode in which such a contract can be made 'good and effectual' is to compel its specific performance by a decree of this court." This act was passed after *Corby v. Drew* had been decided, and presumably with knowledge of the decision. If there had been any intention to alter the law as there stated, the Legislature would not, as it seems to me, have provided generally that no estate or interest of a feme covert should pass by her deed without a previous acknowledgment made by her on a private examination, and then have further provided that every deed or instrument of the description set forth in section 21 (agreements for sale being one of those instruments), executed by her, and so acknowledged and certified, should be good and effectual to convey or affect lands. The carefully guarded declaration that no interest of a feme covert should pass by deed, unless acknowledged in a certain way, coupled with a declaration that certain instruments so acknowledged should pass or affect her lands, indicates very clearly that it was the legislative intent that instruments not so acknowledged should not affect her lands.

This appears to be conceded in the briefs of counsel, and the case is put on another ground. The bill, after alleging the making of the agreement, states that the married woman joined with her husband in causing a deed of conveyance to be prepared in the ordinary form of a warranty deed, and that this deed was, in due form, acknowledged, and sent to her attorney to be delivered, but that before delivery she and her husband joined in executing and delivering a conveyance to some one else. Counsel argues that this deed is to be regarded as a part of the agreement, and that consequently, it having been acknowledged, the statute is satisfied. Now, I cannot understand how an undelivered deed, made after the agreement was entered into, can be regarded as a part of that agreement. The agreement was complete in itself. It required and received the formal assent of both parties. It could only be modified or added to by some agreement having like assent. This is never received. It was, indeed, sent by the vendor to her own attorney; but he never delivered it, and so it never acquired any binding force. Counsel cites many cases to show that an undelivered deed may operate as a sufficient memorandum, within the statute of frauds. But this is beside the mark. The question is not whether the statute of frauds bars the right to relief, but whether the married woman's agreement is so executed and acknowledged as to give a right to relief. The questions are not identical, and they do not

depend upon the same considerations. The statute of frauds does not require the agreement itself to be in writing, but only "some memorandum or note thereof." If there be a written memorandum or note of the agreement, and this be signed by the party to be charged, the statute is satisfied. But the statute does not say that an acknowledged memorandum or note of the agreement shall be sufficient to "affect" the married woman's interest in lands. At common law the wife could only pass her freehold estate by fine or common recovery. Since the year 1743 she has been permitted to convey by acknowledged deed. The act of 1898 for the first time, at least in terms, gives full effect to her agreement to convey, but only if that agreement be acknowledged. Counsel now desires the court to go a step further than the statute goes, and to say that a note or memorandum of the agreement shall affect her lands if only it be acknowledged. For this I can find no warrant. The cases relied on by counsel show very plainly that under the statute of frauds a note or memorandum of the agreement is a different thing from the agreement itself. I am unable to agree, therefore, that the acknowledged but undelivered deed looked upon as a note or memorandum of the terms of the agreement makes up for its deficiencies. It must always be remembered, in dealing with this subject, that in the case of married women the policy of our law has always been to make the acknowledgment of the essence of the transaction, and not merely the evidence or proof of it.

It appears by the bill that, after Mrs. Saville and her husband had agreed to convey to the complainant, they conveyed to one Campbell, who, it is said, took with notice. It may be argued that, having so taken, equity will compel him to convey. It is, of course, true that one of the objections to decreeing a conveyance is, in this situation of the matter, eliminated. The court would not have to decree that the married woman make a conveyance coupled with an acknowledgment that she does that freely, etc., which in fact she does only under compulsion; but the other objection remains. By the policy of our law, she can only pass or affect her interest by an acknowledged deed or agreement. If the deed or agreement be not acknowledged—and the acknowledgment is, as I have said, of the essence of the transaction—then her interest in the land did not pass, and the complainant, being without any interest (whatever right he may have to sue for damages at law), is not in a position to demand that the married woman's grantee shall do that which the grantor herself is not compellable to do.

SOMMERS et al. v. MYERS et al.

(Supreme Court of New Jersey. April 18, 1903.)

CONTRACTS—ROYALTIES—PUBLIC POLICY—DEFENSES—FRAUD—PROOF OF LOSS—SUBSEQUENT AGREEMENT—CONSIDERATION.

1. Where defendants contracted to pay plaintiff the sum of \$200 per annum for the exclusive privilege of running an observation wheel at a pleasure resort during the life of a patent on the wheel, it was no defense to an action to recover unpaid installments of such royalty that during two years of the time for which royalty was demanded defendants did not own or run the wheel.

2. An agreement by which defendants promised to pay plaintiffs \$200 per annum for the exclusive privilege of running a wheel at a pleasure resort during the life of a patent on the wheel was not contrary to public policy.

3. Where, at the trial of an action to recover certain royalties, plaintiffs' counsel expressed his willingness that the question of fraud in the consideration of the contract should be litigated, the fact that such issue was not set out in the notice attached to the plea of general issue served was immaterial.

4. Where, in an action for royalties, defendants charged that there was fraud in the consideration of the contract, but there was no evidence that defendants had sustained any loss by reason of the fraud, the court properly withdrew such issue from the jury.

5. Where defendants contracted to pay plaintiffs a royalty for the exclusive privilege of running a wheel at a pleasure resort, plaintiffs' subsequent agreement that, unless they were able to stop the operation of other wheels at other places, which had rendered the operation of defendants' wheel a financial failure, defendants should not be required to pay further royalties, was without consideration, and no defense to an action for royalties accrued.

Action by William Sommers and others against John Myers and others. Judgment for plaintiffs. On rule to show cause why a new trial should not be granted. Rule discharged.

Argued February term, 1902, before GUMMERE, C. J., and VAN SYCKEL, GARRISON, and GARRETSON, JJ.

William I. Garrison and John W. Westcott, for the rule. Robert H. Ingersoll, opposed.

GUMMERE, C. J. The plaintiffs, doing business as William Sommers & Co., and the defendants, doing business as Johnson, Myers & Co., entered into a written agreement to the following effect: That in consideration of the sum of \$5,500 the plaintiffs contracted to build for the defendants an "observation roundabout" wheel, the details of the construction of which were specifically set out in the agreement. The defendants agreed to pay the plaintiffs the said sum of \$5,500 in installments, the last installment to be paid when the wheel was completed and in perfect running order. In consideration of the further sum of \$200 per annum, the plaintiffs agreed to give the defendants the exclusive privilege of running and operating the device known as "Observation Roundabouts" at South Beach, Staten Island, N. Y.,

during the life of the letters patent No. 489,238, granted for the same; and the defendants agreed to pay to the plaintiffs for that privilege \$200 annually on the 1st day of August of each year during the continuance of the letters patent. The observation roundabout wheel was completed by the plaintiffs in accordance with the provisions of the agreement, and the sum of \$5,500 paid for it by the defendants. After its completion it was operated by the latter for the period of one year, and the royalty for that year was paid by them. This suit is brought to collect the royalty which it is claimed has accrued on the wheel for the four succeeding years, but which still remains unpaid.

To the declaration filed in the case the defendants pleaded the general issue, and attached to the plea the following notice: "Take notice that under the plea of general issue the defendants will offer evidence in bar of a part of the amount sued upon, to show (1) that during two years of the time set forth in the bill of particulars in plaintiffs' declaration defendants were neither owners nor had they run the wheel referred to, and that at and before the beginning of the two-years period they had parted with all right or ownership in the same; (2) to show that the contract sued upon is against public policy."

The matters set out in the first provision of the notice are no defense to the plaintiffs' action. Nor is the contract sued upon in any way violative of the public policy of the state. At the trial of the case, however, the defendants offered evidence to show that they were induced to enter into the contract sued upon by false and fraudulent representations, made by the plaintiffs, of the exclusive character of the rights which would pass under the contract, and of the value of those rights. The defense of fraud is not specified in the notice attached to the plea, but at the trial counsel for the plaintiffs waived their right to confine the defense to the matters set up in the notice, and expressed his willingness that the question of fraud in the consideration of the contract should be gone into. Under this condition of affairs, the trial judge properly permitted the question of fraud to be injected into the case by the defense, notwithstanding that it was not set out in the notice attached to the plea. Evidence was also offered by the defense to show that one of the plaintiffs, about a year after the completion of the observation roundabout wheel, upon being informed by one of the defendants that it was not a money maker, because there were other wheels at other places being run in competition with it, by reason whereof the public had grown tired of it, promised that, unless the plaintiffs were able to stop these other wheels from running, the defendants need not pay any further royalties; and that the plaintiffs tried, but unsuccessfully, to do so. In charging the jury the trial judge instructed them that the

defense of fraud, under the conditions which had been developed by the testimony, could only be used for the purpose of reducing the amount of the plaintiffs' recovery; not as a bar to the action (Lord v. Brookfield, 37 N. J. Law, 552); that, even if the evidence submitted would support the conclusion that fraud existed in the consideration of the contract, yet there was nothing to show that any loss had been sustained by the defendants by reason of such fraud. He further instructed them that the promise of one of the plaintiffs to one of the defendants to exonerate the latter from the payment of further royalties unless the plaintiffs should stop other wheels from running (if the jury should find such a promise to have been made) was no defense to the action; that there was no consideration to support it, and that it was, therefore, without legal validity. He concluded his instruction by directing the jury to render a verdict in favor of the plaintiffs for the full amount of their claim.

An examination of the testimony shows that the statement of the trial judge that there were no facts proved which would justify the conclusion that any loss had been sustained by the defendants by reason of the alleged false and fraudulent representations made to them by the plaintiffs as to the exclusive character of the rights which they would get under their contract, and of their value, was justified by the proof. The same is true with regard to the statement made by him to the effect that the promise to remit royalties, if made, was without consideration to support it. These two matters being the only ones set up by the defendants, at the trial, either in bar of the action or in reduction of the plaintiffs' claim, there was no error in the direction of a verdict for the full amount sued for by the plaintiffs.

The rule to show cause should be discharged.

HAYDAY et al. v. BOROUGH OF OCEAN CITY.

(Supreme Court of New Jersey. April 1, 1903.)

MUNICIPAL CORPORATIONS—PAVING ASSESSMENTS—ADJUSTMENT BY COMMISSIONERS—CONCLUSIVENESS.

1. The fact that paving assessments as originally laid were defective or illegal affords no ground for relief from an adjustment by commissioners of adjustment appointed under the Martin act (P. L. 1886, p. 149, c. 112), providing a way for the correction and validation of assessments ineffective because of irregularities and illegalities.

Certiorari by Hannah S. Hayday and others against the borough of Ocean City. The writ was dismissed, and a rehearing is prayed. Application denied.

Argued November term, 1902, before GUMMERE, C. J., and HENDRICKSON, J.

G. A. Bourgeois, for prosecutor. H. H. Voorhees, for defendant.

GUMMERE, C. J. Commissioners of adjustment appointed under the Martin act (P. L. 1886, p. 149, c. 112), having adjusted certain assessments for paving, laid against property of the prosecutors in the years 1892 and 1895, a certiorari was allowed for the purpose of reviewing the adjusted assessments. At the hearing the prosecutors sought to attack the original assessments, but were not permitted to do so, the court considering that they were barred by their laches. The writ having been dismissed, a rehearing is prayed on the ground that the long period which elapsed between the time when these assessments were originally laid and the suing out of the writ of certiorari did not, under the peculiar conditions which are claimed to have existed, show laches on the part of the prosecutors. This may be so, nevertheless they are not now open to attack. One of the objects of the Martin act and its supplements was to provide a way for the correction, amendment, and validation of taxes and assessments which were inefficacious on account of irregularities or illegalities, in order that land benefited by an authorized public work should not escape the payment of its proportionate share of the benefits thereof. In re Commissioners of Elizabeth, 49 N. J. Law, 488, 10 Atl. 363; Norris v. Elizabeth, 51 N. J. Law, 489, 18 Atl. 802; Protestant Foster Home v. Newark, 52 N. J. Law, 141, 18 Atl. 572. The effect of the action of the commissioners in readjusting the assessments was to cure all defects or illegalities which existed in them as originally laid; or, to speak more accurately—quoting from the title of the act—"to impose and levy a new assessment and lien in lieu and instead" thereof. The fact, therefore, that the assessments, as originally laid against the property of the prosecutors in the years 1892 and 1895, were defective or illegal, affords no ground of relief.

The application for a rehearing should be denied.

WARMOLTS v. KEEGAN, City Clerk.

(Supreme Court of New Jersey. April 1, 1903.)

MANDAMUS TO CLERK OF BOARD OF ALDERMEN.

1. Mandamus will lie to compel the performance of purely ministerial duties, plainly incumbent upon an officer by virtue of his office, and concerning which he possesses no discretionary powers.

2. The clerk of a board of aldermen, who refuses to comply with a resolution of such board to strike one name from the roll of members and to place another thereon, will be compelled by mandamus to perform the duties of his office in these respects.

(Syllabus by the Court.)

¶ 1. See Mandamus, vol. 33, Cent. Dig. § 132.

Application by the state, on relation of Nicholas E. Warmolts, for writ of mandamus to John Keegan, city clerk of the city of Paterson. Writ granted.

Rule to show cause why a mandamus should not issue directing the city clerk of Paterson "to admit N. E. Warmolts as a member of the board of aldermen in the place and stead of August Winters, and to strike the name of August Winters off the roll, and put the name of N. E. Warmolts thereon instead."

The facts established by the proofs taken under this rule are: At a meeting of the board of aldermen of the city of Paterson held on the 16th day of February, 1903, at which the defendant, the city clerk, was present and acting as clerk of said board, the following resolution was adopted:

"Whereas, at the annual election held in this city and county in November, 1901, August Winters was elected for the term of one year as alderman of the Third Ward of this city, he having been regularly nominated for said term; and

"Whereas, at the annual election held in this city, November 4, 1902, for aldermen and other officers, said August Winters was again a candidate for said office, he having been regularly nominated therefor and accepted said nomination; and

"Whereas, N. E. Warmolts was also at said last-mentioned election a candidate for the same office, he having been regularly nominated therefor; and

"Whereas, at said election a greater number of votes were cast for said N. E. Warmolts than for said August Winters for alderman for said Third Ward for the term of two years to commence January 1, 1903, now, therefore, in the judgment of this board the said N. E. Warmolts was duly and legally elected as alderman from said ward at said annual election held November 4, 1902, and is duly and legally entitled and qualified to act as said alderman and to enjoy all the rights and subject to all the duties of such office in the place and stead of August Winters; therefore, be it

"Resolved, that said N. E. Warmolts be at once admitted as a member of this board for said ward and term in the place and stead of said August Winters, with all the rights and privileges and subject to all the duties of a member thereof, and that the name of the said August Winters be stricken off the roll call and the said N. E. Warmolts placed thereon instead."

After this resolution had been declared to have been adopted, the president ordered the defendant to place the name of N. E. Warmolts on the roll of membership of the board in place of that of August Winters, which the defendant refused to do. At a special meeting of the board held on the 20th day of February, 1903, in calling the roll of mem-

bers the defendant called the name of Winters, and did not call the name of Warmolts, who was present and voted upon being asked by the president how he voted. This vote of Warmolts the defendant refused to register. At a subsequent meeting held on March 2, 1903, the defendant refused to call the name of Warmolts, but called that of Winters, after which, upon the application of Warmolts, the present rule to show cause was allowed.

Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ.

J. B. Blauvelt, for relator. William B. Gourley, for defendant. Michael Dunn, for city of Paterson.

GARRISON, J. (after stating the facts). The clerk of a board of aldermen, in keeping a record of its proceedings, performs a ministerial duty that is imperative in its nature. If those proceedings result in a direction to him to omit one name from the roll of members, and to place another thereon, the clerk is as entirely without discretion in the premises, as he is without responsibility for such result. His duty is to note the action of the body of which he is clerk, to keep a record of such action, and to announce it in efficient form when so required. His opinion as to the legal propriety of the official acts that he is called upon to register is of no sort of consequence. Any other view would invest a subordinate ministerial officer with supervisory and veto powers, at once alien to his office and subversive of order and legislative control. The general rule as to mandamus in such cases is thus stated by Mr. High in his work on the subject: "It may be asserted as a rule of universal application that, in the absence of any other adequate and specific legal remedy, mandamus will lie to compel the performance of purely ministerial duties plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers." High on Mandamus, § 80.

This citation states the established rule upon the subject, and is aptly descriptive of the precise situation disclosed by the case in hand.

In the case of *Leeds v. Atlantic City*, 52 N. J. Law, 332, 19 Atl. 780, 8 L. R. A. 697, which is relied upon by the defendant, the title of the relator *de jure* was res judicata, and on this ground the mandamus went. In the present case the title to office is not even drawn in question, and if it were, it could in no respect be tested by the mere nonperformance of a purely clerical function.

A peremptory mandamus may issue, commanding the defendant to strike the name of August Winters off the roll of members of the board of aldermen of the city of Paterson, and to place the name of N. E. Warmolts thereon, with costs.

MAYOR, ETC., OF BOROUGH OF CARLSTADT v. CITY TRUST & SURETY CO. OF PHILADELPHIA.

(Supreme Court of New Jersey. Feb. 24, 1903.)

STREET RAILROADS—CONSTRUCTION—BOND—ACTION FOR BREACH.

1. An ordinance of the borough provided that a traction company, in exercising the granted right to lay its rails in the public streets, should complete the work within a specified time. Thereupon a bond was given by the traction company, with the defendant as surety, conditioned to perform this obligation.

In a suit upon the bond, the condition being regarded as reasonable, the failure of the traction company to comply with it constituted a breach of the bond, and will support a recovery.

(Syllabus by the Court.)

Action by the mayor and council of the borough of Carlstadt against the City Trust & Surety Company of Philadelphia. Demurrer to narr. Overruled.

Argued February term, 1903, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Shafer & Conkling, for plaintiff. Copeland, Luce & Kipp, for defendant.

VAN SYCKEL, J. The plaintiff is a municipal corporation of this state, duly organized as such, with power to grant or refuse to an applying company the right to construct and operate a street railway, by means of electricity as a motive power, through the public streets of its territory, and also the general power to regulate the use of its streets. On the 13th of August, 1896, the Union Traction Company applied for such grant, and, by an ordinance then passed, was given the right applied for. In consideration of the grant, it was required by said ordinance, and the said traction company undertook, to pay the plaintiff the sum of \$250 in case it failed to construct and complete its tracks within the borough in a specified time, and also to pay for macadamizing Division avenue between Monroe and Hackensack streets, for one-half the cost of grading and macadamizing a part of Hoboken avenue between Monroe and Hackensack streets, and the entire cost of regrading, macadamizing, curbing, guttering, and flagging Hackensack street in case the mayor and council deemed it necessary to change the grade of that street. The traction company entered into a bond in the penal sum of \$4,000, with the defendant company as surety, to comply with these conditions. Suit is brought upon this bond, and breaches are assigned. The defendant has demurred to the declaration.

Hoboken street is not one of the streets designated for the laying of tracks, but Hackensack street is; and the ordinance, which is made part of the declaration, shows that changes of grade were to be made on that street, and it appears that such a change was in fact made. Such change necessarily

involved some change in the grade and paving of the connecting streets.

The ground is taken by the defendant that, in conferring upon the borough the power to give or withhold the consent necessary to the grant of a franchise of this nature, the Legislature did not intend to invest it with the right to sell the privilege to the company, or to exact money for the improvement of its streets; that its exercise was intended to be governed exclusively with reference to the advantage or disadvantage of such a railway to the public, and cannot be made the subject of a bargain. Without assenting to this proposition, it is sufficient to say that the decision of the case turns upon a much narrower question, and one in regard to which we think no doubt can be well entertained. One of the requirements of the ordinance, and one of the express conditions of the bond, on which breach is assigned in the declaration, is that the traction company agreed to construct and complete its tracks within a specified time, and that it failed so to do within the prescribed time. It is the right and the duty of the governing body of such a municipal corporation to provide that companies, in exercising their right to lay rails upon the public streets, shall perform the work with such reasonable dispatch that travel shall not thereby be impeded or rendered less safe for an unreasonable length of time. This provision of the ordinance was a reasonable exercise of the corporate power, and the failure of the traction company to comply with it constituted a breach of the bond.

One sufficient breach being assigned, the demurrer must be overruled, with costs. It is not necessary to express an opinion with respect to the other breaches assigned.

WILSON v. BORDEN.

(Court of Errors and Appeals of New Jersey. March 2, 1903.)

BUILDING CONTRACT—BREACH—DAMAGES—EVIDENCE.

1. When, under a building contract, the contractor has been prevented from completing his work by the fault of the owner, the legal measure of damages is generally, for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and, in respect to the work not done, such profits as he would have realized by doing it.

2. Evidence as to the cost of the entire work is necessary in order to ascertain what proportion of the whole work contracted for has been done.

3. The defendant will be entitled to show that the contractor has not done his work in compliance with the contract, and to claim such rebate as will satisfy the loss to him by reason of such noncompliance.

4. The contract provided "that if the architect shall certify that the refusal, neglect or failure of the contractor to comply with the

¶ 1. See Damages, vol. 15, Cent. Dig. §§ 231, 232.

contract is sufficient ground for such action, the owner may terminate the employment of the contractor." The architect occupied a judicial position as to the parties, and was bound to act impartially upon his own judgment, and to express in some appropriate language, in writing, his opinion that there was sufficient ground to take the work out of the contractor's hands.

5. A private letter written by the architect to the owner, and not communicated to the contractor, will not justify a rescission by the owner.

(Syllabus by the Court.)

Error to Circuit Court, Monmouth County.

Action by Wayman Wilson against Matthew C. D. Borden. Judgment for plaintiff, and defendant brings error. Reversed.

John S. Applegate & Son, for plaintiff in error. James S. Degnan, for defendant in error.

VAN SYCKEL, J. This is a suit on a building contract, by contractor against owner, to recover for work done under the contract, dated April 23, 1901. The plaintiff alleged that the owner unlawfully rescinded the contract, and he was permitted by the trial court to recover the cost of the work he had done, and materials furnished.

The first question in the case is whether the owner was justified in putting an end to the contract.

Section 13 of the contract provides "that if the architect shall certify that the refusal, neglect or failure of the contractor to comply with the contract is sufficient ground for such action, the owner may terminate the employment of the contractor." On the 27th of August, 1901, the architects sent to Borden a letter, of which the following is a copy:

"August 27, 1901. Dear Mr. Borden: We have your favor of the 26th inst, in relation to the progress of work on the Bleiman Cottage.

"We feel as you do about this matter, that the present progress is absolutely unsatisfactory, and that under existing conditions it is utterly impossible to prophesy the date of completion. We have urged the contractor on every possible occasion and have instructed him in many ways that with an ordinary contractor would be quite unnecessary, but he exhibits so little capacity for carrying on the work that we are quite discouraged about it, and we are therefore very willing to take any action in the matter which you may suggest.

"The present stage of the work is perhaps the most unsatisfactory of all, as the plastering work which is now being carried on prevents the progress of the woodwork on the interior, and this of course cannot be avoided.

"If you deem it advisable, we will forward to the contractor the formal notice to discontinue work which you have already sent to us for the purpose. We have no means of inducing the contractor to put more energy into the work, nor can we supply his deficiency in this particular. We have exhaust-

ed every resource in our efforts to have him hurry the work.

"We await your instructions in the matter.

"Yours truly, Cavere & Hastings."

After receiving this letter the defendant, on the 7th of September, 1901, caused the notice referred to in the letter of the architects to be served on the plaintiff; having first changed its date to September 7, 1901. The said notice was as follows:

"Wayman Wilson, Esq.—Sir: In accordance with the terms of section 13 of my contract with you for work on the house formerly owned by Max Bleiman of Oceanic, N. J., I hereby give you notice that your failure to proceed with the work compels me to avail myself of my privilege under said contract to have the work finished by some other person.

"Oceanic, 7th Sept. 1901.

"M. C. D. Borden."

An implication may be drawn from the letter of the architects that in their judgment the owner had a right to rescind, but the contractor should not be deprived of his contract by implication when there is an express provision in the contract that the architect must certify that there is sufficient ground for rescission. It is not necessary that the word "certify" shall be used, or that any formal language shall be employed by the architects, but they must express in some appropriate language, in writing, their opinion that there is sufficient ground for the owner to take the work out of the contractor's hands. There is an absence of such language. The architects occupied a judicial position as to these parties. They had no right to favor either, but were under a duty to act impartially between them. Their statement in the letter of August 27th that they were willing to take any action which the owner might suggest, and that they would forward the notice to rescind, if the owner so desired, does not show a correct judicial disposition; and from it the inference may be drawn that the architects had not fully made up their minds whether they should certify, but would be governed by the wish of the owner. That was not a compliance with the requirement to certify their own judgment as arbiters between the parties.

Besides the infirmity in this respect, the letter written by the architects to Borden, the owner, even if in form a certificate, could not justify the termination of the contract, because it was a private letter written to the owner, and not served upon, nor its contents communicated to, the contractor, whose rights under the contract were to be affected. All the information the contractor had was that the owner wished to rescind the contract.

The trial judge therefore properly instructed the jury that the contract was not lawfully rescinded by the owner.

The jury was thereupon directed to find a verdict for the plaintiff for the sum of \$3,266.79, with interest from September 11, 1901—the amount testified to by the plain-

tiff as the cost of the work done and materials furnished by him. In this instruction to the jury an erroneous rule for computing the amount due to the plaintiff was adopted. In *Kehoe v. Rutherford*, 56 N. J. Law, 23, 27 Atl. 912, Mr. Justice Dixon formulated the correct rule as follows: "When the plaintiff has been prevented from completing his work by the fault of the owner, the legal measure of damages is generally, for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work; and, in respect to the work not done, such profits as he would have realized by doing it." If the plaintiff had completed one-quarter of the whole work contracted for, he would have been entitled to one-quarter of the contract price; if he had completed one-half, to one-half of the contract price. To ascertain what portion of the work the plaintiff had done, it was necessary to ascertain what the cost of entire work would have been. The plaintiff had proved the cost of the work done, and the defendant offered to prove what it would cost to finish the contract work. This offer was erroneously overruled. If the plaintiff had done work which cost one-half of the cost of the entire work, he would have been entitled to one-half of the contract price for that work. It is proper, however, to observe, that the defendant would have a right to set up and show that the plaintiff had not done his work in compliance with the contract, and to claim such rebate as would satisfy the loss by reason of noncompliance.

The judgment below should be reversed, and a venire de novo awarded.

LEAVER v. KILMER et al.

(Supreme Court of New Jersey. Feb. 25, 1903.)

APPEAL—BRIEFS.

1. A brief presented on appeal by one who has not been licensed to practice as a counselor at law will not be received.

Error to Circuit Court, Monmouth County.

Action by John F. Leaver against Nelson H. Kilmer and others. Judgment for plaintiff, and defendants bring error. Defendants' brief excluded.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Wesley B. Stout, for plaintiffs in error. S. A. Patterson, for defendant in error.

PER CURIAM. On the call of the list at the opening of the term, it was announced that this cause would be submitted upon briefs. Pursuant to this announcement, copies of the printed case and briefs were filed with the sergeant at arms. It appears, however, upon an inspection of the brief submit-

ted on behalf of the plaintiffs in error, that it is presented by a member of the bar who has not as yet been licensed to practice as a counselor at law. This court will not receive such a brief. The cause stands, therefore, as if, notwithstanding the stipulation to submit it upon briefs under the rule, the plaintiff in error had entirely failed to comply with that stipulation.

The defendant in error is entitled to proceed as if no brief had been filed by his adversary.

JEFFRAY v. TOWAR et al.

(Court of Chancery of New Jersey. Feb. 13, 1903.)

TRUST FUND—PROFITS BY TRUSTEES.

1. The beneficiary of a trust fund is entitled to all profits made thereon by the trustee in violation of his trust.

Memorandum on settlement of decree.

For former opinion, see 53 Atl. 182.

Lindabury, Depue & Foulks, for complainant. Hartshorne, Insley & Leake, for defendants.

EMERY, V. C. Counsel have presented arguments and briefs upon the questions reserved, and, upon further consideration, I reach the following conclusions upon these questions:

1. In determining the principal of the trust fund or property in Towar's hands, the accounts submitted by Towar to Dwight, trustee, in his lifetime, and accepted by Dwight as the statement of the trustee account, must be taken as settling the amount of this principal for the purposes of this suit. As between Dwight, the trustee, and Jeffray, the whole of this amount due on the trustee account is plainly to be treated as part of the trust fund, for the reasons stated in my opinion. It is, as there found, composed entirely of trust property, which is traced, or of additional deposits to the credit of the trustee account made by the trustee to replace trust funds for which he was liable. As between Dwight, trustee, and Towar, these statements of the trustee account, submitted and accepted, plainly fix the balances due. While Towar's liability to pay any portion of the account to Jeffray (Dwight's cestui que trust) depends upon Jeffray's establishing that the whole account was a trust fund, and that Towar had notice of this, the amount recoverable, if these points are established as I have found them to be, is the whole amount admitted to be due by the banker on the trustee account. Jeffray, as to the amount due, claims under Dwight, and is entitled to recover all that Dwight could recover on the face of the trustee account, subject, however, only to such set-off or defenses in favor of his own separate account as Dwight could lawfully impress upon the trustee account; and the circumstances that the balance due on the trustee

account up to its last statement (January 1, 1898) is, to some extent, the result of a previous compounding of interest, cannot entitle Towar now to readjust the entire trustee account from the beginning, in order to eliminate this feature of the accounts. The supposed equity upon which such claim for readjustment is based is that compounding of interest was allowed on the trustee account because it was charged in the additional account, and it was intended that one should offset the other. The answer to this claim is twofold: (1) As between Jeffray, the beneficiary, and Dwight, the balance on the trustee account represents the trust fund, and the profits thereon arising from the deposit of trust funds with the banker. As against the trustee, the beneficiary is clearly entitled to the whole of any profit. This is a settled rule in regard to profits made by trustees, and is made in order to penalize the use of trust funds; and the same principle should prevent the remission, for the benefit of the banker, of any portion of the profits or interest on the trustee account which the banker has already credited to the trustee, with notice that the fund is a trust fund. (2) Dwight is still liable on his separate account for the compound interest included therein, and the readjustment would inure solely to the benefit of the banker on the trustee accounts. The amount due upon the account, therefore, will be fixed according to the last statement as \$19,926.63 due January 1, 1898.

2. Simple interest at 6 per cent. from that date is to be allowed. Complainant is seeking decree for the payment of the balance due on the banker's account held in trust for him, and his recovery is to be limited to the amount due on the account, as stated and agreed on between the banker and his trustee, with such interest thereon as is due for the retention of the money due him, not the interest due as between persons continuing to deal as banker and customer, nor as interest due from the trustee of an express trust, liable for profits. The interest is to be settled as on the ordinary basis of an action for money due.

3. Defendant Towar is chargeable with the interest received upon the two Colorado Coal & Iron Company bonds, so far as received, and not already charged in his account, and must deliver these bonds to complainant. If the amount received is not agreed upon, I will hear evidence, or refer to a master.

4. Defendant Towar is also to deliver to complainant the Wisconsin Central Railroad bond received in exchange for the Chippewa Falls & Western Railway Company bond, and account for the interest received thereon since October 22, 1895, the date of the last credit of interest. This may be settled without an accounting.

5. As against defendant Dwight's administrator, complainant is entitled to a decree for the entire amount of the principal fund

of the trust estate in his hands, as shown by his account to complainant, together with interest thereon from the date of the last payment of interest, and deducting the payments of \$5,000 principal. Any amounts realized from the Connecticut lands are to be credited upon this balance, and also any payments made under this decree by defendant Towar; and, if the latter payments be made, then, after the payment or satisfaction of the entire amount due from the trustee's estate, defendant Towar may apply to have the decree against the Dwight estate assigned to him, to the extent of his payments.

BOWMAN v. BOARD OF CHOSEN FREEHOLDERS OF ESSEX COUNTY.

(Supreme Court of New Jersey. Feb. 24, 1903.)

COUNTY ROAD BOARDS—CONSTITUTIONAL LAW.

1. Upon the views announced in *Road Commission v. Haring*, 26 Atl. 915, 55 N. J. Law, 327, the act of April 24, 1894 (Gen. St. p. 2864), by which the functions of county road boards were transferred to the boards of chosen freeholders, is valid, notwithstanding the fact that the functions of the road board in Essex county differed from those permitted to road boards in other counties.

(Syllabus by the Court.)

Certiorari by Samuel H. Bowman against the board of chosen freeholders of Essex county to review an assessment for the widening of Bloomfield avenue. Affirmed.

Argued November term, 1902, before HENDRICKSON and DIXON, JJ.

Robert H. McCarter, for prosecutor. Joseph A. Munn, for defendant.

DIXON, J. The proceedings subjected to review by this certiorari were taken by the board of chosen freeholders of Essex county in widening a public road, pursuant to the provisions of the local statutes establishing and controlling the Essex public road board. The legality of the proceedings depends on the act of April 24, 1894 (Gen. St. p. 2864), passed to transfer the powers, duties, rights, and authorities of all county public road boards to the boards of chosen freeholders in the respective counties. As the functions of the Essex county road board were different from those permitted to road boards in other counties, it is insisted by the prosecutor that an enactment to transfer those functions to another county board must necessarily be local and special, whether embraced in a statute general in form or not, and therefore must be prohibited by our Constitution. An examination of this claim on principle in this court seems to be precluded by the opinion of the Court of Errors in *Road Commission v. Haring*, 55 N. J. Law, 327, 26 Atl. 915, where Mr. Justice Van Syckel, speaking for that court, declared that

the act of February 10, 1881 (Gen. St. p. 2862), which transferred the functions of every county road board to a committee of the board of chosen freeholders, rested on a substantial basis of classification, and was not prohibited by the organic law. That declaration must be equally applicable to an act transferring the same powers and duties from a committee of the board to the whole board.

The proceedings are affirmed, with costs.

**MERCER COUNTY TRACTION CO. v.
UNITED NEW JERSEY R. &
CANAL CO.**

(Court of Chancery of New Jersey. April 16, 1908.)

STREET RAILROADS—ESTABLISHMENT—MUNICIPAL CONSENT—CONSENT OF ABUTTING OWNERS—EXECUTION—SEAL—ACKNOWLEDGMENT—STATUTES—REPEAL—CONSTRUCTION—EXTENSIONS—MAPS—DESCRIPTION—VARIANCE—JUDGMENTS—ESTOPPEL.

1. P. L. 1896, p. 329, provides that no street railroads shall be constructed except on consent of the governing body of the municipality on the written consent of one-half of the abutting owners filed with the clerk of such governing body. *Held* that, since the filing of the requisite consent by the property owners was a condition precedent to the passage of an ordinance granting authority to construct a railroad, it would be presumed, in the absence of a contrary showing, in a subsequent proceeding, that the township committee before authorizing such construction determined that the consent of such owners had been filed.

2. Under P. L. 1896, p. 329, declaring that no ordinance for the construction of a street railway shall be passed until consent in writing of abutting owners, executed and acknowledged as are deeds, entitled to be recorded, has been filed with the clerk of the governing body of the municipality, consents filed, but not sealed, were insufficient to confer jurisdiction on a township committee to authorize the construction of a road.

3. Where consents of abutting property owners to the construction of a street railway were sealed, an acknowledgment thereto that the grantors signed and delivered the same as their voluntary act and deed was not objectionable for failure to recite that the grantors sealed the same, the sealing being implied from the acknowledgment that the instrument was the signer's deed.

4. P. L. 1894, p. 374, providing that no street railway shall be constructed upon any street or highway in a municipality, except on consent of its governing body and on consent of a certain proportion of the owners of abutting property on streets to be used, was superseded by P. L. 1896, p. 329, covering the same subject.

5. P. L. 1896, p. 329, provides that no street railway shall be constructed in any city, town, township, village, or borough except on consent of the governing body of such municipality, etc., and that such consent shall not be granted except on filing with the clerk of such governing body of the consent of a certain proportion of abutting owners. Section 2 authorizes the change of motive power, and is followed by a proviso that if any board, body, or public authority other than the governing body of such municipality, etc., shall have control of the streets or highways over which the proposed road is to be constructed, the consent of such board or public authority shall also be re-

quired, which shall be granted only on notice. *Held*, that the consent of abutters was only required to be once given and filed before the municipal authorities mentioned in the first section grant permission, and the act did not require the filing of the same consents as a condition to the railroad's obtaining the additional consent of the board of chosen freeholders of the county under such proviso.

6. Under a statute providing that before the beginning or construction of any extension to a street railway the corporation shall file in the office of the Secretary of State a description of the route of such extension, showing the termini, with a map exhibiting the same, with the courses and distances thereof, the fact that the map of an extension marked a distance running 1,462 feet more or less, while the description filed omitted the words "more or less," was immaterial, since such words might be rejected as surplusage.

7. A decree in a proceeding by certiorari to determine the validity of an ordinance granting a street railway company the right to lay its road on the highway within a township, determining that such ordinance was valid, did not estop the contestant in a subsequent new proceeding to contest the validity of the ordinance for reasons not advanced or considered in the prior suit.

Petition by the Mercer County Traction Company against the United New Jersey Railroad & Canal Company for the determination of a method by which the petitioner may have a crossing over defendant's railroad. Petition denied.

John H. Backes, for complainant. Alan H. Strong, for defendant.

REED, V. C. This is a petition filed by the Mercer County Traction Company for the purpose of having this court fix a method by which its road shall cross the road of the Pennsylvania Railroad Company at Yardville. The present road was organized as an extension of another road, also known as the Mercer County Traction Company, running from Allentown to Yardville. The present road starts from the terminus of the former road, and runs 1,462 feet northerly. The United New Jersey Railroad & Canal Company, lessors, and the Pennsylvania Railroad Company, lessees, of the road to be crossed, challenge the power of this court to act upon the petition. The objection to the jurisdiction of the court is put upon the ground that the conditions essential to equip the petitioners with a legal existence have not been performed.

The incorporation of the petitioners seems to have been under section 6 of the act of 1893 (P. L. p. 306), which provides for the extension of an existing railway. The first objection is that the railroad of which the petitioners pretend to be an extension, namely, the road of the original Mercer County Traction Company itself, had no legal existence. The evidence offered by the petitioners in respect to the organization of that road is a certificate of incorporation dated January 19, 1899, recorded in the office of the clerk of Mercer county July 31, 1899, and

filed in the office of the Secretary of State on the same day; also a location of the route of the road, and a map, filed December 7, 1890; also an ordinance of the township committee of the township of Hamilton, granting permission to the said company to lay its road along the highway indicated in the description and shown on the map of its route, and acceptance by the company and the officers of the company, filed January 23, 1900, and also the written consents of certain owners of land abutting on the highway. The evidence offered in respect to the organization of the road of the petitioners is a description of the road, with a map attached, filed in the Secretary of State's office on August 23, 1901; an ordinance of the township committee of the township of Hamilton, granting permission to use the highway; acceptances by the company and the officers of the company of the ordinance, filed in the office of the Secretary of State October 9, 1901, and consents of abutting owners along the highway.

It is insisted that the existence of the original road is not proved, because the consent by the township to the laying of the original road was invalid, in that there was not filed with the township clerk the consent in writing of the owner or owners of at least one-half in amount in lineal feet of the property fronting on the street or highway upon which the road was to run. The act controlling this matter is to be found in P. L. 1896, p. 329. This act provides that no street railroad shall be constructed upon any street or highway except upon the consent of the governing body of such municipality, town, township, village, or borough. The act contains a proviso as follows: "That such permission to construct, maintain and operate a street railway shall in no case be granted in whole or in part until there shall be filed with the clerk of such governing body or other equivalent officer, the consent in writing of the owner or owners of at least one-half in amount in lineal feet of property fronting on the streets, highways, avenues, and other public places, or upon the part of the street or streets, highway or highways, avenue or avenues and other public place or places, through or upon which permission to construct, operate and maintain a street railway is asked, and any such consent may be signed by an attorney in fact, thereunto duly authorized by any owner, or by an executor or trustee holding the legal title or having power of sale, which consent shall be executed and acknowledged as are deeds entitled to be recorded."

It is first objected that it does not appear that those purporting to give their consents, filed in the township clerk's office, owned the requisite number of feet required by the statute; and it is objected, secondly, that the consents are not executed in accordance with the statutory requirements, the statute requiring that the consents shall be executed

and acknowledged "as are deeds entitled to be recorded." In respect to the absence of proof that those who signed the consents owned the requisite number of lineal feet, nothing appears but the statement in the written consents of the number of feet owned by each consenting owner. As the filing of the requisite consent was a condition precedent to the power of the township committee to pass the ordinance, I think that the fact of the passage of the ordinance should be regarded as evidence that the committee found that the consents filed were, in this respect, in accordance with the statute. The committee could resort to whatever evidence it wished to satisfy itself of that fact. It is true that the proceedings were of a statutory body with a limited power, yet, so long as nothing appears in the record of their proceedings to exhibit an absence of power to act, and inasmuch as the statute requires no record of the decision of the committee in respect to the fact that the owners of the required feet have consented, it may be assumed, until the contrary is shown, that this fact was satisfactorily proven to exist.

The remaining objection, however, is based upon what appears in evidence, viz., that the consents which were filed were neither sealed nor acknowledged as sealed instruments. The statute requires that the consents shall be not merely acknowledged, but shall be executed "as are deeds entitled to be recorded." The word "consent" includes those made by the owner himself as well as those made by his attorney in fact, or by an executor or trustee holding the legal title or having a power to sell abutting lands. Now, it is common learning that one of the requisites of a deed is a seal. The grant of an easement requires a seal. It is, of course, true that equity can treat an unsealed instrument purporting to be a deed or grant as an agreement creating an equitable interest in or a lien upon the land which is the subject-matter dealt with by the imperfect instrument. That rule, however, is inapplicable in this proceeding; for, while the method of crossing is put by the Legislature under the supervision of a court of equity, yet one of the statutory conditions upon which the right of the trolley road to cross is that the petitioning road has not merely the consent of a certain proportion of abutting owners, but that the consents shall be evidenced in a form fixed by the statute. To make these consents provable, the statute requires that they shall be executed and acknowledged as deeds. These were not. And so the filed consents were not provable as such, and at the time of the passing of the ordinance granting permission to the original traction company the condition was as if no legal consents had been filed with the clerk. It follows that it is not proved that a legal road existed, of which the present road is an extension.

Again, the same objection in respect to the

legality of the consents is raised in regard to the validity of the petitioning road. The consents of the abutting owners last mentioned are on one paper, having seals attached to the names of the landowners, but the certificate of acknowledgment with one exception states merely that the grantors signed and delivered the same as their voluntary act and deed. Had the certificates stated that the owners "acknowledged that they executed the instrument as their voluntary act and deed," the acknowledgment would have been good, although sealing was unmentioned. *Sharp v. Hamilton*, 12 N. J. Law, 109. I think that these acknowledgments are sufficient. The signers acknowledged that they signed the consents, and delivered them as their voluntary act and deed. A deed imports a sealing, and these consents were actually sealed.

It is also objected that consents should have been filed with the county clerk as a condition precedent to the granting by the board of chosen freeholders of Mercer county permission to place this road upon a macadamized county road. The act of 1894 provided that no street railroad shall be constructed upon a street or highway in a municipality, town, township, village, or borough except upon the consent of the governing body of such municipality. It provides that such consents shall not be granted by the governing body of any such municipality, etc., until consents by a certain proportion of lineal feet owned by abutters upon the road shall have been filed in the office of the clerk of the municipality, etc. The act of 1896, p. 329, clearly supersedes the act of 1894, p. 374, as it covers all its provisions respecting consents. This act provides that no street railroad shall be constructed upon any street or highway in any city, town, township, village, or borough except upon the consent of the governing body of such municipality, town, township, village, or borough. The act then provides for the consent of the abutting owners in the manner already exhibited. It is perceived that the word "city" is substituted in the act of 1896 for the word "municipality" in the act of 1894; and when the word "municipality" is afterwards used, followed by the other specified instances, the word undoubtedly refers to cities. It is the governing body of such cities, towns, townships, villages, and boroughs with which all consents to the required permission shall have been filed. All this is to be found in the first section of the act of 1896. The second section of the act deals with the manner of obtaining permission to change the motive power used by a street railroad. Then follows a proviso that if any board, body, or public authority, other than the governing body of such municipality, town, township, village, or borough shall have control of any of the streets or highways over which the proposed street railroad is to be constructed, etc., the consent of such board,

body, or public authority shall also be required. Then follows a provision requiring that such consent shall be granted only upon notice, to be given in the same manner as provided for in respect to notices to be given upon application for the consent of municipalities. It is under this provision that the application was made to the board of chosen freeholders as the board having control of the road over which this proposed trolley is to be constructed.

It seems entirely clear that the consent of the abutters is required to be only once given, namely, before the municipal authorities mentioned in the first section of the act of 1896 grants its permission. The provision for the consent of the abutting owners is referable to the action of the governing body of cities, towns, townships, villages, and boroughs. The only condition attached to the granting of the latter permission is that notice shall have been given in the same manner as provided for in the first section. While expressly providing for the same notices, it is entirely silent as to any consent of abutting owners in the manner required in the first section. The express requirements of notice, coupled with silence in regard to consent, excluded the idea of an absurd requirement that two consents of the same abutting owners shall be executed and filed before a valid grant of permission can be given by the county.

It is, again, objected that there is no compliance with the statutory requirement that before the beginning or construction of any extension or new trolley line the corporation shall file in the office of the Secretary of State a description of the route of such extension, or new line, showing the termini, together with a map exhibiting the same with the courses and distances thereof. Upon the map filed by the present petitioners is marked a distance from a southerly terminus, running northerly 1,462 feet, more or less. The description filed omits the words "more or less," and described the southerly terminus at a point in the road known as "Crosswicks," and Trenton turnpike, where the road leading from Groveville to Hamilton Square intersects the same, and runs thence a certain course 1,462 feet to a point in said highway, which point is the northerly terminus. I think that the words "more or less" upon the map may be rejected as surplusage. They have no significance whatever when the distance is the only indication of the point where the road stops. I think a point 1,462 feet from the southerly terminus is the northerly terminus of the present road, and sufficiently appears, both in the written description and upon the map.

These conclusions still leave wanting the provable consents by the abutting owners to the laying of the road of which this is an extension. There is, however, offered in evidence the record of a proceeding upon cer-

tiorari in which the Pennsylvania Railroad Company was prosecutor and the petitioner was a defendant. The writ seems to have brought up the ordinance passed by the township committee of Hamilton township, giving the petitioners permission to lay its road upon the highway within the township. This ordinance was adjudged by the Supreme Court and the Court of Errors upon a writ of error to be a valid ordinance. This judgment would conclude the two parties mentioned in any proceeding brought directly to test the validity of that ordinance. The doctrine of *res judicata*, however, differs, when applied to a new proceeding for the same, or part of the same, cause of action, and when applied to a different cause of action. In the former instance everything that could have made for the plaintiff or for the defendant is settled by the first judgment. In the latter instance only those issues actually presented and decided are concluded. *City of Paterson v. Baker*, 51 N. J. Eq. 50, 26 Atl. 324; *Clark Thread Company v. William Clark Company*, 55 N. J. Eq. 658-662, 37 Atl. 599. The present proceeding must be regarded, not as a direct attempt to litigate the validity of the ordinance, but as a new proceeding, in which the validity of the ordinance and the existence of certain conditions essential to the validity of the ordinance come into question. Therefore the only points upon which the Pennsylvania Railroad Company is estopped are those actually litigated in the certiorari proceedings. The issue actually tried in that proceeding was whether the ordinance was good as against the reasons filed for its vacation. In *North River Meadow Company v. Shrewsbury Church*, 22 N. J. Law, 424, 53 Am. Rep. 258, an action of debt was brought to collect an assessment imposed upon lands belonging to the church. The Meadow Company, in support of the assessment, put in evidence the record of a proceeding in certiorari prosecuted by the church to test the legality of the assessment. In this proceeding the assessment had been held to be legal. The Supreme Court held that in the subsequent action to collect the assessment the church was estopped from asserting that the assessment was invalid. It was so held upon the ground that the reasons assigned by the church for vacating the assessment in the certiorari proceeding embraced all the points suggested on the trial of the later action. It is true that in the certiorari proceedings brought to test the ordinance in this case general, as well as special, reasons were assigned for its vacation; but the court was not obliged, and under its practice would not, notice the former, and in fact did not do so.

Inasmuch as the want of filed consents by the abutting owners were not assigned as grounds of objection to the ordinance, the Pennsylvania Railroad Company is not estopped from now setting up this objection.

This renders it unnecessary to consider the question what the posture of affairs would have been had the Pennsylvania Railroad Company been estopped, in view of the fact that the United New Jersey Railroad & Canal Company, which was not a party to the certiorari proceedings, is a respondent in this cause. Unless, by its lease to the Pennsylvania Railroad Company, it stripped itself of all substantial interest in the road, and passed the same to the Pennsylvania Railroad Company, it, not being estopped by the certiorari proceedings, would occupy a position to insist upon all the objections raised.

I am therefore constrained to the conclusion that by reason of the want of provable filed consents of the abutting owners along the road of which the petitioner's road is an extension, the petitioner has no standing to ask for the order now sought.

FIELDERS v. NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

Dissenting opinion. For majority opinion, see 53 Atl. 404.

FORT, J. In this case I am unable to agree with the majority of the court. I should be willing to affirm upon the opinion of Mr. Justice COLLINS in the Supreme Court, reported in 50 Atl. 533. The conclusion reached by the Supreme Court in that opinion is, in my judgment, based upon a proper application of the police power, and also upon a wise public policy. I agree with Mr. Justice PITNEY in his opinion in this case, wherein he declares that "the plaintiff at the time of her injury was not in the exercise of her rights as a passenger in the act of leaving the defendant's car," and that, if she can recover, it is only upon the theory that the defendant, by a failure to repair the hole in the highway lying between its tracks, had failed to perform some duty which it owed to the plaintiff as one of the public. It is misleading, in my view, to refer to this case as one in which the failure of the defendant is a failure to repair the surface of the street. The hole in the highway was at a street crossing, and abutting upon the rail of the track, or its foundation, and the failure to repair at this point was a failure to repair its tracks, within the well-recognized principles of law applicable to the duty to repair tracks, laid upon a railway company having a right to lay tracks in the public streets. The majority opinion in this case concedes that "it is familiar law that a railway company having the right to lay tracks in a public street is bound by the general principles of the common law, and, without either a specific statute or ordinance, or a contractual obligation, to lay

its tracks in a proper manner, and to keep them in a proper state of repair." This principle thus stated is clearly sustained by 2 Thom. on Neg. (2 Ed.) § 358, cited in that opinion. I am at a loss to perceive how the duty to repair the hole between the tracks was not one of the duties to repair the track which was incumbent upon the defendant company under its implied obligation to so construct and maintain the rails of its track as that they should be free from dangers to persons lawfully using the highway. I regard the tracks as contemplating all between the rails as laid in the public highway.

The defendant's counsel, at the hearing and in his brief, admitted that, if the defendant company did not have actual knowledge of the condition of its tracks at the point in question, it was chargeable with such knowledge, because of the length of time the track had been in the condition it was at the time the plaintiff was injured; and, applying the principle of law stated in the majority opinion to the facts in this case, that, "if the defendant was under an absolute duty to repair the pavement, it was at the same time under a duty to observe its condition," it seems impossible to escape the conclusion arrived at by the Supreme Court.

It is held by the Supreme Court, and not controverted by the majority opinion in this court, that the ordinance of the city of Newark in evidence in this case, and upon which the plaintiff in part relied, requires the repairing by the defendant company between its tracks, and that the charter of the city of Newark, passed in 1836, and cited in the opinion of the Supreme Court, under the authority of which said ordinance was adopted, was in force at the time the defendant company took over the street railway which had its tracks upon Mulberry street in the city of Newark, and also at the time of the incorporation of the defendant company. Where a street railway company takes a franchise from a municipality to operate a street railway within the limits of such municipality, it takes it subject to the power of such municipality to regulate, under such franchise, its use of the streets, and its duty to pave and repair between the tracks, as expressly or impliedly authorized by the municipal charter. I am also clear in my view that such a provision of a city charter, or of an ordinance passed under it, is not for the benefit of the city, per se, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repairing of that portion of the highway lying between the rails constituting the tracks of the company. The city does not pave for its own purposes, per se. Paving is for the use of the public—both those of the public who pass over it with horses and carriages, and those who pass on foot. A corporate entity does not travel, and does not need paved streets. In *Sonn v. the Erie Rail-*

way Company this court held that a provision of the charter of the Erie Railway company which required it to keep its crossings at public highways secure for travel laid upon it a duty to the public, and, for default in so doing, it was liable in damages to a person injured because of its neglect of this duty. The principle of that case obtains where any duty is imposed by statute, or an ordinance lawfully passed under statutory authority; and it matters not whether the duty is in a special charter, a general act, or a lawful ordinance. *Sonn v. Erie Railway Company*, 66 N. J. Law, 428, 49 Atl. 458.

In the majority opinion there is a discussion of the question as to whether the ordinance of the city of Newark which attempts to impose a duty upon the defendant company to pave its tracks is not void because such an imposition is, in effect, taxation. I shall not discuss that question, farther than to express dissent from that view, for the reason that that question is not, in my judgment, in this case for decision.

I am authorized to say that Justice HENDRICKSON and Judge BOGERT concur in the view here expressed.

I vote to affirm.

VREDENBURGH, J. I concur in the dissenting opinion of Mr. Justice FORT in this case as a whole, but desire to especially emphasize my adherence to the doctrine therein contained wherein it is said that "a city charter, or an ordinance passed under it, is not for the benefit of the city, per se, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repaving of that portion of the highway lying between the rails constituting the tracks of the company. The city does not pave for its own purposes, per se. Paving is for the use of the public."

For these reasons, I also vote to affirm.

DUYSTER v. CRAWFORD.

(Supreme Court of New Jersey. Feb. 24, 1903.)

APPEAL—BRIEF NOT SUBMITTED BY ATTORNEY—STIPULATION.

1. The Supreme Court will not consider a brief submitted on behalf of a party in error by a member of the bar who has not been licensed to practice as counselor at law, notwithstanding a stipulation to submit the cause upon briefs.

Error to Circuit Court, Hudson County.

Action by George F. Duyster against Theron C. Crawford. Judgment for plaintiff, and defendant brings error.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Theodore Rurode, for plaintiff in error.
George S. Hobart, for defendant in error.

PER CURIAM. On the call of the list at the opening of the term, it was announced that this cause would be submitted upon briefs. Pursuant to this announcement, copies of the printed case and briefs were filed with the sergeant at arms. It appears, however, upon an inspection of the brief submitted on behalf of the plaintiff in error, that it is presented by a member of the bar who has not as yet been licensed to practice as a counselor at law. This court will not receive such a brief. The cause stands, therefore, as if, notwithstanding the stipulation to submit it upon briefs under the rule, the plaintiff in error had entirely failed to comply with that stipulation. The defendant in error is entitled to proceed as if no brief had been filed by his adversary.

In re CLAUS' WILL.

(Prerogative Court of New Jersey. Jan. 27, 1903.)

COSTS ON APPEAL—PROBATE OF WILL.

1. Where the orphans' court decided that contestant, on the probate of a will, had reasonable cause for the contest, and ordered the costs to be paid out of the estate of testator, and the proponent of the will did not appeal therefrom, but no reasonable cause existed for protracting the contest by an appeal to the prerogative court, the costs and expenses of such an appeal will not be paid from the estate.

Appeal from Orphans' Court, Camden County.

In the matter of the alleged last will and testament of William F. Claus, deceased. From a decree admitting the will to probate, contestant appeals. Affirmed.

Spencer Simpson, for appellant. Florance G. Toram and D. V. Summerill, for appellee.

MAGIE, Ordinary. I find nothing in the proofs before the orphans' court to justify a reversal of the decree admitting the will to probate. It must be affirmed.

The orphans' court concluded that the appellant had reasonable cause for contesting the validity of the will, and ordered the costs and expenses of the litigation on her part to be paid out of the estate of testator. The proponents of the will have not appealed therefrom, and the order, as made, must stand. But I find no reasonable cause for protracting this contest by an appeal to this court, and will decline to direct the costs and expenses of appellant in this court to be paid from the estate.

BROWN v. ELIZABETH, P. & C. J. R. CO.
(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

STREET RAILROADS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff attempted to cross, on foot, trolley tracks laid in the middle of an avenue with which he was familiar. The time was after 7 o'clock in the evening of February 12th.

The night was very dark and rainy. He was struck and injured by a trolley car coming from the east. In that direction the avenue was straight for a long distance. The car carried a headlight at its top, and its interior was also lighted. From the configuration of the ground, all the lights of a car thus approaching could be seen for 650 or 700 feet, and the headlight for a much greater distance. He testified that when he started to cross he did not see the car, but before he succeeded in crossing he was struck, though he "stepped as quick as he could." Held that, upon plaintiff's case, his negligence contributing to his injury so clearly appeared that it was error to submit the case to the jury.

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by Daniel Brown against the Elizabeth, Plainfield & Central Jersey Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Frank Bergen, for plaintiff in error. Jeremiah A. Kiernan, for defendant in error.

MAGIE, Ch. The record brought up by this writ of error discloses a judgment in favor of the plaintiff in an action brought to recover compensation for injuries sustained by him by reason of a collision with a trolley car of the defendant. The judgment is assailed on the single ground that the trial judge erred in refusing to nonsuit the plaintiff. It appears by the bill of exceptions that the motion to nonsuit was made upon two grounds: (1) That there was a failure of evidence to justify a finding by the jury that the motorman engaged in running the trolley car which struck plaintiff was guilty of any neglect of the duty which the company owed to a pedestrian crossing the track of the company under the circumstances proved in the case; and (2) that, upon the plaintiff's testimony, his own negligence contributing to his injury was conclusively, and as a matter of law, established, so that a verdict in his favor lacked the support of evidence. It has been deemed necessary to consider only the second ground on which the motion was based.

In dealing with the questions thus presented, it must be assumed that the jury were entitled to give credence to the testimony of the plaintiff and the witnesses produced by him, and to draw therefrom all reasonable inferences favorable to his contention. The question is whether, upon such assumption, a verdict for the plaintiff is supportable. The circumstances disclosed by the evidence thus given are these: The collision took place after 7 o'clock in the evening of February 12th. The evening was very dark, and it was raining. Plaintiff had left his work, and was going toward his home on foot. He had reached a public street called "South Avenue," and was passing along it on the south side, in an easterly direction, when he, for reasons which he gave, crossed, or attempted to cross, to the northerly side of the avenue. In doing this, he was obliged to cross the tracks of the

defendant, which were laid in the center of the avenue. Plaintiff was accustomed to pass along that avenue, and knew the location of the tracks. Before he had crossed the tracks, he was struck by a car going westerly on the west-bound track (which was the more northerly of the two tracks), and injured. From the point where the collision occurred, the avenue, in an easterly direction, was straight for a long distance. There was an ascending grade in that direction of about $2\frac{1}{2}$ per cent. to a summit 650 or 700 feet distant. Beyond that summit there was a descending grade of about the same rate. There were lights along one side of the avenue at rather long intervals. The car which collided with plaintiff carried a headlight at the top, and its interior was also lighted. From these physical facts, it is obvious that the lights of the approaching car could be seen from the point of the collision for over 600 feet, and that the headlight of the car could be seen for a much longer distance. In attempting to cross the tracks, a duty was imposed on the plaintiff to take such care for his safety as reasonable prudence required under the peculiar circumstances. He was bound to use his powers of observation to discover the approaching car, and to exert his judgment how to avoid the danger of a collision. What he did do, may be shown by the following excerpts from his testimony: "Q. When you started to cross the track, did you see any trolley? A. I saw lights way up on the hill. I could not see what light it was. * * * Q. What track did you stand on? A. On the south side when I started. Q. When you started to cross? A. Yes, sir. Q. When you started to cross, was there a trolley car in sight? A. None that I could see. Q. What was it that first drew your attention? A. The light I see on the track. Q. What did you do then? A. I stepped as quick as I could. I thought it was the trolley. I stepped as quick as I could." As the plaintiff did not pause to discover what the light which he saw up on the hill was, or whether it was the light of an approaching vehicle, he did not place himself in the position of one who, having occasion to cross the track of this sort, and having observed an approaching car, exercises his judgment as to his being able to cross safely, without risk of collision—a situation which has been dealt with in many cases. Consolidated Traction Company v. Lambertson, 59 N. J. Law, 297, 36 Atl. 100; *Id.*, 60 N. J. Law, 452, 38 Atl. 683; Newark Passenger Railway v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; Atlantic Coast Electric Railroad Co. v. Rennard, 62 N. J. Law, 773, 42 Atl. 1041. Whether or not a passenger in such cases has exercised a prudent care for his safety must generally be a question for a jury. But by his evidence the plaintiff put himself in another category. He admitted that when he started to cross the tracks he

"saw lights way up on the hill," and did not know what lights they were. Prudence required him then to wait a sufficient time to enable him to observe whether the lights which he saw were those of the street lamps on the side of the avenue, or were those of a car in the middle of the avenue. Without waiting, he proceeded to cross. When he says that at that time he could see no trolley car in sight, he conclusively establishes that he did not then make the observation which duty required of him, because, if he had done so, he would undoubtedly have discovered the approaching car, and have been able to avoid the collision. The case, in this aspect, falls within the doctrine of *P. R. R. v. Righter*, 42 N. J. Law, 180.

Upon this view, it was error in the trial judge to refuse to nonsuit the plaintiff; and, there being nothing in the evidence afterward taken to change the situation as it appeared at the close of the plaintiff's case, the judgment cannot be sustained, and must be reversed.

BUCKLEY v. HANN et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1908.)

MECHANIC'S LIEN—ABROGATION OF CONTRACT.

1. The trial court properly left it to the jury to determine whether, after a building contract had been filed in the clerk's office, it had been subsequently abrogated, and a new parol contract substituted for it; instructing the jury that, if the written contract had been thus abrogated, the land and building were subject, under the mechanic's lien law, to a lien for work done by a subcontractor.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Elwood Buckley against Clarence A. Hann and others. Judgment for defendants, and plaintiff brings error. Affirmed.

G. A. Bourgeois, for plaintiff in error.
Thompson & Cole, for defendants in error.

VAN SYCKEL, J. The defendant Burkhard entered into a written contract with the defendant Hann to erect a building upon the land of the former. The contract was filed as required by law, to protect the owner against liens other than that of Hann. This suit was brought to charge the building and lands of Burkhard with a lien for work done on the building by Buckley, the plaintiff, who was a subcontractor. The plaintiff claimed on the trial of this cause that the written contract was abrogated, and a new parol contract was entered into between Burkhard and Hann, under which the building was erected. On the 17th of October, 1899, Hann signed a paper by which he surrendered all his rights under the contract, and authorized Burkhard to let the work to any other person, stating in it that the con-

consideration was that Burkhard had released him. He handed this release to Shumway, the architect. Shumway testified that he had no authority from Burkhard to release Hann, or to accept Hann's release. Burkhard testified that he gave Shumway no such authority, and that he did not know of the execution of the release by Hann until a month or six weeks before the trial of this cause. The plaintiff, on January 15, 1900, gave notice in writing to Burkhard to retain \$540 of the contract price under the contract filed, alleging that Hann owed him that sum for work done on the building. This was a clear recognition of the existence of the written contract.

Burkhard also offered in evidence four certificates given by Shumway, the architect, to Hann, for the several payments as they became due to him according to the terms of the contract as filed, for which Hann gave his receipt. This testimony was objected to by the plaintiff, but it was clearly competent upon the question whether there had been any agreement between the parties to abrogate the contract. It was, therefore, a question of fact whether the work was done under the written contract as filed, or under a substituted parol contract. The trial court properly left that question to the jury, expressly instructing it that, if the jury found that the work was done under the original contract, the plaintiff could not recover, but, if it was done under a new and verbal contract, the plaintiff was entitled to a verdict for the amount shown to be due him for work done upon the building. Hann testified on the trial that, after the written contract was executed, he discovered he had made a mistake in his estimate to the extent of \$475, of which he informed Burkhard, and that Shumway told him that Burkhard would pay him \$475 in excess of the contract price. The plaintiff afterwards called Shumway as a witness, who testified that Burkhard said to him that he was sorry to see Hann lose any money, and, if he completed the work satisfactorily, he would make up the difference to him, and that he (Shumway) then told Hann that he had better do the best he could to make the work satisfactory, because, if he completed it as he agreed to, Burkhard would make up the difference to him. After this testimony was given by Shumway, the plaintiff recalled Hann as a witness, and asked him the following question: "Question. Mr. Hann, Mr. Shumway the agent or architect for the building of this house, states that it was only a conditional agreement that you should get this \$475 additional, conditioned upon your going ahead and completing the work satisfactorily, and so on. Is that correct?" This question was objected to by the defendant's counsel, and overruled. Exception was taken, and error assigned. The question was objectionable for two reasons: (1) It was a mere attempt to have Hann repeat his previous statement

that the promise to him was unconditional. (2) Whether the promise was absolute or conditional is immaterial: It was without consideration, and void. Hann was under a written contract to perform the work for a stipulated price, and, so long as that contract was in force, there was no legal liability on the part of the owner to pay the extra sum to Hann, nor any right on the part of the plaintiff to retain it in the hands of the owner.

As before stated, the question whether the original contract was abrogated was properly submitted to the jury, and no error in law appears in the trial of the cause.

The judgment should be affirmed.

WEEKS v. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF SOMERSET.

(Court of Errors and Appeals of New Jersey. March 2, 1903.)

BRIDGE—ACCIDENT TO PEDESTRIAN.

1. The mere fact that a person traveling upon the highway, after dark, mistakes the wing wall of a bridge (which carries the highway over an intersecting stream) for a footpath, and, after getting upon it, falls off, and is injured, affords no ground for concluding that the bridge was improperly constructed.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Granville M. Weeks against the Board of Chosen Freeholders of the County of Somerset. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. Beecher, for plaintiff in error. R. V. Lindabury, for defendant in error.

GUMMERE, C. J. The plaintiff in error brought this suit to recover for personal injuries received by him while crossing a bridge erected and maintained by the defendant in error over a small stream which intersected the road along which he was traveling. The accident occurred in the evening. Owing to the darkness, the plaintiff in error mistook one of the wing walls of the bridge for a flagged footpath for pedestrians; stepped upon it, and walked along it until he reached its end; and there either stepped off or fell off, and was injured. The top of the wing wall at the point where the plaintiff in error fell was about 3 feet above the surface of the roadway, and at the other end was about 9½ inches. At what point he got upon it does not appear.

The liability of the board of freeholders to answer in damages for injuries received by a person in crossing a county bridge is a statutory one, and is limited to such injuries as directly result from the neglect of the board to properly "erect, rebuild, or repair" such bridge. Gen. St. p. 307, § 9. In the present case the ground upon which the plaintiff in error rests his right to recover, as stated by counsel in his brief, is that in building the

wing wall of the bridge in question the freeholders were negligent, because they did not place a railing, or some other sufficient barrier, upon the coping of the wall, for the purpose of preventing people from going upon or over it. The only evidence that the presence of a railing or other barrier upon the wing wall of the bridge was necessary, in order to make it reasonably safe for the traveling public, was the fact that at one point the wall was low enough to permit the plaintiff in error to readily get upon it. But improper construction was no more shown by this fact than it would have been by proving that the freeholders had placed a railing or other barrier upon the top of the wing wall, and that the plaintiff in error, mistaking the coping for a flagged footway for the use of travelers, and, unable to discover the railing by reason of the darkness, had received injury by coming in contact with the railing while attempting to get upon the coping. Mere proof of the happening of an accident raises no presumption of negligence.

The trial court, at the close of the testimony, properly directed a verdict for the defendant. The judgment under review should be affirmed.

DOTSON et al. v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

CARRIERS-INJURY TO PASSENGER-DEFECTIVE PLATFORM-CONTRIBUTORY NEGLIGENCE.

1. A passenger at a railway station may lawfully use the platform, or any part of it, for the purpose of exit to and from the company's trains, or for any other lawful purpose connected with his journey; but, in order to maintain a liability against the company for injury received from passing trains, his use of such platform must be limited to the purposes for which it is manifestly adapted.

2. It is the duty of the company to so construct its platform that it shall be reasonably safe for use by passengers, and to locate it in such proximity to the railroad tracks that it will afford a safe and convenient means of exit to and from its cars for its passengers, including those who may be aged and infirm.

3. While trains are passing such platform, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains. Under such circumstances, the edge of the platform is usually a place of danger, and if a passenger, while occupying such a place, is struck in this way, the injury cannot ordinarily be attributed to negligent construction by the company.

4. In the present case the plaintiff was walking along the platform, which was on a level with the top of the rails, toward the station, in order to purchase a ticket. She suddenly diverged in her course, toward the rail, so that she was struck from behind by the bumper of a slowly moving train just pulling into the station, on which she was to take passage, and was injured. The platform was constructed of crushed stone, which extended to the line of planking, 18 inches wide, along the nearest rail. The trial judge treated the outer line of the stone surface as the edge of the platform. The evidence showed that the bumper projected

slightly over this edge of the platform, and it was left to the jury to say, in case they should find that plaintiff was walking within the line of the platform when she was struck, whether it was negligence in the company to have constructed its platform in such close proximity to the rail. It was held, in review, that no negligence was shown, and that the charge, in this respect, was erroneous.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Mary T. Dotson and husband against the Erie Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Corbin & Corbin, for plaintiff in error.
Warren Dixon, for defendants in error.

HENDRICKSON, J. This writ brings up for review a judgment of the Supreme Court entered upon a verdict rendered at the Bergen circuit. The defendants in error, who were the plaintiffs below, and are husband and wife, brought suit to recover damages for personal injuries to the wife, resulting from her being struck by the bumper of a locomotive engine of the defendant company at its station in Englewood, in the county of Bergen. For convenience, I will hereafter refer to her as the plaintiff below. The grounds of recovery averred in the pleadings were twofold. One was the negligent operation and management of the cars and locomotive of the defendant while running along the platform of the station, under the existing conditions, and the other was negligent construction of the platform, in locating it so near the tracks that its locomotives and cars would overlap the platform; and strike passengers walking along the same, so that on the occasion referred to the plaintiff was struck by one of the defendant's locomotives while she was walking along the edge of the platform, and was at the time in the exercise of due care. There were motions to nonsuit and to direct a verdict on the ground that no negligence was proved, and on the further ground of contributory negligence, which were overruled, and exceptions were allowed and duly sealed.

The learned judge, at the close of his charge, directed the jury that, in case they found a verdict for the plaintiffs, they should find specially whether it was based upon the negligent construction of the platform, or upon the negligence of the engineer in the management of his engine, or upon the negligence of both. In returning their verdict for the plaintiffs, the jury based their finding upon negligent construction, and not upon negligence on the part of the engineer. Thus all questions relating to negligent management of the company's train are eliminated from this discussion. We may appropriately deal with the other questions under the exceptions taken to the charge of the court, and to the refusal to direct a verdict.

Some facts should be stated, to properly illustrate the situation: The general direc-

tion of the road at this point was north and south. The station was on the easterly side of the tracks, the west-bound track being the nearer one to the station. The platform of the station was on a level with the top of the rails of the tracks. It consisted of flagging about the station, and then of crushed stone as it approached the track. Immediately along the rails was planking 18 inches wide, and within the rails and between the two tracks the crushed stone continued, so that the whole was on a level from the station to the east-bound track; thus serving as a means of ingress and egress to and from the trains on either of the tracks. The platform is thus extended to the east-bound track for a space up and down the tracks in front of the station of 300 feet. The whole platform is about 685 feet long, and south of the station there is a driveway for carriages along the platform, and 4 feet and a half below its level. The width of the platform at the station is about 50 feet, and at the south end of the station the rear line of the platform curves toward the tracks in a southerly direction until it is narrowed to a width of 10.7 feet, and then runs southwardly of the same width, in rectangular form, along the tracks, a considerable distance. The accident occurred September 3, 1901, about 7:30 o'clock in the evening, and the place where it happened was well lighted by electric lights. The plaintiff came from the town, and entered the platform not far from its southerly end, and was on her way to the station to buy a ticket to her home, in Highwood, a station above. She had walked two or three hundred feet northwardly, and, when she reached a point variously estimated at from 50 feet to 200 feet from the station, she was struck by the bumper of the engine attached to the train she was about to take. It was moving slowly in the same direction she was walking, at the rate of 3 or 4 miles an hour; having slowed up to allow the east-bound train to pull out of the station ahead of it. The plaintiff was walking in about the center of the platform, until a few moments before she was struck, when she diverged in her course toward the rail. She testified that she was crowded toward the rail by passengers who alighted from the down train, but the other witnesses (her own as well as the company's) showed that in this she was probably mistaken. But the fact is not material to the points to be discussed. The engineer, upon seeing her turn toward the rail, gave the danger signal and put on the emergency brake, but too late to avoid the striking of the plaintiff about the hip, and throwing her down upon the platform, causing serious bruises and injuries. The bumper which struck the plaintiff is a square piece of timber, rounded over at the ends, to which the cowcatcher attaches; and it projects to the side far enough to cover the head of the cylinder, which it is intended to protect.

The learned trial judge had charged the

jury that, if they found that at the time the plaintiff was struck "she was upon the planking alongside of this railroad, then the verdict should be for the defendant, because it is evident, and must have been evident to every adult person, that that planking was not intended for persons to walk upon," etc. He had further charged that "if she were not upon the planking, but were upon the gravel walk or platform, as it is called, then the question for you to decide would be whether or not she was guilty of negligence in going so near as that to the rail, under the circumstances of the case." It should be observed that there was no evidence in the case which characterized the platform as only extending to the planking next to the rail. Nor was there any evidence that the platform was not properly constructed, or that the planking was intended for a different use than the rest of the platform. The trial court further charged that, if the jury found upon both of these questions in favor of the plaintiff, then "was it negligence in the company itself to have that gravel platform approach so near to the rail that passengers would be likely to be endangered even if they exercised reasonable care in the use of the platform, and did this accident spring out of that kind of negligence on the part of the company * * *?" "Does the evidence satisfy you that the company failed to take proper care—and that means a high degree of care—for the safety of persons who came there as passengers, when they constructed that platform so close to the rails that there would be danger that persons in the prudent use of the platform would be struck by any part of the engine?" The jury was instructed that if they answered this question, as well as the previous questions, in favor of the plaintiff, then the verdict ought to be for the plaintiffs. Exception to these instructions were duly sealed, and error has been assigned thereon.

Even conceding for the present that the planking along the east rail was not a part of the platform, and that the graveled or stone surface along the planking is to be regarded as the platform proper, we are unable to concur in the view that any actionable negligence is shown by reason of its proximity to the tracks. Admittedly, it would then be a distance of 18 inches from the nearest rail. The evidence was that the engine in question was similar to the other engines used on the road, and that the projection of the bumper was the same in all of them. The engineer testified that the bumper extends a trifle beyond the planks (he could not say how much); that the plaintiff must have been about on the edge of the plank farthest from the rail when she was struck; that the bumper, as the witness stated it, "just glanced her," knocking her off sideways. In order to sustain the theory of the charge, it must be assumed, we think, that there is an implied invitation by the

company to its passengers to stand upon any part of its platform—even at its very edge—when its trains are passing, and with it an obligation to exercise reasonable care for their safety when they may thus expose themselves to danger. In order to sustain a claim of liability against the owner or occupier for the injury sustained in the use of his premises where there is no express invitation, it must appear that there was an implied invitation; that is, that the person injured “entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted, and prepared or allowed to be used.” *Sweeney v. Old Colony R. Co.*, 10 Allen, 864, 87 Am. Dec. 644; *Phillip v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478; *Turess v. N. Y., Susq. & West. R. Co.*, 61 N. J. Law, 314, 40 Atl. 614. Applying this test to the circumstances here involved, we must find that the plaintiff was using the extreme edge of the platform, near the rail, for a purpose entirely foreign to the intention and purpose of the company as to its use, and that there was no evidence to show that such a use was ever permitted or acquiesced in by the company. It is undoubtedly a settled rule that a railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, platforms, and approaches that they shall be safe for use by passengers. *Elliott on Railroads*, 1590. But this use is to be exercised in conformity to the manifest purpose for which the structure in question is adapted. And so a railroad company is only required to build platforms of sufficient dimensions to accommodate passengers getting on and off at their stations. *Harkey v. R. & P. Ry. Co.*, Fed. Cas. No. 6065; *Taylor v. Penn. R. R. (C. C.)* 50 Fed. 755; *Moreland v. Boston, etc., R. R.*, 141 Mass. 31, 6 N. E. 225; *Kelly v. Manhattan Ry.*, 112 N. Y. 440, 20 N. E. 383, 3 L. R. A. 74; *Laffin v. Buffalo R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. It is manifest that this duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains. And it is a matter of common knowledge that, in performing this duty, the platforms along the best regulated railroads are built so near the rails that the projections from the engines and the cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass. It is the plain duty of the passenger when not

getting on or off a train, but while he may be waiting upon the platform, or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he would be beyond the reach of the projections of ordinary trains. And the company is not liable for injury to a passenger who suffers himself to go beyond such a limit, and is injured by a passing train. It was held in *C. B. & Q. R. R. v. Mahara*, 47 Ill. App. 208, that, where a platform is wide enough to give room for safety, the fact that it is so built that the edge nearest the track cannot be safely occupied as a standing place while trains are passing is not negligence. In *Matthews v. Pa. R. Co.*, 148 Pa. 491, 24 Atl. 67, it was held that where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable. See, also, *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. 148, 24 Atl. 205; *Pa. R. v. Bell*, 122 Pa. 58, 15 Atl. 561. It has also been held that a person has a right to walk on an elevated plank walk constructed by a railway company alongside of its track at a station for the use of passengers and the public, and to suppose himself in safety while occupying such walk at a point beyond the projection of all ordinary trains, and, if he is injured by a brake which projected more than the ordinary distance, the company is liable, etc.; it being the duty to warn the passenger as against extraordinary projections. *Sullivan v. Vicksburg, S. & P. R. Co.*, 39 La. Ann. 800, 2 South. 586, 4 Am. St. Rep. 239. Upon principle somewhat similar, it was held that where an accident occurred to a passenger by his falling into the opening between platform and car, which had a width of from 11½ to 18 inches, the opening itself was not evidence of negligence. *Fox v. Mayor, etc., of New York*, 53 N. Y. St. Rep. 902, 70 Hun, 181, 24 N. Y. Supp. 43. Under similar circumstances, the plaintiff, without having hold of the railing, and without looking, stepped out, and fell between car and platform. There was no proof that the platform was not constructed in the ordinary way, nor that the space was greater than the exigencies of business required. There was no evidence of any previous accident. Held no evidence of negligence by the company, and no basis for recovery. *Laffin v. Buffalo, etc., R. R.*, 106 N. Y. 136, 141, 12 N. E. 599, 60 Am. Rep. 433.

There is another reason why we think the question of negligent construction should not have been left to the jury, and that is the entire absence of proof that the construction was faulty, as not being in conformity to the usual mode of construction adopted by well-regulated railroads or otherwise. Negligence must be proved. As was said by *Bramwell, B.*, in *Cornman v. The Eastern Counties R. Co.*, 4 Hurlst. & N. 781: “It is

not enough to say there was some evidence. A scintilla of evidence or mere surmise that there may have been negligence on the part of the defendant clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude there was negligence." To the like effect is the decision in *Cadwell v. Arnheim*, 152 N. Y. 182, 190, 48 N. E. 310. See, also, *Rigg v. The Manchester, S. & L. Railway Company*, 12 Jur. (N. S.) 525.

There was also error in that part of the charge which assumes, without proof, as we think, that the platform stopped at the edge of the graveled surface, where it meets the planking along the rail, and was not, as it seems, from the facts developed, to be only a part of one construction, which served as a platform for trains on both of the tracks. Such a designation by the court would lead the jury to assume, without evidence, that the company had fixed the danger line at that point 18 inches from the rail, and thus enlarged, to a degree, the company's liability for the safety of the passenger.

We also think that, so far as the question of faulty construction of the platform is concerned, a verdict should have been directed for the defendant.

The result is that the judgment below should be reversed, and a venire de novo issued.

ANDERSON v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

RAILROADS—INJURY TO BRAKEMAN—NEGLIGENCE.

1. The plaintiff, while acting as a brakeman in the employment of the defendant, fell from the roof of a freight car, and was injured. The cause of his fall was that the grab iron on the roof pulled out the screw which held it, as he threw his weight upon it in descending, the defects being the insufficiency of the screw and the deterioration of the wood. The car belonged to the Chicago & Erie Railway Company, and first appears in the evidence as arriving loaded at Port Jervis in a freight train which came from the west over the Delaware Division of the defendant's railroad. Afterwards it was hauled by the defendant to Weehawken, where the accident happened. *Held*: (1) It must be inferred against the plaintiff that the car was received by the defendant loaded for transportation by it as a common carrier. (2) The defects complained of were not such as, under the circumstances, the defendant was bound to guard against.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Milton Anderson against the Erie Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Warren Dixon, for plaintiff in error. Corbin & Corbin, for defendant in error.

DIXON, J. The plaintiff, a brakeman in the employ of the defendant, fell, and was injured while descending from a box car in the defendant's yard at Weehawken. The cause of his fall was that the fastening of the grab iron on top of the car gave way as he threw his weight upon it. The evidence tended to show two defects in the fastening—one, the use of a screw running less than an inch into the wooden roof, instead of a larger screw, or a bolt running entirely through the roof, and held by a nut underneath; the other, deterioration of the wood through which the screw ran, indicated by the fibers adhering to the thread of the screw after it was wrenched away. It was proved that the car did not belong to the defendant, but was the property of the Chicago & Erie Railway Company, an Indiana corporation owning and operating a railroad from Hammond, Ind., to Marion, Ohio; that at 12:10 a. m. on June 2, 1901, the car arrived loaded at Port Jervis, coming in a train of 60 freight cars from the west over the Delaware Division on the defendant's road; that it was there inspected by the defendant's inspectors, found satisfactory, and made up by the defendant in another train, which left Port Jervis at 9:30 that evening, and reached the Weehawken yard at 10:55 the next morning. The accident happened about noon the same day. There is no direct testimony in the case as to where, or by whom, the car was loaded, but we think the only legitimate inference is that it came loaded into the possession of the defendant for transportation by it as a common carrier. The fact that it was the property of another owner rebuts any presumption which might arise from possession that it was used by the defendant in its own business, and this rebuttal is strengthened by the further fact that when it first appears in the defendant's possession it was fully loaded, and was afterwards handled by the defendant merely for transportation. The general principles of the law cast upon the plaintiff the burden of proving the duty of the defendant, and we think he sustained this burden only to the extent of such duty as rests upon a railroad company which receives a loaded car of another owner, to be hauled by the company to the place of destination. The nature of that duty has been the subject of considerable judicial comment. 20 Am. & Eng. Enc. Law (2d Ed.) 80. All authorities agree that it requires the exercise of reasonable care for the safety of employés, but they are not all agreed as to the nature of the care demanded. Sometimes it has been held that the duty was coextensive with the duty of the company respecting its own cars. *O'Neil v. St. Louis, etc., Ry. Co.* (C. C.) 9 Fed. 337, 3 McCrary, 423; *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 781; *Jones v. N. H. & H. R. R. Co.*, 20 R. I. 210, 37 Atl. 1033. In Massachusetts the rule is said to require only the employment of competent inspectors, who are to be deemed fellow servants of

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 195.

those managing the train, and for whose neglect, therefore, the company is not responsible to its employes. *Mackin v. Boston & Albany R. R. Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Bowers v. Conn. River R. R. Co.*, 162 Mass. 312, 38 N. E. 508. We think, however, that the weight of reason and authority is in favor of these propositions: First. That on receiving a car for transportation, the company is entitled to assume that the car had been properly constructed of suitable materials for all the purposes for which the owner intended it to be used. *Ballou v. Chicago, etc., R. R. Co.*, 54 Wis. 259, 11 N. W. 559, 41 Am. Rep. 31; *Guttridge v. Mo. Pac. Ry. Co.*, 84 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392. Second. That on receiving the car the company is bound to make such examination as would be likely to discover conditions rendering a car so constructed unfit for safe transportation on the company's line. This examination has been called a "curatory examination," an examination not of a very minute character (*Richardson v. Great Eastern Ry. Co.*, 1 C. P. Div. 342), an inspection for defects visible or discernible by ordinary examination (*Eaton v. N. Y. Cent. & H. R. R. Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; *Gottlieb v. N. Y., Lake Erie & W. R. R. Co.*, 100 N. Y. 466, 3 N. E. 344; *Dooner v. Del. & Hud. Canal Co.*, 164 Pa. 17, 30 Atl. 269; *Balt. & Pot. R. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624). And, third, that, at convenient places during the journey the company is bound to make the same inspection and tests of such a car as it should make of its own car for the purpose of discovering defects likely to occur in the course of transportation. Under these rules we are unable to discern any evidence of fault in the defendant contributing to the plaintiff's accident. The defect of which he complains respecting the screw used to fasten the grab iron was one in construction, which the defendant had a right to assume did not exist; and the same statement is probably true regarding the unsoundness of the wood. Neither of these defects was discoverable by ordinary inspection, or by anything short of a very minute examination, and neither of them could occur in the course of transportation.

We therefore conclude that the motion to direct a verdict for the defendant should have been granted, and because of its refusal the judgment of the plaintiff must be reversed, and a venire de novo awarded.

HENDRICKSON v. PHILADELPHIA & R. RY. CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

RAILROADS—INJURY TO STOCK—FENCES—INSPECTION.

1. By section 32 of the general railroad act (Gen. St. p. 2640) an absolute liability is imposed on a corporation organized thereunder for

all damages to animals coming on its tracks by reason of a failure to erect such a fence as is thereby required. After such a fence has been erected, it will be liable for failure to maintain the fence, when the failure is attributable to a neglect of duty in that regard.

2. The duty to maintain such a fence involves the duty of reasonable inspection and observation to discover the need of reparation. The duty of inspection, its frequency, etc., must depend upon circumstances. Proof of a recent break, of which the company had no actual notice, and which such inspection as reasonable care would have required would not have disclosed, might fail to establish a case for a jury.

3. But where the company permits the land adjoining the fence to be used in the conduct of its business in a mode which imperils the fence, it is a question for a jury whether the duty of inspection does not require more frequent and particular observation, adapted to disclose any break happening from such use.

(Syllabus by the Court.)

Error to Supreme Court.

Action by William C. Hendrickson against the Philadelphia & Reading Railway Company. Judgment for plaintiff. 52 Atl. 232. Defendant brings error. Affirmed.

James J. Bergen, for plaintiff in error.
Dungan & Reger, for defendant in error.

MAGIE, Ch. This is an action to recover compensation for a mare belonging to the plaintiff, which was killed by a train of the defendant company, running on the railroad tracks leased by it of the Delaware & Boundbrook Railroad Company. The declaration charged the defendant with negligence in the performance of the duty of erecting and maintaining a fence along the plaintiff's field adjoining the railroad operated by the defendant, whereby the mare escaped from the field, and went on the railroad tracks, and was there killed. The plea was the general issue.

The bill of exceptions discloses that counsel of defendant admitted at the trial that the Delaware & Boundbrook Railroad Company was organized under the "Act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873 (2 Gen. St. p. 2638). By section 32 of that act a liability is imposed on corporations organized thereunder in language which, so far as is important in this case, is as follows: "That every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law. * * * Until such fences * * * shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses or other animals thereon; and after such fences * * * shall be duly made and maintained, the corporation shall not be liable for any such damages unless negligently or willfully done." The language used to express the legislative intent in this enactment is, perhaps, not very happily chosen, but the intent, I think, can

be discovered. In the first place, a positive duty is imposed on the railroad corporations organized under the act not only to erect, but also to maintain, fences along their tracks, of a specified height and strength. In the next place, the liability of a corporation which does not perform the duty of erection is an absolute one, and is for all damages done to animals on its road by it; the liability being impliedly restricted to injuries to animals which come upon the track by reason of the failure to erect the required fences. The language which follows, viz., "and after such fences * * * shall be duly made and maintained, the corporation shall not be liable for any such damages unless negligently or willfully done," may be construed to limit the company's liability for damages when it has not only erected, but has properly maintained, fences of the required height and strength, to those done willfully or negligently. But this construction leaves the enactment without any provision imposing a liability on the company for failing to maintain fences, except by an implication from the express imposition of that duty. Moreover, it has always been a question whether a railroad company owes any duty with respect to animals which have strayed upon its tracks, except to refrain from willfully injuring them. *Case v. C. R. R.*, 59 N. J. Law, 471, 87 Atl. 65, 59 Am. St. Rep. 617. It can scarcely be conceived that it was the legislative purpose to deal with the company's negligence in respect to the running of its trains and other acts of that sort, and impose liability therefor, and not include its negligence in maintaining the fences as required, and impose a like liability therefor. In my judgment, it is more reasonable to construe the section as regulating, by implication, the liability of the company in case of failure to maintain the fences as required, and imposing such liability only when it has been negligent in the performance of its duty in that regard. Such a construction is possible, and it seems to have been that given this enactment by Chief Justice Beasley in *Van Duzer v. Lehigh & Hudson River R. R.*, 58 N. J. Law, 8, 82 Atl. 376. The issue was tried in the circuit upon this construction of the section, and no contention was then made, and none has been made here, that challenges its correctness. But, as the language of the act is peculiar, it has been deemed best to state our views in respect to its construction.

Nor has there been any contention but that the defendant company (which was shown to be the lessee of the Delaware & Boundbrook Railroad Company for a term of 999 years) is liable for the obligations and duties imposed on its lessor by this legislation. At the trial it was not contended that there had been any breach of the statutory duty in respect to the erection of the fence in question. It was apparently conceded that a post and rail fence of the required

height and strength had been erected on the line where the land of the plaintiff and the track used by the defendant joined. The sole contention was that there had been a break in the fence, which it was the duty of the defendant to repair, and that it had failed in the performance of that duty. The duty to make reparation of such a fence will arise upon notice to the company that the reparation is necessary. There is also involved and included a duty of such inspection and observation as prudence requires to ascertain when such reparation is necessary. When the break is very recent, and the railroad has no actual notice thereof, and such inspection and observation as prudence required would not have disclosed it, the question of negligence may, at times, be a question of law, to be disposed of by a compulsory nonsuit. But when the proofs show that the break was not recent, or, although recent, that it would have been discovered by such inspection and observation as were required under the circumstances, it must be a question for a jury whether the company's duty in that respect has been performed.

The assignment of error in this case is confined to the ruling of the trial judge in refusing a compulsory nonsuit at the trial, and it is here contended that the plaintiff's case disclosed no evidence of negligence proper to be submitted to a jury. The circumstances upon which the trial judge was required to act were these: The fence in question had been erected parallel to, and 29 feet distant from, the north rail of a spur or siding maintained and used by the defendant. Upon this siding the company was accustomed to place freight cars, with freight of various sorts, consigned to persons in that neighborhood. The siding was parallel with the main tracks of the railroad, and so near the north track that consignees could not approach and take their freight from the cars on that side. It was, therefore, the custom for the consignees to approach the cars on the north side, in the space of 29 feet between the north rail and the fence, which space was diminished, when the siding was occupied by freight cars, by the ordinary overhang of the cars, which was about 2 feet and 3 inches. From the evidence the jury could infer that from the configuration of the ground and various obstacles thereon the farm wagons employed in carting such freight from the cars could not drive through without turning, but were compelled to turn in the space thus left. It appeared that such farm wagons measure a little over 23 feet from the rear end to the end of the pole. It could, therefore, be fairly inferred that in turning such a wagon within the space left, there was obvious danger that it might impinge upon and break down the fence. There was proof that marks appeared on some of the rails at the break in the fence which might have been made by the wheel of a wagon striking them. The evidence of plain-

tiff further disclosed that the fence in question was intact and unbroken on the morning of a certain day. Later, on the same morning, and again in the afternoon of the same day, it was observed to have been broken down. This observation was made by several persons engaged in taking freight from the cars that were then standing on the siding. One of the posts had been split in two, and one part lay on the ground in the field. The other part remained standing, but the rails, or some of them, had been released, and the ends of them, or some of them, had fallen to the ground in the field, so as to leave a break through which it was practicable for animals to pass. In the evening of that day the horses of plaintiff were turned out to pasture, and had the range of several fields, one of which was the field adjoining the railroad track. It was a fair inference from the circumstances that the mare in question had escaped through the break in the fence, and had been run down by an engine passing upon one of the tracks used by the defendant, where her body was found the next morning.

Upon these circumstances there was, in my judgment, a plain question for the jury, and it would have been erroneous to have withdrawn it from them. It is true that the break in the fence was recent, and there was no evidence of actual notice of it given to any agent of defendant. It was so recent that, if it had occurred elsewhere, and under ordinary circumstances, a question would have arisen whether the company could have been charged with knowledge of it, or with neglect because it did not discover it. But, in view of the use of the land adjoining the fence permitted by the defendant company to be made by its licensees in the conduct of the company's business, and the obvious risk of injury to the fence by such use, it was a question whether reasonable prudence did not require the company to inspect and observe the fence during, or at least directly after, such use. That question was not for the court, but was a question for the jury. It was for the jury to say whether or not, when the company, by the mode it used the land adjoining the fence, or permitted it to be used, put the fence in peril, it was not bound to take such precaution as would disclose a break thus made which required repair.

After the nonsuit had been refused, defendant proved that it employed a track walker to pass over the railroad along this locality twice a day, and that it was part of his duty to observe the fences along the line. The man thus employed testified that he passed this locality twice on the day in question, and observed no break in the fence. But it appeared by his examination that he passed down upon one track and returned on the other track, and that the break might

have been obscured from his observation by the freight cars on the siding, and would not have been seen by him unless he had left the track, which he did not do. This evidence did not cure the previous defect, because, assuming its truth, it was obviously a question for the jury whether his inspection was such as it was the duty of the company to make under the circumstances that appeared.

The trial judge committed no error in refusing to nonsuit the plaintiff, and the Supreme Court rightly affirmed the judgment of the circuit. The judgment of the Supreme Court must, therefore, be affirmed.

BAKELY et al. v. NOWREY.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

APPEAL AND ERROR—CERTIORARI—PRESENTATION OF QUESTIONS AT TRIAL—COURT OF ERRORS AND APPEALS—REVIEW.

1. Questions which have not been mooted in the Supreme Court on a writ of certiorari to review the removal of police officers of a city will not be considered by the Court of Errors and Appeals on writ of error to the Supreme Court to review its judgment.

Error to Supreme Court.

Certiorari by the state, on the prosecution of Samuel Bakely and another, against Joseph E. Nowrey, to review an order of the mayor of Camden removing prosecutors from the police force of said city. From an order of the Supreme Court (52 Atl. 289) vacating such order, respondent brings error. Affirmed.

Howard Carrow, for plaintiff in error. E. G. C. Bleakly, for defendants in error.

PER CURIAM. The defendants in error sued out a writ of certiorari to review the legality of the action of the mayor of the city of Camden in discharging each of them from the police force of that city. Two questions were submitted to, and decided by, the Supreme Court: First, whether the prosecutors were, at the time of their discharge, members of the police department; and, second, if they were, then whether their discharge was legal. Both of these questions were resolved in favor of the defendants in error, and their discharge was set aside. We concur in the conclusion reached by the Supreme Court, and in the reasons upon which these conclusions were rested, as set out in its opinion.

Whether certiorari is the proper remedy by which to review the action of the mayor in discharging a police officer, and, if so, whether it is proper practice to permit both of these illegal discharges to be reviewed by one and the same writ, we do not decide. Those questions, not having been mooted in the Supreme Court, should not be considered here on review.

ATLANTIC CITY v. THORNHILL.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

INTOXICATING LIQUOR—ILLEGAL SALE.

1. The evidence set forth in the record of conviction in this cause is legally incapable of sustaining the conclusion that the plaintiff in error sold beer or offered it for sale.

Magie, Ch., Gummere, C. J., and Van Syckel, Hendrickson, and Pitney, JJ., dissenting.
(Syllabus by the Court.)

Error to Supreme Court.

Mary C. Thornhill was convicted of selling beer, and brings error. Reversed.

George A. Bourgeois, for plaintiff in error.
Godfrey & Godfrey, for defendant in error.

DIXON, J. Before the recorder of Atlantic City the plaintiff in error was summarily convicted of selling and offering to sell and deliver brewed liquors in quantities of one quart or more without a license, in violation of a city ordinance, and was fined \$150. On certiorari the conviction was affirmed in the Supreme Court. The ordinance imposes a penalty on only those persons who sell or offer for sale, and the primary question suggested on examining the case is whether the evidence set out in the record of conviction affords legal support for the conclusion reached in the trial court. The indisputable facts are that the plaintiff in error is one of the proprietors of a house in Atlantic City called the "Waldorf"; that on the evening of August 27, 1900, two detectives engaged a room in the house, and at 9:55 o'clock rang the bell for the bell boy; that on his appearance they ordered two bottles of beer, and the bell boy forthwith informed the plaintiff of the order; that, after some hesitation and discussion with him, she loaned the bell boy 30 cents, with which he went to a neighboring store, and bought the beer, and that when he delivered it at the room the detectives paid him for it, and he returned to the plaintiff what he had borrowed; and shortly afterwards they rang again for the bell boy, and ordered of him two more bottles, which he likewise bought at a neighboring store, using his own money in the purchase; that on delivering the beer to the detectives they handed him a \$5 bill out of which to take payment; that on his application to the plaintiff she refused to change it, and the bell boy returned it to them, but the next morning, when paying the room rent, they paid also for the beer, and the price was at once turned over to the bell boy. Before the recorder the plaintiff testified that she never sold a bottle of beer in her life; never had any to sell.

The only legitimate conclusion from the facts above stated is that the seller of the beer was the proprietor of the neighboring store, that the detectives were the buyers directly from him, and that the bell boy was their agent in procuring the purchase. There

is no evidence that in that transaction the bell boy was the plaintiff's agent, that the title to the beer was ever vested in her, or that she ever held herself out, or authorized any person to hold her out, as having beer for sale. The testimony was, therefore, incapable of sustaining the adjudication that she had sold the beer, or offered it for sale.

The judgment of the Supreme Court and the conviction by the recorder should be reversed.

MAGIE, Ch., GUMMERE, C. J., and VAN SYCKEL, HENDRICKSON, and PITNEY, JJ., dissent.

MARSH v. EDGE.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

LIBEL—PLEADING—COMPENSATORY DAMAGES.

1. When the plaintiff alleges in his declaration for libel that he is injured in his good name, fame, and credit among his neighbors by the alleged libelous publication, and hence is damaged, he is entitled to recover compensatory damages, notwithstanding the provision of the act entitled "An act relating to libel," approved June 13, 1898 (P. L. p. 476).

2. Under such a declaration he can recover his actual damages. "Actual damages specially alleged," as used in the statute of June 13, 1898, mean such as would be compensatory damages at common law. *Stuart v. News Publishing Co.*, 51 Atl. 700, 67 N. J. Law, 317, followed.

(Syllabus by the Court.)

Error to Supreme Court.

Action by John C. Marsh against Walter E. Edge. Judgment for plaintiff, and defendant brings error. Affirmed.

Harry Wooten, for plaintiff in error. Thompson & Cole, for defendant in error.

FORT, J. This was an action for libel, tried at the Atlantic circuit, resulting in a verdict in favor of the plaintiff for \$125. There are no assignments of error founded on admissions of evidence, and reference need be made only to the first assignment of error in determining the question here raised. This assignment is, "Because the trial court refused to nonsuit the plaintiff, because the plaintiff had not proved malice in fact, and had not demanded in writing a retraction from the defendant, Walter E. Edge, of the matters alleged to be libelous, as required under the act entitled 'An act relating to libel,' approved June 13, 1898 (P. L. p. 476)." The contention of the defendant is that under the act referred to there can be no recovery in an action for libel, except there be proof of express malice, unless the plaintiff has made demand in writing for a retraction of the libelous article as published in the newspaper, and which is alleged as the basis of the action. To give the statute the construction contended for would be to defeat the right of the plaintiff to recover

even nominal damages in a libel suit. Such a construction would not be given to a statute, depriving a person of a remedy, unless it was so clear as to be beyond question. This court, however, has construed this statute directly against the contention of the defendant in this case. The defendant here did not deny that the publication was a libel, but, on the other hand, admitted it, and immediately, in his next publication, retracted and corrected it. The trial justice excluded from the jury, under the proof, all questions of punitive damages, and confined them to compensatory damages only. The amount of the verdict in this case makes it clear that the damages assessed by the jury were within the direction given to them by the court. In *Stuart v. The News Publishing Co.*, this court held that, conceding the act entitled "An act relating to libels," approved June 13, 1898, to be constitutional, which was not then decided, and is not intended now to be decided, nevertheless, under that statute, to recover compensatory damages in an action for libel, it was only necessary to allege that the effect of the publication had been that the plaintiff was "injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and among all his neighbors and other good and worthy persons to whom he was in any wise known." The provision of the act which says the plaintiff "shall recover only his actual damages proved and specially alleged in the declaration" is fully complied with by such an allegation of actual damages or injury as that just above quoted. *Stuart v. News Publishing Co.*, 67 N. J. Law, 317, 51 Atl. 709. The language of the declaration in the case before us is quite as specific in the matter of special allegation of damage as in the declaration in the *Stuart* Case. After reciting the facts as published, and showing their criminal and immoral character, and alleging that they were false and untrue in fact as to the plaintiff, the declaration proceeds as follows: "All of which was well known to the defendant at and before and since the time of such publication, by means of which said premises the plaintiff hath been forced and obliged to undergo, and hath undergone, trouble in body and mind, and laid out and expended large sums of money, and has been greatly affected in his good name and reputation; prevented from transacting his necessary and lawful method of business for a long space of time; by reason of said publication his family and children have been held up to shame, infamy, and ridicule, and have also suffered in body and mind by reason of such publication, and the plaintiff has otherwise been greatly injured and damaged." This is a good declaration under the statute, and alleges specially sufficient grounds to entitle the plaintiff to recover actual damages—which means compensatory damages—for the special injuries thus alleged.

We have not passed upon the constitutional question argued in this case, because the case was submitted to the jury in such a way as to be within the *Stuart* Case, and to be clearly within the statute as to damages, irrespective of the constitutional question.

NORMAN v. MIDDLESEX & S. TRACTION CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

FELLOW SERVANTS—EMPLOYMENT BY AGENT —TRANSFER OF SERVICES—CONSENT OF SERVANT.

1. If plaintiff, when injured by the negligence of defendant's servants, was employed and paid by one who in so doing acted as the mere agent of defendant, plaintiff could not recover, as he was a co-servant of those whose negligence caused his injury.

2. If plaintiff, when injured by the negligence of defendant's servants, was employed by one who had a contract to repair defendant's tracks, the question as to whether he had transferred plaintiff's services to defendant with plaintiff's consent should have been submitted to the jury.

Error to Supreme Court.

Action by Charles Norman against the Middlesex & Somerset Traction Company. A verdict was directed for plaintiff, and defendant brings error. Reversed.

Willard P. Voorhees, for plaintiff in error.
Alan H. Strong, for defendant in error.

PER CURIAM. This was an action in the Middlesex circuit, originally brought against the Middlesex & Somerset Traction Company and Thomas M. Leshner and Frank Leshner, named as partners. The purpose of the action was to recover for an injury of plaintiff occasioned by the alleged negligence of the defendants in running cars over a street railway of the defendant company. The action was discontinued with respect to the defendants Thomas M. Leshner and Frank Leshner, and was brought to trial upon the issue made by the plea of the general issue filed by the Middlesex & Somerset Traction Company.

At the trial there was no question but that the collision injured the plaintiff, and was the result of negligence on the part of employees of the defendant company. The question tried was whether the plaintiff was not also in the employment of the same company, so that the negligence by which he was injured was that of a fellow servant. The trial judge directed the jury to find a verdict for the plaintiff, and an exception was duly taken. In this respect, the judge manifestly erred. There were two views which could have been taken of the evidence. One possible view was that Thomas M. Leshner, who employed and paid the plaintiff, acted in so doing as the mere agent of the defendant company. In such case the plaintiff was a co-servant with those whose negligence occasioned his injury, and there should have

been a direction for a verdict for the defendant if the jury found such agency existed. The other possible view was that Lesher had some contract with the defendant company respecting the repair of its tracks, and, having employed the plaintiff in respect to his business, had transferred plaintiff's services pro hac vice to the defendant company, with plaintiff's consent. In this view, there should have been a submission to the jury of the question whether there had been such transference of services with plaintiff's consent (there being evidence sufficient to submit to the jury on that subject), with direction to find for defendant if such transfer of services was found proved.

As the case will doubtless be tried again upon evidence which may vary from that now before us, it is deemed unnecessary to express any opinion as to the effect of the evidence. In either of the possible views of the evidence above noticed, the action of the judge in directing a verdict for plaintiff was indefensible.

DEAN v. MAYOR, ETC., OF CITY OF PATERSON.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

MUNICIPAL CORPORATIONS—IMPROVEMENT—ASSESSMENTS—REVIEW.

1. The conclusion reached by the Supreme Court in its opinion in the case reported as *Dean v. Paterson*, 50 Atl. 620, 67 N. J. Law, 199, is approved by this court.

2. The finding by a circuit court or court of common pleas that an assessment for benefits has been made according to the peculiar benefits received by the property assessed will not be reversed in the Supreme Court or this court if there be evidence from which the court so confirming the assessment could so find.

3. The finding by the confirming court that the assessment has been laid according to the peculiar benefits received is the finding of a fact, and will not be reviewed here if the record shows any proof to sustain it.

(Syllabus by the Court.)

Error to Supreme Court.

Certiorari by the state, on the prosecution of James B. Dean, against the mayor and aldermen of the city of Paterson. Assessment affirmed, and plaintiff brings error. Affirmed.

Francis Scott and Edward F. Merry, for plaintiff in error. Michael Dunn, for defendant in error.

FORT, J. The opinion of Mr. Justice Hendrickson in the Supreme Court in this case is a clear and correct enunciation of the legal principles applicable to this cause, and it might very properly be affirmed upon that opinion. It will be unnecessary to refer to any matter considered in that opin-

ion. *Dean v. Paterson*, 67 N. J. Law, 199, 50 Atl. 620.

Among the reasons assigned for reversal in this case is the following: "Because the Supreme Court decided that there was a benefit accruing to the abutting property owners from the new curbing." It seems to be a general practice, both in the Supreme Court and this court, to allege a reason similar to this in cases brought up to review the confirmation of assessments by the circuit court or court of common pleas. In the case before us, the commissioners to assess the benefits were appointed by the common pleas. They reported their action to that court. After notice to all parties in interest, the report of the commissioners was confirmed. The report of the commissioners, as confirmed, contained an express statement that the assessments laid had been laid according to the peculiar benefits. The Supreme Court, in its opinion above referred to, has also so found. Such a reason as that above quoted cannot be considered in this court, nor should it be in such a case in the Supreme Court. The action of the common pleas in confirming a report after notice and hearing, or opportunity to be heard, is conclusive upon the parties upon all questions of fact. Whether the assessment has or has not been laid according to benefits is a question of fact. The Supreme Court, in *Van Wagoner v. Paterson*, lately said in a case like this: "The principle upon which the assessment was laid is certified by the commissioners to be according to the peculiar benefits of each lot or parcel of land, and the circuit court, after hearing evidence upon that point, including an examination of the commissioners, found that the assessment had been so made. This finding of fact will not be reviewed here. Whether the assessment was laid by the commissioners according to the peculiar benefits received was the very question at issue before the circuit court upon the rule to confirm—a question over which that court had jurisdiction, and upon which it was required to pass. In such a case the rule is that where the facts are found by a trial judge, and there is evidence to sustain such finding, this court will not review his conclusions thereon." *Van Wagoner v. Paterson*, 67 N. J. Law, 455, 51 Atl. 922; *City of Elizabeth v. Hill*, 39 N. J. Law, 555; *Blackford v. Plainfield Gaslight Co.*, 43 N. J. Law, 438, 440; *Brewster v. Banta*, 66 N. J. Law, 367, 49 Atl. 718. This is a correct statement of the rule of law applicable to such cases, and the Supreme Court, therefore, would have been justified if it had not considered the question of whether the property of the prosecutor was or was not peculiarly benefited.

The judgment rendered in the Supreme Court is affirmed.

REID v. PRINGLE et al.

(Supreme Court of New Jersey. Dec. 28, 1902.)

DESCENT AND DISTRIBUTION—DEBTS OF ANCESTOR—LIABILITY OF HEIR—PLEA—RIENS PER DISCENT—AMENDMENT.

1. Where, in an action against heirs to recover a debt of their ancestor, defendants pleaded that they had no lands from their ancestor by descent, or assets in their hands, and on the trial it was proved that defendants' ancestor died seised of certain lands, subject to a mortgage, but that the plea was not intentionally false, but had been filed by defendants' attorney under the erroneous belief that an equity of redemption did not constitute assets descended, defendants would be permitted to amend the plea to conform to the fact, on payment of costs, and a judgment would be rendered, to be satisfied only from the lands of which defendants' ancestor died seised, instead of a general judgment against defendants.

Action by Sarah R. Reid against William H. Pringle and others. On motion for judgment, and cross-motion to amend plea. Motions granted.

Argued November term, 1902, before DIXON, COLLINS, and HENDRICKSON, JJ.

Randolph Perkins, for plaintiff. Henry Traphagen, for defendants.

PER CURIAM. The action was on the heirs and devisees' act. The defendants pleaded riens per discent. At the trial, in addition to the proof of the plaintiff's debt, it was proved that the ancestor of the defendants died seised of certain lands, subject to mortgage. A special postea recited the facts found, and the plaintiff moved for a general judgment against the defendants. The defendants moved to amend their plea so as to confess the assets described in the postea, and that therefore the judgment should be only for those assets. This court directed testimony to be taken on the points whether the plea was intentionally false, and whether, if not, an amendment would work any injury to the plaintiff. For the security of the plaintiff, a general judgment was permitted, subject to the final order of the court. The testimony has now been presented. We are satisfied that the plea filed was not intentionally false, but was filed through inadvertence, and in the erroneous belief on the part of the attorney of the defendants that an equity of redemption in land did not constitute assets descended. We are satisfied, also, that no harm has come to the plaintiff through the interposition of the plea, beyond the incurring of costs that otherwise need not have been incurred.

The plea may therefore be amended so as to conform to the postea, on terms that the defendants pay to the plaintiff the taxed costs of the trial, and of the testimony taken under our direction; and upon such amendment and payment the judgment entered shall be vacated, and a judgment may be

entered as of the same date, to be levied only on the lands whereof the ancestor of the defendants died seised.

LOID'S ADM'X v. J. S. ROGERS CO.

(Court of Errors and Appeals of New Jersey. March 17, 1903.)

INJURY TO EMPLOYÉ.

1. The plaintiff's intestate, while engaged with others of the defendant's employes, under the direction of a foreman, in lifting and pushing by hand a tall and unwieldy derrick into an upright position to be ready for hoisting materials into a building was thrown from the building and killed by the sudden falling of the derrick. At the trial of the plaintiff's suit against the master for damages resulting from the death of the intestate, based upon the alleged negligence of the master towards the intestate, there was no evidence introduced by the plaintiff from which the jury could lawfully infer such negligence. But under the evidence of the defendant the plaintiff's case was somewhat strengthened on that subject, although not sufficiently to justify the instructions given to the jury by the trial judge, who charged that the liability of the defendant turned upon the question whether or not the plank upon which the machine stood contained nails for the prevention of its slipping, and that, if not, then their verdict should be for the plaintiff; and thereupon refused to charge certain of the defendant's requests to the effect that the jury could find, under the evidence, that the deceased, in the handling of the derrick, assumed an obvious risk for the consequences of which the defendant was not legally chargeable. *Held*, that in refusing such requests the trial court erred.

2. No legal duty of the master towards the servant has ever, judicially, been substituted for the exercise of ordinary prudence by the latter. The Legislature has not, nor have our courts by judicial construction, enlarged the range of legal responsibility of the master to that of a general insurer of the safety of the servant against accidents happening to him in the performance of his duties.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Susan T. Loid, administratrix of William H. Loid, against the J. S. Rogers Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. A. Armstrong, for plaintiff in error. John W. Wescott and Jacob T. Hendrickson, for defendant in error.

VREDENBURGH, J. A tall wooden appliance called a "two-legged derrick," intended for hoisting heavy materials from the ground up to the third story of a building in the course of erection, while being lifted, pushed, or pulled by hand by the intestate, Loid, and other employes of the defendant, into an upright position, so as to be ready for use, lost its center of gravity, toppled over, and fell down from the building. In falling it dragged with it an attached coil of rope, which caught around the intestate's foot, throwing him down from the building, and causing his death. In a suit brought under the statute in the Supreme Court by Loid's administratrix against the defendant for compensatory damages, the declaration

averred that the defendant negligently failed to properly secure and fasten the feet or ends of the frame of the derrick, and negligently failed to notify the intestate that the derrick would, when used, slip and fall, and negligently directed the intestate to use and aid in using the derrick while in the condition aforesaid. The case was tried before the Burlington circuit, and the plaintiff obtained a verdict for substantial damages, and to review the judgment thereon entered the defendant brings error.

The plaintiff's proofs showed that this derrick was constructed of two poles or legs, fastened together at the top, about 20 feet long, and extending apart about 12 feet wide at the bottom, with cross-bars about 5 feet above their ends, holding the legs together. The two ends of these legs rested, but were not fastened, upon a single plank, which was about 12 feet long by 12 inches wide and 3 inches thick. There were cleats or boxes nailed on the plank, within which the ends of the legs fitted, and which were intended to prevent these ends from slipping upon the plank. Two long guy lines or ropes were fastened to the top, one of which reached back and was tied to the floor joists below, and the other extended out over the wall toward the ground. The plaintiff proved that the derrick had been moved from a lower part of the building up to the third floor, but had not been yet placed in a position ready for use. One of the foremen, thinking that it leaned over too far, and desiring to have it righted, called about six or eight workmen, including the intestate, to do it. Morton, the principal witness for the plaintiff, tells what thereupon happened, viz.: "We all went back in a hurry, and then it was leaning too far, and we went to raise it, and it slipped from the bottom, and let the thing go over. * * * We all hands got hold of this machine to try to raise it up. * * * Tried to push it back to straighten it up. * * * We all hands got under it, and tried to push it back, and hoist it up." This force must have caused the derrick to fall (to use again the witness's words)—"just as though both legs were lifted out of the cleats, as though in the raising of it you had raised both legs above the cleats, and it went over." Whether this derrick lost its perpendicular and fell because its feet were lifted too high by the workmen out of the cleats on the plank in which they stood, or because the whole plank at the base slipped out from its position as the result of the force used by the workmen, is a subject of doubt under the evidence. At the close of the plaintiff's case the defendant's counsel unsuccessfully moved the court for a nonsuit, based upon grounds of the want of proof showing any negligence on the part of the defendant, as well as that the proofs demonstrated contributory negligence by the deceased. If the defendant, upon being denied this motion, had then rested his proofs, his right to the direction,

by the court below, of a verdict in his favor, would have been entirely clear. No negligence imputable to the defendant had yet appeared. The defendant had (so far as the plaintiff's case had shown) furnished his employees with a properly constructed machine. There was no evidence as yet of the slightest defect in its construction, either latent or otherwise. The plaintiff had not established the averments in his declaration that the defendant had "negligently failed to properly secure and fasten the feet or ends of the frame of the derrick." On the contrary, it had appeared that the proper construction of this derrick required the feet to rest unfastened upon the supporting plank. The plaintiff's testimony had further shown that in the effort to straighten the appliance by the intestate and those with him, instead of making use of the guy ropes from the top (or other proper and safe means) to pull it, and move it into a vertical position, by force exerted at its top, they had hurriedly applied force at its base, resulting in its fall.

Under the facts so far presented, it was palpably plain that but a slight degree of care in method, and less haste in execution, would have avoided the catastrophe. Even conceding that the injury happened to the intestate in the actual use of the derrick, the decision of this court in the case of *McLaughlin v. Camden Iron Works*, 60 N. J. Law, 557, 38 Atl. 677, is convincing authority against the liability of the master for the consequences of precisely such accidents. In the latter case some employees, during the erection of a building, attempted to raise by hand a large wooden frame, and in hoisting it the plaintiff, an employee, was injured by its falling through lack of fastening, and this court held, in affirming the nonsuit of plaintiff ordered below, that the master was not responsible for the injury. The court, in its opinion, used the following pointed language: "The plaintiff knew that the frame was being raised by hand under the direction of the foreman, and he assumed such resultant risk of that method of doing the work as was obvious to him." The general governing principle, collected from various text-writers and decisions, was there stated as follows: "Where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation; but carelessness in their use, or failure to use them, on the part of his servant, whereby injury is received by a fellow servant in the same common employment, is not chargeable to the master, no matter what may be the grade or authority of the servant." But the defendant corporation then injected into the case a disturbing element by raising an issue of fact as to the proper construction of the derrick, and offered evidence to prove that, for the purpose of preventing the bottom of the supporting plank from slipping, it had, in its construction, caused a dozen or more

nails or spikes to be driven into and entirely through the plank, so that they extended or protruded about one inch beyond its bottom surface. The plaintiff, admitting this, brought proof to show that no nails extended from the bottom of the plank when seen before the accident by the plaintiff's witnesses. The learned trial justice, in his charge to the jury, assumed that this was the only important question of fact to be determined by them, and instructed them as follows, viz.: "The fact upon which your verdict must turn in regard to the liability of the defendant is whether at the time of this accident the plank upon which this machine stood contained such nails for the prevention of its slipping as reasonable care to prevent that would dictate. There, really, is the point in this case;" and, after further instructions in the same line of thought, added: "Were those nails there at the time when the accident occurred, or were they not? As you decide that question you will decide the case, and if you decide the case upon the understanding that the plaintiff has satisfied your minds that the nails were not there, then your verdict is to be for the plaintiff upon the lines that I have indicated." At the same time the learned judge refused to charge the defendant's fourth and fifth requests. Substantially considered, they embrace the proposition that the jury could find, under the evidence, that in the handling of the derrick the deceased assumed an obvious risk, for the consequences of which the master was not responsible. While these requests, as made, are not apt in their phraseology in the presentation of this question to the mind of the court, yet we think they should be held to have been sufficiently specific, and that the express refusal of the court to so charge constituted error. Strictly speaking, this accident did not result from the use of the derrick. It was being straightened into a vertical position so that it could be used. Until it was placed in its proper position for use, it must be evident that the risk of the sudden fall of this topheavy frame, while being righted, should have been obvious to all ordinarily careful workmen, and, if the risk of its falling was not increased by any structural defect in the machine, the master could not be held responsible for the accident. The court, by its charge (above quoted), confined and narrowed the inquiry of the jury to the solution of a fact which was not conclusive as to the negligence of defendant, and erroneously refused to charge them a principle of law to which the defendant was entitled. "An employé assumes all the risks of his employment against which he may protect himself by ordinary observation and care," is the brief, but plain, rule adopted by this court in the recent case of *Durand v. N. Y. & L. B. R. Co.*, 65 N. J. Law, 656, 48 Atl. 1013 (see authorities there cited). No legal duty of the master towards the servant has ever judicially been substituted for the exercise of ordi-

nary prudence by the latter. The liability of the master to respond in damages to the servant in cases founded upon accidents of this character has never been so extended as to dispense with the exercise of ordinary care by the servant to avoid them. The Legislature certainly has not as yet, nor have our courts by judicial construction, enlarged the range of legal responsibility of the master to that of a general insurer of the safety of the servant against accidents happening to him in the performance of his duties.

I think the judgment below should be reversed, and a venire de novo be awarded.

BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY v. RITSON.

(Court of Errors and Appeals of New Jersey.
March 2, 1903.)

INSANE PERSONS—SUPPORT—LIABILITY OF ESTATE.

1. It is within the power of the Legislature to provide remedies against the estates of insane persons while they are living or after their death.

2. An insane female who is married may be held personally liable for her maintenance in any county insane asylum under the supplement, approved May 9, 1894, to the act entitled "An act to provide additional accommodations for the insane of this state." Gen. St. p. 1993. The fact that the husband might be liable for her support does not affect the statutory liability.

3. For a claim for which the insane person could be held in her lifetime, her estate may be held after her death.

4. The words "every insane person supported in any county insane asylum shall be personally liable for his maintenance therein," as used in the supplement of May 9, 1894, will be construed as if the words were "every insane person 'maintained' in any county insane asylum shall be personally liable for his maintenance therein." Gen. St. p. 1995, § 83.

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by the board of chosen freeholders of Camden county against Georgianna W. Ritson, administratrix. Judgment for plaintiff, and defendant brings error. Affirmed.

Howard Carrow, for plaintiff in error.
George J. Bergen, for defendant in error.

FORT, J. This was an action, in the name of the chosen freeholders of the county of Camden, to recover from the defendant, as administratrix of Elizabeth A. Rigg, deceased, for her board in the county hospital for the insane of Camden county. The deceased was received into the hospital as a private patient in 1889, and the rate of board was then fixed at \$3.50 per week. She died on May 31, 1900. At the time she entered the asylum she was married, and her husband, John Rigg, was then alive. He died December 26, 1898. During the time she was in the hospital prior to his death, the weekly amount of board was paid in varying and various installments, so that there remained at the time of his death only \$180 then un-

paid. The balance of the claim sued for was for board accruing after January 1, 1899; the whole claim being \$449.50, exclusive of interest. The proof was that an account was kept of the board in the regular books of the institution, and that the original charge was made against the lunatic, the deceased, and that all payments that had been made were credited on this account, although they were all paid by John Rigg, the husband. The county relied, for its right to recover, upon the provisions of two separate acts. The first of these upon which the county relied is a supplement to "An act to provide additional accommodations for the insane of this state," approved March 3, 1890, the third section of which authorizes "the board of freeholders of any county to receive insane patients in county asylums for pay under such regulations as they may prescribe." Gen. St. p. 1993, § 71. The other act was a further supplement to the same act, which was approved May 9, 1894, and reads as follows: "That every insane person supported in any county insane asylum shall be personally liable for his maintenance therein and all necessary expenses incurred by the institution in his behalf, and the committee, guardian or relative that would have been bound by law to provide for and support him, if he had not been sent to such asylum, shall be liable to pay the expenses of his clothing and maintenance in the asylum and actual necessary expenses to and from the same." Gen. St. p. 1995, § 83.

It will be unnecessary to consider whether the first statute above quoted is applicable, and whether under it the estate of the lunatic can be held for a reasonable or a stipulated payment for maintenance of the lunatic in the asylum, when at the time of the commitment to the asylum the lunatic is a married woman, whose husband is chargeable by law with her support. All the accounts sued upon in this case arose after the passage of the supplement of 1894. This statute is quite broad. Insane persons and other persons not sui juris are wards of the state, and may be sued and their estates charged in such manner as is authorized by statute. That it is within the power of the Legislature to make the estate of an insane person liable for his or her maintenance does not seem to be open to controversy. This statute in that regard is but declaring of that which was a fact at common law, and in this respect the statute simply gives to the board of chosen freeholders, when they furnish the maintenance at public expense, the right to recoup, for the public, the expense thus incurred. The action in this case was defended upon two grounds: First, that this statute could not apply where the insane person was a married woman, as by the common law the husband is chargeable with the maintenance of the wife, and that this duty applies in cases of

insanity as in other cases; and, second, that, if this statute can be held to apply to married women, it does not apply to the case of the deceased, who was a private patient, but only to such patients as are supported in the institution, and that the word "supported," in this statute, must be held to apply only to such patients or persons as are known as pauper or indigent insane.

As to the first contention, the statute is a sufficient answer. It says specifically that every insane person supported in any county insane asylum shall be personally liable for his maintenance therein. This applies to a married woman as well as to any other person. The state fixes by statute when the property of a married woman shall be liable for her obligations, and it may provide for her personal liability, as has been done by this statute. It appears in this case, however, that this account has always been charged against the lunatic; that the county has never charged it against her husband; and, so far as the proof in the case goes, there is nothing to indicate that there was any purpose on the part of the county to collect or enforce the claim against any one, except the lunatic or her estate; and hence there is nothing, in our judgment, in the first ground of defense.

The second contention, that the word "supported," in this statute, makes the act apply only to pauper or indigent insane, is a result which would emasculate the statute. It would be of little use to pass a statute authorizing the counties to hold paupers and indigents personally liable. It is difficult to conceive that the Legislature would have passed an act to enforce a personal liability against a pauper or indigent person. The very statement of the proposition carries with it its refutation. The words "pauper and indigent" convey the meaning that the lunatic has neither money nor estate. The word "supported," in this statute, should be construed as if the word "maintained" were used; so that, to give force and effect to the statute, it should be construed as if it read, "Every insane person maintained in any county insane asylum shall be personally liable for his maintenance therein." By this construction full force and effect is given to the statute, and its usefulness to the public is upheld. The construction contended for by the defendant would nullify the act. A construction which will produce that result will never be given by the court if any other that is reasonable can be given. The learned trial justice in this case instructed the jury to render a verdict for the plaintiff for the full amount claimed, and in this there was no error.

A suit of this nature against the administrator of a lunatic has been held maintainable by this court. *Van Horn v. Hann*, 39 N. J. Law, 207.

The Circuit Court is affirmed.

STATE v. HANSON.

(Supreme Court of New Jersey. Feb. 24, 1903.)

COMPOUNDING FELONY—INDICTMENT—EVIDENCE.

1. An indictment for compounding a crime must distinctly aver that the crime compounded has been committed.

2. The record of acquittal of the person charged with the crime compounded is at least prima facie evidence in favor of the person charged with compounding.

3. Whether, notwithstanding such acquittal, the state can be permitted to prove the guilt of the person acquitted, and whether it requires proof beyond a reasonable doubt, or only a preponderance of evidence, it is not necessary to decide.

4. The defendant not having been convicted under the third count, no opinion is expressed in respect to the proper construction of the act of 1899, p. 214, which makes it a misdemeanor to commit any act for the perversion or obstruction of justice or the due administration of the laws.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Camden County.

James S. Hanson was convicted of compounding a felony, and brings error. Reversed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, FORT, and PITNEY, JJ.

Henry S. Scovel, for plaintiff in error. F. T. Lloyd, for the State.*

VAN SYCKEL, J. The indictment contains four counts. The first count alleges that the defendant, well knowing that one Lensey was charged with the crime of larceny, did, in consideration of \$25 to him paid by said Lensey, compound the said crime. The second count alleges that the defendant agreed to compound said crime. The fourth count alleges that the said defendant, well knowing that said Lensey was charged with the crime of larceny, did receive and accept of the sum of \$25 paid him by said Lensey as a reward for compounding larceny, and for procuring that the said Lensey should not be prosecuted for said crime. The third count alleges that said Lensey was charged and complained against, on the oath of one Willent, with the larceny of the goods of the New York Shipbuilding Company, and that said defendant, well knowing that fact, while said charge and complaint were still pending and undisposed of, did take from the said Lensey the sum of \$25 upon an agreement with said Lensey that he, the said defendant, would fix up and suppress the said criminal charge so made against Lensey, so that the same should not be presented to the grand jury, or otherwise proceeded in.

In State v. Leeds, 52 Atl. 288, this court held that an indictment for compounding a crime should distinctly aver that the crime

charged to have been compounded had been committed, and should set it forth with such particularity as will enable the accused to make preparation for rebutting that element of the charge. If necessary to make such distinct averment, the averment must be proven, to sustain a conviction. No objection was made in the trial to the sufficiency of the indictment, but the trial court instructed the jury that it was not necessary to prove that Lensey had actually committed the crime of larceny. The jury convicted the defendant of an attempt to compound a misdemeanor. The rule as declared in the case of State v. Leeds must be accepted as the law of this court, and the charge was therefore erroneous.

The defendant offered in evidence the record of acquittal of Lensey of the said charge of larceny, which was overruled. This record was at least prima facie evidence that the crime had not been committed. Whether it was subject to be rebutted by the state by proof that Lensey, although acquitted, had actually committed the crime imputed to him, and whether it was incumbent to prove that charge beyond a reasonable doubt, or only by a preponderance of evidence, are questions not presented by this record. See People v. Buckland, 13 Wend. 592; Roscoe's Cr. Ev. 404; Regina v. Best, 9 C. & P. 368; 2 Archibald, Cr. Law, 1065; 2 Wharton. Cr. Law, § 2595.

The third count appears to have been drawn by the pleader in view of the act of 1899, p. 214, which, among other things, provides that any person who "commits any act for the perversion or obstruction of justice, or the due administration of the laws, shall on conviction be deemed guilty of a conspiracy and be liable to the same penalty as persons convicted of a misdemeanor." The defendant was not convicted under this count, and therefore no opinion is expressed as to its proper construction.

The judgment below should be reversed.

STATE v. MULLEN.

(Supreme Judicial Court of Maine. Feb. 24, 1903.)

LANDS RESERVED FOR PUBLIC USES—PLANTATIONS—TOWNS—PRIVATE AND SPECIAL LAWS—CUTTING TIMBER.

By St. 1850, p. 193, c. 196, it was provided that in all townships or tracts of land unincorporated or not organized for election purposes, sold or granted by the state, in which lands have been reserved for public uses, the land agent should have the care and custody of such reserved lands until such tract or township is incorporated or organized for election purposes; and the land agent was directed to sell for cash the right to cut and carry away the timber and grass from off the reserved lands which have been located, the right to continue until the tract or township should be incorporated or organized for election purposes.

The lands so reserved for public uses in Indian township were duly located, and the right

* 1. See Compounding Felony, vol. 10, Cent. Dig. § 1.

to cut timber and grass thereon had been sold by the land agent, and such right had vested in the defendant prior to the incorporation in 1901 of a portion of Indian township as the town of Millinocket. The reserved lands as located are all within Millinocket as incorporated. The acts of trespass complained of were the cutting of trees on the reserved lands after the incorporation of Millinocket. *Held:*

1. That the right of the defendant to cut timber on the reserved lands was terminated by the incorporation as a town of a portion only of Indian township, but in which portion the reserved lands were located; and therefore that the acts complained of were trespasses.

2. But that, although the state is the trustee of reserved lands, and may maintain trespass for injury to them, it is such trustee only until the township is incorporated, and that in this case its interest in the reserved lands in question was terminated by the incorporation of Millinocket. Therefore it cannot maintain this action.

3. That when a portion of a township is incorporated, and no exception or provision is made with reference to the reserved lands, it is to be deemed that the Legislature intended the reserved lands within the portion incorporated to follow that portion and vest in it; and that it did not intend the right to cut timber to continue in a grantee thereof, under St. 1850, p. 193, c. 196, after the title to the land itself had vested in the town by incorporation.

4. That the title to the reserved lands and the timber thereon within the town of Millinocket, have vested in that town.

(Official.)

Agreed Statement from Supreme Judicial Court, Penobscot County.

Action by the state against Charles W. Mullen. Submitted on agreed statement. Plaintiff nonsuit.

The case was submitted by the parties to the law court upon facts agreed as follows:

This was an action for trespass to real estate, with a count de bonis for certain beech, maple, birch, and other trees, not suitable for any purpose but for fire wood, cut and carried away by the defendant between the 1st day of August, 1901, and the date of the writ, March 18, 1902, from lands reserved for public uses in Indian township numbered 3, in the county of Penobscot, and under the care of the land agent of the state.

A portion of said Indian township numbered 3 was incorporated into a town by the name of Millinocket by chapter 377, p. 562, of the Private and Special Laws of 1901. Within the limits of the territory of such incorporated town, organization of which was had under said act of 1901 previous to the alleged trespasses, are included the aforesaid lands so reserved for public uses, and duly located in said township prior to the incorporation and organization of said town.

By deed dated November 8, 1850, and recorded in the land office of said state, in volume 1, p. 18, of records of deeds of timber on reserved lands, Anson P. Morrill, as land agent of said state, agreeably to the provisions of chapter 196, p. 193, of the Laws of 1850, entitled "An act in relation to lands reserved for public uses," approved August 28, 1850, conveyed to one Henry E. Prentiss the right to cut and carry away the timber

and grass from the reserved lots in said Indian township until such time as the said township or tract shall be incorporated, or organized for plantation purposes, and no longer, and at the times of the alleged trespasses the said right to cut and carry away said timber and grass had, by sundry mesne conveyances from said Prentiss, vested in the defendant and others as tenants in common.

If, upon the foregoing agreed statement of facts, the court should be of the opinion the action is maintainable, the case is to stand for trial; otherwise the plaintiff is to be nonsuit.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

C. J. Dunn, for the State. C. F. Woodard, for defendant.

SAVAGE, J. This action is for trespass to real estate, with a count de bonis for certain beech, maple, birch, and other trees not suitable for any purpose but fire wood, cut and carried away by the defendant between the 1st day of August, 1901, and the date of the writ, March 18, 1902, from lands reserved for public uses in Indian township numbered 3, in the county of Penobscot, and under the care of the land agent of the state.

A portion of said Indian township numbered 3 was incorporated into a town by the name of Millinocket by chapter 377, p. 562, of the Private and Special Laws of 1901. Within the limits of the territory of such incorporated town, organization of which was had under said act of 1901, previous to the alleged trespasses, are included the lands so reserved for public uses and duly located in said township prior to the incorporation and organization of said town. By deed dated November 8, 1850, and recorded in the land office of the state, the land agent of the state, agreeably to the provisions of chapter 196, p. 193, of the Laws of 1850, conveyed to one Henry E. Prentiss the right to cut and carry away the timber and grass from the reserved lots in Indian township until such time as the said township or tract shall be incorporated, or organized for plantation purposes, and no longer. At the times of the alleged trespasses the right of Prentiss to cut and carry away timber and grass under the foregoing conveyance had vested in the defendant and others as tenants in common.

Upon the foregoing succinct statement of facts, as agreed to by the parties, the case is submitted to this court to determine whether or not the action is maintainable. The proper determination of it will depend upon the answer to one or more of the following questions:

(1) Was the right of the defendant to cut timber on the reserved lands in Indian township terminated by the incorporation as a

town of a portion only of the township, but in which portion the reserved lands are included?

(2) If so, has the state any interest in the reserved lands, since the incorporation of the town, which entitles it to maintain this action?

(3) If so, are beech, maple, birch, and other trees, not suitable for any purpose but for fire wood, to be regarded as "timber" within the meaning of chapter 196, p. 193, of the Laws of 1850?

If either the first or second question is answered in the negative, it will not be necessary to consider the third.

By St. 1850, p. 193, c. 196, it was provided that in all townships or tracts of land unincorporated or not organized for election purposes, sold or granted by the state, or by Massachusetts, or by both states jointly, in which lands have been reserved for public uses, the land agent should have the care and custody of such reserved lands until such tract or township is incorporated or organized for election purposes. And the land agent was directed to sell for cash the right to cut and carry away the timber and grass from off the reserved lands which have been located, the right to continue until the tract or township should be incorporated or organized for election purposes. The land agent did sell the timber and grass on the reserved lands in Indian township to the predecessor in title of the defendant. The township was never organized for plantation purposes, but a portion of it, which included the reserved lands, was incorporated as the town of Millinocket, prior to the acts of trespass complained of.

Whether this incorporation was such an incorporation of the township as determined the defendant's right to cut timber and grass under the act of 1850 is a question not without difficulty. It is evident from the context that the word "tract" in the clause which contains the right to cut "until the tract or township shall be incorporated" does not refer to the reserved lands themselves, but to the larger territory sold or granted out of which lands are reserved. In terms, the right is to continue until the larger territory or the township is incorporated.

Before determining what the state did do with reference to the reserved lands by incorporating the town, it will be useful to inquire what the state might do. Prior to the separation of Maine from Massachusetts, the latter state, in making grants or sales of public lands, had generally pursued the policy of making reservations of lands for public uses from the lands granted. The beneficiaries of these public uses were not ordinarily in esse at the time of the grant. Massachusetts retained the legal title for the use of the beneficiaries when they should come into existence. After the separation, as held in *State v. Cutler*, 16 Me. 349, this state, by virtue of its sovereignty, became entitled to

the care and possession of these reserved lands until those should come into existence for whose benefit the reservation was made. The state became trustee, and as such could maintain trespass for stripping the land of timber.

By St. 1824-25, p. 993, c. 280, as revised by St. 1828, p. 1160, c. 393, the state, by general law, enacted that there should be reserved in every township suitable for settlement, whether timber land or otherwise, 1,000 acres of land, to be appropriated to such public uses, for the exclusive benefit of such town, as the Legislature should thereafter direct. By this legislation the state constituted itself a trustee, retaining as such the legal title, but subjecting the land to such future public uses, for the benefit of the town, as the state itself might afterwards direct, until the town should be incorporated, when, under the statute of uses, the title would vest in the town. *Dillingham v. Smith*, 30 Me. 370. Until incorporation the reserved lands and the funds arising therefrom are, therefore, under the general control of the state. *Dudley v. Greene*, 35 Me. 14. The state has placed no limitation upon its power to designate the uses, or to control thereafter the title vested in the beneficiaries, only that they are to be public and for the benefit of the town.

This court, in *Union Parish Society v. Up-ton*, 74 Me. 545, had occasion to consider the general character of the trusteeship of the state, and its power even to change designated uses before the vesting of title in the beneficiaries, and it was held that the state might, as was provided by St. 1832, p. 37, c. 39, direct that income from the proceeds of lands reserved for the use of the ministry should be applied to schools, if the fund or the land had not become vested in some particular parish.

By St. 1842, p. 29, c. 33, the state first provided for the custody of funds derived from the timber and grass on lands reserved for public uses. This act authorized the seizure and sale of timber, grass, or hay cut by trespassers on reserved lands, and directed that the proceeds should be covered into the county treasury, to be paid to the town rightfully owning it, when applied for. By St. 1845, p. 144, c. 149, cutting of timber on reserved lands was authorized, the proceeds to be disposed of as the proceeds of grass on public lots are disposed of.

The first general designation of public uses was made by St. 1846, p. 202, c. 217, by which it was provided that the proceeds of the sale of timber or from trespasses on the reserved lots in unincorporated places should be paid into the county treasury, and constitute funds for school purposes, of which the income only was to be used. If there were no inhabitants of the township, the interest was to be added to the fund. If there were inhabitants, and they had become organized into a plantation, and had organized

one or more school districts, the interest on the funds was to be applied to the support of the schools, and in proportion to the number of scholars, if more than one school district; and if a district or plantation consisted of parts of two townships, the interest was to be distributed according to the proportion of such funds arising in each township for the support of schools in that township.

By St. 1848, p. 68, c. 82, it was provided that the proceeds of sales of timber and grass on the reserved lots should be paid into the state treasury, instead of into the county treasuries. By chapter 196, p. 193, of the Laws of 1850, under a provision of which this controversy has arisen, the state treasurer was directed, after deducting expenses, to pay the balance of proceeds received from sales of timber and grass on the reserved lands "to the authorities provided by law to receive the same, when they shall hereafter exist, until which time the funds arising from said reserved lands shall remain in the treasury." And the above-named statute provisions, so far as they relate to the designated use of these funds, their creation, custody, and manner of expenditure, remain practically unchanged down to the present time. Rev. St. c. 5, §§ 12-19, inclusive.

It would, therefore, appear that the state, according as it reserved to itself in the act of 1828 the power to direct, has directed that the use for which reserved lands are to be held is the support of schools, and this use follows the proceeds of the sales of the lands themselves. Rev. St. c. 12, §§ 40, 46; *Harrison v. Bridgeton*, 16 Mass. 16. And, while the funds arising from the reserved lands are used for school purposes, the income is to be expended like other school moneys. Section 46. But, having been devoted to public uses, no doubt the state could more particularly direct its use. It might appropriate it to a particular school, or a particular grade of schools. It might appropriate it to the schools in a particular part of a plantation or town. The only limitations expressed are that the use shall be public, and for the benefit of the town. That the use of the fund for the support of schools is a public use goes without saying, and, if the Legislature deems that any particular application of school moneys within the town is for its benefit, we think their determination is conclusive.

It follows that upon the incorporation of a township, or a part of a township, from which lands have been reserved for public uses, the state has the lawful power to make such provision as it sees fit for the vesting of the reserved lands, and for the application of the school moneys arising therefrom. If it divides the township and incorporates a part, it may divide the reserved lands, as was done in the case of *Argyle v. Dwinel*, 29 Me. 29. It may, we think, expressly assign the reserved lands to the portion incorporated, or it may expressly reserve them for

the part unincorporated. And it would have been competent for the Legislature, in the incorporation of Millinocket out of a portion of Indian township, to declare that the reserved lands in the whole township should vest in the new town. But no such declaration was expressly made, and we are left to inquire whether, in the absence of express declaration, any implication arises either way.

Bearing in mind that the reserved lands are within the geographical limits of the new town, is it or not to be presumed that the Legislature intended them to go with and belong to the new town? The newly incorporated town embracing the reserved lands, was it such an incorporation as was fairly within the contemplation of the act of 1850, by which the defendant's right to cut timber was to be continued until the township was incorporated?

In cases of doubtful construction the legislative intent sometimes may be considerably illuminated by a consideration of the consequences which may follow one or another of varying interpretations. The state held the lands as trustee "until incorporation" of the township, just as the grantee of the right to cut timber held that "until incorporation." St. 1850, p. 193, c. 196. The same phrase has the same meaning, evidently, in both places in the same act. Suppose it were to be held that the act of 1850 was only to be satisfied by an incorporation of the entire township. Then what has become of the reserved lands, and the fund which has arisen from them? Of course, they did not vest in Millinocket upon its incorporation, for it was not the entire township. Equally, of course, for the same reason, they will not vest in the remaining portion of the township, whenever, if ever, it shall become incorporated, or in any subdivision of the township, if it shall be further divided for the purposes of incorporation. And there is no ground for any presumption that the entire township will ever become incorporated as one town. If this view is the correct one, the state, by incorporating Millinocket, has left the title to the reserved lands and the school funds arising therefrom wholly indeterminate. There is no provision of law by which a dollar can be expended, although it will not be denied that the exigency has arisen within the township, which was contemplated by the reservation of the lands, namely, the settling of inhabitants in sufficient numbers to require the expenditure of money for public schools. Can it be supposed that the Legislature still intended to hold these lands in trust, and perchance to vest them and their income wholly in the remainder of the township? Is it to be considered that the Legislature intended that the remainder of the township was ever to have any interest in the lands which were incorporated as a part of Millinocket? If so, it seems singular that it did not say so. When these lands were being incorporated together with the rest, if it was

intended to make any reservation of interest in the state for the benefit of the remainder of the township, the burden is certainly upon those who assert that intention to answer why it was not expressed.

Upon the whole, we are of opinion that it was the legislative intent that the reserved lots embraced within Millinocket should pass to that town, and be vested in it, and that that intent is made sufficiently apparent from the fact that the lands were within the limits of the town, and were not excepted from the results which ordinarily follow the incorporation of a township, including reserved lands. And we are also of opinion that, when that portion of a township which includes reserved lands is incorporated, it is properly to be deemed, as to such lands, an incorporation of the township within the meaning of the act of 1850. It is to be deemed that the Legislature intended the reserved lands within the portion incorporated to vest in that portion, unless otherwise expressed, and that it did not intend the right to cut and carry timber and grass to continue in a grantee thereof after the title to the land itself had vested in a town by incorporation.

From this conclusion it appears that the acts of the defendant done after the incorporation of Millinocket were trespasses, but it also appears that by that very incorporation the state ceased to be trustee of the reserved lands, and now has no interest in them by which it can maintain this action.

In accordance with the stipulation, the entry must be:

Plaintiff nonsuit.

STATE v. DAMON.

(Supreme Judicial Court of Maine. Feb. 23, 1903.)

INDICTMENT—PLEADING—POLYGAMY.

1. In an indictment for polygamy, it is sufficient, to show jurisdiction, to aver that the crime was committed at some town within the county, or that the offender resided in the county at the time of indictment, or that he was apprehended within the county.

2. In such an indictment the statutory exception is sufficiently and properly negated by the use of the following language: "The said Rose Hoff Damon [the lawful wife] not having been continuously absent for seven years previous thereto and not known to him, the said William W. Damon to be living within that time."

(Official.)

Exceptions from Superior Court, Cumberland County.

William W. Damon was indicted for polygamy, and, from an order overruling a demurrer, defendant excepts. Exceptions overruled, and judgment for the state.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

R. T. Whitehouse, Co. Atty., for the State, D. A. Meaher, for defendant.

SAVAGE, J. Demurrer to indictment for polygamy. The indictment was found in the superior court for Cumberland county.

1. The respondent claims that the indictment does not allege that he resided in Westbrook, or that he resided or had been apprehended in Cumberland county. The indictment describes him as "late of Westbrook, in the county of Cumberland," and then alleges that the polygamous marriage took place "at said Westbrook." There is no doubt but that, by virtue of the statutes creating it, the superior court for Cumberland county has general jurisdiction of indictable offenses committed "at Westbrook," in that county, including polygamy, unless the statute defining and affixing a punishment for polygamy in some way affects and changes that jurisdiction. We understand the counsel for the respondent to claim that it does so.

Rev. St. c. 124, § 4, after defining polygamy, concludes as follows: "And the indictment for such offense may be found and tried in the county where the offender resides, or where he or she is apprehended." And the respondent's contention is that, in order that the indictment should show the jurisdiction of the superior court, it must be averred, in substance, that at the time of the indictment the respondent resided, or had previously been apprehended, within the county of Cumberland. We do not think so. Usually an indictment must be found in the county in which the criminal act was committed, and the court in a county has general jurisdiction over such crimes. But the Legislature may give the court in one county jurisdiction over crimes committed in another. It has provided that the crime of polygamy is indictable and punishable in any county where the offender may be found residing, or within which he has been apprehended. But this is not exclusive. It is merely an enlarged or special jurisdiction. It by no means ousts the court of the county in which the polygamy was committed of its general jurisdiction. The offender is not merely indictable in that county, but also in the county in which he resides or in which he is apprehended. An indictment is sufficient in this respect if it alleges that the crime was committed at some town within the county, or that the offender resided in the county at the time of indictment, or that he was apprehended within the county. The first objection to this indictment therefore fails.

2. It is averred in the indictment that the lawful wife was Rose Hoff Damon, and the respondent objects that the averment in the indictment, "the said Rose Hoff Damon not having been continuously absent for seven years previous thereto and not known to him, the said William W. Damon to be living within that time," is self-contradictory and uncertain. We do not think so. The defendant would read it as two separate and distinct averments—one, that Rose Hoff Damon had not been continuously absent for seven years previous to

the marriage complained of; and the other, that she was not known to the respondent to be living within that time. We read it as a negative averment of a single statutory exception. The statute (Rev. St. c. 124, § 4), so far as relates to this question, reads as follows: "If any person except * * * one whose husband or wife has been continually absent for seven years and not known to him or her to be living within that time, having a husband or wife living, marries another married or single person * * * he or she shall be deemed guilty of polygamy." The rules of pleading required the pleader to aver that the respondent was not within the excepted class. *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382. Who was within the excepted class? One whose wife had been continually absent for seven years, and not known to him to be living within that time. Embodied in the exception is the affirmative proposition of seven years' absence, limited by a negative proposition—not known to be living. The latter proposition is not an independent one. It is a modification of the prior one. That his wife was not known to be living was of no consequence, except in case of seven years' absence. Not all cases of seven years' absence were within the exception, but only his whose wife was not known to him to be living within that time. The two clauses must be taken together. Together they define only one excepted class, in which was included only that one whose wife had been absent for seven years, and not known to him to be living within that time. When the affirmative element of absence is limited by the negative element of knowledge to be living, a case is brought within the exception in the statute. The pleader ought to aver that the respondent was not within the exception. How did he do it? He employed the statutory definition of the excepted class, and placed the word "not" before it. He negated the entire excepting clause. How could it have been done better? That the result at first sight may seem uncertain, chiefly because it furnishes an instance of the double negative, is not the fault of the pleader. It is simply the consequence of negating an exception which contains an affirmative limited by a negative. We think the indictment is sufficient.

Exceptions overruled. Judgment for the state.

FISHER et al. v. SHEA et al.

(Supreme Judicial Court of Maine. March 21, 1903.)

TRUSTEE PROCESS—NECESSARIES—COMPENSATION OF ATTORNEY.

1. Aside from the exclusion of certain classes of articles or services, of which it may be predicated as a matter of law that they are not comprised in the term "necessaries," what are necessaries is a question of fact, dependent upon the varying circumstances of each case.

2. Legal services rendered in the defense of a criminal prosecution, and in defense of a civil action in which the defendant has been arrested, are necessities.

3. The plaintiffs, attorneys at law, brought an action to recover for professional services rendered by them in behalf of the defendant in defense of an action for an alleged assault and battery. The defendant at the time of the alleged assault was acting as a police officer. He was not arrested on the writ, and the suit was disposed of by an entry of "Neither party, no further action."

4. The defendant was a police officer, and as such liable to prosecutions of the character described in this case. The suit against him affected his reputation as a citizen and an officer, and he was forced to defend it to avoid consequences more injurious than the loss of property rights. *Held*, that the legal services rendered in his defense, under the circumstances, may properly be included in the term "necessaries," to which the statute (Rev. St. c. 86, § 55, par. 6), has given preference.

5. In the action for the alleged assault and battery the defendant was not arrested, but the fact that he was liable to arrest on execution after judgment against him is to be considered. It is analogous to cases where original arrests were made.

(Official.)

Report from Supreme Judicial Court, Sagadahoc County.

Action by William H. Fisher and others against Robert G. Shea and trustee. Case reported, and trustee charged.

The plaintiffs were attorneys at law, and brought this action to recover for professional services rendered by them in behalf of the defendant in defense of the action *James Hersom v. Robert G. Shea* in the superior court of Kennebec county. That was an action for an assault and battery alleged to have been committed upon Hersom by the defendant Shea while acting as a police officer of the city of Augusta. In the case at bar the principal defendant became defaulted, and it was agreed that at the time of the service of the trustee writ upon him in this case there was due from the trustee to the principal defendant the sum of \$15 as wages for his personal labor for a time not exceeding one month next preceding the service of the writ.

The parties agreed to report to the law court the question whether the funds in the hands of the trustee are exempt from attachment by this process under the provision of Rev. St. c. 86, § 55, par. 6.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and PEABODY, JJ.

W. H. Fisher, for plaintiffs. F. E. Southard, for defendants.

PEABODY, J. This case comes before the law court on report. The plaintiffs were attorneys at law, and brought this action to recover \$24 due them for professional services rendered by them in behalf of the defendant in defense of an action for an alleged assault and battery. The defendant at the time of the alleged assault was acting as a police officer. He was not arrested on the

writ. The suit was disposed of by an entry of "Neither party, no further action." The amount claimed by the attorneys was a reasonable compensation for the services rendered in defense of the action.

At the time of the service of the writ in the present action there was due from the trustee to the principal defendant the sum of \$15 as wages for his personal labor for a time not exceeding one month next preceding the service of the process.

The question is presented whether the funds in the hands of the trustees are exempt from attachment by this process under the provisions of Rev. St. c. 86, § 55, par. 6. This statute provides as follows:

"No person shall be adjudged trustee * * * by reason of any amount due from him to the principal defendant, as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due to him as wages for his personal labor; and this is not exempt in any suit for necessities furnished him or his family. * * *"

The fund in the hands of the trustee being due as wages for the personal labor of the defendant performed within one month, the trustee can be held only if the subject-matter of this suit is "necessaries furnished him or his family."

Aside from the exclusion of certain classes of services or articles concerning which it may be predicated as a matter of law that they are not comprised in the term "necessaries," what are necessities is a question of fact, dependent on the varying circumstances of each case. *Provost v. Piche*, 93 Me. 455, 45 Atl. 506. Legal professional services do not belong to a class which can be excluded as a matter of law. *Peaks v. Mayhew*, 94 Me. 571, 48 Atl. 172; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

Attempts have been made to state general rules by which legal services rendered in a given case may be tested as belonging to the class of necessities. It is impossible to make these rules sufficiently definite to admit or exclude all cases as matter of law. A more practical rule would be to contract the debatable ground so far as possible, for there must always be border lands in which a slight variation of circumstances leads to reasonable difference of opinion among men.

A safe standard for lines of demarcation, as applied to legal services rendered in litigation, is found in the case of *Conant v. Burnham*, cited above. From the illustrations presented by this case it may be stated as a safe rule of general application that legal services rendered in the defense of a criminal prosecution fall within the class of necessities (see, also, *Askey v. Williams*, 74 Tex. 204, 11 S. W. 1101, 5 L. R. A. 176); that such services rendered in the institution of criminal proceedings are not comprehend-

ed in the meaning of the term. Between these extremes lie those services of an attorney rendered in the defense or in the prosecution of civil actions. It would be safe to go a step further, and say that there may be services in the defense of a civil action which are included in the term "necessaries" (*Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160), and that there may even be services rendered in the prosecution of civil actions which are so included (*Munson v. Washband*, 81 Conn. 303, 83 Am. Dec. 151).

It is unnecessary to consider further the prosecution of civil actions. The present case comes within the class of those legal services which are rendered in the defense of a civil action. In most, if not all, cases of arrest of the defendant legal services rendered in protecting and defending him could be properly classed as necessities. Whether this could be said of the defense of a contract right, where an adverse result of the suit would involve only a pecuniary loss, is doubtful.

In the present case there was no arrest on the writ, but the fact that he was liable to arrest on execution after judgment against him is a circumstance proper to be considered. It is analogous to cases where original arrests were made. The defendant was a police officer, and as such peculiarly subject to prosecutions of the character described in this case. The suit against him could not fail to affect seriously his reputation as a citizen and his efficiency as an officer of the law, and he was forced to defend it to avoid consequences more injurious than the loss of property rights.

It is well to consider here the purpose of the statute invoked in this case. The reason for its existence rests on public policy. It is for the best interests of the state that the wage earner should have the incentive to labor for the maintenance of his home which comes from a judicious protection of his earnings, and equally so that he should be protected from the effects of his own improvidence or misfortune by holding out to those who can furnish him with the things he needs a reasonable expectation of remuneration. It is obviously the intent of the statute to encourage furnishing to all, without regard to financial responsibility, those things whose lack might not only cause hardship to the individual, but detriment to the community.

The defense of a citizen from injury to his person or his reputation, the protection of a public officer in the performance of his duties, and the maintenance of his official character, may properly be included among those things to which the statute has given preference.

It is our opinion that the services rendered in this case were necessities within the meaning of the law.

Trustee charged for \$15.

SAWYER v. BEAL et al.

(Supreme Judicial Court of Maine. March 10, 1903.)

SHORE FISHERIES—FISH WEIR—"IN FRONT OF THE SHORE OR FLATS OF ANOTHER."

1. By chapter 3, § 63, of the Revised Statutes, it is provided that "no fish weir shall be erected or maintained in tide waters below low water mark in front of the shore or flats of another, without the owner's consent." *Held*, that the language "in front of the shore or flats of another" must be construed as subject to some limitation as to its meaning other than is therein expressed.

2. The criterion in determining whether or not a weir is "in front of the shore or flats of another," within the meaning of the statute, is whether such weir is so near or so situated with reference to the shore as to in some way injure or injuriously affect the shore owner in the enjoyment of his rights as such owner.

(Official.)

Report from Supreme Judicial Court, Washington County.

Action by Edward M. Sawyer against John W. Beal and others. Case reported, and judgment for defendants.

Action of debt to recover the penalty provided for in Rev. St. c. 3, § 63, as amended by St. 1885, c. 334. The plaintiff claimed that the defendants had erected and maintained a fish weir in tide waters below low-water mark in front of his shore or flats at Green Island, so called, in Jonesport, in Washington county, without plaintiff's consent, and contrary to the statute. The plaintiff further claimed that the weir interfered with his rights as owner of the island.

The plea was the general issue.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and PEABODY, JJ.

W. R. Pattangall and J. W. Leathers, for plaintiff. J. F. Lynch and C. B. Donworth, for defendants.

WISWELL, C. J. The plaintiff, the owner of a small island, known as "Green Island," in the town of Jonesport, brings this action to recover the penalty provided by Rev. St. c. 3, § 63, as amended by chapter 334, Pub. Laws 1885, which section, as amended, is as follows: "No fish weir or wharf shall be extended, erected or maintained except in accordance with this chapter; and no fish weir shall be erected or maintained in tide waters below low water mark in front of the shore or flats of another without the owner's consent, under a penalty of fifty dollars for each offense to be recovered in an action of debt by the owner of said shore or flats; but this chapter does not apply to weirs, the materials of which are chiefly removed annually, provided that they do not obstruct navigation, nor interfere with the rights of others. All acts or parts of acts inconsistent with this act are hereby repealed."

The defendants erected some years ago,

and have since maintained, the fish weir complained of—a permanent structure, the materials of which are not chiefly removed annually. The distance between the nearest portions of the island and of the weir, at low-water mark, is 528 feet. Between the weir and the island there is a sufficient depth of water, at low water, for vessels of considerable size to pass.

The question decisive of the case is whether or not the defendants' weir is "in front of the shore or flats" of the plaintiff, within the meaning of this statute. It is obvious that the statute must contain some limitation other than is expressed in it. If it were to be given a literal construction, there is no point, however distant in any direction, that would not be in front of the shore of the plaintiff, since he owns the whole island, with shores fronting in all directions.

A brief consideration of the purpose of this statute, in connection with the rights of an owner of land upon the seashore and of the public, will readily enable us to supply the limitation in the effect and meaning of this section that must have been contemplated, and which is perhaps so evident that it need not have been expressed. In this state, under the Colonial Ordinance of 1641, as modified by that of 1647, which has become the common law of this state, the owner of land upon the seashore owns to low-water mark, unless the tide recedes more than 100 rods, although, of course, the ownership of upland and flats may become divided by the act of the owner. Within the limits of his ownership, he has all the exclusive rights of an owner. But beyond low-water mark the owner of the upland and flats has no more ownership or control than any other member of the public. This ownership of the land under the sea, as well as the control of the sea fisheries, is vested in the state for the benefit of the public, and the state may regulate the time and method of taking fish from the sea.

It is apparent that the rights of the owner of the shore might be seriously affected by the building of a fish weir beyond the limits of his ownership, but so near thereto as to very materially injure him. For this reason the Legislature wisely enacted the statute under consideration. But the purpose of this was not to extend the ownership of the owner of the shore, or to give him any new or additional rights, but simply to protect him in the enjoyment of those which he already had as owner of upland and shore, or of shore alone. It follows that this statute does not apply to all fish weirs that may be erected by a person in front of the shore of another, but only to such as are so situated or are so near the shore of another as to injure or injuriously affect the latter in the enjoyment of his rights as such owner—as, for instance, by preventing, to some extent, at least, fish from coming to the weir of the shore owner, if he has one, or by injuring

his weir privilege, or by obstructing access by sea to his land, or in some other way. And the owner of the shore cannot maintain this action to recover the penalty provided, which is intended, in a certain sense, as compensation for the injuries suffered by him, unless he is able to show that in some way he has been injured in the use and enjoyment of his land and shore by the construction of a weir in front of his shore. See *Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017, and cases cited.

We do not mean that the shore owner can only be injured in some of the ways above referred to. The very purpose of the statute is to extend to him additional protection in the enjoyment of his rights as such owner, and to give him a remedy for injury, where, prior to the statute, there was neither remedy nor injury in the legal sense. But as there must necessarily be some limitation to the statute other than is expressed therein, and as there should be some criterion by which it may be determined when a fish weir is in front of the shore of another, within the meaning of the statute, and when not, we think that this criterion must be injury of some kind to the shore of the owner. If this was not intended, we can perceive no reason why the Legislature should have given to the shore owner a right to maintain an action for the erection of a fish weir beyond the limits of his ownership, and within the public domain. We do not believe that it was intended to give to the shore owner a right to maintain an action of this kind, not a *qui tam* action, as said in *Donnell v. Joy*, *supra*, unless he had suffered some injury, or been injuriously affected, by reason of the erection of the weir complained of. It follows that a fish weir maintained in front of another's shore, so near or so situated with reference to the shore as to cause any injury to the shore, or to render it less valuable for any purpose for which it is adapted, is within the meaning of the statute, but otherwise it is not.

The report of this case contains no evidence of any injuries suffered by the plaintiff by reason of the construction or maintenance of the weir complained of. In fact, the action is evidently not based upon this theory, but upon the idea that the defendants should make some compensation to him for maintaining a weir in front of his shore, but so situated and so far removed from his shore as to in no way injure or affect his rights. The statute does not give compensation on this account.

Under this construction of the statute, the action is not maintainable, and it is unnecessary to decide the other question argued—as to whether, when consent has once been given by the owner of the shore to erect a permanent weir in front of his shore, it can afterwards be revoked by him or by his successor in title.

Judgment for defendants.

54 A.—54

EMERSON CO. v. PROCTOR.

(Supreme Judicial Court of Maine. March 16, 1903.)

CORPORATIONS — RESIDENCE — CONDITIONAL SALES—RECORD—LEX LOCI—CONTRACTS —CONSTRUCTION—PLACE—TROVER.

1. Rev. St. c. 111, § 5, as amended by Pub. Laws 1895, c. 32, requires the agreements therein named, where a corporation is the purchaser, to be recorded. Such corporation, within the meaning of the amended section, "resides" in the town in which it has its established place of business.

2. The general rule governing the construction of a contract is that its validity is to be determined by the law of the place where it is made.

3. Where nothing more remains to be done by either party to make a contract valid and binding between them, it is deemed to have been executed at the place where the last act necessary to complete it was done. Wheresoever the other steps have been taken, it is the last or final act of assent which is regarded as giving the contract a place or locality.

4. The agreement under which the plaintiff claimed was finally signed by the purchaser in Biddeford, Me., and sent by mail to the plaintiff in Maryland. It became obligatory from the moment that the minds of the parties met, even though a knowledge of this concurrence had not been brought home to the plaintiff. The act of acceptance which completed the contract took place when it was finally signed and deposited in the mail, properly addressed to the plaintiff; and the contract was then complete, even though it had never been received by the plaintiff.

5. Held, that the contract was made in Maine; that its validity is to be determined by the laws of Maine, and, not being recorded in accordance with the laws of this state, it is invalid as against the defendant, who was not a party thereto.

(Official.)

Report from Supreme Judicial Court, York County.

Action by the Emerson Company against Thomas D. Proctor. Case reported. Judgment for defendant.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Edwin Stone and Enoch Foster, for plaintiff. H. Fairfield and L. R. Moore, for defendant.

POWERS, J. This is an action of trover. The first count is for a six-track patent automatic compressing dry kiln, 31 feet wide and 84 feet long. The dry kiln is a building erected by the Biddeford & Natick Manufacturing Company, a corporation located at Biddeford, in this state. The plaintiff corporation furnished, and claims to still own, the most of the apparatus and iron work used in its construction, but this would not give title to the building itself. In order to recover under the first count, the plaintiff must show title to the dry kiln, and this it has not done.

This brings us to the second count, which is for the apparatus and ironwork sold and

delivered by the plaintiff to the Biddeford & Natick Manufacturing Company, and used by it in the construction of this dry kiln. Prior to October 21, 1899, there had been some negotiations between said company and the plaintiff, but the parties had been unable to agree upon the terms of a sale or contract. On that date the plaintiff made and signed a written proposal at its office in Baltimore, Md., and sent it to the Biddeford & Natick Manufacturing Company in Biddeford, by Mr. Bruce, one of the directors of the last-named corporation. By this written proposal the plaintiff corporation offered to furnish specifications and schedule of material required for a dry kiln 31 by 84 feet, and also the apparatus and ironwork, for the price of \$1,850. The erection of the building was to be under the superintendence of a mechanic to be furnished by the plaintiff, and paid by the Biddeford & Natick Manufacturing Company. On the day of the shipment the plaintiff was to notify the Biddeford Company by telegraph, and the latter was to send at once to the former its note on four months, to the order of the plaintiff, for \$1,850, which note the proposal recited that the First National Bank of Biddeford had agreed to discount. Upon the receipt of the proceeds the plaintiff corporation agreed to immediately assign and forward bill of lading to the Biddeford Company; the title in the shipment, until the receipt of said proceeds, to remain in the plaintiff. It was further agreed that the title to the property was to remain in the plaintiff until all payments were fully paid and discharged. The proposal contained a guaranty as to the working of the kiln after construction. The Biddeford Company was to give to the superintendent, before leaving, a written acceptance or rejection of the kiln. If rejected, it was to have the right to reload and return the material at the cost of the plaintiff, and a failure to do so was to be regarded as an acceptance.

Such, in substance, was the written proposal made and signed by the plaintiff in Baltimore, and sent to the Biddeford & Natick Manufacturing Company at Biddeford. After its receipt the latter telegraphed the former: "If we sign contract, do you agree to renew notes for four months, making eight in all? Wire reply." The plaintiff answered: "Yes, if bank will discount renewal." Thereupon the Biddeford & Natick Manufacturing Company, at Biddeford, signed the following acceptance at the bottom of the proposal: "Biddeford, Me., Oct. 26, 1899. The Emerson Company, Baltimore, Md.: We hereby accept the above proposition." It then returned it to the plaintiff, and also sent the plaintiff its note for \$1,850, payable at the First National Bank, Biddeford, Me. This note has never been paid, and the plaintiff claims title to the property under the terms of the written agreement.

The agreement has not been recorded, and the defendant, who claims title by purchase

from the assignee of the Biddeford & Natick Manufacturing Company, invokes the provisions of Rev. St. c. 111, § 5, as amended by Laws 1895, c. 82, which declares that "no agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby. And when so made and signed * * * it shall not be valid except as between the parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase." This section requires all such agreements in which a corporation is the purchaser to be in writing and signed. We think it was also intended that they should be recorded; that a corporation, within the meaning of that section, "resides" in that town in which it has its established place of business. Prior to 1895 this section required such agreements to be "recorded like mortgages of personal property," and mortgages of personal property made by a corporation must be recorded in the town where it has its established place of business. Rev. St. c. 91, § 1. The change of phraseology made in 1895 was not intended to work a change of the law in this respect. It was intended to broaden, rather than limit, the rule that such agreements, in order to be valid, must be in writing, signed, and recorded. No reason can be assigned why it should not apply to such agreements when made by a corporation as purchaser, as well as when made by any other person. The act of 1895 required them to be in writing and signed, and the Legislature, when it used the word "resides," did not intend to change the existing law in regard to recording, but did intend that the term should embrace corporations which have an established place of business in this state, as well as those persons who, more strictly speaking, reside here.

It is a general rule governing the construction of a contract that its validity is to be determined by the law of the place where it is made. The case shows that the law of Maryland does not require such agreements to be recorded. In all other respects it must be presumed that the law of that state is the same as our own, and that even in Maryland no such agreement was valid against third parties unless in writing and signed by the purchaser. Where, then, was this contract made—in Baltimore or in Biddeford? The plaintiff signed and sent its proposition to the Biddeford & Natick Manufacturing Company, in Biddeford. When it did so, it, in effect, sent its mind into Maine. At Biddeford the Biddeford & Natick Manufacturing Company assented to the proposition—signed and returned the contract. It was in Maine that the minds of the parties met. It was there that what was before but the plaintiff's proposition became a contract by the assent of the other party to the proposi-

tion. It was there that the agreement that the property in suit should remain the property of the plaintiff until paid for was signed by the person to be bound thereby. Nothing more remained to be done by either party to make the contract valid and binding between them. The paper was returned and received by the plaintiff, and we think it a fair presumption, in view of the testimony in the case, that it was returned by mail from Biddeford. The burden is upon the plaintiff to show title—to show a contract made in Maryland—and there is no suggestion in the case that the written contract was returned in any other way than by being deposited in the mail at Biddeford. By that act it passed beyond the control of the Biddeford & Natick Manufacturing Company, and became a binding contract.

In determining the place where a contract is made, it is a rule of very general application that it is deemed to have been executed at the place where the last act necessary to complete it was done. *Northampton Mutual Live Stock Ins. Co. v. Tuttle*, 40 N. J. Law, 476. The rule is thus stated in a note to *McGarry v. Nicklin*, 110 Ala. 559, 17 South. 726, 55 Am. St. Rep. 44: "It is undoubtedly true that a contract cannot exist, to which the assent of two or more parties is essential, until that assent has been given by all; and therefore, where there are negotiations or various steps leading to the contract, the last of which is necessary before it can become a contract, it is, not finally executed until that step has been taken, and, wheresoever the other steps have been taken, the last only is regarded as giving the contract a place or locality, and it is therefore deemed executed at the place, only, where the final or last act of consent is given." *Gilps Brewing Co. v. De France*, 91 Iowa, 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. In the latter case a guaranty was executed in Massachusetts, and sent by mail to the plaintiffs, in Maine, and there accepted by them. It was held that the contract was made in Maine, because a guaranty is inoperative until accepted, and the last act of assent was given in Maine. *Bell v. Packard*, 69 Me. 105, 111, 31 Am. Rep. 251, is not in conflict, but in accord, with this rule. There the plaintiff was to give up the old note upon the delivery of a new one signed by a good surety. The surety's contract was not binding until its acceptance by the plaintiff. The new note was accepted in Maine, and it was held that the contract was made in Maine, where the last act of consent was given.

The contract became obligatory from the moment that the minds of the parties met, even though a knowledge of this concurrence had not been brought home to the plaintiff. The act of acceptance which completed the contract took place when the assent of the Biddeford & Natick Manufacturing Company was deposited in the mail at Biddeford, prop-

erly addressed to the plaintiff. *Bailey v. Hope Ins. Co.*, 56 Me. 480. It did not depend upon its delivery to the plaintiff, and the contract was complete, even though it had never been received by the plaintiff. 7 Am. & Eng. Ency. of Law (2d Ed.) 134, 185; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437. Not only, therefore, was the contract made in Maine, and the parties presumed to have contracted with reference to the laws of Maine, but the circumstances are such that it is difficult to avoid the inference that the parties in fact regarded it as a Maine contract. The bill of lading was in the name of the plaintiff as consignee, and it was afterwards to be indorsed to the Biddeford & Natick Manufacturing Company, and the apparatus and ironwork to be first delivered to it in Maine. They were to enter into the construction of a building in Maine, to be erected under the superintendence of the plaintiff. The apparatus and ironwork were to be there accepted or rejected, and, if rejected, to be there returned to the plaintiff. The note was to be paid in Biddeford. Every substantial act attending the performance or enforcement of the contract, except the shipping of the apparatus and ironwork consigned to the plaintiff itself, was to be done in this state.

It was a Maine contract, and, not being recorded in accordance with the laws of this state, the plaintiff fails, as against the defendant, to show title under it.

Judgment for defendant.

CAVEN v. BODWELL GRANITE CO.

(Supreme Judicial Court of Maine. April 4, 1903.)

INJURY TO EMPLOYE—EVIDENCE—EXPERT TESTIMONY—NEGLIGENCE.

1. It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it, than the jury. To warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than persons of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions, and do justice between the parties.

2. A mechanical engineer, skilled and experienced in regard to the construction of all parts of a projecting stage, designed especially for unloading coal, and, when not in use for that purpose, drawn back upon the permanent stage of the wharf, and the strength both of wood and wire under different conditions, may be competent to answer questions as to the suitability and sufficiency of an iron guy; also qualified to estimate the strain which would be exerted upon iron guys by a given weight at the end of a projecting stage.

3. A carpenter and builder with special experience in the construction of coal stagings and platforms may be permitted to give the jury his opinion as to the proper method of constructing certain parts of the woodwork of

a staging. But it is a question for the jury whether, upon all the testimony relating to such a structure, an iron guy is suitable and sufficient for the use to which it is applied.

4. *Held*, that a witness, who is a carpenter and builder, but not a mechanical engineer or bridge builder, and who has had no special experience in proving the tensile strength of iron wire and cables, is not such an expert as to give his opinion in regard to the strength of wire cables, nor how many pounds a piece of wire rigging three-quarters of an inch in diameter or an inch in diameter, either old or new, can sustain.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by Lizzie Caven against the Bodwell Granite Company. Verdict for plaintiff. Motion for new trial, and exceptions by defendant. Exceptions sustained.

Action by the plaintiff, as administratrix of James Caven, under St. 1891, c. 124, to recover damages sustained by her, as said Caven's widow, by reason of his death, caused by the collapse of a wharf staging belonging to the defendant. Verdict for plaintiff.

Besides the general motion for a new trial, and exceptions to instructions, and refusal to give certain requested instructions, the defendant excepted to the admission of certain testimony. Only the latter is considered by the court.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and SPEAR, JJ.

M. A. Johnson, for plaintiff. C. E. and A. S. Littlefield, for defendant.

WHITEHOUSE, J. This is an action against the defendant company to recover damages for negligently causing the death of James Caven, the foreman of its granite quarry. In addition to the duties immediately connected with his position as foreman of the quarry, Caven also had charge of the loading and unloading of vessels at the wharf. It was not in controversy that his death was caused by the fall of a staging which projected from a permanent structure on the wharf out over the hold of the vessel. This projecting stage was designed especially for unloading coal, and, when not in use for that purpose, it was drawn back upon the permanent stage on the wharf. When extended, the projecting stage was supported by guys running from its outer end to the top of vertical timbers that rested on the capill of the wharf, and supported the outer corners of the permanent stage. Other guys attached to the opposite side of these upright timbers at the top were secured to an anchorage in the ledge by the side of the coal shed. These guys were of wire, and when the stage was to be used they were attached to the anchorage, and tightened by means of a tackle, one end of which was secured to the lower end of the wire guy, and the other hooked into an eyebolt in the ledge. The lower end of

the wire guy was provided with an eye into which one end of the tackle was hooked.

After the accident it was discovered that the two vertical timbers, to the tops of which the guys were attached, had been broken off at a point nearly level with the stage, and that the northern guy had broken at the eye into which the tackle was hooked.

A section of the wire cable, alleged to be a part of the broken guy, was introduced in evidence and exhibited to the jury.

The plaintiff contended that the northern guy was defective at the point of breaking, and unsuitable for the purpose for which it was used, and that the vertical timbers of the stage were also insufficient.

The defendant contended that the breaking of the guy was the sole cause of the accident, but denied that it was insufficient, and further contended that, in any event, there was no actionable negligence respecting it on the part of the defendant company.

The verdict was for the plaintiff, and the case comes to this court on motion and exceptions.

Among other exceptions reserved to certain instructions given the jury, the case discloses the following exception to the admission of evidence:

Charles O. Grant, a witness called by the plaintiff, testified in regard to his occupation that part of the time he was cutting stone and part of the time he built buildings and handled derricks, and that he built the coal shed and staging in question in accordance with a plan furnished by the superintendent. Thereupon he was permitted by the court, against the defendant's objection, to testify as follows in regard to the broken guy in question:

"The condition of this wire was worn, and it had been used; that is, I could recognize that it had been used. It was an old piece of wire rigging, and I didn't consider it suitable for that purpose. (Objected to and moved to be struck out.)

"The Court: You may ask him whether it was a suitable piece of wire for that purpose.

"Mr. Johnson: What was the condition of it?

"Answer. When I put it there seven years ago, the wire was rusty, and some of the strands—some of the wires—broken, and I presume it was just as rusty at the present time, being exposed to the weather all the time; and it was small wire rigging from a vessel, and unsuitable for the place it was put into. (Objected to.)

"The Court: I think he may state that about its being suitable."

Whether or not this wire cable, in the condition described, was a suitable and sufficient guy to sustain the projecting stage in question, weighted as it was at the time of the accident, was one of the vital issues in the case, upon the decision of which the liability of the defendant company depended. It was purely a question of fact to be deter-

mined by the jury upon a consideration of all the relevant circumstances and conditions. The staging in question, when projected 18 feet beyond the permanent platform, and supported by guys passing over the tops of vertical timbers, illustrated some of the principles of mechanical engineering involved in both the cantilever and the suspension bridge. A mechanical engineer or expert bridge builder might be qualified to estimate the strain which would be exerted upon the iron guys in question by a given weight at the end of the projecting stage. One having special experience in the application of tests to prove the tensile strength of iron wire and iron cables, and special observation respecting the influence of time and use upon them, might be qualified to give the jury valuable information respecting the strength of the wire cable in question. A carpenter and builder with special experience in the construction of coal stagings and platforms might be permitted to give the jury his opinion as to the proper method of constructing certain parts of the woodwork of the staging in question. But it would still be a question for the jury whether, upon all the testimony relating to that particular structure, the northern guy was suitable and sufficient for the use to which it was applied.

Charles O. Grant, the witness in question, was not a mechanical engineer or bridge builder. He had no special experience in proving the tensile strength of iron wire and cables. The projecting stage in question was the only structure of the kind he had ever built or seen. From his experience in erecting buildings and handling derricks, he may have been better qualified than some of the jury to form a judgment as to the sufficiency of the guy in question. But "it is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it, than the jury. To warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than persons of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions, and do justice between the parties." *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986. But if it be assumed in this case that a mechanical engineer skilled and experienced in regard to the construction of all parts of the projecting stage, and the strength of both wood and wire under different conditions, would be competent, as a general expert, to answer the final question as to the suitability and sufficiency of the northern guy, it is manifest that Charles O. Grant

was not such an expert, and could not safely be permitted to decide as a witness one of the principal questions which it was the province of the jury to determine. The presiding judge did not feel authorized to recognize him as an expert in regard to the strength of wire cables, and accordingly declined to permit him to estimate "how many pounds a piece of wire rigging three-quarters of an inch in diameter or an inch in diameter, either old or new, could sustain."

It may be true, as suggested by counsel, that his expression of opinion gave no additional weight to his testimony descriptive of the size and condition of the cable, and that the jury would have reached the same conclusions if the opinion had not been received as evidence. But, as already stated, it related to one of the leading and vital questions in the case, and we do not feel warranted in assuming that the opinion of the builder who erected the staging, although in accordance with a plan furnished by the superintendent, expressed and more positively reiterated as was this opinion, would fail to make any impression upon the minds of the jury under the circumstances of this case. It is, therefore, the opinion of the court that the entry must be:

Exceptions sustained.

WATSON v. FALES.

(Supreme Judicial Court of Maine. March 21, 1903.)

DISCLOSURE COMMISSIONER—COMPENSATION—CONTRACTS—PUBLIC POLICY—REASONABLE TIME.

1. No contract is valid which makes the payment of fees to a judicial officer dependent on his decision between parties. Public policy requires that such contracts be declared void, and they are equally futile as a basis of an action or defense.

2. It is absolutely essential that such an officer should be fair, impartial, and unbiased. If his compensation by contract is made to depend on the result, he would be tempted to sway toward that decision which would result in his getting pay for his services, and it is not the policy of the law that he should be even subjected to temptation.

3. In an action of assumpsit to recover for fees as a disclosure commissioner, the defendant offered evidence tending to prove an agreement between the parties that the plaintiff should not receive his pay from the defendant for disclosure cases, as a disclosure commissioner, until it was collected from the judgment debtors; but this was denied by the plaintiff, who recovered a verdict for his claim.

The following instructions of the presiding justice were held to be correct:

"If there was any agreement between the plaintiff and the defendant whereby the plaintiff agreed to perform the services of disclosure commissioner, and not have any pay unless the defendant received it—that is, making the receipt of the pay on the part of the plaintiff conditional and contingent on the defendant's getting the money out of the cases—that would be an invalid and unlawful contract, and would afford no defense whatever to this action."

4. Among other defenses, the defendant alleged that the plaintiff agreed to wait for his fees until the defendant collected them. *Held*, that the following instruction is correct: "If that is taken in its literal sense, so, in case the defendant did not collect, the plaintiff was never to have his pay, it would be open to the same objection as the contract I have just discussed with you. That would be a case of no pay unless collected, and that is just the trouble with the other proposition."

5. What is a reasonable time is a question of law.

6. *Held*, in this case, no circumstances appear by which to determine what would be a reasonable time, and the question of the reasonableness of the time is an absolute one. It is not involved with matters of disputed fact, or any facts from which an inference could be drawn that the time which had elapsed was within the limit of reasonable time, and it is therefore a question for the court.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by Fred O. Watson against Lorenzo W. Fales. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

This was an action of assumpsit to recover the amount alleged to be due the plaintiff from the defendant for services of the plaintiff as disclosure commissioner and register of probate, done and performed for the defendant. The jury returned a verdict for the plaintiff in the sum of \$154.90.

The defendant claimed, and offered evidence to prove, that there was an agreement between him and the plaintiff that the plaintiff should not receive his pay from the defendant for the disclosure cases of the defendant's, in which he had rendered services as disclosure commissioner, until the defendant had collected it from the judgment debtors in the cases. The plaintiff denied that there had ever been such an agreement.

Argued before WISWELL, C. J., and STROUT, POWERS, PEABODY, and SPEAR, JJ.

W. H. Newell and W. B. Skelton, for plaintiff. H. E. Holmes, for defendant.

PEABODY, J. This case comes to the law court on exceptions.

It was an action of assumpsit to recover the sum of \$150.15, fees of the plaintiff as disclosure commissioner.

The defendant claimed, and offered evidence to prove, that there was an agreement between him and the plaintiff that the plaintiff should not receive his pay from the defendant for disclosure cases in which he had rendered services as disclosure commissioner until the defendant had collected it from the judgment debtors. The plaintiff denied that there had ever been such an agreement.

In reference to this alleged contract the presiding justice instructed the jury as follows:

"If there was any agreement between Mr. Watson and Mr. Fales whereby Mr. Watson

agreed to perform the services of disclosure commissioner, and not have any pay unless Mr. Fales received it; that is, making the receipt of the pay on the part of Mr. Watson conditional and contingent on Mr. Fales getting the money out of the cases; if that was the proposition; if that is what they meant; if there was such a contract—then I instruct you, gentlemen, that it would be an invalid and unlawful contract, and would afford no defense to this action whatever."

The justice explained to the jury the reasons why such a contract with a disclosure commissioner is against public policy, and that, as a judicial officer, "It is absolutely essential that he should be fair and impartial and unbiased." "If his compensation, by contract, was made to depend on the result," he would be tempted "to sway towards that decision which would result in his getting his pay for his services." That, without saying that this or any disclosure commissioner would be influenced, "It is not wise, and it is not the policy of the law, that they should be subjected even to temptation."

As to another construction of the alleged contract suggested by counsel, viz., that the plaintiff agreed to wait for his fees until the defendant collected them, he instructed the jury as follows:

"If that is taken in its literal sense, so that, in case the defendant didn't collect, the plaintiff was never to have his pay, it would be open to the same objection as the contract I have just discussed with you. That would be a case of no pay unless collected, and that is just the trouble with the other proposition."

The presiding justice fully and accurately stated the objection to agreements of this nature. Where they relate to the administration of justice, and involve considerations which may affect the impartiality of the magistrate, public policy requires that they be declared void, and they are equally futile as the basis of an action or of a defense. The law applies the general principle to all contracts which embody this potential danger to the public interests. So no contract is valid which makes the payment of fees to a judicial officer in any way dependent on his decision between the parties. *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603; *Willemin v. Bateson*, 63 Mich. 309, 29 N. W. 734; *Beach on Contracts*, § 1534.

The presiding justice referred to another construction which might possibly be given to the language of the alleged contract, viz., that the plaintiff would not hurry, but would wait a reasonable time, and give the defendant an opportunity to collect. On this view of the contract, he ruled that what is a reasonable time is not a question of fact for the jury, but a question of law for the court to decide; and, acting upon this ruling, he instructed the jury, as a matter of law, that a reasonable time had elapsed in

the present case, so that, even under the most favorable construction, the alleged contract would not be available as a defense.

From the statement of the contract as claimed by the defendant, it seems unlikely that the jury could have given it so strained a construction as that to which this last ruling relates, even applying to the utmost the presumption in favor of legality.

But if such a view of the case were possible, the ruling was undoubtedly correct that the question of reasonable time was for the court.

In *Attwood v. Clark*, 2 Greenl. 249, the right of action depended on the furnishing of a certain memorandum by the original plaintiff to the defendant of defective merchandise, on which a rebate was to be allowed. There was no time mentioned within which the memorandum was to be furnished. The judge left it to the jury to decide, as a question of fact, whether it was a part of the contract that the plaintiff should furnish the defendant with a memorandum within a reasonable and convenient time, and, if it was, then a reasonable and convenient time had elapsed. Held, that what is a reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law, and that the judge was in error in leaving the construction of the contract to the jury. Mellen, C. J., says (page 254): "Now, as it appears by the exceptions that no time was mentioned in the contract, within which the memorandum was to be furnished, the law fixed the time, as we have before stated, viz., a reasonable time; and such time had elapsed before demand made, according to the judge's opinion. There was therefore nothing as to this point for the jury to decide. The contract as proved was not denied, and no fact existed from which they would have a right to presume that the time for furnishing the memorandum did form a part of the contract."

Applying the principle of *Attwood v. Clark* to the circumstances of this case, it is clear that, in the absence of any other defense than that of the alleged contract, the court properly instructed the jury, although his instructions were equivalent to the direction of a verdict for the plaintiff. The three alternatives seem to be: (1) No contract opposed to the plaintiff's right to recover his statutory fees; (2) an illegal contract, which is no defense to his action; (3) a contract to defer payment for a reasonable time, which had elapsed prior to the date of the writ.

In *Kingsley v. Wallis*, 14 Me. 57, where defendant had the right to rescind the contract, and no time was fixed by its terms, it was held that he was bound to make his election to do so within a reasonable time, and that what was a reasonable time was a question of law; the court following *Attwood v. Clark*.

"What is due diligence or a reasonable time for making demands and giving notices of negotiable paper is a question of law to be decided by the court." Shepley, J., in *Howe v. Huntington*, 15 Me. 350.

Whether tender was made within a reasonable time was held to be a question for the court in *Greene v. Dingley*, 24 Me. 131.

Under a statute authorizing a city council to vote exempting from taxation property of a water company for a certain term of years, it was held that the exemption must be voted, if at all, within a reasonable time, and what would be a reasonable time is a question of law. *Portland v. Portland Water Co.*, 67 Me. 135.

Cases like these raise a simple question of law, and are to be distinguished from those cited in the defendant's brief which are complicated with disputed facts. The distinction is stated by Shepley, J., in *Hill v. Hobart*, 16 Me. 164: "Where the facts are clearly established or are undisputed or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury before any judgment can be formed whether the time was or was not reasonable."

Wilder v. Sprague, 50 Me. 355, relied on by the defendant, was an action of the acceptance of an order to pay money when the acceptor had sold certain logs. Exceptions were taken to the introduction of evidence tending to prove that a delay of three years in selling the logs was not unreasonable. This was held to be proper evidence for the jury, as "the court cannot know the limit of time within which, by the exercise of common and ordinary care, a quantity of wharf logs could be sold." In that case the question was as to the default of the acceptor in selling the logs within a reasonable time, for only on such default would he be liable on his acceptance. This raised a question of mixed fact and law. Although *prima facie* it might appear that a reasonable time had expired, circumstances beyond his control may have delayed the sale, and it was proper for him to show these circumstances.

In the present case, however, no such circumstances appear to show that the delay is reasonable, and the question of the reasonableness of the time must be an absolute one. It is not only not involved with matters of disputed fact, or any facts from which an inference could be drawn that the time which had elapsed was within the limit of reasonable time, but it is seriously involved with the other question of illegality of the alleged contract. It is therefore a question for the court.

Exceptions overruled.

LIBBY et al. v. DEAKE et al.

(Supreme Judicial Court of Maine. March 21, 1903.)

CONTRACTS—ASSENT—EXCEPTIONS—WAIVER—PRACTICE.

1. In an action of assumpsit to recover for work and material furnished to the defendants, the dispute related to an item of spruce stringers and planking not in the memoranda of the contract, but for which the plaintiffs claimed to recover as extra material furnished at the request of the defendants.

At the trial the plaintiffs introduced a memorandum which was relied upon by both parties as embodying the final contract, but not signed by the parties. The defendants, while claiming that the plaintiffs were bound to furnish all necessary material for the sum specified in the memorandum of the contract, relied upon the words of the memorandum as conveying that meaning.

The presiding justice, calling the attention of both parties to his statement of their position, instructed the jury as follows: "Both of the parties agree, as I understand it, that the contract that was made between them on that day was embodied in that memorandum." *Held*, that the assumption by the presiding justice as to the memorandum was tacitly acquiesced in by the defendants when stated in the presence of a jury, and any objection thereto was thereby waived.

2. It being once determined that the memorandum contained the terms of the contract, *held*, that it was the duty of the presiding justice to explain to the jury its legal effect; and the following instructions are accordingly correct:

(1) The plaintiffs were bound to furnish only the amount of lumber specifically mentioned in the memorandum.

(2) The defendants were liable to pay a reasonable compensation for any additional lumber furnished with their consent.

3. Where the defendants except to the entire charge of the presiding justice, the law court will consider only those exceptions which are specific.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action by Washington Libby and another against Charles S. Deake and another. Verdict for plaintiffs, and defendants moved for a new trial, and except. Overruled.

This was an action of assumpsit, on account annexed, to recover for work and material in repairing Deake's Wharf, in the city of Portland. The verdict was for the plaintiffs, and the case comes before the law court on exceptions and motion for a new trial.

The dispute related to an item of \$196.64 for 12,895 feet of spruce stringers and planking, not in the memoranda of the contract, but for which the plaintiffs claimed to recover as extra material furnished at the request of the defendants.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

M. P. Frank and P. J. Larrabee, for plaintiffs. W. H. Looney, for defendants.

PEABODY, J. This was an action of assumpsit, on an account annexed, to recover

the balance of \$476.89 and interest for work and material furnished in repairing Deake's Wharf, in the city of Portland. The verdict was for the plaintiffs, and the case comes before the court on exceptions to the charge of the presiding judge, and on motion for a new trial.

The dispute relates to an item of \$196.64 for 12,895 feet of spruce stringers and planking furnished by the plaintiff, not comprised in the written memoranda of the contract, but for which the plaintiffs claim to recover a reasonable price as extra material furnished with the consent of the defendants. This leads to the inquiry as to what were the terms of the contract, and, if in writing, what construction is to be given to the written memorandum.

The following memorandum in the handwriting of one of the defendants, but unsigned, was relied upon at the hearing by both parties as embodying the final contract for repairing the wharf:

"Portland, Me., August 27, 1900. Mess. Washington Libby and Son agree to furnish the following new material for repairs to Deake's Wharf, Portland, Maine, and do all the work required to put it into place on said wharf, and do such labor in taking out and replacing the old material as is found necessary to do during the progress of the work until both old and new work is finished in a complete and satisfactory manner that will pass the inspection of a competent judge of such work. * * * The new material to be as follows: Then follows an itemized statement of the material to be furnished, including the following item:

"3,609 feet 'B. M.' spruce lumber for the stringers that are necessary from the outside cap sill to that portion of the stone wall covered by the lumber shed on both the east and west sides; and where found to be required on the other parts of the pile end of the wharf.

"2,500 feet 'B. M.' 3-inch spruce planking."

The memorandum specified the following consideration:

"Washington Libby & Son to be paid for furnishing this material and doing this work by the administrator of the estate of Charles Deake the sum of thirty-two hundred dollars (\$3,200)."

This the plaintiffs introduced, claiming that it embodied the terms of the contract, and that the \$3,200 paid only for the items specifically described therein. The defendants, at the trial, while claiming that the plaintiffs were bound to furnish for the sum of \$3,200 all necessary material, nevertheless relied upon the words of the memorandum as conveying that meaning. This appears from the testimony of Mr. Deake, as follows, on direct examination:

"Q. Did he tell you that he would put in all the planking and stringers necessary for the \$3,200?

"A. I won't say that he said planking and

stringers—specified those. He said all the work that was called for—all the work called for in that memorandum for \$3,200.

"Q. Was anything said about stringers and planking, except as enumerated in those two items?

"A. Nothing whatever."

His cross-examination still further tended to show that he placed his reliance on the terms of the memorandum.

Under these circumstances, the presiding judge, calling the particular attention of both parties to his statement of their position, instructed the jury as follows:

"Both of the parties agree, as I understand it, that the contract that was made between them on that day was embodied in that memorandum."

Construing the writing, he further said:

"Now, under that memorandum, if that contains the contract—and both parties say that it does—how much spruce lumber for stringers were these plaintiffs bound to furnish? They were bound to furnish 3,600 feet, and no more. That is what the contract says—3,600 feet."

He further instructed the jury that if the plaintiffs put in any more lumber than the amount named in the memorandum, and it was furnished and put into the wharf with the knowledge and consent of Mr. Deake, then Mr. Deake and his co-administrator are responsible for it, and must pay a reasonable sum for it.

The defendants have excepted to the entire charge of the presiding judge, and have specified certain portions—substantially those above stated—to which they except particularly. Only so far as they have made their exceptions specific can they be considered. *McKown v. Powers*, 86 Me. 291, 29 Atl. 1079.

There seems to be no ground for criticism of the judge's charge with reference to these propositions. His assumption as to the memorandum is borne out clearly by the record of the evidence, and, even if not warranted by the testimony of Mr. Deake on the stand, it was tacitly acquiesced in by the defendants when stated, and cannot now be objected to. *Bradstreet v. Bradstreet*, 64 Me. 204; *McKown v. Powers*, supra.

It being once determined that the memorandum contained the terms of the contract, it was the duty of the presiding judge to explain to the jury its legal effect; and this he has correctly stated in the second proposition above quoted, viz., that the plaintiffs were bound to furnish only the amount of lumber specifically mentioned in the memorandum.

It was also correct to instruct the jury that the defendants were liable to pay a reasonable compensation for any additional lumber furnished with their consent.

The questions of fact properly left for the determination of the jury were substantially only two—whether the plaintiffs furnished

the extra lumber with the knowledge and consent of the defendants, and what was a reasonable price for the same; and there was evidence bearing on these points sufficient to warrant the verdict. Therefore the motion for a new trial cannot prevail.

Exceptions overruled. Motion overruled.

HARRON v. DU BOIS et al.

(Court of Chancery of New Jersey. May 1, 1903.)

MORTGAGES—MORTGAGEE'S PURCHASE OF EQUITY—PURCHASE OF FIRST MORTGAGE—ACCOUNTING FOR RENTS AND PROFITS—MARSHALING ASSETS—RIGHT OF JUNIOR INCUMBRANCER.

1. Neither the fact that a second mortgagee advances money for the purchase at sheriff's sale of the equity of redemption, causing title to be taken in the name of a third person, who, on receiving a deed, takes possession, nor the fact that such mortgagee purchases the first mortgage, under which possession is never taken, taking an assignment in the name of a fourth person, will entitle a junior incumbrancer to an accounting of the rents and profits to be credited on either mortgage; it appearing that no merger was intended by the parties.

2. The fact that a second mortgagee has an equity to require the marshaling of assets at a time when judgment creditors of the mortgagor purchased his equity in the property not covered by the second mortgage will prevent them from insisting that the property which is covered shall be first applied to the first mortgage.

Suit by Thomas Harron against Josiah S. Du Bois and others. Heard on bill, answer, and proofs. Decree advised for complainant.

The bill in this case is filed by the complainant, Thomas Harron, the assignee of a mortgage made on February 3, 1890, by Jonathan T. Adams and wife to John A. English to secure the payment of \$5,500, with interest, in three years from date, upon a lot of land fronting on Central avenue in Ocean City, N. J., on which is located the Hotel Lafayette, and upon other vacant lots in Ocean City, located on Wesley avenue and Asbury avenue. The mortgage was recorded on the 3d day of April, 1890, in Cape May county clerk's office. The defendants are Peter Gallagher, who has become the owner of the hotel property on Central avenue by purchase from Charles Nicholls, the sheriff of the county of Cape May, at a sale made under judgments and executions conveying the title whereof the mortgagor, Adams, was seized, on the 22d day of August, 1892. The sheriff's deed to Peter Gallagher is dated January 26, 1893. Another defendant is Daniel Gallagher, who holds a mortgage on the hotel property for \$2,500. This mortgage is dated July 23, 1892, and recorded in Cape May county clerk's office on the 25th day of July, 1892. Another defendant is Josiah S. Du Bois. He is the holder of the equity of redemption in the unimproved lots on Wesley and Asbury avenues, by purchase from the sheriff of the county of Cape May,

by deed dated August 24, 1900, as appears by the evidence, under a judgment entered on January 14, 1893, and levy and sale thereunder. The other defendants are judgment creditors who have not filed answers. The defendant Daniel Gallagher admits the equity and priority of lien of the complainant's mortgage, and sets up his own subsequent mortgage on the hotel property; claiming that as his (Daniel Gallagher's) mortgage is a lien only on the hotel property, and not on the vacant lots, the complainant, in selling the mortgaged premises to make the money due him, must first sell the vacant lots, and apply the proceeds in satisfaction of the complainant's mortgage, so far as they will go, and sell the hotel property last, to make any residue remaining unpaid to the complainant. The defendant Josiah S. Du Bois also admits the complainant's mortgage, and its assignment to him. The defendant Du Bois contends that the conveyance of the hotel by Sheriff Nicholls to Peter Gallagher was in fact made in trust for Daniel Gallagher, who was the real purchaser, and that the assignment of the mortgage presently in suit to the complainant was likewise in trust for Daniel Gallagher; that the latter, as mortgagee in possession of the mortgaged premises, has received rents for which he should be charged on an account, as against the amount due on the complainant's mortgage. This cause came to a hearing on these pleadings.

S. D. Bergen and M. V. Bergen, for complainant. F. Morse Archer and D. J. Pancoast, for defendant Josiah S. Du Bois.

GREY, V. C. (after stating the facts). There are but two questions in dispute between the parties. The defendant Du Bois insists that there should be an accounting for the rents and profits of the hotel property from January 26, 1893, when Peter Gallagher bought it from the sheriff, and a charging of the amount of such accounting against the complainant's mortgage. Secondly, the defendant Du Bois contends that, in ordering the sale of the mortgaged premises, the hotel property owned by the defendant Peter Gallagher should be first sold, and the vacant lots owned by the defendant Du Bois should be secondly sold.

The incidents upon which the defendant Du Bois bases his claim for an accounting against the complainant's mortgage are as follows: In July, 1892, Jonathan T. Adams appears to have been the owner of the hotel property, and also of the vacant lots. A number of Adams' creditors had recovered judgments against him. On July 23, 1892, Daniel Gallagher purchased all of the judgments then outstanding against Adams, and caused them to be assigned to Peter Gallagher. On the same date he received from Adams and wife a mortgage on the hotel property for the sum of \$2,500. On the 28th day of January, 1892, the hotel property was,

under judgments against Adams, sold by the sheriff to Peter Gallagher, by deed dated January 26, 1892. In February, 1893, as Peter's tenant or appointee under the sheriff's deed, Daniel Gallagher went into possession of the hotel. The effect of the conveying at this time was that Peter Gallagher was the holder of the equity of redemption under the sheriff's deed, with his tenant or appointee, Daniel Gallagher, in possession of the premises. John A. English was the holder of the first mortgage (since assigned to the complainant, and now in process of foreclosure in this suit), and Daniel Gallagher was the holder of the second mortgage, which was a lien only on the hotel property. It will be noted that no possession of the hotel was taken under or by virtue of the complainant's mortgage, now sought to be charged with rents and profits. On the contrary, at the time Peter Gallagher, by his appointee, Daniel Gallagher, took possession of the hotel property, the complainant's mortgage was held by John A. English, who did not assign it to the complainant until the 24th day of April, 1893. There was no merger of the equity of redemption with the first mortgage title, because the equity was held by Peter Gallagher, and that mortgage was held by John A. English. There was no merger of the equity of redemption with the second mortgage of Daniel Gallagher, because the title to the equity was, as above stated, held by Peter Gallagher, while the second mortgage was held by Daniel Gallagher. It was obviously the intention of all the parties that the equity of redemption should stand separate and apart from the mortgage title under either mortgage. It did not matter, if it were in fact true, that Daniel Gallagher, the second mortgagee, did advance his own money to enable the purchase of the equity of redemption by Peter to be made under the sheriff's deed. Daniel had a right to purchase the equity of redemption, and to preserve and protect it from merging with his mortgage title. He owed no duty to Adams, the mortgagor, or to the defendant Du Bois, or to anybody else, which obligated him to deal with that title in such a manner that a merger should be effected. The equity of Adams, the mortgagor debtor, who continued to hold title to the vacant lots, now held by Du Bois, gave him no right to require Daniel Gallagher, if he did purchase the equity of the hotel property, to merge it with his mortgage for Adams' benefit, as owner of the vacant lots. As against Adams, and against all those claiming under him, of whom the defendant Du Bois is one, Peter Gallagher's title and entry under the sheriff's deed was and is controlling and superior. There was no entry into possession under the complainant's mortgage, now sought to be charged with the rents and profits, and no entry into possession under Daniel Gallagher's mortgage. The entry and taking possession was under the

sheriff's deed to Peter Gallagher. Under that deed, the rents, issues, and profits of the premises were rightfully collectible by the purchaser, as holder of the equity of redemption. The possession having been taken under the sheriff's conveyance of the equity of redemption, the rents and profits cannot be charged against either mortgage, by whomsoever held.

If it were true that the complainant's mortgage was in fact purchased by Daniel Gallagher's money, and put in the complainant's name for the protection of Daniel's interests in the property, there was neither illegality nor inequity in the transaction. While the first mortgage was held by English, he had the right to foreclose it, to collect the full amount of principal and interest due thereon, and to require the application of all the mortgaged premises to its payment. He was in no way chargeable with the rents and profits. At the time of the assignment of the first mortgage to the complainant, possession of the hotel property was rightfully in Peter Gallagher under the sheriff's deed. When that mortgage was purchased from English, whether it was by the complainant, or by Daniel Gallagher, the purchaser took English's place, and thus became entitled to apply all of the mortgaged premises to the payment of principal and interest of the mortgaged debt, without being surcharged with any rents and profits of the hotel property, because no possession of that property was taken or held under that first mortgage. There is no aspect of this case which entitles the defendant Du Bois to have an account taken of the rents and profits of the hotel property, and to have them charged, as is sought by his answer, against the amount due on the complainant's mortgage.

As to the claim of the defendant Du Bois that the hotel property should be first sold, and applied to the satisfaction of the complainant's mortgage, and the vacant lots should be last sold, the pertinent facts are as follows: The complainant's mortgage was recorded on April 3, 1890. It covers both the hotel property and the vacant lots. The mortgage to Daniel Gallagher was made July 23, 1892, was recorded July 25, 1892, and covered only the hotel property. When Daniel took his mortgage on the hotel property, he acquired an equity, as against the mortgagor, which entitled him to have the assets marshaled, and the values in that portion of the mortgaged premises on which he had no lien (the vacant lots) to be first applied to the satisfaction of the complainant's mortgage, which covered both properties; the other lot (the hotel property) responding only for the residue remaining thereafter unpaid on the complainant's mortgage. This equity of the junior creditor having a lien on only one of two funds became fixed, as against the mortgagor, at the time the second mortgage was taken, and, by the record of that mortgage, was notified to all subsequent judgment creditors of the mort-

gagor. Such judgment creditors, by their judgments and levies, take the property of their debtor as he held it, and nothing more. *Herbert v. Mechanics' Building Ass'n*, 17 N. J. Eq. 500, 90 Am. Dec. 601. (Court of Appeals.) In the present case the defendant Du Bois acquired the vacant lots by purchase from the sheriff under the judgment which he recovered and entered on January 14, 1893, about six months after the defendant Daniel Gallagher had, by recording his mortgage, established his equity. Du Bois therefore took title to the vacant lots, with notice of and subject to Daniel Gallagher's right, as second mortgagee only in the hotel property, to have the vacant lots on which he had no lien first applied to pay the complainant's mortgage, which was a charge on both properties. To order the hotel property to be first applied would be a manifest injustice, for it would change the relations which the parties have themselves fixed, acting with full notice. The defendant Du Bois, as purchaser at the judicial sale, took the vacant lots burdened with the then existing charges, and has no status which enables him to escape by shifting them to other property in which he has no interest. *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452, affirmed on appeal in *Ferry v. Krueger*, 48 N. J. Eq. 295, 14 Atl. 811.

Neither of the contentions advanced in behalf of the defendant Du Bois can be sustained.

I will advise a decree for the complainant, without charging him with any rents and profits, and for a sale of the mortgaged premises; the vacant lots owned by the defendant Du Bois to be first sold to pay the amount due on the complainant's mortgage.

BOON et al. v. PADGETT et al.

(Court of Chancery of New Jersey. April 29, 1903.)

MORTGAGE FORECLOSURE—INTERVENTION AS PARTY DEFENDANT—PROPRIETY OF ALLOWANCE.

1. An administrator with the will annexed, whose rights have not been established by any judgment or decree, cannot be admitted as a defendant in a foreclosure suit to deny the validity of the mortgage, as having been created under a mistaken and unlawful exercise of a power given by the will, but his remedy is to file his own bill of complaint.

Suit by Sallie B. Boon and others against Ebenezer Padgett and others, in which the Cumberland Trust Company, as administrator with the will annexed of Elmer Biddle, deceased, seeks to be admitted as a defendant. Order to show cause dismissed.

Walter H. Bacon, for petitioner. J. W. Acton, for defendants.

GREY, V. C. (orally). The present application is made by the Cumberland Trust Company, administrator with the will annexed of Elmer Biddle, deceased, to be admitted as

a defendant in that capacity in this foreclosure suit. The petitioner seeks to deny the validity of the complainants' mortgage, on the ground that it was created under a mistaken and unlawful exercise of a power given by Elmer Biddle's will. The petitioner is not now a party defendant, as administrator with the will annexed of Elmer Biddle. No decree can, in the present condition of the pleadings, be made against the petitioner, affecting its rights as such administrator. The questions it seeks to litigate arose antecedently to the making of the mortgage now in suit, and set up a title hostile to that mortgage. The rights of the petitioner have not yet been established by any judgment or decree. A defense to a foreclosure of a mortgage, which mortgage was admittedly made subsequently to the happening of the circumstances on which the petitioner bases its equity, is not the proper method in which to assert that equity. The petitioner claims that its right is superior to that of the complainants in the present foreclosure suit. Its proper mode of procedure is to file its own bill of complaint, setting up its alleged equity, and making defendants those who adversely claim the property, or liens upon it. In such a suit the petitioner may pray for such relief as may be applicable to the equities which it may establish.

The present application to admit the petitioner as a party defendant to litigate the matters recited, in this foreclosure suit, must be denied. I will make an order dismissing the rule to show cause, with costs.

ENGLISH v. WARREN et al.

(Court of Chancery of New Jersey. April 20, 1903.)

MECHANICS' LIENS—FILING CONTRACT AND SPECIFICATIONS—STOP NOTICES—FRAUD—INTERPLEADER—COSTS.

1. Filing of the specifications is essential under Mechanic's Lien Law (Revision 1898, p. 538) § 2, providing that a building shall be liable only to the contractor, provided the contract, together with the specifications accompanying it, be filed.

2. Under Mechanic's Lien Law (Revision 1898, p. 538) § 2, providing that a building shall be liable only to the contractor, provided the contract, together with the specifications accompanying it, be filed, and section 3, giving the remedy by stop notices to materialmen who have furnished materials used in the erection of "such house," the remedy by stop notices is limited to houses where the contract and specifications have been filed.

3. A contractor for a building, who signed an order directing the owner to pay to the materialman who had served the first stop notice the amount due to him from the contractor, was not induced to do so by fraud because not told of the defect in filing of the contract, whereby the stop notices were ineffectual, he having, after being reminded that the materialman was first in priority, and having said that he desired him to be paid in full, been told that there was doubt about his being paid in

full under the stop notice, and that the object of his signing the order was to make the payment certain.

4. The owner of a building who files an interpleader against materialmen to determine the distribution of the sum due the contractor, is not entitled to costs, having claimed such sum was considerably less than that the court found to be due.

Bill of interpleader by Richard English against James Warren and others. Heard on bill, answer, and proofs.

Charles L. Corbin, for complainant. Mr. Fielder, for defendants Warren and Dodge. Bliss & Co. Peter Bentley, for defendant James F. Stewart Co. Mr. Hudspeth, for defendants Bossert & Son and Jacob Ringle & Son. John S. McMaster, for defendants Wood & Menagh.

PITNEY, V. C. This is an interpleader suit. The complainant, as owner of 304 Montgomery street, Jersey City, entered into a contract in writing with James Warren for the erection of a building thereon to cost \$7,100. The contract, as usual, referred to specifications, and that they were annexed. The contract only, without the specifications, was filed. Warren proceeded with the erection of the building, and received on account of the contract price \$4,000, then abandoned it, and it was finished by the complainant under a provision in the contract. Five parties defendants herein served stop notices on the complainant in the following order: Dodge & Bliss, J. F. Stewart Company, Jacob Ringle, Wood & Menagh, and Bossert & Son. These notices were all served under the third section of the Mechanic's Lien Law (Revision 1898, p. 538), all parties supposing that the contract had been filed in such manner as to satisfy the second section of that act. No action was taken to enforce either of those claims until the expiration of the time limited for filing lien claims under the first and sixteenth sections of the act. On the 29th of August, 1902, some of the lien claimants and the defendant Warren met at the office of Corbin & Corbin, the counsel of the complainant, and there a statement was made up of the amount due each of the claimants, and the date of the service of their several stop notices, and under that statement was written and signed by Warren the following memorandum: "Above five items of claims are correct, and I authorize Richard English to pay the same pro rata out of the funds in his hands as the same may be found due to me. Dated August 28th, 1902. [Signed] James Warren." The amount due from complainant to Warren was not at that or any time agreed upon, but was fixed by the court at the hearing, and after litigation, at the sum of \$2,030.29—considerably more than complainant admitted, and enough to pay about 60 cents on the dollar to the creditors.

The case so far stated presents the simple question whether the contract was filed in such manner as to satisfy the terms of

the second section of the lien act. The section provides that the building and land shall be liable only to the contractor, provided the contract or a duplicate or copy, together with the specifications accompanying the same, be filed, etc. This provision for filing the specifications found its way into our system of legislation by the act of March 14, 1895 (P. L. p. 313), and was intended to clear up the confusion in the law arising out of the old statute, which did not expressly include the specifications, and which is reviewed by Justice Collins in *Murphey-Hardy Lumber Company v. Nicholas*, 66 N. J. Law, 414, 49 Atl. 447. Probably the immediate occasion of the amendment was the opinion of this court in *Freedman v. Sandknop*, 53 N. J. Eq. 243, 31 Atl. 232. Be that as it may, I am clearly of the opinion that the statute is peremptory, and that the failure to file the specifications left the land and building subject to the filing of lien claims under the first and sixteenth sections of that act. Such seems to have been the opinion of Vice Chancellor Grey in *Weaver v. Atl. Roofing Company*, 57 N. J. Eq. 547, 40 Atl. 858. The same opinion establishes the necessary corollary to this result, namely, that the stop notices served under the third section of the act are valueless. That section gives the remedy by stop notices only to materialmen (and all of the defendants herein are materialmen) "which may have furnished materials used in the erection of such house or other building." The word "such" confines the section to buildings which are protected from the imposition of the ordinary lien claim by reason of the owner having complied with the terms of the section which immediately precedes it, and that is the second section. This result subjects the fund in the hands of the complainant to the operation of the pro rata assignment of August 28, 1902, with a single exception, next to be considered.

The defendants Dodge, Bliss & Co. claim the right to be paid in full by virtue of two writings signed by said Warren, one dated April 23, 1902, and the other dated August 28, 1902, which latter is the day before the date of the assignment above set forth. That of the 23d of April is in the shape of an affidavit. The part of which that is relied upon is as follows: "That deponent is still indebted to said Dodge & Bliss Company in the said sum of seven hundred and fifty-two dollars and nineteen cents (\$752.19) for said material, and is willing that said Richard English should pay the said sum to Dodge & Bliss Company out of the money due from said Richard English to deponent under said contract. The one dated August 28, 1902, is a formal order addressed to the complainant asking him to pay to Dodge, Bliss & Co. the sum of \$752.19, the amount due from Warren to them for material furnished for the construction of the building in question, and to charge the same to the money due from English

to Warren on account of the contract in question. The serious question in the case is as to the efficiency of those writings, or one of them, to give Dodge, Bliss & Co. a preference over the other creditors. I will consider the order dated August 28, 1902, first, because, if that is valid and effectual, it disposes of the question. Although it bears the same date with the paper signed by Warren directing English to pay the balance due him to the materialmen pro rata, it was, in point of fact, executed the day before that paper; and the assignment to all the creditors, though dated the 28th of August, was actually signed on the 29th. The fact is that counsel for Dodge, Bliss & Co. represented the only one of the creditors who appears to have discovered the defect in the filing of the contract, and on the 28th of August they prepared the order of that date, and handed it to Mr. Gilson, the collecting agent of Dodge, Bliss & Co., with instructions to procure the signature of Mr. Warren thereto. This Mr. Gilson succeeded in doing, and on the morning of the 29th, prior to the meeting of the creditors and the signature by Mr. Warren of the other paper, it was served on Mr. English; and when the creditors met on that day in the office of Messrs. Corbin & Corbin there is evidence tending to prove that it was stated to the creditors by Mr. Corbin that such an order in question had been served on Mr. English. It would further appear that the several creditors other than Dodge, Bliss & Co. then for the first time became aware of the defect in the filing of the contract, and the disposition which Mr. Warren proposed to make of the amount due him from English on the contract. The objection made by those creditors to the order of August 28th is that it was procured from Warren by a fraud practiced on him by Gilson, the agent of Dodge, Bliss & Co. Warren and Gilson were examined and cross-examined at great length, and the net result of such examination, I think, may be fairly stated as follows: Warren was aware, at the time the order was presented to him, that Dodge, Bliss & Co. and the other creditors had served upon English stop notices, and he was also aware that under ordinary circumstances the amounts claimed in those stop notices would be paid in the order of the date of their several services, and he was also aware that Dodge, Bliss & Co. were first with their stop notice, and under ordinary circumstances would be first paid. Being in that frame of mind, he was waited upon by Mr. Gilson, who presented the order, and asked him if he would sign it, and reminded him that Dodge, Bliss & Co. were the first in order of priority, and asked him if he wished them to get their pay in full. Mr. Warren answered that he did. Thereupon Mr. Gilson said that there was some doubt about their being paid the amount due them in full under their stop notice, and that the object of the signature to the order by him was to render payment of that certain. Warren then signed the order

voluntarily, knowing that it would have the effect of adding Dodge, Bliss & Co. in being first paid, if the stop notice which they had already given was insufficient for that purpose. It is inferable from his evidence that he was not aware of the defect in the filing of the contract, and yet there is one piece of evidence which indicates that on the very same day he had in some manner given Messrs. Corbin & Corbin, or one of their firm, the idea that he desired to have the money due him on the English contract divided pro rata among the claimants thereto, for what is termed the "assignment pro rata" is in the handwriting of Mr. Charles L. Corbin, and is dated, as I think, plainly, the 28th of August; and, while Mr. Corbin was not called as a witness, I think it is safe to infer that when he prepared and dated that short assignment he had reason to believe that Warren would willingly sign it. Be that as it may, I am unable to perceive any fraud practiced upon Warren by Gilson in the procurement of the signature to that order.

I come to this conclusion with regret, because, as I have had occasion, in common with some of my brother vice chancellors, heretofore to state on more than one occasion in connection with the operation of the present remedy under the third section of the mechanic's lien law, which gives to materialmen priority over the fund in the order in which they are fortunate enough to be able to serve their stop notices, I think it is most inequitable in its operation, and I would be glad to see this fund divided pro rata among all the lien claimants. But the law is very clear that at the moment the order here in question was signed the fund was subject to the disposition of Mr. Warren, and he signed the order without any false representations made to him. It was duly presented to Mr. English, and the result was that it worked, in equity, an assignment of that much of the amount due Warren to Dodge, Bliss & Co., and I am obliged to so find, and to advise a decree accordingly. Dodge, Bliss & Co. must, then, be first paid out of the fund, and the balance must be divided pro rata among the other four claimants.

With regard to the costs, the complainant is not entitled to costs out of the fund, for the simple reason that in his bill he distinctly and clearly claimed that the amount due from him to Warren, which he was ready and willing to pay into court and be discharged, was considerably less than the amount which the court, upon a careful consideration of the evidence, found to be due; in other words, the issue was joined between the complainant and the assignees of Warren as to the amount due, and the complainant was beaten on that issue.

In regard to the defendants, I think, as at present advised, the best adjustment of the matter of costs and interest is to allow the fund to be divided as above stated, without interest or costs allowed to either party.

WOLFINGER v. McFARLAND et al.

(Court of Chancery of New Jersey. April 20. 1903.)

SPECIFIC PERFORMANCE—SUFFICIENCY OF CONTRACT—EVIDENCE—ESTOPPEL.

1. Where all the proof leaves it in doubt whether an alleged agreement to convey lands was an obligatory contract, or a declaration of a purpose to confer a benefit, specific performance will not be decreed.

2. All the terms of the alleged parol contract must, in cases where specific performance is sought, be proven by the complainant with definite certainty, or it will be refused.

3. The complainant claimed to have a parol contract whereby a decedent had agreed to convey to him certain lands used for a foundry. The decedent devised those lands in fee to his widow, who had no notice of the complainant's parol contract. The complainant persuaded the widow to continue the foundry business on the lands in question, as owner thereof, to employ him as manager of the business for a long term, and to spend money in its conduct, without disclosing to her that he had any parol contract for the conveyance of the lands to him. *Held*, the conduct of the complainant, above recited, estops him from afterwards asserting his parol contract against the widow.

(Syllabus by the Court.)

Bill by Irwin P. Wolfinger against Dora McFarland and others. Bill dismissed.

The bill of complaint in this cause is filed by Irwin P. Wolfinger to enforce the specific performance of a contract which it is alleged one William McFarland made in his lifetime with the complainant, to convey a foundry property and its equipment, situate in Trenton, N. J., to the complainant, together with an accounting for the profits of the foundry business since the death of McFarland. The defendants are the widow of McFarland, who is executrix and sole devisee in his will, the next of kin and heirs of McFarland, and also Ellis R. Meeker, a lessee, who since the death of McFarland has received a lease of the premises in question.

The bill alleges that in 1886 McFarland was carrying on the foundry business, and had the complainant in his employ as a molder, paying him as wages \$15 per week, and that McFarland then agreed with the complainant that, if the latter would remain in his employ, he "would pay to the complainant the wages he was then receiving, and would increase them from time to time as he might be able, and at his death would give his foundry business, with all tools, machinery, appliances, appurtenances, and everything belonging thereto or used in connection therewith, to the complainant, absolutely." The bill alleges that afterwards McFarland moved his foundry to another site, at the corner of Breunig avenue and Mead streets (described by metes and bounds in the bill), and that the agreement between the complainant and McFarland was renewed—that, in consideration that the complainant would serve the best interest of McFarland in the foundry business as long as he should live, he (McFarland) would convey to the complainant

the Breunig avenue and Mead street foundry lot, and its equipment, in addition to any other compensation which he might receive. The bill alleges performance by the complainant of his part of his contract. The bill admits that the complainant received from McFarland constantly increasing compensation as wages for his services; that in 1886 it was \$16 per week, in 1887 \$18 per week, in 1889 \$20 per week, and from 1898 to the time of McFarland's death, on December 23, 1900, at the rate of \$25 per week. The bill further alleges that in August, 1899, McFarland executed a will devising the foundry property and its equipment to the complainant "in recognition of his faithful services in the past and care for my interest." On December 8, 1900, McFarland executed his last will, and the bill alleges that, through undue influence or fraud, he attempted to give the foundry property to his widow, Dora McFarland; that this will was proven before the surrogate of Mercer county on January 9, 1901, and letters testamentary thereon were issued to the defendant Dora McFarland, as executrix thereof, and that the widow, Dora McFarland, was informed of the alleged contract between the complainant and McFarland; that after McFarland's death the complainant was greatly surprised and disappointed on learning the contents of the will, and, being without any position by which to earn a living, the complainant on or about the 14th day of January, 1901, entered into an agreement with the defendant Dora McFarland to manage and operate the foundry for five years at a salary of \$1,800 per year; that on April 15, 1901, Mrs. McFarland leased the premises to the defendant Ellis R. Meeker for the term of five years, and put Meeker into possession on the following day, against the complainant's protest, and that Meeker took his lease with full knowledge of the complainant's right under the alleged contract; that the complainant has demanded from the devisee and next of kin and heirs of McFarland that they convey the premises in question to him in performance of the contract entered into by McFarland in his lifetime, and that they have refused to make such a conveyance; that he is ready to release Mrs. McFarland from any obligation to employ him under the contract dated January 14, 1901, and return to her all moneys paid him by her, upon terms that Mrs. McFarland and Meeker shall account to the complainant for the profits of the foundry business since McFarland's death. The bill prays that the defendants may be decreed specifically to perform the agreement between the complainant and McFarland, by conveying to the complainant the foundry property and its equipment; that the lease to Meeker may be canceled; that McFarland and Meeker may account for the profits of the business since the death of McFarland; that Mrs. McFarland and Meeker may be en-

joined from disposing of the property; and for further relief, etc.

A decree pro confesso has been taken against all of the defendants who are heirs and next of kin of the decedent, McFarland. They appear to have no interest in the suit, unless the will should for some reason be declared invalid.

The defendant Dora McFarland, who is the widow of the decedent McFarland, the executrix of his last will, and the sole devisee of the property in question, files an answer to the bill of complaint, denying that McFarland ever made the contract set forth in the bill. She admits that the complainant was in the defendant's employ, and in the receipt of wages for services rendered, and that he continued in the service of McFarland to the time of his death, but she denies that the complainant's services were rendered in pursuance of any such agreement as is set forth in the bill. On the contrary, she insists that the wages received by complainant were in full compensation for the work and services by him done and rendered to McFarland. She leaves the complainant to the proof of his allegation that the decedent in August, 1899, made a will devising the foundry property in recognition of his faithful services. The defendant Dora McFarland further admits that the decedent, William McFarland, on the 8th of December, 1900, made his last will, devising and bequeathing his real and personal property to the defendant Dora McFarland, which will she duly proved on January 9, 1901, before the surrogate of Mercer county, and that on January 14, 1901, the complainant entered into the written agreement named in the bill. She alleges that by that contract the complainant undertook to act for her as manager of the foundry business for the period of five years from January 14, 1901, at a salary of \$1,800 per year; that, with full knowledge of the decedent's will, dated December 8, 1900, devising the foundry business to her, the complainant thus recognized her as the owner of the foundry and business, and entered into her service as such owner, and conducted and carried on the foundry business for her until April 17, 1901, receiving wages at the agreed rate named in the contract; that at the last-named date the defendant leased the foundry to Ellis R. Meeker, agreeing with him (Meeker) for the taking over of all contracts by him relating to the business, with the option to purchase the premises. The answer of the defendant Dora McFarland sets forth the substance of the agreement between her and Meeker, and particularly this clause: "And this indenture also witnesseth, that for the consideration hereinbefore expressed the said party of the second part shall and will continue in his employment one Irwin P. Wolfinger, mentioned in a certain writing, dated January 14th, 1901, purporting to be an agreement of hiring between

the said party of the first part and the said Irwin P. Wolfinger, subject to the terms thereof (a copy of which the said party of the second part has already seen), until the expiration of the term of service therein in that behalf provided." The defendant Dora McFarland further alleges that this agreement was exhibited to the complainant, and that he then availed himself of the benefit of it by entering into Meeker's service, to manage for him the foundry and business, in the same capacity and on the same terms as the complainant had agreed to work for the defendant Dora McFarland by the contract of January 14, 1901, and that the complainant continued to work for Meeker, managing said foundry business for him, up to May 13, 1901, the date of the filing of complainant's bill. The defendant Dora McFarland insists that the complainant, by his making the contract of January 14, 1901, to carry on the foundry business for five years as her manager of that business, and by his entering into the service of the defendant Meeker in the same capacity on the same terms, has waived and abandoned any rights, if any he ever had, under the supposed contract with the decedent which the complainant sets up in his bill, and which he now seeks to have specifically performed under a decree in this cause. The defendant Dora McFarland denies the right of the complainant to any relief in equity, and prays the same benefit as if she had demurred to the bill of complaint.

The defendant Ellis R. Meeker also answers the bill of complaint. He denies all knowledge of the alleged contract with the decedent, McFarland, which the complainant seeks to have specifically performed, referred to in the bill, and charges that there never was, in fact, any such agreement. He admits the ownership of the foundry by the decedent, his death, and that his will devises the foundry and its equipment to his widow, the defendant Dora McFarland. He alleges that the complainant, after he had knowledge of the decedent's death, and that by his will he had given the foundry and business to the widow, contracted with her to manage it for her for five years at an annual salary of \$1,800; that, learning this, and that the will had been proven, the defendant Meeker on April 17, 1901, leased the foundry and business from Mrs. McFarland at an annual rental of \$3,000, and agreed to continue to employ the complainant according to the terms of his agreement of January 14, 1901, with Mrs. McFarland. The defendant Meeker denies that his rights in the foundry and business under his lease from Mrs. McFarland are in any way subject to any claim of the complainant. On the contrary, Meeker insists that, if the complainant ever had any such rights in the premises as he alleges in his bill of complaint, he has by his contract of January 14, 1901, with Mrs. McFarland, acknowledged her to be the owner of the foundry and business, and by his re-

newal of that contract, accepting employment under Meeker, has acknowledged the efficiency of the latter's lease of the foundry and business from Mrs. McFarland, and that the complainant is thereby now estopped to assert his supposed rights in that foundry and business, as he seeks to by his bill of complaint. The defendant Meeker amended his answer, reciting the complainant's claim by his bill of complaint that he became entitled to the foundry and business upon William McFarland's death, and that it appears on the face of the bill that since McFarland's death the complainant entered into a written contract with Dora McFarland, who is William McFarland's devisee of that property, whereby the complainant agreed to manage and operate it for the said devisee for the period of five years from January 14, 1901, which written contract appears to be yet in full force and effect. The defendant Meeker claims that the complainant cannot, in view of these facts, have a decree that he became the owner of the foundry and business upon McFarland's death, as he prays in his bill, and for this reason the defendant Meeker asks the same benefit as if he had demurred to the bill of complaint.

Issue was joined on these pleadings, and the cause came to final hearing on the testimony offered by the respective parties.

Carrol Robbins and Robert S. Woodruff, for complainant. James Buchanan, for defendant Dora McFarland. William M. Lanning, for defendant Meeker.

GREY, V. C. (after stating the facts). The contract which the complainant in this cause seeks to have specifically performed is stated by him in his bill of complaint as follows: He alleges that the decedent, William McFarland, in 1886 agreed with him (the complainant) that, if the latter would remain in his employ, he would pay the complainant the wages he was then receiving, and would increase them from time to time as he might be able, and at his death would give his foundry business (then carried on upon Taylor street, Trenton), with all tools, machinery, appliances, appurtenances, and everything belonging thereto or used in connection therewith, to the complainant, absolutely, and that afterwards this agreement was renewed, and applied to a lot of land described in the bill by metes and bounds, situate on Breunig avenue, Trenton. The alleged contract is not claimed to have been reduced to writing. All of the evidence which is offered to show that any contract was ever made consists of the casual parol statements made by the decedent, McFarland, to various persons to whom he talked about his business relations with the complainant. In the absence of proof of an agreement which would be forceful against the statute of frauds, the complainant alleges that he has fully performed his part of the alleged agree-

ment, and is therefore equitably entitled to have those who represent the decedent decreed specifically to perform his part thereof. No testimony is offered which attempts to directly prove the making of the contract set up in the bill of complaint. Nobody testified that he was present when any such contract was made, either at its inception, in 1886, or at the time of the alleged renewal, applying the contract to the Breunig street property. Some 14 witnesses testify to statements made by the decedent, McFarland, regarding his business relations with the complainant, and it is these statements of the decedent which are relied upon to show that any contract ever was made by him with the complainant, whereby the complainant was to receive a conveyance of the lands and business in question. None of these witnesses testify that any of these statements of the decedent, McFarland, were ever made to, or in the presence of, the complainant. No two of these witnesses testify with precision to the same statement by the decedent. The language said to have been used by him, as it is repeated by more than two-thirds of the witnesses, is entirely consistent with the declaration of a purpose to make a gift, and does not convey the idea that the decedent declared that he had made a contract. Most of the witnesses testify that the decedent, McFarland, made statements such as these: "He told me at the time that Mr. Wolfinger [the complainant] should get the foundry;" "I expect Irv. [the complainant] to succeed me here;" McFarland said "he proposed to give that business to Irv.;" "I have arranged to let Irv. Wolfinger continue the business on his own account;" "I am going to give him the foundry;" "He had decided to turn over the factory and business to him [Wolfinger] when he was dead;" "He had promised Irv. the factory," and the like. There are, however, several witnesses who testify that the decedent, McFarland, had, in casual conversation with them, made admissions which have color of recognition of a contract between himself and the complainant. The first witness who refers to any admission of a contract was a man named Lafetra. He testifies that McFarland said: "The foundry business here is for Irv., my business manager, but not this; showing me with his finger along in this direction—that the new power building didn't go with the foundry building." "He had told me perhaps a dozen times that this property he proposed to give to his business manager for extra services rendered. That is about the way he expressed himself." These statements of the decedent are rather the talk of an intending benefactor than of a party bound by a contract. But there is a further statement by this witness that in July, 1899, the decedent, McFarland, said to him that there was an agreement "whereby Wolfinger was to have extra compensation. What that extra compensation was, might be construed in a good

many ways," etc. Testimony touching the essential point of the case, which, it is declared by the witness who gives it, "might be construed in a great many ways," is of very little aid in deciding what the contract in fact was. A Mr. Pattison testifies to a statement by the decedent more in the nature of an admission of a contract, in which he said "Wolfinger had made an agreement with him to stay with him as long as he lives, to run the foundry, and the foundry and business should be his when he either retired or died." Mrs. Pattison also testified that McFarland said to her, "I cannot afford to pay Mr. Wolfinger just what I ought to pay him, not just now;" and he said, "We have made an agreement between the two of us that Mr. Wolfinger should have the foundry if anything happens to me. That is the only way I can pay him back for all he has done for me." This language, it is to be observed, is not that of one who feels the obligation of a defined contract, but rather that of a friend who expects to arrange a grateful recognition of kindness received. At a later place in her testimony, in response to the probing of complainant's counsel, the same witness said, "I think I do remember him [McFarland] saying something to me once about Mr. Wolfinger was going to leave him, and he asked him to stay with him, and he said that, if he stayed with him, the recompense would be the foundry and business: he would repay him in that way if he stayed with him as long as he lived." Another witness (a Mrs. Pancoast) testifies that the decedent said regarding Wolfinger (complainant) that, "if he stood by him— The understanding was that if he would stand by him, and live up to his agreement as long as he lived, his foundry property and all pertaining was to be his after he was done with it." Mr. Pancoast also testified that Mr. McFarland said to him that "Wolfinger knew what he was going to get for his services, and that was the foundry, and in fact he took me out and showed me one day what was to be Wolfinger's." He said: "The bargain was, if he [Wolfinger] stayed with him and looked after the business as long as he lived, everything was to be his when he was done with it." "He told me that Wolfinger was to have it for the good work he had done, to pay him." "He was to get the foundry and everything connected with it. That was to be his."

These parol statements of the decedent, McFarland, are, it is claimed, admissions of the existence of a contract which are sufficient to support a decree for the specific performance of the undertaking to convey set forth in the bill of complaint.

It appears to be an accepted rule that verbal admissions ought to be received with great caution. It frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what

the party actually did say. 1 Greenl. Ev. § 200. Words which are used in a sense expressing grateful appreciation of kindness received, and an intention to requite them, are not admissions of an obligatory contract. A mere promise to confer a benefit, though made in explicit terms, is not a contract. Even if the promisor declares that the inducements which led him to make the promise were the valuable services which the beneficiary was rendering him, the transaction is yet not a contract. Mr. Justice Dixon, speaking for the Court of Appeals, illustrated this difference in the case of *Eggers v. Anderson*, 63 N. J. Eq. 268, 49 Atl. 578. In order to prove a contract, it must be shown that the parties were mutually bound, each to the other, by consideration moving both ways. To prove an alleged contract for services, it is not enough to show declarations, by the party receiving them, of a purpose to confer a benefit for the services received. A contract must be proven, whereby the party doing the services agreed to render them in consideration of values which the other party agreed to give for them. The witnesses who testified to the above statements of Mr. McFarland which have some appearance of acknowledgment of a contract gave no impression, in delivering their testimony, that they were repeating his words with accuracy. They had no especial reason to remember the expressions he used. They heard them in mere casual conversations. A very slight change would vitally alter their significance. Their testimony varies from that of the great majority of the witnesses who heard Mr. McFarland speak on the subject of his intentions regarding the foundry. These show that his language was that of one who, without any sense that he had contracted to transfer property in payment for services, yet, in grateful recognition of kindly help, proposed to reward a faithful employé by a gift. The complainant's own conduct, which will be hereafter discussed, strongly supports the view that there was no contractual undertaking by Mr. McFarland to give the foundry property to the complainant. Taking the most favorable view for the complainant, it must be said there is a failure to show by satisfactory proof such a contract as will be specifically enforced by decree.

In addition to the doubtful character of that evidence which comes nearest to exhibiting some contractual undertaking by Mr. McFarland, it does not, when the statements of the different witnesses are compared with each other, show that the terms of the contract alleged to have been admitted by Mr. McFarland were in each instance the same, and in none of them do the terms stated agree with those alleged in the complainant's bill of complaint. The only attempts to show any written recognition by Mr. McFarland of the alleged contract to convey or devise the foundry business to the complainant are a clause alleged in the bill of complaint to have

been part of a will made by Mr. McFarland on May 4, 1900, in pursuance of such an agreement, and for the purpose of carrying out the same. It is as follows: "Eighth. I do give, devise and bequeath to Mr. Irwin P. Wolfinger, of Trenton, New Jersey, in recognition of his faithful services in the past and care for my interests, the foundry property now owned and operated by me in the city of Trenton, New Jersey, together with the buildings and appurtenances, comprising the six city lots upon which said buildings are erected, located in the said city of Trenton, and also all the tools and contents of said foundry as the same shall stand at the time of my decease, to him, his heirs, and assigns, absolutely." It is extremely likely, although it was not proven, that Mr. McFarland did at some time before his last marriage make some such provision in a will as is above quoted, which he subsequently revoked by a later will made after his second marriage. But the quoted clause contains no recognition of any contract. Its phrasing is that of one who is making a gift to a faithful servant, not of one who is performing an obligation. Another written reference is contained in a letter by Mr. McFarland to one William H. Thomas on December 15, 1899. In the letter occurs this phrase, "Business is good yet, and I have arranged to let Irv. Wolfinger continue it on his own account when I am done with it." Not a word in this letter indicates that the writer was mentioning an arrangement entered into because of any contract to give the business to Wolfinger. The reference is obviously to the whole of the decedent's business, and not to the foundry and its business, which is the present claim of the complainant. It does not even declare a purpose to make a gift of property to complainant, but simply to permit him to carry on the business on his own account.

The relations between Mr. McFarland and Mr. Wolfinger were such that it may readily be believed that Mr. McFarland, in the statements made by him, referred to an intended disposition of his property, which was, in his conception of it, voluntary, and not obligatory. The complainant was his managing foreman. The decedent was paying him wages, which had been increased from \$15 per week at the beginning of his employment to \$25 a week during the last two years, with corresponding advancement in the character of the work required. They were upon friendly—almost affectionate—terms. Each expected from the other the most kindly consideration. Neither saw any reason for a hard and fast bargain as to the future, and there is therefore less likelihood that any such bargain was in fact made.

The probability that Mr. McFarland's consideration for the complainant was voluntary, and not obligatory, is cogently supported by the complainant's own conduct when it was made known to him, after Mr. McFarland's death, that he had by his last will given all

his property to his surviving widow. Mr. McFarland died on December 23, 1900. On the day of the funeral the complainant asked Mrs. McFarland if he should go on with the business at the foundry, and accepted orders from her to go right on with it. About a week after the funeral he asked Mrs. McFarland if she was going on with the business, and accepted directions from her to take charge of it. He suggested to her, as he would have to look after everything now, whether she did not think it was worth more money than he had been receiving. He fixed his own salary, naming to Mrs. McFarland a sum not quite \$1,800 a year; and she said, "Make it \$1,800." He declared to her that he would do his best to please her, and would keep her posted as to everything that was going on. He said nothing whatever to her, intimating in any way that he had any claim to be the owner of the business. Nothing was said about Mr. McFarland's will until about the 14th or 15th of December, 1900, when, Mrs. McFarland having brought it to the office of the foundry, the complainant asked her if she had it, and, when told that she had, he said, "Would you mind letting me see it?" The will gave all the decedent's property to Mrs. McFarland, including, necessarily, the foundry and business which the complainant now claims. Upon reading it the complainant said: "Well, he has blackballed me. He has forgotten all about me. I thought he would remember me." Mrs. McFarland said: "Perhaps he would have if he hadn't married again." At this time the complainant knew by the will itself that Mr. McFarland had disposed of the foundry property as if he were under no contract to convey it to the complainant as compensation for services. With this knowledge before him, the complainant gave no hint by any expression or protest that he ever had any contract with Mr. McFarland that the latter should convey the business to him. On the contrary, the words he used indicated his disappointment, not that the will had broken a contract, but that the testator had not remembered him as he had expected he would. From the time of Mr. McFarland's death, on December 23, 1900, the complainant continued to accept wages from Mrs. McFarland for the conduct of the very business which he now claims the decedent had agreed to convey to him. He knew that Mrs. McFarland, believing herself to be the owner of the foundry and business by the gift under the will, was paying the weekly wages of the men, and advancing the money necessary to carry on the business.

This situation of affairs continued until the 14th day of January, 1901. It then came to the complainant's knowledge that different parties were seeking to purchase the foundry and business from Mrs. McFarland, and that her counsel had advised her to give it up. He knew that there was pressure on her to have her sell out, and he was afraid that she would do so. He was not content with

the verbal assurances of Mrs. McFarland of his continued employment, and wanted a contract in writing that he should be employed for five years. He dictated the terms of such a contract to Mrs. McFarland, knowing that her counsel disapproved of it. She, at his suggestion, wrote the contract and signed it, and he added an acceptance and signed it, and procured witnesses to attest its execution, and retained the paper. It is in the following words and figures:

"Trenton, N. J., January 14th, 1901. I do hereby engage Irwin P. Wolfinger to manage and carry on the foundry Business for five years at a salary of \$1,800 a year.

"[Signed] Dora McFarland.

"I accept the same.

"[Signed] Irwin P. Wolfinger.

"Witness:

"D. Grant Frye.

"Louis Gerlach."

On the hearing, strenuous efforts were made by the complainant's counsel to minimize the effect of the making of this agreement, and it has been energetically argued that it has little significance, because made by the complainant in ignorance of his rights, and without the previous advice of his counsel. It may be doubtful whether the advice of his counsel had been received on the subject-matter of this contract prior to its making, but it is impossible to read the cross-examination or the complainant himself on this point without being convinced that this contract was of his own uninvited suggestion, contrivance, and procurement. His manner when testifying as to the drafting and execution of this contract showed that he sought to convey an impression contrary to the fact as it happened. He induced the widow to make the contract, and dominated the whole transaction. If the agreement to convey set up in the bill of complaint was ever in fact made between the decedent and the complainant, the latter would have disclosed it to Mrs. McFarland before entering into their contract of January 14, 1901. No advice of counsel was necessary to explain so evident a duty. The complainant at that time had known for several weeks that the decedent had by his will given the foundry and business to Mrs. McFarland, and he had thus, in substance, denied that he had contracted to give them to the complainant. The latter also knew that Mrs. McFarland had accepted the gift, and that she was proceeding to act as owner of the foundry and business, spending money, incurring debts, and making contracts in the conduct of its affairs, and he had no reason to believe that she had any knowledge of his alleged claim to the property. In fact, she had no intimation of his claim. The complainant not only kept silence, but he invited her to act as owner, by a contract which for five years fixed an obligation upon her as owner, operating in his favor as an employé under her ownership.

The complainant contends that Mrs. McFarland declared that this contract of January 14,

1901, was made for a purpose, and that her counsel could readily defeat it. There is some testimony on the point, but the impression I have received from all the proofs is that there is not the slightest probability that she ever said anything of the kind. She for a time forgot that she made that contract, but, when reminded of its existence by the complainant, who asserted its protecting force, Mrs. McFarland at once acknowledged it. Neither she nor her counsel ever attempted to defeat it. On the contrary, its obligation was recognized, and imposed by Mrs. McFarland upon Mr. Meeker to whom she leased the foundry, and its benefits were accepted by the complainant from both Mrs. McFarland and Mr. Meeker, her transferee. Long after the complainant had enjoyed the advice of counsel—as late as Easter Monday of 1901—he and his counsel used this contract to compel Mrs. McFarland to continue the complainant in her employ. He continued so to use it while the bill in this case was being prepared, and kept on using it after the bill was filed, on May 13th; and as late as July 2, 1901, by a letter to Mrs. McFarland, the complainant tendered himself ready to perform his part of it. Other conduct of the complainant is entirely inconsistent with the idea that Mr. McFarland ever made a binding contract to give the foundry and business to the complainant. On February 10, 1901, the complainant, as sworn appraiser, helped to make the inventory which enumerated the foundry tools and equipment as part of Mr. McFarland's personal estate. On the 15th of February, 1901, the complainant suggested to Mrs. McFarland that he needed a power of attorney to enable him to conduct the business for her, and she, as owner of the foundry, gave him one authorizing him to carry it on for her in the name of the "estate of William McFarland." She continued to furnish funds to the complainant, and to direct the conduct of the business which he carried on for her. She wrote to the complainant on the 13th of March, 1901, stating that some one had applied to her to see if she would sell the foundry. She received applicants for the purchase of it, who were shown over the premises in the presence of Mr. Wolfinger, without a suggestion at any time that he claimed any rights in the property. Wolfinger spoke to Mrs. McFarland of these possible purchasers of the foundry; said that it was foolish for her to sell it. He was extremely desirous that she should make no sale of it, and that he should be continued in her employment as manager. In the month of March, 1901, Mrs. McFarland had caused an examination to be made of the books at the foundry, and became dissatisfied with Mr. Wolfinger's method of conducting the business. She forgot the contract of January 14, 1901, and on Easter Monday (the 8th day of April, 1901) she attempted to discharge him by a summary notice. He and his counsel at once confronted her with that contract, by which, as owner of the foundry and business, she had

contracted to employ Mr. Wolfinger as her manager for the term of five years. Wolfinger and his counsel threatened Mrs. McFarland with a suit for damages if she persisted in her attempt to discharge him. They used the contract which they now insist Mrs. McFarland led Wolfinger to make, to compel her to continue to act as the owner of the foundry and business, and to retain the complainant as her employé in that business. Mrs. McFarland accepted the inevitable. She withdrew her notice of the discharge of the complainant, and continued him in her employ at the wages provided for in the contract. For three months after Mr. McFarland's death, and for more than two months after Wolfinger knew Mr. McFarland had given the foundry and business to Mrs. McFarland, Mr. Wolfinger had seen Mrs. McFarland continue to act as the owner of that property, had himself contracted with her as the owner, had compelled her to recognize that contract, had participated in transactions based on her ownership, which necessarily called for expenditures of money and the assumption of contractual obligations by her, and he never in all that time in any way asserted that he had any such claim as he now sets up in his bill of complaint.

I am presently considering the complainant's attitude, not with relation to the working of an estoppel because of his silence when he should have spoken, but as to its indications that in truth there never was any contract between him and the decedent, Mr. McFarland, whereby the latter agreed, for a consideration, to convey or devise the foundry and business to the complainant. If there was in fact any contract between the decedent, McFarland, and Wolfinger, to that effect, the latter must have been aware of it during all the transactions in which he recognized Mrs. McFarland as the owner of that property. Had there been such an agreement, it would have been the most reasonable and natural thing for Mr. Wolfinger, in his own defense, to have disclosed it to Mrs. McFarland. I am constrained to believe that the reason Mr. Wolfinger did not mention any such claim to her was that in truth there never was any contract between himself and Mr. McFarland. What had taken place between them was merely a promise to make a gift, and Wolfinger, on finding that Mr. McFarland had changed his mind, obtained from Mrs. McFarland the contract of January 14, 1901, as the best thing he could do to take care of his own interests. He had relied upon Mr. McFarland's kindly consideration for him. He believed and expected that he would be remembered by way of gift in his will, and when he found he was not, he accepted the disappointment as conclusive. The complainant's subsequent claim is an afterthought encouraged by the discovery that Mr. McFarland had told many people that he intended to give the foundry and business to him. Mr. McFarland is dead. He cannot state his side

of this controversy. It is not to be presumed, without proof, that he deliberately perpetrated a fraud upon a faithful employé, by breaking his contract with him. But it can readily be believed that his desire to care for his new wife might have led him to change his previous purpose to make a generous gift to such an employé.

Giving to all of the evidence, affirmative and negative, its full significance, it is not sufficiently shown that Mr. McFarland made any contract to convey or devise the foundry and business to the complainant, to entitle the complainant to a decree for specific performance.

In addition to the failure to prove the undertaking of a contractual obligation, the complainant's evidence is too uncertain in defining the terms of the alleged agreement to be the basis of a decree for specific performance. It is entirely settled that, in order to enforce specific performance of a contract which is within the statute of frauds, on the ground of part performance, the parol agreement relied on must be certain and definite in its terms. *Brown v. Brown*, 33 N. J. Eq. 651 (Court of Appeals). In the present case it has been shown that Mr. McFarland in his lifetime conducted a machine shop and foundry business. The machine shop and the foundry adjoined each other. The bill of complaint alleges that the decedent agreed to give the complainant "his foundry business, with all tools, machinery, appliances, appurtenances, and everything belonging thereto or used in connection therewith." The bill assumes that this alleged contract affected not only the foundry business and its equipment, but also the lot of land and real estate upon which it was conducted. A metes and bounds description of the Breunig street lot of land is recited in the bill. Some of the witnesses say that Mr. McFarland stated that he was to give the complainant the "foundry"; some of them, that it was the "business"; some of them, the "factory and business." Nothing that Mr. McFarland said in the repeated admissions mentioned any land as intended to be included in his gift to the complainant, except as the word "foundry" might mean land. Nothing in his alleged admissions defined what land was included in the foundry. There has been no proof of anything said by Mr. McFarland which fixed a defined line where the machine shop and the foundry (admittedly located immediately adjoining each other) separate. It has not been shown what was included within the word "business," as alleged to have been used by the complainant. It is, indeed, one of those things, as the witness Lafetra described it, "which might be construed in a good many ways." These definitions of the alleged subject-matter of the contract are too uncertain.

In the foregoing review of this case, I have not considered the element of estoppel, which is insisted upon by the defendants with great force, to the effect that the complainant is

estopped by his own conduct from asserting himself to be the purchaser of the foundry. As this point is presented by the defendant Meeker, it appears to have less strength than as put forward by the defendant Mrs. McFarland. It is shown that before Mr. Meeker had entered into any binding contract for the purchase of the foundry, and before he had paid any part of the purchase money, he was fully notified of the complainant's claim upon the foundry and business. Mr. Meeker, in subsequently leasing and taking an agreement to purchase, took the risk that the complainant's claim might be successfully asserted. Mr. Meeker, however, alleges that, as to him, the complainant has waived and abandoned his claim by accepting service under his five-year contract with Mrs. McFarland after it had been transferred to Mr. Meeker. It is in proof that Mr. Wolfinger, having contracted with Mrs. McFarland, as owner of the foundry and business, to work for her for five years as her employé in that business, did in fact accept Mr. Meeker as his employer in the foundry, under the five-year agreement, in Mrs. McFarland's place, while at the same time he was prosecuting the present suit, which seeks to compel Mrs. McFarland and Mr. Meeker to convey the foundry and business to him as purchaser by a contract obligatory upon them. The two positions thus assumed by the complainant seem to be quite irreconcilable, but Mr. Meeker was in no way misled by anything done by the complainant in the premises. Mr. Meeker knew of the impending suit when he took his lease and option to purchase, and when he continued Mr. Wolfinger in his employ. The complainant has never since, to Mr. Meeker's certain knowledge, actively prosecuted this suit, and, far from waiving or abandoning his claim, has diligently pushed it. Mr. Meeker has predicated no action upon Mr. Wolfinger's supposed waiver of his claim.

The complainant's relation to Mrs. McFarland on the charge that he is estopped is much more forceful. Assuming for the moment that there was in fact a contract between the complainant and Mr. McFarland, in his lifetime, that the latter should convey or devise the foundry and business to the complainant, it was necessarily within the complainant's knowledge. Immediately after Mr. McFarland's death the complainant became acquainted with the fact that by his will Mr. McFarland had repudiated this contract, and had given the subject-matter of it to Mrs. McFarland. The complainant knew that she had accepted the gift, and he had no reason to believe that she had any knowledge of his claim to that property. In fact, she did not know of it. With all this information, the complainant, without disclosing his claim to Mrs. McFarland, advised and induced her to undertake the foundry business as owner of it, to spend money on account of it, to make contracts in the conduct of it (one of them with himself), and to change her

position in a way which it is impossible to believe she would have done, had she known that he claimed that he was himself the owner of that property. He actually accepted a power of attorney given by her, as owner, to carry on the business for her. The complainant's counsel, recognizing the awkwardness of this situation, offer in the bill of complaint to release Mrs. McFarland from her contract, as owner, to employ the complainant for five years as manager, and to return what money she had paid or might pay him on account of that contract, upon terms that she should convey the foundry and business to him, and account to him for the profits of the business up to that time. But the conduct of the business was not solely between Mrs. McFarland and the complainant. Her contract to employ him is but a small incident of the business. She took the property, it is true, as a volunteer; but the proof is that, believing herself to be the owner, and knowing nothing of the complainant's claim, she, by the complainant's contrivance, advanced money and entered upon the conduct of the business. She may have, and it is entirely reasonable to believe that she has, in the conduct of the business, entered into other outstanding contracts than that with the complainant—possibly losing contracts. From these matters the complainant makes no offer to relieve her. If it be assumed that the complainant had the contract with Mr. McFarland alleged in his bill of complaint, he should be estopped to assert it, as against Mrs. McFarland, after he had persuaded and induced her to enter upon the conduct of the foundry business without disclosing to her the fact that he had a contract which would take that business away from her. There is no difference, in principle, between his action and that of an intending purchaser who has obtained from an owner of lands a private contract to convey to him, and who, secreting the fact that he has such a contract, induces the heir or devisee of the owner to build on the lands.

The complainant has failed to present a case which entitled him to a decree for specific performance as prayed for in his bill of complaint. I will advise a decree that the bill be dismissed, with costs.

KRYN et al. v. KAHN.

(Supreme Court of New Jersey. March, 1903.)

TROVER AND CONVERSION—CAPIAS AD RESPONDENDUM—AFFIDAVITS AND ORDER—FILING—SUFFICIENCY—DEMAND—NON-RESIDENTS—PROOF—JURISDICTION—PUBLIC POLICY.

1. Where a *capias ad respondendum* is issued in an action for trover and conversion, as authorized by 2 Gen. St. p. 2543, § 58, the fact that the affidavits and order were not filed in the clerk's office until the day succeeding the issuance of the writ and the making of the arrest was no ground for quashing the writ.

2. Where, in an action for conversion of certain diamonds, the affidavits for a *capias ad*

respondendum showed that the goods were obtained by false pretenses, and were sufficient to warrant a conclusion that they were purchased by defendant with a preconceived intention not to pay for them, an objection that the affidavits did not state a cause of action for failure to allege a previous demand for the goods was not sustainable.

3. An action for conversion of goods fraudulently purchased being transitory, a court of one state will not refuse to take jurisdiction because the transaction was in another state, of which the defendant is a resident, on the ground of public policy.

4. Where, in an action for conversion, an affiant testified that he knew defendant by sight, and that he resided with his family at a certain address in New York City, and that on a certain day affiant conversed at such address with defendant's wife, who informed him that defendant resided there, was sufficient proof of defendant's nonresidence, in the absence of any showing to the contrary, to sustain an order to hold to bail on such ground.

5. Under 2 Gen. St. p. 2541, § 46, authorizing amendments of indorsements omitted from writs, an omission of plaintiff's attorney to indorse on the back of a *capias ad respondendum* the name of the county in which the writ was to be served and the address of the attorneys issuing the writ, as required by a rule of court, was amendable where the omission occasioned no injury to defendant.

At Chambers.

Action by Jacques Kryn and others against Arthur H. Kahn on a *capias ad respondendum*. Application by defendant for a discharge on common bail and to quash the writ. Application denied.

C. L. Cole and Robert H. McCarter, for the motion. Colle & Duffield, opposed.

HENDRICKSON, J. The first ground of the motion is that the writ issued before the filing in the clerk's office of the affidavits and order to hold to bail. It appeared that the order was made at Atlantic City by a commissioner of this court in the evening of June 18, 1902, and that the arrest was made the same evening, and that the papers were received by mail and filed the following morning. The clerk, in compliance with a custom of the office, filed the papers as of the date of June 13, 1902. The action is in tort for trover and conversion, and the procedure as to the holding to bail and the issue of the writ is regulated by section 53 of the practice act (2 Gen. St. p. 2542). The filing of the affidavit and order are not made a condition precedent to the issue of the *capias*, as it is under section 58 of the act where the action is upon contract. It was held by the Supreme Court, in *Wert v. Strouse*, 38 N. J. Law, 184, upon a motion like this, where the action was tort, that "the affidavits need not be actually filed before the writ is issued and arrest made, in actions of tort. Aliter in actions on contract." This decision has not been reversed or disapproved in any later decision, and must govern in determining the point here involved. The decision in *Hassler v. Stowe*, 7 N. J. Law J. 204, is cited in favor of the application, but in that case the action was in *assumpsit*, and hence it is not

in conflict with the case of *Wert v. Strouse*, supra.

Another ground advanced is that the affidavits do not disclose a cause of action. It is contended that, the action being in the form of trover and conversion, in order to recover the value of goods sold, the sale of which had been rescinded for fraud, there must be a demand made for the return of the goods before the conversion necessary to support the action can be shown. No such demand was made before the bringing of the action. It is conceded that, where the goods of another came lawfully into the possession of a defendant, there must be a demand and refusal to deliver before the action will lie. The goods purchased in this case consisted of diamonds of a value exceeding \$50,000. The affidavits show that they were obtained by false pretenses, and the circumstances developed are such as to warrant the conclusion that the goods were bought with the preconceived intention not to pay for them. Where this is the situation, it is held that the possession gained in this way is tortious, and that the sale may be rescinded, and that an action of trover will lie. *Ferguson v. Carrington*, 9 Barn. & C. 59; *Waters v. Van Winkle*, 3 N. J. Law, 154; *Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700; *Buffington v. Gerrish*, 15 Mass. 156, 8 Am. Dec. 97; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757; *Powell v. Powell*, 71 N. Y. 71; *Irving v. Motley*, 7 Bing. 543. And it is also held—and, I think, rightly—that in such case a previous demand of the goods before action brought is unnecessary. *Thurston v. Blanchard*, supra; *Powell v. Powell*, supra.

It is further contended that, although this action is transitory, and may be brought in a different jurisdiction from that of the residence of the parties and the place of the transaction, yet that on grounds of public policy jurisdiction of the case should not be entertained. New York decisions have been cited in support of this assumption. But I think the decisions referred to have only related to actions between foreigners coming into this country, and for causes of action arising on the high seas or outside of our country. In such cases the courts there have, in their discretion, declined to entertain jurisdiction. A dictum in *Burdick v. Freeman*, 120 N. Y. 422, 24 N. E. 949, is in favor of the right to extend the exercise of this discretion to an action there between citizens of another state and for a cause of action not arising within its jurisdiction. The other New York cases cited therein do not support the dictum stated. In *McIvor v. McCabe*, 26 How. Prac. 257, where the tort was committed in New Jersey, and the parties being both resident here, the court, after a careful review of the authorities, held that the court had jurisdiction in such cases, and was bound to entertain the jurisdiction when invoked,

where both or either of the parties are citizens of the United States. In *Hale v. Lawrence*, 21 N. J. Law, 714, 47 Am. Dec. 190, upon argument of a demurrer, one of the objections raised was that the cause of action arose in New York, and the defendant resided there. Judge Nevius, speaking for the Court of Errors and Appeals, said the answer to this was that the action was transitory for trespass to personal goods, and might be prosecuted wherever the defendant should be found. The court also observed that the question was not properly raised, and hence the adjudication may not have the force it otherwise would. But I do not feel at liberty, in the light of the authorities alluded to, particularly upon a motion like this, to deny jurisdiction to the plaintiffs in prosecuting their action.

It is further urged that the proof of non-residence—the special ground upon which the order to hold to bail is justified—is insufficient. One of the affiants swears that he knows the defendant by sight; that he resides at No. 101 East Seventy-Ninth street, in the city of New York, where said defendant resides with his family. This statement is definite and positive, and, standing alone, would assuredly be regarded as sufficient proof of residence in the state of New York. It cannot justly be inferred that this statement under oath was based upon hearsay evidence alone, because the affiant added after this statement that on June 6, 1902, he conversed at the above address with the wife of the defendant, who informed affiant that defendant resided there, but was then out, and would return later in the day. In *Bennett v. Benson*, 25 N. J. Law, 166, the affidavit described a defendant as of the city of Brooklyn, and this was held sufficient proof of nonresidence to sustain an order to hold to bail upon a motion to discharge upon common bail. I think the proof made in this case as to defendant's residence must be held sufficient, especially since the defendant has not as yet availed himself of the opportunity afforded by the statute to bring counterproofs on the matters contained in the plaintiff's affidavits.

The only other ground of this motion is the omission of the plaintiff's attorney to indorse upon the back of the writ the name of the county in which the writ was to be served and the address of the attorneys issuing the writ, as required by a rule of the court. It must be observed that these omissions have not, so far as appears, worked injury to the defendant. Application was made to amend in these particulars at the opening of the hearing. In dealing with infractions of its rules, the court will, I think, have regard to section 46 of the practice act (2 Gen. St. p. 2341), and permit amendments in proper cases as to the matters required to be indorsed upon its writs. Such amendments, even of compulsory process, have been held

proper. *Drake v. Berry*, 42 N. J. Law, 61; *Logan v. Lawshe*, 62 N. J. Law, 567, 41 Atl. 751.

The motion to amend is allowed. The result is that the motion to discharge the defendant is denied.

GARBETT v. MOUNTFORD.

(Supreme Court of New Jersey. March, 1903.)

ATTACHMENT—ABSCONDING DEBTOR—NON-RESIDENT—AFFIDAVIT—JOINDER OF GROUNDS—EVIDENCE.

1. P. L. 1901, p. 158, § 1, subd. 1, authorizes an attachment against an absconding debtor and subdivision 2 authorizes an attachment against a person who is a nonresident of the state. *Held*, that where an attachment affidavit charged that defendant had absconded, and also alleged that she was not, to deponent's knowledge and belief, a resident of the state at the time, and affidavits filed in resistance of the attachment showed that, while she was not an absconding debtor, she was a nonresident, the attachment was sustainable on that ground.

2. Evidence that defendant was a lecturer, and that her husband resided in England, and she lectured in different states, and had a permanent address in New York City, and that she was sojourning in New Jersey, delivering lectures in various localities, and resided at different hotels during her stay in each place, was sufficient to show that she was a nonresident, within P. L. 1901, p. 158, § 1, subd. 2, authorizing attachments against nonresident debtors.

At Chambers.

Action by William Garbett against Lydia M. Von F. Mountford. On rule to show cause why an attachment should not be set aside. Motion denied and rule discharged.

Wesley B. Stout, for plaintiff. S. Stanger Iszard, for defendant.

HENDRICKSON, J. The affidavit sets forth that defendant is indebted to plaintiff in the sum of \$197.80, and then says that the said defendant, "debtor as aforesaid, absconds from her creditors, and is not, to deponent's knowledge and belief, a resident of this state at this time." The ground of defendant's motion is that the defendant was not an absconding debtor; that the affidavits taken under a rule for that purpose abundantly show this, and therefore the writ is invalid and must be set aside. I think the affidavits taken under the rule do show quite clearly that the defendant, who was a lecturer, was not an absconding debtor, within the meaning of subdivision 1 of section 1 of the attachment act (P. L. 1901, p. 158), at the time of the making of the affidavit; that, on the contrary, she was not a resident of this state, and never had been, but was at the time temporarily within this state, delivering lectures. The motion to quash is resisted on the ground that, even if the proofs do not show the defendant to have been an absconding debtor, still that the attachment may be sustained under the second subdivision of section 1. I am inclined to adopt this view. As will be observed, the affidavit,

after declaring that the defendant absconds from her creditors, also declares, in the words of the second subdivision of the section, that the defendant "is not, to deponent's knowledge and belief, a resident of this state at this time."

Where several statutory grounds for an attachment are stated cumulatively in the affidavit, if any one of them be true the attachment will be sustained, although all the others be untrue. *Drake on Attachment*, p. 86, § 101. "Surplusage in the affidavit, not inconsistent with the substantial averment required by the statute, will not vitiate." *Id.* § 105. It is contended, however, that this part of the affidavit is drawn under and pursuant to the first subdivision of the section, which relates to an attachment in case of an absconding debtor, only, and has a different meaning from that of the same identical words in the second subdivision, which relates to an attachment in case of a nonresident debtor. But there is nothing in the affidavit which makes reference to one rather than the other of these subdivisions of the section. But even if it did, it is hard to see that the situation would be altered.

Defendant's counsel refers in support of his contention to *Del Hoyo v. Brundred*, 20 N. J. Law, 328, and *Leonard v. Stout*, 36 N. J. Law, 370. The difference in the meaning of the word "resident," as there pointed out, is that in the section relating to absconding debtors it means an actual residency or inhabitation in this state, while in the absent debtor section it means not only a legal residence or domicile out of the state, but that ordinary service of process upon the defendant was impossible. But the point in question here was not before the court in these cases, and hence they do not govern. It may be observed that the latter case was reversed in *Stout v. Leonard*, 37 N. J. Law, 492, and that the distinction there pointed out has undergone some transition in later decisions. In the latter case the difference between domicile and residence is indicated, and it was held that a debtor having a residence in this state, and also a residence elsewhere, is liable to be sued by attachment if at any time he is not in this state, and does not dwell or have his usual place of abode here. In *Baldwin v. Flagg*, 43 N. J. Law, 495, where the attachment was against an absent debtor, it was held that, if a debtor has not at the time of the attachment such a place of abode in this state that a summons could be served at it, he is a nonresident, within the meaning of the statute, etc.

It should also be noted that in the present revised attachment act that part of section 3 of the former act (Gen. St. p. 98) which provided that the attachment might issue against "every debtor who may reside out of this state," upon the proper oath, etc., has been eliminated. But whether the distinction adverted to has entirely disappeared, it is not necessary to decide in this case.

There is no doubt, I think, but that the affidavit for the attachment was made in good faith. The evidence shows that the defendant was not a resident of this state, within the meaning of the statute. Her evidence on that point was that her husband was in England, that she lectured in different states, and that her permanent address was in New York City. She had come in from the West, and lectured a few days in Asbury Park, and was about to go to Ocean City to give a course of lectures occupying a week, perhaps, and then she was to go to the state of New York. The plaintiff had been her agent to arrange for the lectures, and was claiming some money to be due for services. Her trunks had been shipped to Ocean City prior to the making of the affidavit, and she was soon to follow. She was stopping at a hotel in Asbury Park and in Ocean City during the lectures in those localities. But such temporary sojourn at a hotel does not constitute the latter one's usual place of residence, at which ordinary process could be served, as defined in *Baldwin v. Flagg*, *ubi supra*.

It has been held that an affidavit for an attachment under the third subdivision of this act, requiring proofs of fraud, though not good under that subdivision, might be sustained because the facts stated brought the case within the second subdivision of the act. *Dixon v. Abren*, 25 N. J. Law J. 172. In determining this motion, I must also have regard to the thirty-third section of the act, which enjoins that the act shall be construed in all courts in the most liberal manner for the detection of fraud, the advancement of justice, and the benefit of creditors. *Stout v. Leonard*, *supra*.

My conclusion is that the motion to set aside the attachment should be denied. The rule to show cause will be discharged, with costs.

UNDERHILL v. BUCKMAN FRUIT CO. OF BALTIMORE.

(Court of Appeals of Maryland. April 2, 1903.)

SALES—CONTRACT—CONSTRUCTION—DURATION—ACTION FOR BREACH—PROOF—DIRECTION OF VERDICT.

1. Where, in an action for breach of contract to furnish plaintiff 400 bunches of bananas from each steamer arriving during a certain time, at specified prices, there was evidence that defendant always had one and sometimes more steamers per week, and to show the arrival of steamers after defendant refused to furnish plaintiff more bananas, it was error to direct a verdict for defendant on the ground that the plaintiff had failed to prove the arrival of any steamer after the breach, and before the termination of the contract.

2. Where defendant contracted to furnish plaintiff bananas from each steamer as it arrived, at certain prices, and, before the termination of the contract as renewed, defendant notified plaintiff by letter that it considered the contract with him at an end, and refused to furnish further bananas thereunder, such act constituted a breach of contract for which plaintiff was entitled to recover.

3. Where a contract provided that defendant should furnish bananas to plaintiff, at certain prices, for one year, with the privilege of renewal for another year, or so long as plaintiff did not "advance, loan, or aid any one" in importing bananas, defendant was not entitled to terminate the contract by reason of the fact that plaintiff purchased additional bananas from defendant's competitors, on the ground that such purchase aided defendant's competitors in importing such fruit.

4. Where a contract for the sale of bananas provided that it was to remain in force for one year, with the privilege of renewal for another year, provided the buyer did not "advance, loan, or aid any one" in the importation of bananas, the proviso was a limitation on the contract at the end of the renewal year, and did not render it of unlimited duration so long as plaintiff complied with its provisions.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Joshua J. Underhill against the Buckman Fruit Company of Baltimore. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

W. S. Bansemer and Richard B. Tippet, for appellant. Randolph Barton, Sr. and Randolph Barton, Jr., for appellee.

BRISCOE, J. This is a suit brought by the appellant against the appellee company to recover damages for the alleged breach of a contract. The appellant is a resident of the state of California, but at the time of the alleged breach was engaged in the oyster and fruit business in Baltimore City, and his principal business was to sell to the retail trade. The appellee is a fruit company trading as the Buckman Fruit Company, and was engaged in the business of importing foreign fruit, including bananas, to the city of Baltimore, and sold to the trade known as "jobbers." The contract, which is the basis of this controversy, is dated Baltimore, April 23, 1897, and is as follows: "I hereby agree to furnish J. J. Underhill bananas to the extent of four hundred (400) from each steamer during the months of May and June of each year at the following prices, namely, first, \$1.10 per bunch; eight hands .80 per bunch; seconds, .60 per bunch; thirds, .40 per bunch. And the remainder of the year, that is ten months, prices are to be the same as originally agreed upon, namely, firsts, \$1.00 per bunch; eight hands, .75 per bunch; seconds, .50 per bunch; thirds, .35 per bunch. It is further agreed and understood that this agreement is to remain in full force one year with privilege of renewal for another year, or as long as the said J. J. Underhill does not advance, loan or aid any one in the importing bananas, also the number of bunches not to exceed four hundred (400) bunches out of each cargo. And in consideration of the above agreement the said J. J. Underhill agrees not to loan, advance or aid any individual or corporation in the importing of bananas into this market. [Signed] Buckman Fruit Co., per O. C. Buckman,

Pres't." It appears that, according to the terms of the contract, it was renewed, by agreement of the parties, for the period of one year, beginning on April 28, 1898. Subsequently, on the 3d of March, 1899, the defendant company notified the plaintiff by letter, and for reasons therein stated, which will hereafter appear, that it considered the contract with him, dated April 28, 1897, at an end. The declaration alleged that the defendant has ever since the 3d of March, 1899, refused to comply with its agreement made with the plaintiff, and although he has notified the defendant of his renewal of all of his rights under the agreement for another period of one year, and of his intention to resume all of his rights of renewal under the agreement, the defendant has denied his right of renewal under the contract, and refuses to be further bound by the same, although the plaintiff has in all respects performed his part of the agreement, and is ready and willing to continue to do so, and by reason of this breach the plaintiff has suffered great loss and damage. The defendant pleaded to the declaration, "Never promised as alleged, and not indebted as alleged;" and, the case, upon trial, resulting in a verdict for the defendant, the plaintiff has appealed.

The questions in the case arise upon a single exception reserved by the plaintiff to the rulings of the court in the granting of the defendant's prayers which were offered at the close of the plaintiff's case. The defendant's prayers, as granted, withdrew the case from the jury; and the question here is, as they were, in effect, a demurrer to the plaintiff's evidence, were they properly granted by the court? We cannot concur with the court below in the instruction granted in this case, and we think there was error in the rulings of the court upon both prayers.

The defendant's first prayer ruled, as a matter of law, that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the verdict must be for the defendant, because the plaintiff had failed to prove the arrival or presence of any steamer after the alleged breach of the contract on March 3, 1899, up to and including the 28th of April of the same year. It will be seen, upon an examination of the record, that there was evidence tending to show the time and dates of the arrival in Baltimore of the company's steamers. The witness H. W. Underhill testified that the company always had one, sometimes more, and sometimes three, a week. The letter of March 3, 1899, of the defendant's company to the plaintiff, the postal cards, and the tickets issued by the company, were all evidence tending to show the arrival of the steamers, and this evidence should have been submitted to the jury. There was no contradictory proof offered on the part of the defendant, and the evidence was legally sufficient to have been left to the jury. *Jones v. Jones*, 45 Md. 154; *Co. Com'rs v. Wise*, 75 Md. 43, 23 Atl. 65; *State v. Kent Co.*

Com'rs, 83 Md. 383, 35 Atl. 62, 33 L. R. A. 291. But apart from this, the prayer was manifestly erroneous in directing a verdict for the defendant. The facts of the case, as stated in the record, clearly amounted to a breach of the contract by the defendant, and this constituted a good ground for the action. *Eckenrode v. The Chemical Co. of Canton*, 55 Md. 56.

There was also error in granting the defendant's second prayer. The prayer is as follows: "The defendant asks the court to instruct the jury, by the true construction of the contract made between the parties, and offered in evidence, the defendant was bound to sell bananas to the plaintiff only so long as the plaintiff should not loan, advance, or aid any one in the importation of bananas into the city of Baltimore; that such aid included the purchase by the plaintiff of bananas from competitors of the defendant engaged in the importation or sale of bananas in the city of Baltimore; and inasmuch as the plaintiff admits that during the duration of the contract, and prior to the alleged breach thereof on the 3d of March, 1899, he purchased bananas from such competitors of the defendant, then the defendant was justified thereafter in refusing longer to sell bananas to the plaintiff, and the plaintiff is not entitled to recover." This prayer, as granted, proceeded upon the theory and asserted the proposition that, according to the construction of the contract between the parties, the plaintiff should not only "not loan nor advance nor aid" the competitors of the defendant in the importation of bananas, but that it also prevented the plaintiff from buying from persons engaged in the sale of bananas in the city of Baltimore. This construction of the contract, as placed by the prayer, would prevent the plaintiff from buying from other persons engaged in the sale of bananas, and would necessarily limit his business, during the existence of the contract, to the 400 bunches stipulated in the contract. We are clearly of the opinion that such a construction cannot be sustained by either the language of the contract, the intention of the parties at the time of making the agreement, nor the subsequent course of dealings between them. On the contrary, the plain language of the contract is, "In consideration of the above agreement, J. J. Underhill agrees not to loan, advance, nor aid any individual or corporation in the importing of bananas in this market." The object of the agreement on the part of the defendant company was to prevent the plaintiff, as was set out in a previous contract between the parties, dated the 15th of April, 1895, from discounting loans or advancing money in any way for the purpose of conducting or aiding to conduct the business of importing bananas and foreign fruits to the Baltimore market; and, in consideration thereof, the defendant company was to furnish the plaintiff with bananas to the amount and at the

prices named in the contract. The undisputed evidence in the case is to the effect that both parties so understood the agreement, and the defendant assented to its renewal in 1897 with a full knowledge of its meaning. Indeed, any other interpretation, it seems to us, would not only violate its plain terms, but would operate as an unreasonable limitation and restraint upon the plaintiff's business, not contemplated by the parties to the agreement. *Guerand v. Dandeleit*, 32 Md. 568, 3 Am. Rep. 164.

Upon the question of the duration of the contract, we need only say that, according to its terms, it was to remain in force for one year, with privilege of renewal for another, provided the plaintiff did not "advance, loan, nor aid any one" in the importation of bananas. The appellant contends that, "by its terms, the contract was to remain in force for one year, with a renewal privilege for another year, or as long as he does not advance, loan, nor aid in the importation of fruit," etc. We cannot assent to this contention. This construction would make the contract unlimited in its duration, so long as the plaintiff complied with the conditions of the agreement, and would render nugatory the clause which provides that it should remain in force for one year, with a privilege of renewal for another year. But we are not left without light as to the meaning of this clause of the contract. The agreement of April 15, 1895, of a similar import, and between the same parties, is expressly limited to one year from its date, and shows that the words of the clause now under consideration were intended as a limitation on the contract. As stated by the appellee in its brief, "if the clause referred to meant what the plaintiff contends for, it would be a contract practically in perpetuity, and would be absolutely nonmutual and unilateral." We find no reason for holding that the duration of the contract in this case extended beyond the period fixed by the parties. The cases relied upon by the appellant to sustain his contention are distinguishable from this.

For the errors in the rulings of the court upon the prayers, the judgment must be reversed and a new trial awarded. Judgment reversed and new trial awarded, with costs.

APPEAL OF REAVER et al.

(Court of Appeals of Maryland. April 1, 1903.)

WILLS—ATTESTATION—SIGNATURE—SUFFICIENCY.

1. Where a person writes the name of a witness to a will for him, and the latter thereupon puts his mark to the name thus written, it operates as the signature of such witness as fully as if he himself subscribed his name.

Appeal from Orphans' Court, Carroll County; Wm. Y. Frizzell, Jacob Rinehart, and L. Calvin Jordan, Judges.

Judicial proceedings on the probate of the will of Washington Reaver, deceased. From

an order of the orphans' court refusing to admit the will to probate, proponents Joseph M. Reaver and others appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

John M. Roberts and Benjamin F. Crouse, for appellants.

SCHMUCKER, J. The record in this case presents for our consideration the single question whether a mark made by a witness to a will as his signature constitutes a sufficient attestation by him. The will of Washington Reaver, late of Carroll county, when presented to the orphans' court of that county, was duly signed and sealed by him, and was attested as follows:

"Signed sealed published and declared by Washington Reaver as and for his last will and testament, in the presence of us, who at his request in his presence, and in the presence of each other have subscribed our names as witnesses thereto.

"Witnesses Clayton H. Harner.

his
"Charles X Engle."
mark.

After due proof of the custody of the will and of the fact that no other will of the testator had been found or was supposed to exist, each of the two witnesses made oath before the orphans' court that he saw the testator sign and seal the will, that he heard him pronounce and declare it to be his last will and testament, and that at the time of doing so he (the testator) was, to the best of the witness' apprehension, knowledge, and belief, of sound and disposing mind, memory, and understanding, and that he had subscribed his name as a witness at the request of the testator, in his presence, and in the presence of the other witness. Both witnesses also swore that Engle had subscribed his name as a witness to the will by making his mark to his name, which had been written for him by Harner. The orphans' court then passed the order appealed from, refusing to admit the will to probate because it was "not executed according to the act of assembly in such case made and provided."

The orphans' court were clearly in error in refusing probate of this will. The provision of the statute of this state that a will must be attested and subscribed by the witnesses in the presence of the testator had its origin in the statute of frauds, and is substantially the same as that in force in most of the other states and in England. The text-books and the decisions of the English and American courts agree that when another person writes the name of a witness to a will for him, and the latter puts his mark to the name which has thus been written, it operates as his signature as fully as if he had subscribed his name. Jarman on Wills, *85; Beach on Wills, § 41; Schouler on Wills, § 331; Redfield on Wills, vol. 1, p. 229; Harri-

son v. Harrison, 8 Ves. Jr. 185; Addy v. Grix, Id. 503; Compton v. Mitton, 12 N. J. Law, 70; Ford v. Ford, 7 Humph. 96; Davis v. Semmes, 51 Ark. 48, 9 S. W. 434; In re Will of Bridget Guilfoyle, 22 L. R. A. 372 (where a collection of the cases on the subject will be found under the note on "Attestation").

No Maryland decision directly to the point now in issue has been called to our attention, but in *Collins v. Nicols*, 1 Har. & J. 402, it was held that, to establish a will so as to pass title to land, "there must be proof of the handwriting of the testator and of all the witnesses before the will can be given in evidence [in an ejectment], and, where the witnesses have put their marks, there must be proof that such marks are the marks of the witnesses"; thus recognizing the mark made by the witness as a sufficient attestation by him of the will. The doctrine thus announced in *Collins v. Nicols* was cited with approval and relied on by this court in *Hoppe v. Byers*, 60 Md. 388, showing it to be in accord with the current of authorities upon the sufficiency of the mark made by the attesting witness. The order appealed from will be reversed, and the case remanded, to the end that the will may be admitted to probate.

Order reversed, with costs to be paid out of the estate, and cause remanded for further proceedings in accordance with this opinion.

WOLFE et ux. v. MURRAY.

(Court of Appeals of Maryland. March 31, 1903.)

REVIVAL OF ACTION—DEATH OF ONE DEFENDANT—REVIVAL AGAINST ADMINISTRATOR—APPEAL—AFFIRMANCE.

1. Under Code Pub. Gen. Laws, art. 50, § 4, requiring that, on the death of a defendant jointly sued with another, a separate suit against his administrator shall be docketed, it is error to revive an action against husband and wife, after the husband's death, against his administrator, so as to effect a joinder of the wife and administrator, as a judgment against the wife will be *de bonis propriis*, while that against the administrator will be *de bonis testatoris*.

2. Where it appears from the record that a judgment should never have been entered, an order reinstating it will be reversed, though the order striking it out was conditioned on defendants pleading to the merits, which they failed to do.

Appeal from Baltimore City Court; George M. Sharp, Judge.

Suit by Jesse H. Murray against Humphrey D. Wolfe, administrator of the estate of John H. R. Wolfe, deceased, and another. From an order reinstating a judgment by default which had been struck out on defendants' motion, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Alonzo Miles, for appellants. Julian L. Alexander, for appellee.

SCHMUCKER, J. This is an appeal from an order of the Baltimore city court which rescinded a previous order striking out a judgment, and declared the judgment to be restored. The suit was originally instituted in the circuit court for Howard county on April 13, 1894, against John H. R. Wolfe and his wife, Lavinia, upon the common counts in assumpsit. After having been continued from term to term until March 22, 1895, it was then removed, on affidavit by the defendants, to the circuit court for Baltimore county, where the defendants filed the general issue pleas on May 13, 1895. John H. R. Wolfe then died, and the plaintiff suggested his death, and, instead of docketing a separate suit against his administrator, as is required in such cases by section 4 of article 50 of the Code of Public General Laws, procured the administrator to be made a codefendant to the existing suit, and summoned upon process issued out of the circuit court for Baltimore county. At that stage of the proceedings the defendants, with leave of the court, withdrew their pleas, and filed a demurrer to the declaration. The court sustained the demurrer, and directed the plaintiff to declare over. The case was continued in that condition from term to term until the March term, 1897, when it was put upon the stet docket, under the rule of court, after having been called four times and continued. On December 9, 1898, while the case was upon the stet docket, the plaintiff so amended his narr. as to aver that the transactions out of which the alleged indebtedness of the defendants arose had been made during the lifetime of the said John H. R. Wolfe and his wife, Lavinia, "at their written request." Nothing further seems to have been done until the 8th of February, 1901, when the plaintiff, without first procuring the case to be taken from the stet docket and restored to an active condition, filed a suggestion and affidavit for its removal, and it was thereupon transmitted to the Baltimore city court, where it was placed upon the trial docket; and on May 31, 1901, on motion of the plaintiff, a judgment by default was entered against the defendants for want of a plea to the amended narr. This judgment was made final and extended on June 3, 1901. On March 19, 1902, the court struck out this judgment on motion of the defendants, who were granted 10 days within which to plead to the amended narr. On March 25, 1902, they filed pleas to the jurisdiction of the court. To these pleas the plaintiff filed a motion *ne recipiatur*, which the court granted on November 3, 1902, refusing the defendants' application to plead over, and at the same time passed the order appealed from, which is as follows: "The motion of the defendants to strike out the judgment entered against them in this cause having been fully argued before the court, the court thereupon, on the 19th day of March,

1902, made an oral order directing the judgment to be stricken out on condition that the defendants plead to the merits within 10 days from the date of the order, which order or judgment the clerk, by inadvertence, entered on the docket. Motion to strike out judgment granted, judgment stricken out, and defendants to plead within ten days; and, the defendants having thereafter filed a plea to the jurisdiction, the plaintiff entered a motion that the said plea to the jurisdiction be not received, and that the order striking out the said judgment against the defendants should be rescinded, and the said judgment restored. It is thereupon, this 1st day of November, 1902, after argument, considered and adjudged by the court here that the docket entries 19th March, 1902, to wit, 'Motion to strike out judgment granted, judgment stricken out, and defendants to plead within ten days,' be amended so as to read, 'Motion to strike out judgment granted, judgment stricken out, and defendants to plead to the merits within ten days;' the same being the real order or judgment made by the court on the said 19th day of March, 1902, upon the said motion to strike out said judgment. And it is further considered and ordered by the court that the defendants having failed to plead to the merits within said ten days, as required by said order of 19th March, 1902, that the motion of the plaintiff that the plea to the jurisdiction filed by the defendants herein be not received, and that the order striking out the said judgment be rescinded, and the said judgment restored, be, and the same is hereby, granted, and the said judgment so stricken out be, and the same is hereby, restored."

We do not deem it necessary to discuss all of the grounds of objection urged by the appellants, on their brief and in argument, to the action of the learned judge of the city court in passing this order. It is apparent upon the face of the record not only that the judgment against the appellants never should have been entered, and was therefore properly stricken out, but also that the suit, in its present form, cannot be maintained; one of the defendants being sued in his own right, and the other as administrator. As was said by our predecessors in State, Use of Ranstead, v. Banks, 48 Md. 520: "It was error to join the surviving obligor and the executor of the deceased obligor in the same action. In such cases separate suits only can be maintained, for the reason that they are liable in different rights, and the judgments, if recovered, will not be the same; one being *de bonis propriis*, and the other *de bonis testatoris*." The doctrine there announced had already been asserted in *Blizzard, Adm'r, v. Jacobs*, 3 Gill & J. 70-73, and it is directly applicable to, and must control, the suit now under consideration. The order appealed from must therefore be reversed.

It is not apparent from the record that the plaintiff at the time of instituting his suit held any such joint written obligation of the hus-

band and wife, who were the original defendants, as is contemplated by section 2 of article 45 of the Code of Public General Laws, which furnished the only authority then existing for bringing a joint suit at law against a husband and wife; but, as he may have then held such an obligation, we will remand the case, to the end that he may be permitted, upon proper terms, to amend his suit, if he desire so to do, by discontinuing it as to Humphrey D. Wolfe, administrator. The remaining defendant should then be permitted to plead to the merits, to the end that the case may proceed in due course.

Order appealed from reversed, with costs, and case remanded for further proceedings in accordance with this opinion.

YENTSCH v. CHLORIDE OF SILVER DRY CELL BATTERY CO.

(Court of Appeals of Maryland. March 31, 1903.)

SERVANT—PERSONAL INJURIES—DIRECTION OF VERDICT.

1. In an action for injuries received by an employé while working at a sandpaper wheel, where the evidence showed that the machine was dangerous, that no warning was given the employé of the danger, and that he was inexperienced and received no instructions, it was error to take the case from the jury.

Appeal from Superior Court of Baltimore City; Danl. Giraud Wright, Judge.

Action by Charles W. R. Yentsch, an infant, by his father and next friend, Herman Yentsch, against the Chloride of Silver Dry Cell Battery Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Emil Budnitz and C. D. McFarland, for appellant. Carroll T. Bond, for appellee.

FOWLER, J. The plaintiff sues to recover damages for a serious personal injury, which he alleges was caused by defective or improperly constructed machinery used in the factory of the defendant company. At the close of the plaintiff's testimony, the judge of the superior court of Baltimore City, at the instance of the defendant, took the case from the jury. There was accordingly a verdict and judgment in favor of the defendant, and the plaintiff has appealed. It will therefore be necessary to examine the testimony as contained in the record, in order to determine, assuming it all to be true, whether there is any error in the action of the court in taking the case from the jury.

It appears from the testimony that in the room of the factory of the defendant in which the plaintiff was working there is, among other machinery and appliances, a "sandpaper wheel," used for grinding down and shaping pieces of hard, compressed paper, which are used in fitting out electrical

batteries. This machine is composed of two large, flat, iron wheels, on an axle 3 or 4 feet long, all supported about 4 feet up from the floor on two braces, constructed much like the common sawhorse. The wheels are about 36 inches in diameter. The outer flat service of each wheel is covered by a large sheet of sandpaper, held by an iron band or rim screwed on the outer edge, and which is removed to put in fresh sheets of paper from time to time. The wheels are kept revolving at the rate of from 280 to 300 revolutions per minute, or faster, by power transmitted through a belt which runs around a pulley or flat wheel on the axle, midway between the sandpaper wheels. This machinery is kept running continuously all day. The fiber to be ground or shaped is pressed up against one of these revolving sandpaper wheels until the desired amount of grinding has been accomplished. It also appears from the testimony that the space between the wheel and the table or rest which supported the fiber while it was in the hands of the plaintiff was from a quarter to three-eighths of an inch wide, and that it ought not to have been more than one-sixteenth of an inch in width; that the sandpaper on the rim of the wheel was not wide enough, and that air would get under the paper, and form lumps, which caught the fiber plate that was being ground, and forced it between the table on which it rested and the wheel; that the frame or structure on which the wheel rested was not fixed tight; and that it was without a loose pulley. The plaintiff thus describes the accident: "He was grinding fiber plates about six inches square and three-eighths of an inch thick. * * * The wheel was going around. There was a dangerous edge on the wheel, because the paper was too small, and came out of the hub on the outside that held the paper on. * * * His hand slipped against the wheel and was pulled through. He could not get it out." He called for assistance, but, because there was no loose pulley on the machine, it could not be stopped at once. The plaintiff was about 17 years old at the time of the accident. His duties were to work all around the shop, at everything. He testifies that he had been grinding fiber plates for five or six weeks for a short time each day, but that he was not experienced, and never had any instructions; that he was never told of the danger; that he did not know that lumps would form on the sandpaper around the wheel. He further testified that his injury was caused by the lump on the sandpaper striking the fiber plate, carrying it and his hand into the space between the wheel and the table. The witness Clarence W. Smith, a tinner and plumber, testified that "he had worked at this machine about four months. It was a dangerous machine. * * * The space between the wheel and the plate on which the fiber rested when being ground was about one-quarter of an inch, or three-eighths; something like

that. If the plate had been nearer to the wheel, the fiber would not have gone down, and the plaintiff's hand would not have been carried through. There would not have been space enough. But that was the way it was constructed." Another witness (Arthur Kretchmar, a machinist by trade) testified that he knew the construction of this machine of the defendant, and worked there five years. He reiterates the testimony of the other witnesses as to the space between the wheel and the table being too large for safety, and said "the fixture ought to be made so it fits tight and can't give at all. But for that, the fiber plate can't slip down. That would have made it a safe machine." "This accident," he said, "could not have happened if it had different fixtures."

In the present state of the record, it is clear that the machine by means of which the plaintiff was injured was dangerous. It was dangerous, first, because the space between the wheel and the table was too wide; second, because the sandpaper used on the wheel was too narrow; third, because it was without an appliance called a "loose pulley," used for the immediate stopping of the wheel; and, fourth, because the machine itself was not firmly fixed, or, as one of the witnesses said, "That fixture ought to be made so it fits tight, and can't give at all." It is equally clear from the testimony as it now stands (for we are bound to assume it to be true) that the plaintiff never received any warning of the danger, nor did he know there was any. He testifies that he was without experience and had never received any instructions. While it may be conceded that on the whole testimony, as now before us, the inference might be drawn that the plaintiff had sufficient experience and knowledge to make him aware of the danger, yet that was a question for the jury, and not for the court. It was conceded by counsel at the hearing that, as we said in *Levy v. Clark*, 90 Md. 147, 44 Atl. 990, the principles controlling such cases as this have been so thoroughly and definitely settled in Maryland that there ought to be no longer any necessity to discuss them. It is the duty of the employer to furnish his employé safe machinery and appliances. This duty, however, is not absolute, for, as was said in *Wood v. Helges*, 83 Md. 268, 34 Atl. 872, the obligation of the employer extends no further than to require him to use that care which ordinary prudence and the exigencies of the situation demand in providing the servant with machinery or other instrumentalities safe for use by him." And so in the same case it is stated as a well-settled rule that an employé assumes such risks incident to the discharge of his duties as are open or obvious, but where, as the plaintiff in this case swears, the dangers and risks are such as he had no reason to believe he would have to encounter, the case is entirely different. "No one," he says, "told him what the danger was."

"He never had done the work before, and was not experienced at it." "His experience was not enough to learn him of the danger to grind. Unless some one told him, he would not know of it. * * *" If the risks and dangers, therefore, are, as testified by the plaintiff, hidden, and such as he could not know unless he was informed of them, the defendant was bound to notify him, provided the defendant knew, or by the exercise of ordinary care ought to have known, of them. *Wood v. Helges*, supra; *Am. Tob. Co. v. Strickling*, 88 Md. 500, 41 Atl. 1083; *Natl. Enam. Co. v. Brady*, 93 Md. 646, 49 Atl. 845. And whether the dangers in this case were such as the defendant knew or ought to have known was a question for the jury, upon proper instructions, and not for the court.

It follows, therefore, from what we have said, that there is legally sufficient evidence that the machine was dangerous; that no warning was given the plaintiff of the danger; that the plaintiff was inexperienced and received no instructions. These facts being conceded, as they must be, as the case is now presented on a demurrer to the evidence, the defendant was guilty of negligence which directly caused the injury, and the case was improperly withdrawn from the jury.

Judgment reversed. Cause remanded for new trial.

GUY v. STATE.

(Court of Appeals of Maryland. March 31, 1903.)

JURORS — DISQUALIFICATION — LOCAL OPTION LAW — EVIDENCE — INSTRUCTIONS.

1. Declaration of Rights, art. 21, provides that in all criminal prosecutions every man is entitled to a speedy trial by an impartial jury. In a prosecution for violating Code Pub. Loc. Laws, art. 13, § 228 et seq., commonly known as the "Local Option Law," where it did not appear that the Law and Order League or Law Enforcement League of the county were in control of the prosecution, or employed counsel to participate therein, although two witnesses for the state were detectives in the regular employ of the league, and laid the information before the grand jury which led to the indictment of the traverser, the fact that two of the jurors were members of such league (one of them having paid, and the other having promised to pay, a contribution to the funds thereof) did not disqualify them as jurors in the case, as they both stated on their voir dire that, while the principal object in organizing the league was the enforcement of the local option law, they had not formed or expressed any opinion as to the guilt or innocence of the traverser, or any opinion of the local option law of the county which would prevent them from giving an impartial trial to any person charged with violating such law.

2. The fact that two of the state's witnesses were detectives in the regular employ of the Law and Order League, and laid the information before the grand jury which led to the indictment of the traverser, was a circumstance to be considered by the jury in weighing the credibility of their testimony.

3. It is within the discretion of the court in criminal trials to give instructions as to the

law, although the jury, being judges of both the law and facts, are not bound by the court's instructions, but should give them such weight as, in their judgment, is proper.

4. The fact that the traverser had a government license to sell liquors in a county was prima facie evidence that he was engaged in the business of selling liquors.

5. The fact that the traverser was engaged in the business of selling liquors was not sufficient to warrant his conviction for violating the local option law, without distinct proof that he or his agent made the particular sale charged in the indictment.

Appeal from Circuit Court, Harford County; James D. Watters, Judge.

George Guy was convicted of violating the local option law, and appeals. Affirmed.

Argued before MCSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Harry S. Carver and Walter W. Preston, for appellant. Atty. Gen. Rayner, for the State.

SCHMUCKER, J. The appellant was tried and convicted in the circuit court for Harford county for a violation of article 13, § 228 et seq., of the Code of Public Local Laws, commonly known as the "Local Option Law" of that county. Three exceptions were taken by the traverser during the trial. The first exception was to the ruling of the court to the qualification of two jurors; the second was to an oral statement of the court to the jury when they were brought into court and expressed the opinion that they would be unable to agree; and the third was the answer of the court to a written request from the jury for information on certain legal propositions.

At the trial of the case, before the jury were impaneled, they were, at the request of the traverser, sworn upon their voir dire. After having been so sworn, two of the jurors, in response to questions put by the counsel for the traverser, stated that they were members of the Law and Order League, or Law Enforcement League, of Harford county, and one of them stated that he had paid a contribution to the funds of the league, and the other stated that he had promised and expected to pay such a contribution. They both stated, in reply to further questions, that they supposed the principal object in organizing the league was the enforcement of the local option law. They both further stated that they had not formed or expressed any opinion as to the guilt or innocence of the traverser, or any opinion of the local option law of Harford county which would prevent them from giving a fair and impartial trial to any person charged with violating said law, or from rendering a verdict according to the law and evidence in such a case. Louis Wein and John Sperzel, two witnesses who testified on the part of the state, stated in their testimony that they were in the em-

† 4. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 2981, 310.

ploy of and paid by the said league as detectives, and, while so employed, procured the indictment against the traverser in this case.

The traverser objected to the names of these two jurors being put upon the list of 20 names from which to strike a jury, but the court overruled the objection, and directed their names to be put upon the list; and to this action of the court the traverser took his first exception. The contention of the appellant is that those two jurors were not, under the circumstances, impartial jurors, within the meaning of article 21 of the Declaration of Rights; that their presence upon the list left him but 18, instead of 20 names, from which to strike 4. There is no doubt that he was entitled to a list of 20 qualified jurors, from which to strike 4, so that the issue under this exception is narrowed down to the question whether the membership of the two jurors in the league, and their contributions—the one paid, and the other promised—to its funds, disqualified them from acting as jurors in this case. There was no question as to the qualification of the two jurors on any other ground. The answers which they made to the questions put to them by the court when examined on their voir dire were such as have been held by repeated decisions of this court to constitute the parties making them qualified jurors. *Gillespie v. State*, 92 Md. 171, 48 Atl. 32; *Waters v. State*, 51 Md. 430; *Zimmerman v. State*, 56 Md. 539; *Garlitz v. State*, 71 Md. 300, 18 Atl. 39, 4 L. R. A. 601. We do not think that the mere fact that they were members of the league, and had contributed or promised to contribute to its funds, disqualified them from being jurors in cases prosecuted by the state against persons charged with having violated the provisions of the local option law. The purposes of the league were identical with those which the law imposes upon every citizen in respect to the matters within the purview of that organization. As was said by the Supreme Court of Illinois in *Musick v. People*, 40 Ill. 272, all members of civilized society are, in effect, members of such leagues. The fact that these two jurors had contributed or promised to contribute to the funds of the league gave them no pecuniary interest in the result of the trial, for neither the conviction nor the acquittal of the traverser would have restored the contribution already paid, nor diminished the obligation to pay the promised one. They had no interest whatever in the conviction of the traverser, if he were not guilty of the offense with which he was charged. The conclusion to which we have come upon this question has been reached by almost all of the courts which have been called upon to consider it. *Musick v. People*, supra; *Koch v. State*, 32 Ohio St. 353; *U. S. v. Borger* (C. C.) 7 Fed. 193; *Boyle v. People*, 4 Colo. 181, 34 Am. Rep. 76; *State v. Wilson*, 8 Iowa, 407; *State*

v. Knapp, 40 Kan. 148, 19 Pac. 728. In *Commonwealth v. O'Neil*, 6 Gray, 343, it was also held that mere membership in such a league, and having contributed to its funds, did not disqualify a juror; but it was intimated that if he had promised, but not yet paid, a contribution, it might be otherwise. In the later case of *Com. v. Moore*, 143 Mass. 138, 9 N. E. 25, 58 Am. Rep. 128, it was held by the same court that members of such an association, binding themselves to contribute to it, cannot be regarded as indifferent, and ought not to be jurors in a prosecution for an unlawful sale of liquor. But in the still later case of *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884, the same court held it not to be error in the trial court to refuse to ask a juror, at the instance of the traverser, if he belonged to a law and order league, although the statute, in addition to requiring certain questions to be put to a juror, to test his qualification, provided that the party objecting to him might introduce any other competent evidence in support of the objection. The law upon the subject seems, therefore, to be not finally settled in Massachusetts.

We are, however, of the opinion that in order to furnish, for the trial of persons charged with the commission of crimes or misdemeanors, jurors free from the suspicion of bias or partiality, members of such leagues or organizations should not be permitted to serve upon the jury in those cases in which the league is in control of, or by the employment of special counsel actively participates in, the prosecution of the traverser. It appears in the present case that the witnesses Wein and Sperzel, who testified for the state, were detectives in the regular employ of the league, and that they had also laid the information before the grand jury which led to the indictment of the traverser; but we do not think that amounted to such an active participation by the league in the prosecution as to disqualify as jurors all of its members—especially not such members as could answer as the two jurors in this case did when examined upon their voir dire. The witnesses Wein and Sperzel, when called by the state, were bound to appear, and, when put upon the stand by it, were bound to answer truthfully and tell all that they knew about the alleged violation of the law by the traverser. The fact that they were employed by the league, although it was done to aid in the enforcement of the law, was a circumstance to be considered by the jury in weighing the credibility of their testimony, but it ought not to be permitted to exclude from the jury list members of the league otherwise qualified to serve as jurors. As it does not appear from the record that the league in the present case were in control of the prosecution, or employed and paid counsel to participate therein, we find no error in the action of the learned judge below in holding the two jurors to be qualified. Our view as to

the qualification of these jurors would be different if they had been members of an association, the purpose or the practical operation of which was to delay or in any manner impede or obstruct the enforcement of the law, and the state had objected to them for that reason, for the fixed policy of the state is to enforce its laws, and it is the duty of the citizen to advance, and not to impede, the execution of that policy.

We think the ruling of the learned judge below on the second and third exceptions was correct.

After the jury had been out more than 24 hours, they were brought into court, and asked by the judge whether they had reached any verdict. They replied that they had not, that they stood seven to five, and asked to be discharged. The judge, in a very temperate address, said to them that he did not care to know how they stood, but that he thought they should exhaust every reasonable effort to reach a verdict before the cost and expense of a mistrial was put upon the public. He further told them that if their difficulties were as to matters of fact, or the credibility of witnesses, he could not assist them, but if they differed upon questions of law, and would put the points upon which they differed in writing, and it was the unanimous wish of the jury to have instructions from him on those points, he was willing to give them the desired instructions; but it must be done with the distinct understanding on their part that they were not bound by his opinions, but might accept or reject them as their own reason might dictate. To this action of the court the traverser took his second exception. The jury having again retired to consider their verdict, they, while still out, addressed and sent to the court the following written request:

"Hon. James D. Watters: Will your honor inform this panel if the law is sufficient in this case to convict; George Guy, the traverser in this case, not being present at the time of the sale of said beer as testified by certain witnesses.

"Could the evidence before us of the government license taken out or supposed to be taken out for business at his house be evidence against George Guy sufficient to convict?

T. B. Grafton,

"Foreman of Jury.

"Oct. 9, 1902."

To which inquiries the court gave the following written answer:

"Gentlemen of the Jury: It gives me pleasure to comply with your request that I give you some instructions as to the law of the case which you are now trying. You have already spent a full twenty-four hours without reaching an agreement. I am sure it would be a misfortune if the days already spent on the trial of this case should be lost by a mistrial. If your difficulty is in applying the

facts as you find them to law of the case, it may very possibly help you to know my view of the law; and, since you seem to desire it, I am perfectly willing to take the responsibility as to the law, leaving to you the responsibility of applying the law to the facts. I must tell you, however, that what I may say is only for your assistance, and not to control your verdict. In other words, you are not bound to accept my view of the law.

"(1) As to your first question: If you believe from the evidence that George Guy on the 8th day of September last had a United States government license to sell spirituous or fermented liquor in Belair, then this fact (if you so find) is prima facie evidence that George Guy was at the time engaged in the business of selling spirituous liquor in Belair; and, if so engaged, he was responsible for the acts of his employes in conducting the business at his place of business. That is to say, if you find from the evidence that an employe of George Guy at his place of business in Belair sold the beer as charged in the indictment, you shall find George Guy guilty.

"(2) This is, I think, already answered, but I may say explicitly that the fact (if you so find) that George Guy had a government license does not prove or tend to prove that he or his agent made the sale charged in the indictment, and you cannot convict George Guy upon the fact (alone) that he had a place of business for the sale of spirituous or fermented liquors, without distinct proof that he or his agent made the particular sale charged in the indictment.

"The whole question before you, I imagine, resolves itself into this: Do you, or do you not, believe the two prosecuting witnesses, Louis Wein and John Sperzel, or either of them? If you believe them, or either of them, your verdict should be, 'Guilty.' If you do not believe them, or either of them, your verdict should be, 'Not guilty.'

"James D. Watters."

This court has repeatedly held that it is within the discretion of the court in criminal trials to give instructions to the jury as to the law at their request, although the jury, being judges of both the law and fact, are not bound by the court's instructions, but should give them such weight as, in their judgment, is proper. *Bloomer v. State*, 48 Md. 521; *Forwood v. State*, 49 Md. 537; *Swann v. State*, 64 Md. 425, 1 Atl. 872; *Beard v. State*, 71 Md. 280, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536. In *Swann v. State*, supra, it was held that an instruction so given, although merely advisory, may, if it be erroneous, be made the subject of an exception, and corrected on appeal. We, however, see nothing erroneous in the instructions given to the jury in the present case. The instruction as to the effect of the traverser having a government license to sell liquors in Harford county, as prima facie evidence of his being engaged in that business, is in pre-

cise accord with the rulings of this court on that subject in *Guy v. State*, 90 Md. 35, 44 Atl. 997, and the further instruction that there must also be the further distinct proof that the traverser made the particular sale charged in the indictment is clearly correct. Nor do we find anything objectionable in the remarks made by the learned judge to the jury when they reported their disagreement to him.

The judgment appealed from will be affirmed. Judgment affirmed, with costs.

SCHOENBERGER et al. v. WHITE et ux.
(Supreme Court of Errors of Connecticut.
April 30, 1903.)

ASSUMPSIT—COMMON COUNTS—BILL OF PARTICULARS—JOINT JUDGMENT—SUFFICIENCY OF PLEADINGS—WAIVER OF INVALIDITY—APPEAL—ABSENCE OF PARTY—WAIVER—REVERSAL OF JOINT JUDGMENT IN TOTO.

1. Rules of Court, p. 41, § 129, provides that, where a bill of particulars is filed after a complaint containing common counts, the counts not applicable thereto shall be stricken out by amendment. Plaintiffs filed a complaint containing common counts against husband and wife, and afterwards a bill of particulars against the husband alone. The defendants filed a joint answer, which admitted so much of the complaint and bill of particulars as alleged a certain amount due, and denied the balance, averring that they had made certain payments on account. *Held*, that the pleadings would not sustain a joint judgment, the allegation as to payments not being an admission by the wife of personal liability.

2. The invalidity of a joint judgment because the pleadings do not allege liability on the part of one defendant is not waived by the fact that such defendant at the trial merely contested the amount sought to be recovered, and assigned as a reason of appeal that the judgment against her was excessive; the burden of proof being on the plaintiffs.

3. Where, from a joint judgment in an action ex contractu, only one defendant appeals, though both joined in the notice of appeal, appellees' failure to object on the ground of one defendant's absence and their argument of the appeal on the merits is a waiver of such objection.

4. The rule that a joint judgment must be disposed of by a total affirmance or reversal is not affected by the fact that one defendant, after joining in the notice of appeal, fails to perfect his appeal; nor by the fact that, while the judgment was totally void as to the other defendant on account of the insufficiency of the pleadings, she had only attacked it in her reasons of appeal as excessive.

Appeal from City Court of New Haven; James Bishop, Judge.

Action to recover for merchandise sold by Emil Schoenberger and others against Anthony A. White and Adella J. White, his wife. From a judgment for plaintiffs, defendant Adella J. White appeals. Reversed.

George E. Hall, for appellant. Jacob P. Goodhart, and Robert C. Stoddard, for appellees.

BALDWIN, J. The plaintiffs' complaint is in the form known in the Practice Book as "the common counts." The bill of particu-

lars is against the husband alone for provisions bought by him to the amount of \$197.91. The defendants filed a joint answer. This admitted "so much of the allegations of plaintiffs' complaint and bill of particulars that allege \$84.86," and denied the rest; and then set up a tender before suit, by "the defendant," of \$84.86, and that "the defendant" has been ever willing to pay that sum, and that payments were made by "the defendants" from time to time "on account of such goods as are alleged in the bill of particulars, amounting in all to \$113.05." The plaintiffs replied, admitting the tender, and making no reference to the alleged payments on account.

These pleadings constitute no foundation for the judgment rendered. A bill of particulars filed under "the common counts" controls them. *Zacchino v. Pallotti*, 49 Conn. 36, 38. Its object is to show the real cause of action as fully as is done in an ordinary complaint, and it virtually amends the complaint by striking out all the counts not appropriately applicable to it. Rules of Court, p. 41, § 129. The bill of particulars filed by the plaintiffs therefore left nothing in the original complaint except the counts for goods bargained and sold, or sold and delivered, to the defendants; and modified these by limiting each to goods sold to one of the defendants—that is, the husband. That the wife, having been made a party to an action which had not been discontinued against her, afterwards pleaded jointly with her husband that they had made payments on account, did not admit that she owed what was thus paid. She might have contributed to discharge her husband's obligations.

The appellant has never objected to the rendition of a judgment against her. She finds fault only with the amount. She joined with her husband in stating to the trial court, as a claim of law, that "the plaintiffs could only recover judgment for \$84.86, the amount tendered," and it is one of her reasons of appeal that the court erred in rendering judgment against her for more than that sum and for costs. In view of this, were there nothing else in the case leading to a different result, she could not be heard to complain of the judgment, except so far as it exceeds the amount tendered and charges her with costs. It is not protected from her attack in these respects by the statement in the finding that at no time during the trial of the cause was any claim presented that the defendants were not jointly and severally liable for whatever was due to the plaintiffs, and that the only question submitted to the court was whether the amount due was \$84.86, or the full amount charged in the bill of particulars. Mrs. White had not the burden of proving that she was not liable to the plaintiffs' demand. It was for them to prove that she was liable. Courts are to decide causes in view not simply of the claims presented by counsel, but of the issues presented by the pleadings. The city court had before it a

process against husband and wife, but a declaration against the husband alone. Such a declaration could not support a judgment against both, except by the consent of both.

The judgment appealed from is a joint judgment against husband and wife in an action *ex contractu*. One only has appealed, but both joined in the notice of appeal. The appellees have raised no question on the ground of the husband's absence, and the appeal has been argued on its merits only. If they had any cause of exception, it must, therefore, be deemed to have been waived. *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953; *Lenow v. Lenow*, 8 Gr. 349. As such a judgment is an entirety, had all parties to it been formally brought before the court, and the reasons of appeal been such as to dispute its validity altogether, the appeal could only have been disposed of by a total affirmance or reversal. *Gaylord v. Payne*, 4 Conn. 190, 196. That the husband was not so made a party does not vary this rule. After the filing of the notice of appeal, he had the right to be heard in this court as to all the questions brought up for review. *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 431, 47 Atl. 763. As he has not exercised this right, it may be assumed that he is content with the judgment against him as it stands; but he might complain of it were we to modify it by reducing the amount which it requires his wife to pay, and thus reducing the amount of the contribution which he might be able to call upon her to make in case he paid all that it requires of him. Nor is the force of the rule escaped because the wife, in her reasons of appeal, attacked only the excess of the judgment against her above \$81.86. Her attack is successful because the entire judgment against her goes outside of the issue. This defect was one apparent on the record. She had the right to argue from it that her ground of appeal was well taken. She could not limit its effect, as respects her husband's rights, and in his absence, by disclaiming any desire to set aside the entire judgment.

There is error, and a new trial is ordered. The other judges concurred.

DOUGLASS v. CONCORD & M. R. R. et al.
(Supreme Court of New Hampshire. Hillsborough. Feb. 3, 1903.)

RAILROAD COMPANIES — MERGER — CONVERSION OF STOCKHOLDER'S SHARES — LACHES — ESTOPPEL — LIABILITY OF ASSIGNEE — NOTICE.

1. Laws 1889, p. 35, c. 5, § 1, provides that if a railroad shareholder dissents from a merger the new corporation shall apply to a Supreme Court justice for the appraisement of his stock, which shall be had after a hearing, whereupon the amount awarded shall be paid to the shareholder; or if that cannot be done, or if he refuses it, it may be deposited with the State Treasurer. A contract of merger made September 19, 1889, provided that, if any stockholder did not accept the stock of

the new company apportioned to him in exchange for his old stock, it, with any other that he might have, might be sold by the directors, and the proceeds applied to the uses of the corporation. In May, 1871, a shareholder had placed a certificate with an agent, and on May 15th it was presented to the corporation, bearing a purported assignment, and a certificate was issued to the agent. In 1873 the shareholder received this certificate, but did not examine it till 1898. The agent died in 1886. The shareholder had no actual notice or knowledge of the merger until 1898. No steps were taken by the new company under the statute. *Held*, that the shareholder's rights had not been lost by laches.

2. Under the statute, the shareholder was not bound to attend the meeting at which the merger was arranged, in order to oppose a contract illegally depriving her of the value of her stock.

3. The new company assigned its unissued stock to another corporation. *Held* that, as no one had rightfully acquired rights, or invested money, or changed position, on the strength of the stockholder's silence, she was not estopped to claim her property; the assignee corporation being put on inquiry as to its assignor's title to unissued stock.

4. Evidence, in an action by a stockholder in a merged company to compel an exchange of her old stock for stock of the new company, examined, and held to sustain a finding that she had never in fact refused to accept the latter stock.

Exceptions from Superior Court; Young, Judge.

Suit by Mary Ann Douglass against the Concord & Montreal Railroad and another. Decree for plaintiff, and defendants except. Exceptions overruled.

May 27, 1865, the plaintiff became the owner of five shares of the stock of the Boston, Concord & Montreal Railroad, and a certificate was issued to her on that date. In May, 1871, she placed the certificate and other papers in the possession of Henry Brown for safe-keeping. May 15, 1871, the certificate was presented to the corporation, bearing an indorsement which purported to transfer the shares to Brown, and a certificate was issued to him therefor. In 1873 the plaintiff received from Brown what she supposed to be the papers previously delivered to him. The stock was then of little value, and the plaintiff had never received a dividend or other return upon her shares. She did not examine the certificate until the summer of 1896, when her attention was called to it, and she then discovered that it stood in the name of Brown, and was indorsed in blank by him. Upon subsequent inquiry, the plaintiff learned that the stock had stood in the name of Brown upon the books of the corporation since May, 1871. Brown died in 1886.

In September, 1889, at meetings of the stockholders of the Concord Railroad Corporation, and of the Boston, Concord & Montreal Railroad, an agreement was made for the creation of a new corporation by the union of those companies; and on September 19, 1889, a contract was executed by the authorized agents of the corporations, this action being taken under authority of chapter 5, p. 35, Laws 1889. The contract provid-

ed that the stock of the new corporation should be of different classes, and that shareholders of the Boston, Concord & Montreal Railroad owning stock such as that held by the plaintiff should have the right to exchange their shares for an equal number of shares of a certain class in the new corporation. The agreement further provided: "The stock of the new corporation shall be full payment for the stock of the old corporation for which it is to be exchanged as aforesaid, and the latter stock shall thereupon become the property of the new corporation. If any stockholder does not accept the stock apportioned to him in exchange for his old stock as aforesaid, it, together with any other stock belonging to the corporation, may be sold by the directors as they may order, and the proceeds be applied to the uses of the corporation."

The plaintiff had no actual notice of the meetings of September, 1889, or of the contract of union, nor did she know that the meeting had been held or the contract executed until the summer of 1898, after the time when her attention was called to the facts as to the certificate. Upon discovery of the facts concerning the certificate, the plaintiff notified the Concord & Montreal Railroad—the new corporation—that she claimed to be the legal owner of the stock; and on November 21, 1899, she made demand on the corporation to issue to her five shares of stock, and tendered the certificate held by her in exchange therefor. At the date of demand there was no unissued stock of the Concord & Montreal Railroad that could be substituted for those five shares, and the corporation refused to issue to the plaintiff any stock in exchange for her certificate.

In March, 1896, the Concord & Montreal Railroad sold all its unissued stock, including the five shares corresponding to the stock standing in the name of Henry Brown, and applied the proceeds to the uses of the corporation. No stock has ever been set apart for the plaintiff or Henry Brown, and the defendants refuse to account in any manner to the plaintiff for the proceeds of the sale. June 29, 1895, the Concord & Montreal Railroad granted, demised, and leased to the Boston & Maine Railroad all its property, rights, and franchises, including its unissued stock. The lease was made according to law, and notice thereof given to stockholders of both corporations, in accordance with the by-laws of each. The sale of the unissued stock, and the application of the proceeds, were in accordance with the terms of the lease.

The defendants moved for judgment, claiming, among other things, that upon the facts the plaintiff was guilty of laches, had forfeited all right to claim an exchange of stock, and was estopped from setting up this claim, the stock having been sold, and its avails having become the property of the Boston & Maine Railroad. It was found that the plaintiff was not estopped, and was not guilty

of any laches, and the defendants excepted. The bill was dismissed as against the Boston & Maine Railroad, and the plaintiff excepted. The court ruled that the plaintiff could recover from the Concord & Montreal Railroad the value of the five shares of stock, with accrued dividends to the day the plaintiff discovered that the stock had been converted, and interest from that date, and the Concord & Montreal Railroad excepted.

Taggart, Tuttle & Burroughs, for plaintiff.
Mitchell & Foster and Streeter & Hollis, for defendants.

PARSONS, C. J. "If any stockholder in a railroad corporation of this state, which shall make a contract of lease or agree to unite with another railroad corporation pursuant to this act or any other law of this state, shall dissent from said lease or union, the corporation in which he is a stockholder in case of lease, or the united corporation in case of union, shall apply by petition to any justice of the Supreme Court in term time or vacation, * * * praying that action may be taken by the court to determine the value of the stock, interest, or property right taken of any dissenting stockholder or any stockholder who may be entitled to have the value of his stock, interest, or property right taken determined. * * * When notice has been given, * * * the justice shall proceed to hear the parties and shall determine, as soon as practicable, the value of the stock, interest, or property right taken of dissenting stockholders and all such other stockholders who have not assented to the lease or union as are entitled to have compensation for their stock, interest, or property right taken, and shall award such stockholders such compensation as they may be entitled to receive. * * * The petitioner shall forthwith pay or tender the sum so awarded to the stockholders entitled thereto, and if for any reason it is impracticable to make or tender such payment, or if such person refuses to receive the same when tendered, said justice may order and direct the petitioner to deposit the money with the State Treasurer." Laws 1889, p. 35, c. 5, § 1.

The Concord & Montreal Railroad was formed by the union of the Boston, Concord & Montreal Railroad and the Concord Railroad Corporation, under the authority of the act cited. The plaintiff owned five shares of the stock of the Boston, Concord & Montreal Railroad, and, by the terms of the agreement of union, was entitled to five shares of one of the classes of the capital stock of the new corporation. If the plaintiff dissented from, or did not assent to, the union of the two corporations, the new corporation could have had the value of the plaintiff's stock ascertained; and upon payment or tender of its value, or deposit of the same with the State Treasurer, would have become the owner of the plaintiff's stock in the Boston, Concord

& Montreal Railroad, and of her right to five shares in the new corporation. Such proceedings have not been had, and nothing has been paid or tendered the plaintiff for her stock, or deposited for her use. It is claimed that the defendants have become the owners of the plaintiff's stock, without paying anything for it, because the plaintiff did not seasonably apply for an exchange of stock. It is said the plaintiff had constructive if not actual notice of the meeting of the Boston, Concord & Montreal Railroad for the formation of the new corporation, and is bound by the action of that meeting and the contract of union there entered into. Assuming this to be so, she was not bound by any unauthorized action taken at the meeting, or by any action of the defendants not authorized by the contract to which the corporation in which she was an owner was a party. As it is the law of this state that the union of two railroad corporations cannot be effected without the payment of the value of their interests to stockholders who do not assent (*Dow v. Railroad*, 67 N. H. 1, 36 Atl. 510), and as the legislative authorization for the action proposed to be taken expressly provided for such payment as an essential to the validity of such contract, she was not legally bound to attend the meeting to oppose a contract illegally depriving her of the value of her stock. The contract provides: "If any stockholder does not accept the stock apportioned to him in exchange for his old stock as aforesaid, it, together with any other stock belonging to the corporation, may be sold by the directors as they may order, and the proceeds be applied to the uses of the corporation." This provision manifestly relates to the possible contingency that some stockholder might not assent to the union, whereby proceedings might be necessary under the law for the ascertainment of the value of such stock, and one of the uses of the new corporation for which the proceeds of refused stock would be applicable would be payment of the sums awarded such stockholders. No stock was ever set apart for the plaintiff or Henry Brown, in whose name the plaintiff's stock stood on the books of the Boston, Concord & Montreal Railroad. It is understood from the findings that no certificate for the same was in fact ever offered to or refused by either of them.

The plaintiff's delay in presenting her stock for exchange must have been understood by the defendants either as an assent to the agreement of union or as a dissent therefrom. If they understood she assented to the contract, they understood she did not refuse to accept the stock, and that they had no right to sell it. If they understood she dissented, under the law they had no title to her corporate interest without paying its value, to be ascertained in proceedings the burden of commencing which rested with them, and not with her. There is no suggestion of any method, either in the statute

or the contract of union, if either could be upheld, by which any stockholder could be or was to be deprived of his corporate interest without payment in stock or money. If a provision, in the contract of union, that all stockholders who did not present their stock for exchange within a time named, or a time denominated reasonable, should forfeit their right to stock in the new corporation and to compensation for its value, would have been valid and binding upon the plaintiff, in actual ignorance of the provision, no such provision was attempted to be inserted. The defendants, justifying their sale of the stock upon the ground that the plaintiff did not accept the stock—the sole provision of the contract upon which reliance is placed—cannot maintain that position in fact, if sufficient in law, without establishing that the owner of the old stock did not accept the new stock. Nonpresentation for exchange, if evidence of refusal, is not conclusive. Upon the facts stated, it cannot be held, as matter of law, that the force of the delay as evidence is not answered by the other evidence in the case, or that the finding that the plaintiff did not in fact refuse to accept the stock, included in the general finding for her, was unwarranted.

The Concord & Montreal Railroad could convey to the Boston & Maine Railroad no better title to its unissued stock than it possessed. What the transaction as to the sale of the stock under the lease was, does not appear with clearness. If the stock was leased and sold by the lessor subsequently, as the agent of the lessee, the latter receiving the proceeds, there would seem to be no reason why the principal should not account as well as the agent. If the sale was made by the Concord & Montreal, and the proceeds applied to the uses of the corporation generally, it may be doubtful whether the proceeds could be followed into the hands of the lessee, if received in the mass of the corporate property leased.

The plaintiff has filed no brief, and it is probably of no practical importance whether the decree runs against both defendants or one only. In the absence of request for the consideration of the plaintiff's exception, and in view of the uncertainty of the ground upon which the order was made, this order is not disturbed. If the plaintiff had not become a stockholder of the Concord & Montreal Railroad by acceptance, the notice of the meeting to lease the road to the Boston & Maine was not constructive notice to her. If she had accepted the stock, and so become a member, a vote by the corporation to sell or lease her stock, without her consent, was unauthorized and void.

The authorities cited by the defendants upon the question of laches and estoppel have no application. The plaintiff did not lie by with knowledge of her rights, and no one has rightfully acquired rights, or invested money, or changed his position, upon the

strength of her silence. If in good faith the Concord & Montreal Railroad sold the stock, understanding, because of want of application, the owner refused to accept, they are not harmed by the order requiring them to account for the proceeds. If the unissued stock was an inducement to the Boston & Maine Railroad to make the lease, they were put upon inquiry as to the title of the Concord & Montreal Railroad thereto, and bound to inquire whether the owners had in fact refused to accept it.

The defendant the Concord & Montreal Railroad wrongfully converted the plaintiff's stock, either at the date of the lease to the Boston & Maine (June, 1895) or the date of the sale (March, 1896), and the plaintiff is entitled to recover the value in an appropriate action. No objection is made to the form of the proceedings or to the damages assessed.

Exceptions overruled.

CHASE and BINGHAM, JJ., did not sit. The others concurred.

GUILLOU v. REDFIELD.

(Supreme Court of Pennsylvania. April 20, 1903.)

BOND—PRESUMPTION OF PAYMENT—REBUT-TAL—EXCEPTIONS.

1. A presumption of payment of a bond after 20 years is not rebutted by evidence of the insolvency of the obligor, without proof of continual inability during the entire term.

2. A presumption that a bond has been paid after 20 years is not rebutted by evidence of payments during that time by the obligor, where they were shown to have been on other accounts, and of the insolvency of the obligor, when it was not shown to have been continued.

3. Where the testimony of a witness has been stricken out, and no objection taken, after a nonsuit has been entered, the court cannot note an exception to the striking out of the testimony.

Appeal from Court of Common Pleas, Philadelphia County; Bregy, Judge.

Action by Victor Guilloû, executor of Floren-cio J. Verrier, against Robert J. Redfield, administrator. From an order refusing to strike off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. Percy Keating, B. Gordon Bromley, and John Samuel, for appellant. Richard C. Dale and Robert D. Maxwell, for appellee.

FELL, J. Suit was brought on a bond more than 20 years after its maturity, and the question at the trial was whether the presumption of payment arising from the lapse of time had been rebutted by proof of payments on account of the bond, or by proof of the continued insolvency of the obligor and his inability to pay. The bond was for \$47,800,

due one year from its date, and was given August 26, 1879, by René Guilloû to the executor of the will of F. G. Verrier. From an agreement made in 1881 between the obligor and the obligee and creditors of the estate, it appeared that the bond was a collateral obligation given to secure an accounting by Mr. Guilloû to the executor for assets of the estate of Verrier which were in his possession. Five payments were made to creditors under the agreement on account of Mr. Guilloû's indebtedness to the estate before 1890. He died in 1893. Some of these payments were made by Mr. Guilloû, and some by Mr. Verrier's executor. The first was made when the agreement was executed, in order to reduce the amount due to two creditors to an even sum. The other payments were made from rents collected by the executor, to whom Mr. Guilloû had assigned the leases of a number of properties, and from moneys realized by the conversion of collaterals pledged by Mr. Guilloû. The testimony, in our judgment, not only failed to show that any of the payments were on account of the bond in suit, but it affirmatively showed that all of them were on other accounts.

The evidence in support of the contention that Mr. Guilloû was unable to pay is contained in letters written by him between 1883 and 1886—the last being seven years before his death—to the attorney of the creditors of the estate. From these letters it appears that Mr. Guilloû, because of the loss of rents, was pressed for funds, and was obliged to use his income to prevent the foreclosure of mortgages on his real estate. They show financial embarrassment and inability promptly to meet his obligations, but they also show that he possessed assets of considerable value, which he confidently expected would enable him to pay in full. They were not written to the obligee in this bond, nor in answer to a demand for its payment, but to the representative of creditors who were pressing for the payment of other obligations held as collaterals under the agreement mentioned. They fail to show a continued and absolute inability to pay, from which nonpayment might be inferred. Mere poverty or insolvency of a debtor is not sufficient to rebut a presumption of payment after 20 years, unless it is such as to have created a continued inability to pay during the whole of that time. Proof of the insolvency of the debtor alone will not rebut the presumption of payment. Much less will proof that during only a part of the time he was unable to meet other obligations be effective. *Taylor v. Megargee*, 2 Pa. 225; *Dev-eureux's Estate*, 184 Pa. 429, 39 Atl. 225.

During the trial a witness was asked, "Look at that agreement, and say how the agreement was made, what led up to it, and afterwards what was done under it?" An objection to so much of the question as asked the witness how the agreement was made was sustained. It is not clear what was meant by the first part of the question, and its tendency was to elicit

¶ 1. See Bonds, vol. 8, Cent. Dig. § 226; Payment, vol. 39, Cent. Dig. § 183.

statements that would not be competent evidence. The part of the question not objected to left it open to the plaintiff to show what led to the making of the agreement, and what was done under it. This was all that he was entitled to show. No exception was taken to the action of the court in striking out a part of the answer of a witness on motion of defendant's counsel until after the nonsuit had been entered. The court was right in then declining to note an exception. The case was ended, and the court could not properly put upon the record something that did not occur at the trial.

The judgment is affirmed.

KESSLER et al. v. BERGER.

(Supreme Court of Pennsylvania. April 20, 1903.)

NEGLIGENCE—DANGEROUS PREMISES—OBSTRUCTING STREET—INJURY TO PEDESTRIAN.

1. A pedestrian has a right to stop on a street for a reasonable time, when required by illness or fatigue, where such act does not inconvenience other persons in the use of the street.

2. Where a boy, on his way home from a game of ball, sits down near lumber piled in the street without authority, and, without fault on the part of the boy, the lumber falls on him, the person piling the lumber is liable for injuries.

Appeal from Court of Common Pleas, Philadelphia County; Audenried, Judge.

Action by Howard Kessler, by his next friend, William J. Kessler, and William J. Kessler in his own right, against Gustav Berger. Judgment for defendant, and plaintiff's appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

D. Webster Dougherty and Charles E. Mees, for appellants. Thomas R. Elcock and Charles Knittel, for appellee.

MESTREZAT, J. This action was tried before Judge Audenried and a jury in the common pleas No. 4 of Philadelphia county, and at the conclusion of plaintiff's testimony the defendant's counsel moved the court for a nonsuit. This motion was denied. The defendant declined to offer any evidence, and presented a point to the court that "under all the evidence the verdict should be for the defendant." The record discloses no ruling on the point, but the court charged the jury as follows: "This case is withdrawn from your consideration, and upon the law I direct you to find a verdict for the defendant." What legal principles applicable to the facts of the case controlled the learned judge in his summary disposition of the cause do not appear in the record brought to this court. His refusal to grant a nonsuit, and his action in directing a verdict for the defendant on

the same evidence shortly thereafter, are in consistent positions. The defeated party has taken this appeal.

The appellee is not in a position to raise the question here as to whether or not Bodine is a city street, if we correctly understand the colloquy which took place between the court and counsel during the trial. The record shows, as we interpret it, that Bodine was conceded to be a street by the court as well as by appellee's counsel, and for the purpose of this appeal we must, therefore, assume it to be a fact. If it was an open question in the court below, it should have gone to the jury.

The case as thus presented is one in which, if the testimony is taken as verity the jury would have been justified in finding that a child in the lawful use of a public street had been injured by an unreasonable and a dangerous obstruction placed on the street by the defendant. In *Commonwealth v. McNaugher*, 131 Pa. 55, 18 Atl. 934, it is said, quoting from *Wood on Nuisances*: "Every actual encroachment upon a highway by the erection of a fence or building thereon, or any other permanent or habitual obstruction thereof, may fairly be said to be a nuisance, even though it does not operate as an actual obstruction of public travel. It is an encroachment upon a public right, and as such is clearly a purpresture and a nuisance." The evidence tended to show that the pile of lumber was of sufficient size and so carelessly and irregularly placed as to make it dangerous. It does not appear to have been placed on the street temporarily for any purpose authorized by law. Nor was there any denial that the defendant placed the obstruction on the street, nor that it had been there for at least a month prior to the time it fell on the boy. Pertinent to the facts of this case is the observation of Mr. Justice Clark in *North Mannheim Township v. Arnold*, 119 Pa. 380, 13 Atl. 444, 4 Am. St. Rep. 650, that: "The owners of this lumber might, perhaps, have been privileged to use the street for the temporary purpose of loading or unloading their lumber. This would, perhaps, depend upon circumstances, but it is plain that they had no right to use the highway for the purpose of a board yard."

It was for the jury, under the evidence and instructions of the court, to determine whether the plaintiff was using the street for a lawful purpose at the time he was injured. He and several other boys had been playing ball in a vacant lot near the place of the accident. After they had finished their game, and had left the lot for home, the boys seated themselves on some boards in the street about one foot distant from the lumber pile, "to get cooled off." Shortly thereafter the board pile fell, and quite seriously injured the plaintiff. The contention of the appellee is that the boy was a lounge, and was, therefore, not making a legitimate use of the street at the time he was injured. The boys

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1672.

who were called as witnesses testified that they had finished the game of ball before they took their seats near the board pile to "cool off." They evidently had then left the lot, and the inference may well be drawn that at the time of the accident they were en route home, and had made a brief stop to rest from the fatigue incident to the game in which they had just been engaged. If such were the fact, it would, indeed, be a very harsh and rigid rule of law that would declare that the boy was not, under the circumstances, entitled to the rights and protection accorded a traveler on the streets. But such a rule is not supported by reason, and therefore should not exist. The use of a highway, it is true, is for passage, but that does not prevent the pedestrian from making such stops thereon "as business, necessity, accident, or the ordinary exigencies of travel may require." He may not use it as a playground, or for any similar purpose, to the extent that it would deny the public the right of transit over it; but that does not deprive him of the right to stop on the street for a reasonable time when illness or fatigue requires it, and his stopping does not interfere with or inconvenience other persons in the use of the street. The plaintiff was not injured by another person or a vehicle using the highway. His act in stopping for a few minutes to rest in the shadow of the board pile did not inconvenience any other person in the use of the street. He was injured while lawfully using the street by an illegal obstruction placed there by the defendant. So far as the testimony discloses, he did not cause the board pile to fall, nor did he in any way contribute to the accident. In such a case, where the facts are disputed, it is for the jury, under proper instructions, to determine whether the traveler is making a lawful use of the highway at the time he is injured.

It follows that the learned trial judge should have submitted the case to the jury with instructions as to the rights and duties of each of the parties on Bodine street at the time the plaintiff received his injuries.

The judgment is reversed, and a venire facias de novo is awarded.

SHARP v. WIGHTMAN.

(Supreme Court of Pennsylvania. April 20, 1903.)

WILLS—LEGACY TO DEBTOR—PAYMENT OF DEBT—EVIDENCE.

1. A legacy by a testator is not an extinguishment of the debt, unless such was clearly the intent of the testator.

2. Extrinsic evidence is admissible to ascertain the intent of testator, when doubtful.

3. A testatrix left the residue of her estate in trust; the income to be paid to her son, free from his present or future debts or contracts. At her death she held notes of the son. *Held*, that extrinsic evidence that it was the intent of testatrix that, if the son survived her, the notes should not be paid, was admissible.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Isaac S. Sharp, executor of Jane A. Wightman, against John E. Wightman. From an order making rule of judgment for want of sufficient affidavit of defense absolute, defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

E. Hunn Hanson and John W. Patton, for appellant. Albert L. Moise, for appellee.

DEAN, J. John G. Wightman, the defendant, is the son of Jane A. Wightman, for whom the plaintiff is executor. The mother died on August 24, 1901, possessed of considerable estate. In her lifetime she had frequently given to her son money in amounts of \$200 and \$300, for which she took his promissory notes, which were in her possession, uncanceled, at her death. On these notes, amounting, with interest, to over \$3,000, the executor brought suit against the son. The son made affidavit of defense, averring: (1) That one note, of over \$1,500, was made up of several of the smaller notes, which he had neglected to take up when the larger note was given. (2) That there was between him and his mother, at the time the notes were given, a parol agreement that, in case the son survived her, they were to be treated as part of his estate and canceled, but, in case she survived, were to be collected. (3) That a reasonable interpretation of his mother's will, which he makes part of his affidavit, shows such to have been her intent. (4) He further avers an ability to prove the parol agreement by a disinterested witness. On a rule for judgment for want of a sufficient affidavit of defense, the court below made the rule absolute, and defendant appeals.

The learned judge before whom the rule was argued filed no opinion. To say nothing of the aid which an appellate court has the right to expect from a lower court in reviewing its judgment, surely the parties to this issue, involving to them more than \$3,000, might reasonably hope to have upon the record some reason for the judgment, but they have here only the announcement of the clerk that a judgment has been entered. The consequence of such an unsatisfactory record might well have been anticipated—an appeal to this court, with all the delay and expense incident thereto.

The question is whether the affidavit averred sufficient to prevent judgment. That brings us to an interpretation of the will. After making certain bequests of household goods and personal jewelry, as to the residue of her estate she directs as follows:

"Fourth. The rest, residue, and remainder of my estate, real, personal and mixed, I give, devise and bequeath to my trustees herein-after named, their successor or successors, in trust, nevertheless, for the following purposes, to wit:

"To invest and keep the same invested in such manner as they shall deem best, and to pay the net interest, income and profits thereof into the hands of my said son John Gerry Wightman, M. D., from time to time so long as he shall live free from his present or future debts, contracts and engagements. If he should die leaving issue at his death, I direct that my said trustee or trustees, their successor or successors, shall assign, transfer and convey said trust estate to said issue as if my said son had survived his wife and died possessed thereof intestate and a citizen of Pennsylvania."

If we give this language a technical construction to accord with the strict import of the words, it would, in effect, constitute a gift to her son of the amounts represented by the notes, for the income is to be free from his present debts. The notes evidence a present indebtedness of the son to the mother. But a general and well-settled rule here comes in, which avoids the technical construction. That rule is this: "A legacy by a testator to his debtor does not operate as a release or extinguishment of his debt, unless it clearly appears that it was the intention of testator that it should so operate." This rule is recognized by the text-writers and by our own cases: 2 Story's Equity Jurisprudence, § 1123; Matlack's Appeal, 153 Pa. 402, 28 Atl. 23. It will be noticed, however, that it does not exactly meet the words of this bequest. The gift is not only of the net income, which of itself would not warrant an inference that the debt was to be canceled, but is at once followed by the words "free from his present or future debts." It would not be free from his present debts if the one he owed the testatrix was to be paid. We may say, then, that, taking the view most favorable to the appellee, the intention of the testatrix was doubtful. All the authorities agree that, if the intention be doubtful, we can have resort to evidence, as Judge Story says, *alunde*, or, as Chief Justice Sterrett says in *Matlack's Appeal*, *supra*, evidence dehors the instrument, or more elaborately by Gibson, C. J., in *Zeigler v. Eckert*, 6 Pa. 13, 47 Am. Dec. 428; "It [the evidence] is not adduced to control the will, but to rebut a presumption from matter extrinsic to it." He then cites from Lord Loughborough's opinion in *Aston v. Pye*, 5 Ves. 350, note: "A father, who had taken two bonds from his daughter's husband for money lent, said in a letter to the husband's mother that the debt was forgiven, and expressed the same thing to others, whose testimony was corroborated by cash accounts in testator's handwriting. The chancellor decreed not only payment of the legacy, but that the other bond should not be demanded."

We assume, then, that the intention of testatrix by the will is at least doubtful. What, then, is the evidence dehors the will averred in the affidavit? He avers (quoting from the affidavit): "Upon several occasions when her

property [the mother's] became the subject of my mother's talk with her confidential friend, Catherine Bard, who for more than ten years prior to my mother's death lived with her as a companion, my mother said she had taken the notes which I had given her so that the money would be repaid if I died first; otherwise she did not wish me to repay them, and in that way benefit her nephews and nieces." Taking into consideration the doubtfulness of the intention as expressed in the will, the facts that the son was her only child and the sole legatee of the income of her residuary estate, and that the evidence of Catherine Bard, if believed by the jury, would make clear an intention not to have the notes collected if he survived her, we think the evidence dehors the will should have been submitted to them.

The judgment of the court below is reversed, and it is directed that the trial be proceeded with according to law.

LENGERT v. CHANINEL et al.

(Supreme Court of Pennsylvania. March 30, 1903.)

PLEADING—AFFIDAVIT OF DEFENSE.

1. An order making absolute a rule for judgment for want of a sufficient affidavit of defense will be reversed where defendant sets up fraud and failure of consideration, and denies the right of plaintiff to recover any sum whatever, though the affidavit may be wanting in definiteness.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Michael A. Lengert against William J. Chaninel and Edward D. Chaninel. Rule for judgment for want of a sufficient affidavit of defense. Appeal by defendants. Reversed.

The defendants filed affidavits of defense, in which they averred failure of consideration for which the mortgage was given; alleging that the consideration for which the mortgage had been given was to secure the payment to the mortgagee for 166 shares of the capital stock of the Lengert Company, under an original tripartite agreement, dated December 18, 1899, and a supplementary agreement between the same parties dated June 5, 1901; that the consideration therefor failed by reason of the fact that Lengert, who was the owner of said stock, had not paid the 10 per cent. in cash upon his original subscription, as required by law, but had resorted to an artifice to withdraw \$10,000, the amount of this subscription, in cash, and subsequently withdrew the balance of his said stock (some 600 shares, of the value of \$60,000), in real estate, from the company, whereby the said 166 shares sold to the defendant became valueless.

William J. Chaninel filed a supplementary affidavit of defense, which was as follows:

"(1) That at the time of the organization of

the company, to wit, on or about April 18, 1891, the plaintiff contributed to the real estate, machinery, stock, book accounts, and plant for the organization of the company the property then belonging to the said Lengert, and also agreed to pay in the ten per cent. in cash necessary for the organization of the company. The arrangements for obtaining the said money in cash were made by the plaintiff and his counsel, but the details of the negotiation with Meyers or with the bank were unknown to your deponent at the time. Your deponent was subsequently informed that the plaintiff had raised the \$10,000 by a bond and mortgage for that amount secured upon the real estate in question, and that the money had been deposited in the name of the treasurer of the company. When, at the recorder's office, at the time the certificate was signed, deponent called the attention of the plaintiff and his counsel, who was also counsel for the company, that the incumbrances against the real estate were not mentioned in the certificate, your deponent was then advised by counsel for the company and the plaintiff that it was not necessary or proper to do so, that only the equity in the property was contributed and that it was entirely proper to omit them; and your deponent, relying upon and acting under the advice of counsel for the company, signed the certificate of incorporation, believing the same to be entirely regular and in accordance with the law. That subsequently your deponent was elected secretary, and, at a meeting of the company held some thirty days thereafter, the stockholders passed a resolution authorizing the payment of the \$10,000 mortgage. All of which was done, as far as your deponent is concerned, under the advice of the counsel for the company, in whom your deponent placed implicit confidence, and upon whose advice your deponent is advised he had the right to rely, without the slightest doubt at the time as to the entire regularity and integrity of the transaction; and your deponent received no portion whatever of the said \$10,000, the entire amount having been paid over to the plaintiff. Nor did your deponent know of or have reason to doubt the validity of the said transaction until after the sale to him of the said stock, ten years after the subscription, when your deponent then learned for the first time of the invalidity of the transaction, under the following circumstances: Some time after the sale of the said stock, and execution of the agreement therefor, your deponent turned the papers over to his counsel, along with other papers of the company coming into his hands and turned over to him after the retirement of the plaintiff from the company. Your deponent's counsel, after examination of the papers, designated the whole scheme, as far as the payment of the money was concerned, as a fraud, and advised that the plaintiff was individually liable to the company for the amount; and your deponent then learned for the first time of the unlawfulness of the transaction, but did not learn until

July 15, 1901, after the execution of both agreements, that these, the particular shares (viz., the 166 in question), were liable for such unpaid subscription.

"(2) That the said plaintiff, upon his retirement from the company, insisted upon withdrawing all of his capital in the company, \$76,000, and, in the settlement and all of the said stock held by him, it was considered, understood, and agreed, and withdrawn as full-paid stock, and your deponent had no knowledge at the time of the sale of the said stock to him that the effect of Lengert's withdrawal of the said 600 shares, of the full par value, was, in effect, to leave the said 166 shares unpaid, and liable to forfeiture, and valueless, by reason of the said unpaid subscription, but the same was bought and sold expressly upon the understanding that the same was full paid and not subject to any lien; nor did your deponent, by any agreement, express or implied, agree to pay the said \$10,000, but purchased and the stock was sold as full paid.

"(3) That the plaintiff refused to perform his covenants and agreements under article seventh of agreement of June 5, 1901 (Exhibit B), and although deponent vacated the premises, paid the rent, and generally performed all of the covenants therein, and then demanded the return of his securities and a release, plaintiff declined and refused to deliver his said three collateral notes for \$6,000, the stock, the aforementioned 166 shares, until a long time thereafter, to wit, two months, and refused to release deponent from his said contract of December 18, 1899, and still holds, in addition to the \$5,000 bond accompanying the mortgage sued on, the said original bond for \$5,000, the said three notes of \$6,000, and ninety-nine shares of the stock, although the said agreement provided, under article eighth, that time should be of the essence of the agreement, and refused to deliver the said securities, or any of them, except sixty-seven shares; and by such refusal and delay your deponent has suffered damage and loss, by reason of being unable to raise money personally or upon his other stock in the said company, by reason of the fact that no one would either invest money in the company, or loan money to your deponent upon his other stock or interest in the company, by reason of the said two contracts outstanding, to the damage of your deponent in an amount more than the amount of this claim, by depriving him of the use of his said property, and impairing his credit by the dual obligations, with their various collaterals, both of which contracts had been fully discharged.

"(4) That on or about July 20th your deponent demanded the return of the said ninety-nine shares, having performed all of the covenants and agreements, and was thereto entitled and had an offer of sale for the same of \$60.66% per share by a trust company (in all, \$6,666), whereby your deponent lost the said sale, your deponent not knowing, however, at the time, of the fact that this particular 166

shares was subject to the unpaid subscription money, and which sale, if this court is of the opinion that this particular stock is not subject to the lien of the said \$10,000 subscription, was entirely lost to your deponent, and whereby he had lost the amount thereof, and has the right to refuse to accept the said stock, and did refuse to accept the same after plaintiff had refused to deliver as aforesaid and charge the plaintiff with the said price thereof.

"(5) That the plaintiff has not made nor can make proper transfer of the said 166 shares to your deponent, either by the attempted transfer to your deponent already made, or the transfer back to him as owner, the title to the stock then and now being in the said Lengert, subject to the lien of his debt for subscription, \$10,000, or at least \$7,900, and no valid transfer can be made of the said stock; such transfer being subject to the provisions of the act of April 29, 1874, § 7 (P. L. 78), which directs that no certificate of stock 'shall be transferred so long as the holder thereof is indebted to the said company, unless the board of directors shall consent thereto,' and the said board of directors neither can nor will assent to such transfer. The said debt, being for the statutory subscription required by law, cannot be released by them; and your deponent never having assumed the payment of the same, but having purchased the said stock as full paid, no valid transfer can be made to him without the payment of the said debt of Lengert to the company.

"Lastly, your deponent is advised by counsel that, having bought the said stock as full paid, and having given this mortgage as a purchase-money mortgage therefor, he is entitled to set off the amount of the unpaid subscription therefor, which is a lien against the said stock, and that, in any event, that, being the only remaining consideration for the mortgage, is an illegal and void consideration, and as such there can be no recovery under the mortgage."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William S. Divine, for appellants. Francis E. Bucher and W. H. G. Gould, for appellee.

MESTREZAT, J. This action is a *scire facias* on a mortgage, in which the mortgagor and his vendee are the defendants. The court below made absolute a rule for judgment for want of a sufficient affidavit of defense, and entered judgment for the full amount of the plaintiff's claim. The defendants have appealed.

The affidavit of defense and supplemental affidavit of defense denied the right of the plaintiff to recover any sum whatever, and set up, as a defense, fraud, failure of consideration, and set-off. While the affidavits are open to some of the many criticisms—notably, a lack of clearness and conciseness—suggested in the argument of the learned counsel of the plaintiff, yet we think their averments are

sufficient to send the case to the jury. We are satisfied from the allegations in the affidavits that a correct decision of the questions arising in the case requires a consideration of all the facts, and they can only be developed and disclosed on a trial before a jury. As said by the late Chief Justice Green, in reversing the trial court for entering judgment for want of a sufficient affidavit of defense, in *Comegys v. Davidson*, 154 Pa. 534, 26 Atl. 618: "We will not discuss or presume to decide the merits of the present case. That can only be determined when all the facts are known. But we are of opinion that the affidavits of defense disclose facts enough to carry the case to the jury. * * * We reverse the judgment of the court below to enable the defendant to lay his facts before a jury, and have a judgment of the law upon them when they are all known."

The assignment of error is sustained, the judgment is reversed, and a *procedendo* awarded.

BRENNAN et al. v. MERCHANT & CO.
(Supreme Court of Pennsylvania. March 30, 1903.)

TORTS OF SERVANT—LIABILITY OF MASTER—SCOPE OF EMPLOYMENT.

1. Where a wrongful act was committed by a servant outside of his employment, and not in the execution of his master's business, but to gratify his own malice, the master is not liable, though the servant was at the time in his employment.

2. In an action for injuries received by the tort of a servant, the question whether the act done was within the scope of the servant's employment is a question of fact for the jury.

3. A boy eight years old climbed on a moving truck, and held onto the standard. The driver, without warning, struck the boy with his whip on the hand which grasped the standard, and the boy fell and was injured. *Held*, that it was for the jury to say whether the act of the driver was within the line of his duty and the scope of his employment.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas Brennan and others against Merchant & Co., incorporated. From an order refusing to take off a non-suit, plaintiffs appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph P. McCullen, for appellants. John G. Johnson, for appellee.

MESTREZAT, J. Tommy Brennan, eight years of age, lived with his parents at 816 South Nineteenth street, in the city of Philadelphia, near the place where he was injured. While he and Peter Gormley, another boy of the same age, were playing on Laferty's steps, on Christian street, below Twentieth street, Nicholas Larkins, an employé of the defendant company, drove its wagon down Christian street, in the front of the Laferty

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 1230.

residence. This was a four-wheeled truck wagon, with uprights or standards along the sides, connected by a chain passing between them. It was loaded with flat boxes, and the driver sat on a high seat in front. As the wagon passed the place where the boys were playing, they went into the street and got onto it—Gormley on the rear end, and Brennan on the right or south side, between the front and rear wheels. Brennan stood on the side of the wagon, and sustained himself by holding to a standard located between him and the driver. After the boys had mounted the wagon, and it had gone a short distance, the driver turned toward Brennan, and, without saying anything to him or giving him any warning, struck him with his whip on the hand with which the boy grasped the standard. He was knocked off the wagon, or through fright relaxed his grip of the standard, and fell off, and under the wheels. His leg was crushed to a jelly below the knee, requiring it to be amputated at the middle of the thigh. At the time the boy was struck and fell from the wagon, Larkins was driving at a medium trot. This action was brought to recover damages for the injuries sustained by the boy. The evidence would have warranted the jury in finding the facts as we have stated them. The learned trial judge granted a compulsory nonsuit, "first, because the act of violence by which the injury is said to have been occasioned was not done by the driver in the execution of the authority given him, but was beyond it, and must be regarded as the unauthorized act of a servant, for which the defendant is not answerable; and, second, because there has been no negligence shown on the part of the defendant." The court in banc subsequently refused to take off the nonsuit, and the plaintiffs have appealed.

A master is liable for the tortious acts of his servant done in the course of his employment, and within the general scope of his authority. His presence or absence when the act is performed, and whether it is done with or without his direct authority, do not affect the question of the master's liability to the party injured. If, however, the wrongful act resulting in the injury was done by the servant outside of his employment, and not in the execution of his master's business, but to gratify the servant's personal ill will or malice, the master is not liable, although the servant was at the time in his employment. In *Rounds v. Delaware, etc.*, R. Co., 64 N. Y. 129, 21 Am. Rep. 597, Mr. Justice Andrews, delivering the opinion of the court, states the rule as to the liability of a master for the torts of his servant as follows: "It is, in general, sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in

that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, and commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." Whether the negligent act was within the scope of the servant's employment is a question of fact for the jury. *Guinney v. Hand*, 153 Pa. 404, 28 Atl. 20. Of course, if the facts and the inferences to be drawn from them are not in dispute, the court may determine the question as a matter of law.

Applying these principles to the case in hand, it is apparent that the learned trial judge committed error in granting the nonsuit. It was for the jury to determine, under proper instructions, whether the act of the driver in causing the boy to fall from the wagon was negligent, and whether it was in the line of his duty and within the scope of his employment, so as to render his employer responsible for the act. At the time of the accident, Larkins had the custody and management of the wagon, and was driving it for the owner, the defendant company. The driver's control of the wagon carried with it the employer's authority to protect it and to prevent persons from getting on it, as well as to remove persons from it. It was not only the right of the driver to remove trespassers from the wagon, but also his duty to his employer to do so. He therefore was authorized to eject the boy from the wagon, and could use the necessary force for that purpose. If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer, for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him, to gratify the ill will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employé in the execution of his employer's business, although it was performed while he was in the service of the employer. It would be an act of the employé directed against the boy independently of the driver's contract of service, and in no way connected with or necessary for the accomplishment of the purpose for which the driver was employed. The negligent performance of the act, therefore, would impose no liability on the employer.

In exercising the right and in performing

the duty to remove the boy from the wagon, the driver was required to use the care that a reasonably prudent man would exercise under the circumstances. His failure to observe such precaution in removing the child from the wagon would convict him of negligence for which his employer would be liable. The tender years of the child relieve him from any charge of negligence in entering upon the wagon. If it was the intention of the driver to remove or drive the boy from the wagon by striking him on the hand with his whip, and thereby causing him to fall or jump from the wagon, it was a grossly negligent act. As said by the counsel of the appellee in his printed brief: "If he [the driver] had requested appellant to get off, even though he had not stopped, there can be no doubt that the latter, who had succeeded in climbing up, could equally well have gotten down. Under the evidence, however, he hit appellant in such a way over the hand as caused his hold of the standard to relax, and his fall between the wheels." Larkins' act endangered not only the safety, but the life, of the boy, and was wholly inexcusable. "Extra precautions," says Mr. Justice Gordon in *Biddle v. Hestonville, etc., Passenger Railway Co.*, 112 Pa. 551, 4 Atl. 485, "are not required in anticipation of the intrusions of trespassers, even though they be children; but when they do so intrude, and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. Any other doctrine would so illy accord with Christian civilization as to render its maintenance impossible." If the jury should find that Larkins intended by his act to remove the boy from the wagon, the case would be within the rule announced in *Enright v. Pittsburg Junction R. Co.*, 198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 795; *Northwestern R. Co. v. Hack*, 68 Ill. 238; *Kline v. Central Pacific R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Hoffman v. New York Central, etc., R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337; and that line of cases where the employer was held liable for the negligent acts of his employé done in the line of his duty, and within the scope of his employment. In the *Hack Case* the employé kicked a boy's hand, thus loosening his hold, and he fell under the cars and was killed. In the *Kline Case* the conductor pushed the boy off a moving car, or he jumped off in obedience to a sharp command of the conductor, and was injured. In the *Hoffman Case* a boy had jumped upon the steps of a car in a passenger train, and the conductor or brakeman kicked him off while the train was in motion, and he was injured. In the case at bar, as in those cited, the servant had the right to remove the boy, but in doing so he was compelled to observe the necessary precaution, so as not to endanger the life or limbs of the child. This duty was incumbent upon the employé, and a failure to perform it

would be negligence for which the defendant company would be liable.

The learned counsel for the appellee cites and relies upon *Guille v. Campbell*, 200 Pa. 119, 49 Atl. 938, 55 L. R. A. 111, 86 Am. St. Rep. 705, to sustain the court below in entering the judgment of nonsuit against the appellant. The facts of that case clearly distinguish it from the case under consideration here. There the servant was employed to drag bales of cotton from the sidewalk into a wareroom, and was furnished with an iron hook with which to perform the service. Some boys were playing on and around the bales, and thus interfering with his work. He attempted to frighten them away by making a motion as if to throw the hook at them. The hook slipped from his hand, and struck and injured a boy not on or about the bales, but standing at another place, on the sidewalk, where he did not interfere with the servant in the performance of his work, and towards whom the servant made no demonstration to remove him from his place. It was held that the employer was not liable for the injuries sustained by the boy. In the case at bar, however, the act was directed against the injured boy by the servant, who had the authority and whose duty it was to remove him from his employer's wagon. We think the difference in the cases is apparent, and that the decision in the *Guille Case* does not rule this case in favor of the appellee.

The assignment of error is sustained, and the judgment is reversed, with a procedendo.

McCAW v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. March 30, 1903.)

CARRIERS—OVERCROWDED CARS—INJURY TO PASSENGER—RIDING ON PLATFORM.

1. A carrier must exercise additional care and precaution where it allows its cars to be overcrowded.

2. Where a passenger is allowed to enter a street car where there is no vacant place except on the platform, and pays his fare, it is an assurance that the carrier will guard him against accident while standing on the platform, so far as circumstances permit.

3. In an action against a street railway company for injuries to passengers, it appeared that the plaintiff, the car being crowded, went on the front platform at the conductor's request; that the car was run very rapidly over the tracks of a steam railroad, and down a grade; that the conductor, who had preceded the car at the crossing, jumped on the front steps, and so pushed the other passengers on the platform that plaintiff lost his hold, and fell under the wheels. *Held*, that a verdict for plaintiff would be sustained.

Appeal from Court of Common Pleas, Philadelphia County; Pennypacker, Judge.

Action by Robert McCaw against the Union Traction Company. Verdict for plaintiff, and defendant appeals. Affirmed.

Defendant presented these points:

"(10) Under the law and the evidence in this case the verdict must be for the defendant. Answer. I decline that point."

"(4) The only negligence alleged is that the conductor's act in mounting the west step, which nobody was on, resulted in pushing one of the eight persons on the platform (which it is uncontradicted will accommodate a larger number), and thereby pushing the plaintiff off the east side. This was not a natural or probable result of the conductor's lawful act, nor was his act the proximate cause of the accident, and the verdict should be for the defendant. Answer. I decline that point.

"(5) It is contributory negligence per se to remain on the front platform of a moving trolley car when there is room inside. It is undisputed the plaintiff left a seat, and went out upon the platform. The conductor's request is no excuse for doing that which is negligence per se, and the verdict should be for the defendant. Answer. I decline that point."

The court charged as follows: "He would be entitled, in the first place, to his loss of earnings. He has told you—and there is no contradiction of that testimony—that he was earning at the rate of \$9 or \$10 a week, and he says that up to this time, in consequence of the loss of his leg, he has not been able since to earn anything. That becomes a matter of very easy computation. You can tell readily how much there has been lost. He would also be entitled to what would compensate him for his loss of earning power, and that becomes a matter of very great difficulty. You will have to consider, in the first place, how long he is likely to live, and then you will have to consider how long his earning capacity is likely to continue, because as men get older they lose the capacity to work; and you will also bear in mind that it would not do simply to ascertain the number of years, and then multiply that by the sum which he earns in one year, and give that amount to him, for this reason: it would be giving to him now what he would not earn perhaps for a number of years to come. What you have to do is, taking all of these matters into consideration, to endeavor to arrive at a sum which, given to him now, would be compensation for his loss of earning power."

Verdict for plaintiff for \$16,000. Judgment was entered for \$10,000, all above having been remitted. Defendant appealed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Leaming and Charles Biddle, for appellant. Eugene Raymond, for appellee.

MESTREZAT, J. The chief and principal complaint of the defendant company, which is the appellant here, is that the trial court erred in not affirming its tenth point, and in not withdrawing the case from the jury.

This would have been manifest error. The learned trial judge submitted the case in a charge exceptionally clear, comprehensive, and explicit on every point presented for the consideration of the jury. The verdict was for the plaintiff and against the defendant company.

On Saturday evening, between 5 and 6 o'clock, on December 16, 1899, Robert McCaw, the plaintiff, aged 21 years, with a fellow laborer, boarded one of the defendant's cars on Sixth street, at the corner of Dauphin street, in the city of Philadelphia, to go to his home in the southern part of the city. It was a closed car, with a seat along either side. The two men were in the employ of A. G. Elliott & Co., manufacturers of paper, for whom they drove delivery wagons. Immediately before taking the car, they were engaged in performing some heavy work about the stable of their employer. They entered the car, and took seats on the west side, near the center. As the car proceeded south on Sixth street, many persons entered it. The seats were all occupied, the passage-way was crowded, and persons were standing on both the rear and front platforms. The plaintiff gave his seat to an elderly lady, and stood in the aisle near the front door. When the car arrived at Arch street, some ladies entered it, and the conductor said to the plaintiff, "Won't you step out front, and make room for these ladies?" He complied with the request, stepped out on the front platform, where six or seven other passengers were standing, and stood on the extreme left or east side of it. In the language of the witnesses, the car was then "loaded up"; there was a great crowd on it. The plaintiff stood with his back against the car, and supported himself by holding to the brass bar passing horizontally under the window. When the car approached Washington avenue, on which is laid the double track of a steam railroad, it gradually slowed up, and the conductor alighted from the front platform of his car on the west side, ran to the railroad tracks, and, seeing no danger, signaled the car to come forward. After the car had passed over the tracks a short distance, the conductor jumped on the step on the west side of the front platform, and the plaintiff was thrown or fell off on the east side of the platform, and his foot was so badly injured by the wheel of the car that, after two operations, his leg had to be amputated.

It is claimed on the part of the plaintiff that his injuries were caused by the negligent conduct of the defendant's employes in charge of the car on which he was a passenger. The testimony tended to show, in addition to what is stated above, that the car was run very fast over the railroad crossing on Washington avenue and down the descending grade on the south side of the avenue until the plaintiff was thrown from it; that, after the car had passed the railroad tracks, its speed was suddenly acceler-

ated, was "bouncing up and down" and was "swaying on both sides" as it went down the incline; that at the time the conductor jumped on the step on the west side of the front platform he caused the passengers standing on the platform to go or fall against the plaintiff standing on the opposite side, whereby the latter's hold on the rail beneath the window was broken, and he was thrown from the car. The manner in which the car was being run at the time of the accident is alleged to have been reckless and careless, considering its overcrowded condition and the fact that it was then on a descending grade.

The defendant company denies that the plaintiff's injuries were occasioned by the negligent conduct of its employes, and claims that his own negligence caused his injuries. It alleges that the plaintiff left his seat in the car voluntarily, and went out on the platform, and by reason of his intoxicated condition fell from the car. It is denied that the conductor re-entered the car by the front platform after it had passed Washington avenue, and thereby caused the plaintiff, who was standing on the opposite side of the platform, to fall from it. As a further defense to the action, the defendant, on the trial, presented a paper, signed by the plaintiff, releasing it from all claims of damage by reason of the accident. The plaintiff introduced evidence to show that the release was procured by fraud, and that he was in the hospital, suffering from his injuries, and was unconscious, at the time it is alleged the release was signed by him.

It will be observed that the questions presented for determination were questions of fact, and that the case was clearly for the jury. In the beginning of his charge the learned trial judge very properly observed: "This is a case of some importance. In it arise an unusual number of questions of fact, and it will require the utmost of your good judgment and your care and attention to determine those questions of fact accurately, in order that justice may be done between the parties. Those are questions which are exclusively for you to decide." Being a carrier of passengers, the defendant had a high degree of care imposed upon it. The company was required to exercise this care in receiving and in carrying the plaintiff to his destination. It has not yet been declared negligence for a street railway company to permit its cars to be overcrowded, but when such a condition prevails additional care and precaution must be exercised by the conductor and motorman to protect the passengers against resultant danger. *Reber v. Pittsburg, etc., Traction Co.*, 179 Pa. 339, 36 Atl. 245, 57 Am. St. Rep. 590. A street railway company cannot invite or permit passengers to board its cars beyond their normal capacity, and not be responsible for danger which necessarily results from their overcrowded condition. If a passenger is permitted to enter a car having no vacant place except on the platforms, and the

conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so; and by receiving him the carrier undertakes and gives him assurances that it will take care of him, and guard him against accident, as far as the circumstances permit. *Thane v. Scranton Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767. Here the evidence disclosed the fact that the plaintiff observed his duty by taking a seat in the car when he entered it. He subsequently gave it to an elderly lady, who was compelled to stand in the passageway by reason of the crowded condition of the car. Later, at the request of the conductor that he make room for more lady passengers in the car, the plaintiff went to the front platform, where he attempted to secure his safety by taking hold of the railing beneath the car window. This was his position when he was thrown from the car, and it was taken at the request of the conductor, and because of the overcrowded condition of the body of the car. It is true that the defendant contends that there was sufficient room in the car for the plaintiff, and that he was negligent in not taking a seat on the inside of the car; but this was submitted to the jury, and was found against the defendant. The learned trial judge said to the jury: "If there was sitting room inside of the car, where he might have taken his seat, then it would be negligence per se * * * negligence in that mere fact * * * for him to be upon the front platform. But you will remember the evidence in this case as to the condition of the car, many witnesses having told us that the car was full and crowded at the time." It was also alleged by the defendant that the plaintiff's drunken condition caused him to fall from the car, and that his intoxication contributed to his injuries. This, like the other allegation of negligence in the plaintiff, was submitted to the jury with proper instructions, and the finding was against the defendant. The question of contributory negligence of the plaintiff, therefore, was considered and determined in his favor by the proper tribunal.

It is earnestly contended by the defendant that there was no evidence of negligence on the part of its employes in the conduct of the car at the time of the accident. But this was clearly for the jury. We think there can be no doubt, under the evidence, that at that time the number of passengers in the car was far in excess of its normal capacity. This imposed upon the company's employes a very high degree of care in crossing the railroad tracks and in descending the grade immediately thereafter. These were places of danger to persons on the overcrowded platform of the car, and the employes should have recognized the fact, and run the car accordingly. The defendant alleges that this was done, that the car was run slowly at these places, with no unusual or unsafe movement or swaying of it, and that it crossed the railroad tracks and proceeded on the descending grade in the or-

dinary and customary manner. The defendant company denied that its conductor carelessly jumped on the front platform of the car, and crowded the passengers against the plaintiff, so that he lost his hold on the bar beneath the window and was thrown to the street, or that the rapid speed and undue swaying of the car caused the plaintiff to be thrown from it. There was evidence to support the contention of both parties as to these matters, and it necessarily had to be submitted to the jury for their consideration. We will not consume time and space by referring to the testimony of the many witnesses called by the parties, but it will be sufficient to suggest that the whole testimony, and not the excerpts upon which counsel base their arguments, had to be considered by the jury in determining the facts of the case.

In the fourth assignment, the defendant alleges error in the judge's charge as to the question of damages. It is claimed that the charge in this respect was not justified by the evidence, and that, in effect, the jury was told that the earning capacity of the plaintiff was totally destroyed. The trial judge did say to the jury, as alleged, that the plaintiff "says that up to this time, in consequence of the loss of his leg, he has not been able since to earn anything." A reference to the testimony bears out this statement. The plaintiff testified that since the accident he could get no work, that he had not asked any business man for a job, but had asked certain persons to get him a job; that he had tried, but could not get work by reason of the loss of his leg. This is substantially what the trial judge told the jury. This testimony should be taken in connection with the fact that the plaintiff's business had been principally that of a teamster, requiring him to handle heavy material, and he evidently referred to that kind of employment when he said he had been unable to get work. The jury would not conclude that he meant to say in his testimony that he could get or do no work of any kind. The language used by him would be regarded as referable to his former employment. The excerpt from the charge above quoted was followed by instructions that the plaintiff would be entitled to compensation for loss of earning power, in determining which the jury was told they must consider how long he was likely to live and his earning capacity was likely to continue. In this connection the judge also said: "You do not need to be reminded that he has lost his leg from the knee downward, and that is a serious loss to a man, and is likely to result in inconvenience and in pain." This language meant, and the jury would so construe it, that the loss of the leg would be serious, and would result in inconvenience, but not in a total loss of earning capacity. The jury was then admonished that they could not give an exaggerated verdict, and that, if they did, it would have to be set aside. It was shown

by the evidence that the plaintiff was earning \$10 a week at the time he was injured. His age and ability to work were also disclosed by the testimony. The attention of the jury was directed to these facts, and we are not convinced that the charge as a whole misled the jury on the question of damages.

The validity of the release was determined against the defendant by the jury, and the assignments do not raise any question in regard to it. The learned counsel for the defendant company, however, in their printed brief, refer to and criticise the language used by Judge Pennypacker in his charge, wherein, after stating the circumstances under which the release was obtained from the plaintiff by Brobt, the defendant's agent, it is said: "When we consider that the agent of the traction company, under these circumstances, secured from him, for a small consideration, a release to be signed, it is certainly an act not to be commended." We think the learned trial judge was very conservative, and fully justified, under the evidence, in the language used by him bearing upon the conduct of Brobt in securing the release from the plaintiff. This release was set up as a defense to the plaintiff's claim, but the testimony, which was believed by the jury, and doubtless by the judge, disclosed that it had been procured at a time and under circumstances which merited the most severe condemnation, and rendered it void. It was introduced in the case by the defendant company to prevent a recovery, and, if the consequences were prejudicial to the defendant's case, as counsel seemed to think, it is not the fault of the plaintiff nor of the court below.

The assignments of error are overruled, and the judgment is affirmed.

SHARPLEY v. WRIGHT.

(Supreme Court of Pennsylvania. March 30, 1903.)

INJURY TO EMPLOYEES—DEFECTIVE APPLIANCES.

1. Where an owner employs a stevedore to pile lumber on a wharf, and permits him to use a derrick for such purpose, and the stevedore uses it without testing it, and one of his workmen is injured by defects therein, the stevedore is liable for the injuries received.

Appeal from Court of Common Pleas, Philadelphia County; McMichael, Judge.

Action by William Sharpley against Thomas H. Wright. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph T. Bunting, for appellant. John P. Connelly and Flanders & Pugh, for appellee.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 235.

MESTREZAT, J. The plaintiff was injured while in the service of the defendant, and this action was brought to recover damages for his injuries, which he alleges were caused by the negligence of the defendant. Thomas H. Wright, the defendant, was a stevedore, and contracted with W. S. Taylor & Co. to pile lumber for them on their wharf on Delaware avenue, in the city of Philadelphia. William S. Sharpley, the plaintiff, was employed by the defendant to assist in this work. In performing the work, the defendant's employes used a derrick owned and erected by Taylor & Co. on the wharf. The mast of the derrick was planted in the ground, and cribbed with timber. The ratchet wheel of the derrick, used in hoisting the timber, was moved by a crank, and, when supporting the timber, was held in place by a pawl or dog, whose grip of the wheel was made secure by a weight attached to it by means of a wire. The plaintiff, with other laborers, was engaged in piling lumber on the morning of November 29, 1899. While he was at the crank of the ratchet wheel, lowering on the lumber pile a large stick of timber which had been hoisted by the derrick, the wire attaching the weight to the dog broke, releasing it from the wheel, which suddenly began to revolve at a great speed, and the crank of which struck the plaintiff, injuring him severely. The proximate cause of the plaintiff's injuries was the breaking of the wire, which had been in use for a long time, and was rotten and defective. The plaintiff avers in his statement that the defendant failed to exercise due care in providing him with safe and properly constructed machinery and appliances with which to do his work, and alleges that the wire holding in position the dog had become insufficient, weak, worn, and rotten, and that the ratchets and dog were, and for a long time had been, insufficient, worn, and imperfect. The jury returned a verdict for the plaintiff, on which judgment was entered, and the defendant has appealed.

The assignments of error raise but a single question, and that is whether the defendant is responsible for the unsafe condition of the derrick. That the derrick was unsafe, and that a previous inspection would have disclosed the fact, are not controverted. The defendant, however, denies his liability for the injury received by the plaintiff "because he had neither the control over the derrick which would have warranted an inspection, nor the power to make the repairs which might have been suggested by the inspection." The position of the defendant is untenable. His contract with Taylor & Co. required him to pile the lumber on the wharf, and for that purpose he had to furnish the tools and appliances, as well as the labor. The testimony shows that a derrick could be used advantageously in performing the work, and that without such an appliance the cost of piling the lumber would have been mate-

rially increased. The size of the timber required the use of a heavy derrick in handling it. Whether the defendant used the derrick constructed by Taylor & Co. on the wharf, or brought another derrick to the wharf with which to perform his work, is immaterial, so far as it affects this case. The machine which injured the plaintiff was in the possession and control of the defendant, while his employes used it in handling the lumber, and was unquestionably an appliance used in piling the lumber in pursuance of the contract with Taylor & Co. That the possession and control of the machine by appellant was temporary, and liable to be resumed at any time by the owners, did not, as argued by appellant's counsel, relieve him from the legal duty of inspection imposed upon him. The danger to the employe in the use of unsafe machinery was the same, whether his master owned or temporarily controlled it, and hence the protection of the servant demanded the performance of the master's duty to keep it in a reasonably safe condition in either event. Therefore, when Wright obtained permission of the owners to use the derrick, and put his employes in possession of it, he assumed the duty of a master to a servant, which required him to furnish a reasonably safe appliance with which to perform the work, and to see that it continued in that condition, by proper inspection.

We are unable to see the force of the suggestion of the counsel of defendant that his client's control of the derrick did not warrant an inspection of it by him, nor invest him with the power to make repairs. The owners did not deny him the privilege of doing either. The possession of the machine invested the defendant with the same authority and gave him the same opportunity to inspect it as it did to use it. The inspection involved no change in, nor injury to, the machine, unless in determining its strength it was broken; thus disclosing its weakness and unfitness for use. In that event there could be no complaint by the owners, as the defendant was performing a duty imposed by law alike on him and the owners before they could use it. The permission to use the derrick, therefore, necessarily carried with it the permission as well as the duty to test it. It will not be presumed that the owners expected or desired the defendant, in the use of the machinery, to violate the law by failing to inspect it, or to use the machinery if it was unsafe or defective. Nor do we think it will be seriously contended that, if an inspection had disclosed defects in the machinery, the defendant would not have had "the power to make repairs" before using it. His failure to have made the necessary repairs would have been a flagrant violation of his duty, and would have made him responsible for any resultant injury to his employes. He could not with impunity knowingly furnish them with an unsafe machine.

In support of his position the counsel for the

defendant has cited *Anderson v. Oliver*, 138 Pa. 156, 20 Atl. 981, and *Connelly v. Faith*, 180 Pa. 553, 42 Atl. 1024. Neither of the cases is analogous to the case under consideration, nor do the principles announced in those cases in any way affect or control the decision in the case at bar. In the former case the plaintiff was denied the right to recover for an injury received while unloading a car, a defective brake on which caused the injury. In the language of the court: "The defendants are not responsible, because they did not own the cars, and had no control over them, further than to unload them." In *Connelly v. Faith*, the plaintiff, an electrician, was in the employ of Faith & Co., and was sent to do some work in the hotel building of the Boothby Hotel Company. While engaged in the boiler room, he stepped into boiling water which had overflowed from a well through the negligence of the engineer of the hotel company. Connelly brought a joint action against Faith & Co. and the Boothby Hotel Company. This court held that there was no evidence of negligence on the part of Faith & Co. It will be observed that the plaintiff's injuries resulted solely from the negligence of the Boothby Hotel Company's employé, and were not in any way attributable to a failure in the performance of any duty imposed upon Faith & Co. At the time of the accident, Connelly was not on premises owned, controlled, or used by them, nor was he injured by any appliance or machinery with which he was furnished to perform his work. No act of Faith & Co., either of commission or omission, contributed in the slightest degree to his injuries.

It is further contended that *Johnston v. Ott Brothers*, 155 Pa. 17, 25 Atl. 751, and that line of cases, rule this case against the plaintiff, and compel him to seek redress for his injuries from Taylor & Co., the owners of the wharf and the derrick. We are not concerned here with the liability of Taylor & Co. to answer for the injuries sustained by the plaintiff. If it be conceded that they are responsible to the plaintiff, it by no means follows that the defendant is not also guilty of culpable negligence, for which he must respond in this action. His act in failing to have the derrick properly inspected clearly was an efficient cause of the accident resulting in the plaintiff's injuries.

It is well settled that an employer is not responsible for an injury sustained by his employé caused solely by unsafe premises which are owned and controlled by a third person, and where the employé's services are performed. The reason of the rule is that the employer does not own, use, or control the premises, and hence he cannot be made responsible for injuries sustained by reason of their unsafe condition. But the defendant here cannot invoke the application of the principles controlling such cases to relieve him from liability in this action. Here the plaintiff was not injured by defective premises where he was engaged at his work, but by an

unsafe appliance furnished him by his employer with which to do the work. While Taylor & Co. owned the derrick and the real estate on which it stood, the defendant was in possession and control of the derrick, the appliance with which the plaintiff was furnished to perform his work, and the defects in which caused his injuries.

The assignments of error are overruled, and the judgment is affirmed.

SEABURY v. FIDELITY INS., TRUST & SAFE DEPOSIT CO. et al.

(Supreme Court of Pennsylvania. March 23, 1903.)

REAL ESTATE BROKERS—RIGHT TO COMMISSIONS—EVIDENCE.

1. Where an owner of real estate authorized an agent, in writing, to sell it, for a certain commission on the purchase money, and he introduced an acceptable purchaser, he was entitled to recover his commissions, though the contract entered into between the parties provided for payment out of mortgages to be given on the property, and in fact was never carried out, through the failure of the purchaser to perform.

2. Where, in an action by a real estate agent against executors to recover commissions due from testator for the sale of land, defendants set up as a defense that testator and his alleged vendee had never entered into a contract of sale, within the meaning of the contract between the real estate agent and testator, a record of the orphans' court showing a decree of specific performance against the executors was inadmissible in favor of the real estate agent.

Appeal from Court of Common Pleas, Philadelphia County.

Action by James M. Seabury against the Fidelity Insurance, Trust & Safe Deposit Company and others. From a judgment refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. S. L. Shields, for appellant. Richard C. Dale, O. Percy Bright, and Simpson & Brown, for appellees.

DEAN, J. Andrew M. Moore owned the Girard House, corner of Chestnut and Ninth streets, Philadelphia. On May 19, 1896, he employed James M. Seabury, by the following written contract, to sell it: "Philadelphia, May 19, 1896. In the event of the sale of the property N. E. corner Chestnut street and Ninth street, I promise to pay to James M. Seabury a commission of one per cent. on the amount of one million, four hundred thousand dollars (\$1,400,000). I also promise to pay, in addition to the above, to James M. Seabury all the amount in excess of one million, four hundred thousand dollars. A. M. Moore." Seabury at once went to work, under the agreement, to make the sale, and, as a result of his efforts, introduced to

¶ 1. See *Brokers*, vol. 2, Cent. Dig. §§ 73, 75, 87.

Moore, as a purchaser, one John J. McDewitt, who was acceptable to the vendor. On March 20, 1897, Moore and McDewitt entered into a written agreement for the transfer of the property. The first clause of the contract describes the property, and sets out Moore's agreement to transfer and McDewitt's to take. The second states that McDewitt is to obtain a loan on mortgage of the property to the amount of \$750,000, out of which are to be paid liens, and the balance to be paid to Moore. The third states that McDewitt is to borrow \$500,000 on what is in fact a second mortgage on the property, and is to expend in the erection of a building \$800,000. The fourth, that McDewitt is to give to Moore his bond and mortgage, which would be a third mortgage, in amount of \$750,000. The fifth, that, as soon as McDewitt obtains the second mortgage, he will pay Moore \$25,000 cash. The sixth, that Moore will make a good title within 30 days from date of agreement; it being understood that he is not to deliver deed until the loans are secured by McDewitt, and the mortgages are ready for execution; the sale only to be made if the loans are made and the mortgages executed according to the stipulation. This agreement was twice extended, in writing; and before the end of the last extension, on June 19, 1897, Moore agreed, in writing, to loan McDewitt \$200,000 on mortgages to enable him to complete the new building. About a month after the expiration of the last extension, he urged McDewitt to break off an arrangement the latter had in Philadelphia to secure a loan of \$1,000,000, and to get the money in New York. Conferences and negotiations were kept up between Moore and McDewitt and with money lenders until the following December, when Moore took sick, and died the next month. His executors declined to carry out the contract. McDewitt petitioned the orphans' court to decree specific performance. That court made the decree, and gave McDewitt 60 days from final decree to perform his part, but he failed to do so; giving as a reason that Moore's interference with his plans, and the delay incident to obtaining the decree in the orphans' court, had caused the failure. Seabury brought suit against the executors in the court below for commissions of 1 per cent. on \$1,400,000, the selling price fixed in the agreement of May 19, 1893, between him and Moore, and also for \$100,000, the excess over the selling price agreed to be paid by McDewitt. On argument here, the claim for the excess price is formally abandoned, so that now we have only to do with the commissions, amounting to \$14,000, with interest. At the trial in the court below, under the facts substantially as we have stated them, the court was of opinion that Seabury had wholly failed to sustain his claim by the evidence, and therefore directed a nonsuit. We now have this appeal by plaintiff.

At present we will not pass on the assignments of error to the rejection of the evidence

of the record in the orphans' court and of this court in the matter of the decree for specific performance of contract, as an interpretation of the contract between Moore and Seabury. At present the question for us is whether, without this record, there is enough in the case to sustain appellant's fourth assignment, alleging that the court erred in not submitting to the jury the evidence tending to establish Seabury's claim to the 1 per cent. commission on the minimum selling price.

As to the contract of May 19, 1893, Moore clearly appointed Seabury his agent to sell the Girard House at a fixed minimum price, and fixed his commission on that price. We do not understand this to be questioned by appellee's counsel. It is earnestly argued, however, that the alleged contract with McDewitt was in no sense such a sale as that intended by the contract with Seabury; nor does it come within the general rules determining the right of real estate agents, and the liability of their principals.

In the first place, we think it clear that the rights of Seabury rest solely on his contract with Moore. He does not sue on a quantum meruit. His statement is based on that contract. No reasonable interpretation can be given it, other than that he was only to receive the excess over \$1,400,000 in the event of a sale being actually consummated. It was not consummated, no matter from what cause. Is there evidence from which a jury might find that he is entitled to the 1 per cent. commissions? This depends on whether he brought to Moore a bona fide purchaser, willing to buy at the minimum price. It is wholly immaterial that McDewitt did not have the money to buy. Moore did not reject the proposed purchaser for that reason. In interpreting this or almost any other contract, courts must necessarily resort to the surroundings of the parties to ascertain their real meaning, and the often unexpressed reasons which prompt their conduct. It will be noticed that Seabury undertook to find a purchaser for Moore at a fixed price. Not a word was said in the contract as to the terms of payment Moore would exact from him. It is therefore necessarily to be implied that that was a matter solely for Moore's judgment, and, if the purchaser did not come up to his demands in that particular, he had the right to reject him. Moore might demand cash, or part cash and short-term payments. If the purchaser did not accede to these terms, that was an end of the matter. Seabury had not fulfilled his contract in such a way as entitled him to anything. Of course, Moore, for the purpose of evading the responsibility of his contract, could not dishonestly or capriciously reject the purchaser. Obviously, McDewitt was satisfactory to Moore. He had no means of his own—did not pretend to have any. He had large experience as a hotel keeper—perhaps had been successful. We do not know. Doubtless Moore knew, for he was under Moore's observation, according to McDewitt's testimony,

for years. Hence sprang the contract between Moore and McDevitt, by which Moore's price, as well as the cost of a new structure on the old site, were to be raised largely by loans secured by mortgages on the property. McDevitt arranged to borrow \$1,000,000 in Philadelphia. After the plans for the new structure were prepared, this was found to be wholly insufficient. Moore advised breaking off the negotiations in Philadelphia, and urged that McDevitt go to New York for the loans. McDevitt consented, and, from the papers in evidence, actually found parties there willing to loan him on mortgage, as soon as the deed was delivered, \$1,250,000. As Moore himself had agreed with McDevitt to loan him \$200,000 on what would practically have been a third mortgage, McDevitt thought himself able now to proceed and complete his new hotel. Just at this juncture, while the contract with McDevitt was, by reason of the extension, in full force, Moore sickened, and soon died. The executors refused to recognize the contract as still existing. Then followed the proceedings for specific performance in the orphans' court, resulting in a decree in McDevitt's favor. This litigation tied up the transaction between McDevitt and the New York money lenders. At the end of it, they declined to proceed further, as McDevitt alleges, and he was unable to carry out his bargain with Moore.

We do not say these facts were, beyond doubt, proven. We only say there was ample evidence tending to prove them. We think, under the law, it was for the jury to pass upon the evidence. It is argued by appellees' counsel that no binding bargain was made between Moore and McDevitt, which could have been enforced as between them. We do not pass upon this question. The claim for excess purchase money above \$1,400,000 being eliminated, the only question for us is whether Seabury brought to Moore a bona fide purchaser at that price, who was satisfactory to Moore. Clearly, he did do so. Moore either knew McDevitt's financial ability, or was truthfully informed of it by McDevitt. This is plain from the very terms of the agreement between them. McDevitt agreed to pay more than the minimum price, in the method adopted by them. Admit that this method, concurred in by both, still left an uncertainty as to McDevitt's ability to raise the amount of the purchase money; that certainly was no concern of Seabury's. Moore might well have said to McDevitt, "I will not deal in any such uncertainties;" but he did not so say. He made with him what was, in substance, an agreement of sale on terms acceptable to him. Whether, because of Moore's death, or for some other reason, the sale as stipulated was not consummated, it nevertheless was actually made. Seabury did not contract that he would bring to Moore a purchaser, at the price of \$1,400,000, who would actually pay the money according to any terms Moore might see proper to fix. He did im-

pliedly contract to bring a purchaser who would pay the minimum price on the terms fixed by Moore; and plaintiff has adduced evidence to show that he did this, and that Moore was either satisfied that McDevitt could comply with the terms, or was willing to take the risk of his failure. This ended Seabury's duty and power under his agreement with Moore. No one can say that Seabury was not injured by the failure of this peculiar sale to McDevitt. If Moore had immediately rejected McDevitt because of his inability to pay, Seabury might have found another purchaser more satisfactory; but, by Moore's acceptance of McDevitt, Seabury's power was at an end. The property, so far as he was concerned, was taken by the owner out of the market at the price for which he was authorized to sell it. All the text-books and all the cases cited by appellant's counsel from many states hold this to be a sale. In *Keys v. Johnson*, 68 Pa. 42, the owner authorized the agent to sell a farm for \$18,000 cash. A buyer called on the agent, agreed to the price, but desired to pay by an exchange of other land of equal value. The agent refused, but the buyer learned from him the name of the owner, and afterward went to the latter and bargained to pay him \$17,000 in land. The owner refused to pay the agent's commission on the ground that he had employed the agent to sell for cash, while he himself had made with the buyer an exchange of lands—an entirely different contract. This court held, in an opinion by Justice Sharswood, that the whole business of the agent was to bring the buyer and purchaser together; that he has nothing to do with the terms the owner sees fit to make; that, as it was through the agent the buyer obtained the name of the owner, the agent was entitled to his commissions. For this principle quite a number of authorities are cited. *Francis v. Baker* (Minn.) 47 N. W. 452, has almost precisely the same facts as the case before us. The same principle is announced, and the same reasoning adopted, although with greater elaboration, as in our own case of *Keys v. Johnson*, supra. While these cases and most of those cited by the learned counsel for appellant are actions of assumpsit on a quantum meruit to recover a broker's commission, the same principle is applicable to a special contract such as the one before us, for this contract goes no further than to stipulate the minimum selling price and the amount of commission. It is silent as to what kind of a purchaser Seabury shall procure, what his ability to pay, or at what times or how he shall pay the price. It can hardly be questioned that the agent brought the seller and purchaser together, and that they agreed upon terms, the latter uncertain and attended with risk—a risk as well known to Moore as to McDevitt, but Moore took that risk and made the sale. The plan for consummating the sale fell through nearly three years after the original agreement was made with Seabury, either through the owner's misfortune or the pur-

chaser's fault. But if plaintiff's evidence be believed, the agent had performed fully his part, and, if the jury so believe, he ought to have a verdict. The appellant's fourth assignment of error is therefore sustained.

As to the first and second assignments of error, appellant complains of the rejection of the record of the orphans' court and of this court of the proceedings to obtain specific performance of the contract. We think the purpose of the offer was too broad. That suit was between other parties than those to this suit. The decree of the orphans' court was that a deed should be made by the executors of Moore to McDevitt on payment or tender of the consideration of the contract. Neither the orphans' court nor this court decided that the contract with McDevitt constituted a legal sale, as intended by the agreement between Seabury and Moore. It was decided that, as between Moore and McDevitt, the executors were bound to make a deed when McDevitt tendered the consideration of his contract with Moore, or showed an ability to perform his agreement. The issue in the orphans' court was a different one from that raised here. It depended wholly on the contract between Moore and McDevitt. This depends on the contract between Moore and Seabury, which was merely incidental to the contract between Moore and McDevitt. The orphans' court could have enforced or refused to enforce this last contract, without regard to the first one, which was a personal contract. We now decide that if Moore accepted McDevitt as a purchaser, and made terms with him, Seabury earned his contract compensation; but that is a question which the orphans' court was not called to pass upon. Incidentally, in that proceeding, it showed how Moore and McDevitt were brought together. Yet the offer was to read the record, for the purpose of showing that the agreement between Moore and McDevitt was one of sale. The Seabury contract would not of itself show this. There was no reason why the court should interpret it. Its interpretation could not have affected Seabury's rights as against Moore, for Seabury was no party. If the offer had been merely to show that Moore had made a contract with McDevitt, which the orphans' court had decreed should be specifically enforced, and that, as a precedent to the contract, Seabury had brought the parties together, it would have been admissible. This is the extent of the ruling in *Aitkin's Heirs v. Young*, 12 Pa. 15. All that was offered in that case was the proceeding under the act of 1818 to prove the contract in the common pleas. It was held admissible, just as if the offer here of the record had been made to prove a contract with McDevitt. In the opinion affirming, *Rogers, J.*, says it was some proof of the facts, though not conclusive. Here the record was some proof of the fact that Moore had contracted with McDevitt, though even as to that it was not conclusive.

It was not an adjudicated interpretation of the Seabury contract in any sense binding on these parties. The appellant here must stand upon his written contract of May 19, 1896, and our interpretation of it, and the evidence tending to show that he fully performed his side of it; that is, brought the parties together, and that the purchaser agreed to pay the minimum price, and was accepted by Moore, who made his own terms with him. If the jury so believe, then appellant should have a verdict for his contract compensation.

The first and second assignments are overruled on the purpose disclosed in the offer. The fourth assignment is sustained. The judgment is reversed and a procedendo awarded.

While, under this view, there is very little for the jury to pass upon, neither we nor the court below can determine the credibility of the witnesses. Therefore this necessitates another trial.

WHITE v. GUNN.

(Supreme Court of Pennsylvania. March 23, 1903.)

SALE—VALIDITY—CHANGE OF POSSESSION—CONTROL OF PROPERTY—EVIDENCE.

1. Where, on a sale of personalty, the purchaser pays the price, but leaves the goods in possession of the seller, the goods are subject to the rights of a bona fide purchaser of an execution creditor.

2. Where a purchase of personalty is made in good faith, and the evidence shows that it was the intention of the parties, by their conduct, to transfer the possession as well as the title, and the vendee assumes a control of the property which reasonably indicated a change of ownership, it is sufficient as against an execution creditor of the seller.

3. The owner of a brick plant, including machinery, engines, wagons, and other property necessary in the manufacture of brick, told plaintiff he was hard up, and would like to have some money, and plaintiff gave him \$100 in cash, and a note for \$2,400, payable in four months after date, in payment for such plant and property. Thereafter plaintiff paid the note. The price was a fair one. Plaintiff took possession of the property immediately, but employed the former owner to manage the yard for him. Plaintiff furnished the money to pay the hands, went to the plant five days out of six, took out insurance in his own name, and advertised the plant for sale. *Held*, that the question of the good faith of the transaction and the sufficiency of the possession as against a subsequent execution creditor of the seller were for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Lemuel A. White against John Gunn. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. Hampton Todd and Bamberger & Levi, for appellant. Emanuel Furth, Max Herzberg, and Jacob Singer, for appellee.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 465.

BROWN, J. The complaint of John Gunn, the appellant, is that the jury were allowed to determine the character of the sale of the brickyard plant by his father, Charles B. Gunn, to Lemuel A. White, the appellee. He insists it was a fraud in fact as well as in law, and that the court should have sustained each of these positions, and directed a finding in his favor. The learned trial judge was clearly of the opinion that the sale was in fact fraudulent, and, incautiously, perhaps (though of this the appellant cannot complain), told the jury that he was not without a very strong impression on that question, and that, if he were in the box, he would have little hesitation in drawing the conclusion from the evidence submitted that there had been a collusive sale by Charles B. Gunn to Lemuel A. White, for the purpose of avoiding and anticipating an adverse decree against him by putting his property out of the reach of his creditors. But, notwithstanding his own impression, he declined to withdraw the question from the jury, saying: "That, however, is merely my personal impression, and my calling your attention to it is not in any way to bias you, or to withdraw from you the question of whether there was fraud or not on the part of White and Charles B. Gunn. That question is for you to decide. It is, as I have already said, peculiarly within your province, and it is to be decided on your own inferences, and not on those of the trial judge." Though the jury might very fairly have determined that the sale was a fraud in fact, there was at the same time sufficient evidence to justify their finding that it was not, and it would have been error for the court to have withdrawn the question from them. The good faith of the transaction was purely for them.

The appellee testified that on February 26, 1900—a year before the appellant obtained a decree against Charles B. Gunn—he had purchased the personal property which was the subject of the feigned issue; that a day or two before he purchased it Charles B. Gunn came to his office, and told him he was "hard up," and would like to have some money. A receipt of Charles B. Gunn to the appellee was produced, acknowledging the latter's check for \$100 and his note for \$2,400, payable four months after date, in payment of the purchase money for the property purchased, which the appellee says he paid. Evidence was submitted that the price paid for the property was a fair one. In the face of this, the good faith of the transaction between the vendor and vendee was for the jury alone, no matter how persuasively the learned counsel for the appellant contend that other features of the case, to which we need not call attention, made it the duty of the court to declare the transfer a fraud in fact.

The jury having found that the sale was in fact honest, was it constructively fraudu-

lent? When we said in *Keystone Watch Case Co. v. Fourth Street National Bank*, 194 Pa. 585, 45 Atl. 328, that the rigor of the rule as laid down in *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 348, which requires the purchaser of personal property to take and retain possession of it, had been greatly relaxed, we did not say, nor intend to say, that the rule itself is not still the law. It is as true now as it was when the rule was announced in that case, nearly a century ago. That, if a purchaser pays the price for goods purchased by him without taking possession of them, he takes the risk of the integrity and solvency of his vendor when the rights of a subsequent bona fide purchaser or an execution creditor arise. *Stephens v. Gifford*, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 368. Less than a year ago we said: "There has been no deviation from the general rule that delivery of possession is indispensable to transfer a title by the act of the owner that shall be valid against creditors." *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57. What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of trade or business. *Crawford v. Davis*, 99 Pa. 576; *Renninger v. Spatz*, 128 Pa. 524, 18 Atl. 405, 15 Am. St. Rep. 692; *Stephens v. Gifford*, supra; *Goddard, Hill & Co. v. Weil & Co.*, 165 Pa. 419, 30 Atl. 1000; *McCullough v. Willey*, 200 Pa. 168, 49 Atl. 944. When a purchase is made in good faith, the fair and honest purpose of the vendor and vendee will not be defeated if the conduct of the parties shows that there was an intention to transfer the possession as well as the title, and the vendee assumes such control of the property as ought reasonably to indicate a change of ownership. Knowing this to be the rule, the learned trial judge could not, as a matter of law, with the evidence before him upon which the appellee relied to show that he had taken and retained possession of the property, have declared the transaction constructively fraudulent. If the jury believed this evidence, they were justified in finding that the sale was as honest in law as it was in fact.

On the cross-examination of the plaintiff and his witnesses, and from the testimony offered by the defendants, it is true facts were developed which fully warranted the

contention that there ought to have been a finding that there had not been a sufficient change of possession. On the other hand, if the jury believed what was offered by the plaintiff to prove that he had taken and retained possession of the property he had purchased, their verdict was fairly for him, and cannot be disturbed. The property purchased was a brick plant, including brick machinery, two engines and boilers, drier, blower, five kilns, trucks and tracking, horses, carts, wagons, harness, shedding, and other appliances which were upon the premises, and needful in manufacturing, drying, burning, and delivering 32,000 bricks per day. The vendee had an option to purchase the yard itself. He testified that after he purchased the property he took immediate possession of it; that he manufactured bricks, hauling clay from other grounds to the yard; that, though he employed Charles B. Gunn and his son, Frank, to manage the brickyard for him, he went there five days out of six to look after the business, and furnished the money to pay the hands; that he built a sixth kiln on the premises; that he advertised the plant for sale; that the insurance was taken out in his name. He further stated that three days after he purchased the property, and more than a year before John Gunn obtained his decree, he told the latter he had purchased it, and offered to sell it to him for \$3,000. This statement was admitted to be true by the appellant. Charles Horner, a witness called by the plaintiff, testified that he knew the brickyard had been sold to the appellant, who had taken possession of it in February, 1900, and some weeks had been in the yard 10 or 12 times. Frank Gunn testified that the appellee had taken possession of the place, and continued in possession until the trial of the feigned issue; that he was there looking after the business four or five days a week. John E. White, another witness, testified that his brother, the appellee, had taken possession of the plant, and that he went up to look after the business for him from time to time, and to see that things were going right. One of the witnesses called by the defendant testified that he had received a bill with the name "Charles Gunn & Co." crossed out and Lemuel A. White's on the top of it, and that the appellant had told him his father had sold the brickyard to White. Another said he had called on White to collect the amount of a bill which had been charged against him for something furnished to the yard, and found him there. Still another, who called at the yard to purchase materials that had been advertised for sale by White, stated he had seen him there frequently, and for a year had known him to be the owner of the plant.

From the testimony to which we have called attention, plaintiff's case was clearly for the jury, whose finding could have been either way, and the judgment on their verdict is affirmed.

IN RE DUTTON'S ESTATE.

(Supreme Court of Pennsylvania. March 23, 1903.)

DECEDENT'S ESTATE—PROOF OF CLAIM—REJECTION—DIRECTING ISSUE—NOTE—INTERLINEATION.

1. Where a note against the estate of a decedent was rejected because of insufficient evidence to explain an interlineation on the face of the note, the court, on exceptions to the findings of the auditor, may direct an issue to try the question of the validity of the note, and whether the interlineation was written before the signature, and whether there was a fiduciary relation between the parties of such a character as would impose on the creditor the burden of proving a consideration.

2. A note had on its face an obvious interlineation. The note was on a printed form, payable one day after date. On the line preceding the signature were interlined the words, "This to be held until after my death." The signature was in the handwriting of testatrix, but the other parts were written by her stepson, the payee. There was no clear evidence as to when the interlineation was made. Testatrix was an intelligent woman, and had the note in her possession a year before she delivered it to payee. There was evidence that she was indebted to him, but not nearly to the amount of the note, and that she had frequently expressed her intention to pay him. *Held* to sustain a verdict in favor of the validity of the note.

In the matter of the estate of Lydia F. Dutton. Appeal by Isaac Thomas, surviving executor, from a decree overruling exceptions to auditor's report. Affirmed.

The case involved the validity of a promissory note partly printed and partly in writing in the following form:

\$3600 ⁰⁰/₁₀₀ Chester, Pa., April 3, 1893.
One day after date, I promise to pay to
the order of George G. Dutton
at the Delaware County National Bank
Thirty-six Hundred ⁰⁰/₁₀₀ dollars
This to be held until after my death.
without defalcation, value received.
[Signed] Lydia F. Dutton.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

A. Lewis Smith, for appellant. David F. Rose and W. B. Broomall, for appellee.

DEAN, J. -At the audit for distribution of testatrix's estate, George G. Dutton, her stepson, presented a promissory note of hers in the sum of \$3,600, and claimed that it be distributed. The note was dated April 3, 1893, on a printed form, payable one day after date; but just before the last line preceding the signature were interlined in a full written line these words: "This to be held until after my death." All the written parts of the note except the signature, it was admitted, were in the handwriting of George G. Dutton, the payee. The signature of Lydia F. Dutton was undisputably genuine. The evidence was not entirely clear whether the interlineation, from its appearance, was made at the time, with the same pen and ink as the other written parts of the note. The auditor did not, on the evidence, determine this

fact; but, as the fact of interlineation was obvious, he held, under the case of *Marshall v. Gougler*, 10 Serg. & R. 164, *Hill v. Cooley*, 46 Pa. 259, and a long line of cases down to *Bank of Baltimore v. Williams*, 174 Pa. 66, 34 Atl. 303, that it was incumbent on the holder of the interlined note to prove that the interlineation was honestly made. He was of the opinion that the holder had failed in such proof, and therefore rejected the note as evidence of the claim. No other sufficient evidence in support of the claim was adduced. On the auditor's report coming before the orphans' court it was met by the exception that the auditor erred in not allowing the claim of *George G. Dutton* on the evidence offered to sustain it. After full argument, the learned judge of the orphans' court said: "There may be some doubt as to the alleged interlineation. We do not feel called upon to decide the question of fact, depending only on the weight of the evidence, and have, therefore, concluded to grant an issue to try that question." Accordingly he directed an issue in this form: "And now, June 19, 1899, an issuable matter of fact having arisen in the above-stated case upon the validity of a promissory note of the decedent dated April 3, 1893, for thirty-six hundred dollars, it is deemed expedient by the court to refer an issue to the court of common pleas of Delaware county in relation thereto in the following form: The said *George G. Dutton* shall be plaintiff and the said executors shall be defendants, and the issue to be tried shall be the same in all respects as if the plaintiff had filed a statement of claim based on the said promissory note, incorporating a copy thereof, and had averred that the amount justly due, owing, and payable is the sum of thirty-six hundred dollars, with interest thereon from the 16th day of February, A. D. 1896, and the defendant had filed a plea of non assumpsit."

At the trial in the common pleas there was a verdict for the plaintiff, *George G. Dutton*, in the sum of \$4,323.60, being the face of the note with interest, which, with the entire proceedings, was by the prothonotary certified back to the orphans' court. There being no separate orphans' court for Delaware county, necessarily the judges of the orphans' court and of the common pleas were the same. At that time the late Hon. *Thomas J. Clayton*, who heard the exceptions to the auditor's report, directed the issue to the common pleas, and in that court tried it. A motion for a new trial was made, which, after hearing, he overruled. Before anything further was done, he died. Judge *Johnson*, his successor, having been of counsel, called in Hon. *William Butler*, of Chester county, to dispose of the exceptions, after the record of the common pleas came back to the orphans' court. He decreed that the first and second exceptions to the auditor's report, which constituted the substance of the issue in the common pleas, be sustained, and that

the distribution be referred back to the auditor, he "to be controlled by the result in the common pleas, so far as the law directs he should be, and so far as there may be no legal reasons to the contrary." Notwithstanding the verdict in the common pleas and the decree of the orphans' court sustaining the first and second exceptions to his first report, the auditor refused to change his distribution on the ground that in his opinion "the issue was irregular, if not wholly unwarranted." On the coming in of this report, Judge *Butler*, again presiding, sent the report back to the auditor with a peremptory direction to allow the claim of *George G. Dutton* in accordance with the verdict certified from the common pleas; saying: "Under the circumstances, we feel that we should simply record the judgment which Judge *Clayton* clearly would have entered had not the accident of death removed him when it did." In accordance with this order, the auditor made distribution.

The legatees, on confirmation of the report, prosecute this appeal with 14 assignments of error. It would not aid us in the consideration of the alleged errors to discuss separately each one of them. Directly or indirectly, they, in substance, allege three errors, and but three, as follows: (1) The court erred in directing of its own motion an issue to the common pleas. (2) The court erred in directing an issue for the determination of a mixed question of law and fact. (3) The court erred in determining as a fact on the evidence that the note was entitled to distribution.

As to the first assignment, we remark there was but one question in dispute, and that was, as the court below termed it, "the validity of the note," or, rather, should it be enforced as a legal obligation of the testatrix? It was her note. It had not been paid. Had it become of no legal effect because of an alteration after signature, or had it been obtained from her by methods closely allied to fraud? The issue directed was one in assumpsit, which would involve these questions of pure fact, and on that issue it was well and carefully tried. The auditor's report on the question of fact was against the creditor. The orphans' court, might, on a reading of the testimony, have overruled the auditor without further proceedings, or it might have affirmed his finding. The judge of the court, probably being in doubt, declined to do either, but of his own motion sent the case to a jury. It is argued that this was too late, as the creditor had submitted his case to the auditor, and taken his chances of a favorable decision. This is correct as applicable to a disappointed suitor who has been heard before one tribunal, and lost, and then demands, as a right, a hearing before another; and all the authorities cited by the auditor and the counsel for appellant so hold. See *People's Sav. Bank v. Mosier*, so late as 190 Pa. 375, 49 Atl. 132, where many of the cases are noted.

But none of the cases rule the one before us. If the claimant here had, after the finding against him by the auditor, demanded that the question of fact be sent to a jury, the court might well have ruled, on the cases cited, that such was not his right. But here exceptions to the auditor's finding of fact were pressed upon the consideration of the court. The written testimony, which was all the court had before it, may not have seemed to the judge as convincing as to the auditor, for the latter had before him the witnesses, and therefore, to overrule him, even though the judge did not concur, might be a mistake. The case to the creditor was an important one. With him it was all or nothing. Therefore, to enlighten his conscience, the judge of the orphans' court, sitting, as chancellor, thought best to send the issue of fact to a jury; not as the right or at the request of the creditor, but in response to his own sense of what was judicially the safer course. He hesitates as one judge to overrule another judge, the auditor, on contradictory and doubtful testimony, where the latter has had the advantage of hearing and seeing the witnesses. So he sends the case before 12 jurors, who will have every opportunity the auditor had, and where he can preside, see, and hear for himself. This is not done as a benefit to the disappointed creditor, but as a means of obtaining further light as a foundation for an intelligent and conscientious decree.

There have been cases where we have held that the judge ought not to overrule the findings of fact by an auditor or a master without satisfactory reasons stated of record; but no case is cited, nor do we believe there is one, where this court has held that it is not entirely proper for a judge to send of his own motion, to satisfy his conscience, a disputed question of fact before a jury, notwithstanding a finding by an auditor. True, the verdict of the jury is not conclusive upon the judge. He may, in a final decree, disregard it. But that is not material to the question, and does not touch his right to direct an issue. Therefore appellant's first assignment of error is overruled.

The second assignment complains that the issue was directed to try a mixed question of law and fact. While it is settled that the court cannot direct a question of law to be passed upon by a jury, yet the questions of law and fact may be so blended as to render it impossible to separate them in framing the issue. Here, for example, was the question whether this note was a legal obligation, and this involved three others: First. Was the sixth line of the note written before signature? Second. Was there a relation of trust and confidence between testatrix and the creditor? Third. Was the relation of that character which imposed on the creditor the burden of proving a consideration? There might be relations of trust and confidence having no bearing on the business relations

of the debtor and creditor. Their character could only be ascertained as developed by the evidence, and the law applicable to the relation could only be announced as the evidence was offered, or at the close of the evidence in the charge to the jury. It would be impossible for the court to foresee and provide for each phase of the case in framing the issue. By no fair construction can it be interpreted as directed to try a question of law, although incidentally, in trying the fact, questions of law arose calling for the decision of the judge. For example, at the trial, the cashier of the bank, being called as a witness for plaintiff, stated that the note, except the interlineation, was in the ordinary form of a promissory note recognized by the bank in its business, and that it was not unusual to add to the printed blank written stipulations not in the note proper, or in the blank spaces corresponding to the printed words. This was objected to by defendant, but allowed by the court, and exception taken. Incidentally, the court thus decided a question on the law of evidence which could not have been anticipated in framing the issue. And many other questions of law arose during the trial which called for immediate decision by the court, but they were all incidental to the ascertainment of the main questions of fact. And so, whether there was sufficient evidence to show such relation of confidence and trust as imposed upon the creditor the burden of showing that there was a consideration for the note was also incidental to the main question. If the interlineation was made after the signature, the note was void; if before, and it was obtained by the payee by unfair means from one who trusted and confided in him without knowledge of its consequences to her estate, the note was void as to him who thus obtained it. There was evidence to go to the jury on this question, and the court very clearly and fairly submitted it to them, with the law applicable thereto.

This brings us to what is in substance the third assignment of error—was there sufficient evidence to sustain the claim in view of the relations of the parties, even if the interlineation was there before the signature? In view of the verdict, we must assume that it was there before. The evidence showed that it was in testatrix's possession a year before it was delivered to the payee; that he had been specially attentive and kind to her; that she was actually indebted to him in some amount for goods, though not nearly to the amount of the note; that she frequently declared her intention to compensate him for all he had done for her. The court instructed the jury that, if they found from the evidence that there was such a confidential relation as gave to the creditor a power to unduly influence her, then the burden was on him to show that she perfectly understood the effect of the note, knew the amount, and how much it would deplete her estate after

her death. This was fully as favorable to defendants as they had a right to ask. Testatrix was an intelligent woman, could read and write, transacted considerable business in the investment of her money, and had this note in her pocketbook for a year before she delivered it to the payee. Therefore there was competent evidence which warranted the jury in finding, as they did, for plaintiff. All the assignments of error, it follows, must be overruled.

The argument that Judge Butler only overruled the report of the auditor because he conjectured Judge Clayton, if he had lived, would have done the same, rests on no sound foundation. We may be very sure that, if Judge Butler had been of the opinion the claim was not sustained by the evidence of record, he would not have hesitated to disregard the verdict. To say otherwise would be to conclude that he made a wrong decree because Judge Clayton would, if he had lived, have committed the same wrong. We do not think so. As is obvious from what he says, the facts that Judge Clayton tried the issue, heard all the evidence, then fully and impartially submitted it to the jury, then refused a motion for a new trial, were persuasive evidence with Judge Butler in making his decree. Nevertheless that decree was based on the evidence before him, and ought to stand. Therefore it is affirmed, and the appeal is dismissed.

BOULDEN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. March 30, 1903.)

WRONGFUL DEATH—RIGHT OF ACTION—MITIGATION OF DAMAGES.

1. A New Jersey administrator may maintain an action for wrongful death in Pennsylvania, where the cause of action arose in New Jersey, without an ancillary administration being appointed in Pennsylvania.

2. In an action for wrongful death, brought by an administrator of an employé of a railroad company, defendant cannot show, in mitigation of damages, that the mother of the deceased would receive from the relief department of the road, of which deceased was a member, certain death benefits.

Mitchell, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County; Davis, Judge.

Action by Kate R. Boulden, administratrix of Frank R. Boulden, against the Pennsylvania Railroad Company. Verdict for plaintiff, and defendant appeals. Affirmed.

The court overruled an offer of defendant's counsel to prove by John C. Van Rodan, and by the documents by him to be produced, that Frank R. Boulden, the decedent, was a member of the Pennsylvania Railroad Voluntary Relief Department, and had agreed to be bound by the regulations of said department; that he had directed that the benefits payable upon his death should be paid to his mother, Madeline Boulden; that he had agreed in the

stipulations signed by him that the acceptance of benefits from the relief fund for injury or death should release all claims for damages against the company defendant arising from such injury or death; that after the death of said Boulden the claim for death benefits was made by the beneficiary, to wit, his mother, Madeline Boulden, who was one of the persons entitled to damages, if any, under the Acts of Assembly of the State of New Jersey; that a release by the said Madeline Boulden was duly executed on the payment and receipt by her of the sum of \$500, to which she, as the beneficiary named by the decedent as a member of the second class of the relief association, was entitled; furthermore that the company defendant paid all the expenses of the relief association, amounting to \$130,000 annually; that the said company is responsible for any deficiencies, without which contribution and guaranty the relief association could not exist; that the members of the relief association number 60,000; and that the foregoing offers were proposed to be followed by putting in evidence the regulations of the relief department, and also the other papers produced by the witness. The court refused binding instructions for the defendant. Verdict for plaintiff for \$15,500. Judgment was entered for \$12,000, all above having been remitted.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George Tucker Blapham and John Hampton Barnes, for appellant. Augustus Trask Ashton, for appellee.

MESTREZAT, J. Frank R. Boulden, a resident of New Jersey, was seriously injured in a collision between two trains while being carried on the defendant company's road as a passenger between Camden and Trenton, in that state, on February 21, 1901, and as a result of which injuries he died two days thereafter. He left to survive him a widow and a mother, both residing in New Jersey, where letters of administration on his estate were duly granted to his widow, Kate R. Boulden. No administration was raised in this state. It was admitted that the collision in which Boulden was injured was caused by the negligence of one of the company's employés, and that the defendant would have been liable to Boulden for the injuries he received if death had not ensued.

As appears by the statement filed in this case, "the plaintiff, Kate R. Boulden, administratrix of the estate of Frank R. Boulden, deceased, as the personal representative of said Frank R. Boulden, deceased, brings this suit against the Pennsylvania Railroad Company to recover damages for the exclusive benefit of the widow and next of kin of the said Frank R. Boulden, deceased, by reason of the death of the said Frank R. Boulden through the negligence of the defendant, the Pennsylvania Railroad Company, its servants,

agents, or employés." The action was instituted in pursuance of a statute of New Jersey of March 3, 1848 (P. L. 151), as amended by that of March 31, 1897 (P. L. 134), which is, *inter alia*, as follows:

"Section 1. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate: * * * provided, that where such deceased person has left or shall leave him surviving a widow, but no children, or descendants of any children and no parents, the widow shall be entitled to the whole of the damages, which she shall sustain and which shall be hereafter recovered in any such action, and the same shall be paid to her."

The trial of the cause in the court below resulted in a verdict and judgment for the plaintiff. The defendant company has appealed.

The second and third assignments of error were abandoned on the argument of the case. The other assignments raise two questions: (1) Was the defendant company entitled to show in mitigation of damages that the deceased was a member of its relief department, and that his mother, as his beneficiary, received the death benefits to which his membership therein entitled her? (2) Could the plaintiff, as administratrix, duly appointed in New Jersey, without ancillary letters having been granted in this state, bring an action here under the New Jersey statute to recover damages resulting from the death of her intestate?

1. Both of these questions were determined by the learned trial judge in favor of the plaintiff, and we think rightly so. It will be observed that this action was brought in pursuance of the provisions of a statute of New Jersey. The beneficiaries named in the statute are the widow and next of kin, who in this instance appears to be the mother of the deceased. Whatever damages may be recovered will be distributed between the widow and the mother in the proportion provided by the intestate laws of New Jersey. The individuals, however, who are benefi-

ciaries under the statute, are not named in, nor parties to, this suit, which was instituted, pursuant to the statutory requirement, "by and in the name of the personal representative of the deceased." The mother, therefore, was not a party to the action; nor, so far as the pleadings disclose, was she entitled to receive any part of the damages that might be recovered. The only questions in the case were whether a right of action had accrued to the personal representative of Boulden by reason of his death having been caused "by the wrongful act, neglect, or default" of the defendant company, and, if so, the amount of the damages thus sustained. If the first proposition were answered in the affirmative by the jury, their verdict would necessarily be in favor of the personal representative for the full amount of the damages, irrespective of the amount to be awarded the several distributees named in the statute. The jury was not required to determine, as part of the issue submitted to them, whether one of the beneficiaries had received her share of the damages recoverable by the personal representative. If it be conceded that one of the parties interested in the damages had received her share, it could not defeat the right of the plaintiff to have determined in this action the amount of damages caused by the death of the intestate. No release or acquittance given by one of the parties having a beneficial interest, therefore, could be interposed as a defense in this action of trespass. What persons are entitled to participate in the distribution of the sum recovered in the action, and the amount to be awarded each of the distributees, must be determined after this suit has been successfully terminated. The right of the defendant company to the whole or any part of the share of any beneficiary in the fund may then be considered and determined.

2. We have held that a suit will lie here for a cause of action arising in another state out of the alleged negligence of the defendant in that state, resulting in death. *Knight v. West Jersey R. Co.*, 108 Pa. 250, 58 Am. Rep. 200. It has also been expressly decided by this court, in a case arising under the New Jersey statute in question here, that the only proper plaintiff in such action in Pennsylvania is the individual in whom the right of action is vested by the laws of the state where the injuries were inflicted. *Usher v. West Jersey R. Co.*, 128 Pa. 208, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863. The New Jersey statute provides that the "action shall be brought by and in the names of the personal representatives of such deceased person." This action was brought, in compliance with the statute, in the name of the personal representative of Frank R. Boulden, the deceased, and the statement avers that the damages are recoverable for the exclusive benefit of his widow and next of kin. It would therefore appear that in this action the plaintiff has followed strictly not only the

statutory requirement, but our construction of it. The defendant company contends, however, that the letters of administration granted the plaintiff in the state of New Jersey do not confer upon her authority to bring an action here without having taken out letters ancillary in this jurisdiction. This contention is based upon the sixth section of the act of March 15, 1832 (P. L. 136; *Purd. Dig.* p. 407, par. 13), which provides as follows: "No letters testamentary or of administration, or otherwise, purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth shall confer upon such person any of the powers and authorities possessed by an executor or administrator, under letters granted within this state." It is unquestionably true that the plaintiff is not authorized to intermeddle with the assets of the decedent within this state. Our statute plainly forbids her assuming any such authority. But in this action, as we have seen, she is not seeking to recover the assets of the decedent, nor any money in which the decedent, or those claiming through him, have any interest whatever. No heir, legatee, or creditor of the decedent can have any claim on the fund collected in this suit. The statute of 1832 therefore has no application to the facts of the case. The right of action for damages resulting from death did not survive at common law. This action, therefore, is purely statutory; the right to recover here being founded on a statute of New Jersey. It created the cause of action, named the party who should enforce it, and designated the beneficiaries under it. It is elementary law that the statute must be strictly pursued, and hence the rights secured by it can only be enforced by an action in the name of the party therein specially authorized. As we have seen, the New Jersey statute confers the right of action in cases of this kind on the personal representative of the deceased. He acts, therefore, not by the authority which the probate court gave when it granted him the power to administer the estate of the deceased, but solely by virtue of the authority vested in him by the statute. It designated the personal representative of the deceased, whoever he might be, as the party to enforce the right of action given by the statute. In bringing this suit, therefore, the plaintiff does so not as the personal representative of her deceased husband, and by virtue of the authority conferred upon her as such, but as the representative or trustee of the parties for whose benefit the action was instituted, and by the authority conferred upon her by the statute. The right of action might have been conferred upon the beneficiaries themselves, or upon any private person or public official; and, if it had been, it is too clear for argument that there could be no question of the right of the person or official thus designated to maintain the action. The fact that the Legislature of New Jersey saw proper to in-

vest the right to bring the action in the person acting as the personal representative of the deceased, instead of conferring the authority upon some other person or official, does not make the person the representative of the deceased in prosecuting the case, and therefore bring him within the prohibition of the act of 1832.

We think it is clear that the plaintiff, who is the personal representative of the deceased in the state of New Jersey, could bring this action without having taken out ancillary letters of administration in this state. The assignments of error, therefore, are overruled, and the judgment is affirmed.

MITCHELL, J., dissents.

HOWE v. HOWE et al.

(Supreme Judicial Court of Maine. April 9, 1903.)

TRUSTEE PROCESS—SET-OFF—EQUITABLE ASSIGNMENT—NOTICE—ATTACHMENT.

1. The plaintiff by a trustee process attached the principal defendant's distributive share of personal estate to which he was entitled in the hands of an administrator. He also attached the goods, effects, and credits of the defendant in the hands of another party as the defendant's assignee.

The administrator, in his trustee disclosure, offered evidence to prove that the plaintiff was indebted to him in his individual capacity, and this sum he claimed to set off against such sum as was due to the plaintiff from the intestate's estate. *Held*, that this demand, thus due him in his individual capacity, cannot be set off in this action.

2. Where the subject of the assignment is not capable of manual delivery, an oral assignment may be sufficient, if founded upon a valuable and adequate consideration, and accompanied by acts which amount to a constructive delivery, and even if the written assignment had never been executed.

3. By the assignee's disclosure it appeared that the principal defendant was indebted to him, and that for a valuable consideration, consisting of such present indebtedness and also future advances, the defendant had executed an assignment to him of all sums of money then due and all that might be due him from the estate, then unsettled, and in the hands of the administrator. *Held*, that the transaction between the defendant and the claimant satisfies the requirements of an equitable assignment.

4. As between the plaintiff and the claimant, equitable considerations must prevail as fully as possible. *Held*, that the execution of the assignment and its record, in accordance with a previous understanding between the assignor and the assignee and notice to the administrator, removes the question of its sufficiency from possible doubt.

5. An assignment is not effective to charge the holder of a fund as debtor to an assignee until notice has been given him of the assignment, but it will be complete as against creditors of the assignor if the trustee has notice or knowledge of it in season to disclose the fact of the assignment.

6. Where an assignment is given as collateral security for the amount then due the assignee and for future advancements, and is valid between the parties for that purpose, and it does

¶ 5. See Garnishment, vol. 24, Cent. Dig. § 190.

not appear that there was any adjustment by which the fund was applied in payment or as specific security for a stated amount, but transactions between the parties continued, and the items of debit and credit were the subject of general account up to the time of the hearing on the assignee's claim, *hold* that, as against attaching creditors, the assignment is not security for advancements made by the assignee to the assignor after notice of the attachments, and the plaintiff's attachment thereupon had precedence over subsequent advancements of the assignee, and defeated his claims to the fund.

(Official.)

Exception from Supreme Judicial Court, Penobscot County.

Action by George W. Howe against Samuel T. Howe and Charles A. Howe, trustee, and Charles W. Pierce, trustee and claimant. Judgment for defendants. Plaintiff excepts. Exceptions sustained.

Assumpsit to recover upon two promissory notes given by Samuel T. Howe. The action is by trustee process, in which the plaintiff sought to hold the defendant's distributive share of the estate of Mary J. Keaton, in the hands of her administrator, Charles A. Howe; also the same fund claimed by Charles W. Pierce under an assignment from the defendant.

Argued before WISWELL, C. J., and WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

G. W. Howe, for plaintiff. H. J. Chapman and G. H. Worster, for Howe, trustee. M. L. Durgin, for defendant and Pierce, claimant.

PEABODY, J. The plaintiff in an action of assumpsit against the principal defendant attached his goods, effects, and credits in the hands of Charles A. Howe, administrator of the estate of Mary J. Keaton, deceased, intestate, in his capacity as administrator, and in the hands of Charles W. Pierce, assignee of the defendant, as trustees.

The trustees filed their disclosures made in answer to interrogatories propounded by the plaintiff. It appears that at the time of the service of the writ upon the administrator as trustee the defendant was entitled to a distributive share of the personal estate of the intestate, which was subsequently shown by an order of distribution issued by the probate court of Penobscot county having jurisdiction of the estate, to the amount of \$104.97.

The administrator offered evidence tending to prove that at the time of the service of the writ the plaintiff was owing him in his individual capacity the sum of \$122.75, which he claimed to set off against such sum as might become due to the plaintiff from the intestate's estate. His demand, if valid, could not be set off in this action. Rev. St. c. 82, § 63.

The disclosure of Charles W. Pierce as trustee states that he had at the time of the

service of the writ on him no goods, effects, or credits belonging to the defendant, but that prior thereto, and prior to the service of the writ upon the administrator of the estate of Mary J. Keaton, deceased, the defendant was indebted to him to the amount of \$155.15; and for a valuable consideration, consisting of such present indebtedness and also future advances, the defendant had executed an assignment to him of all sums of money then due and all that might be due him from the estate of Mary J. Keaton, then unsettled, which assignment was dated June 26, 1901.

It appears that the assignee did not receive the assignment after it was signed, but it was shown to him at his house by the defendant, who, at his request, took it to the office of the town clerk of Milo, where it was signed by him and recorded July 4, 1901. His claim under the assignment to the funds disclosed by the administrator was duly filed. The plaintiff formally denied the validity of the assignment, and a hearing was had upon the disclosures of the trustees and the evidence of the claimant.

The presiding justice ruled as follows: "Trustees discharged, with costs. Funds in trustees' hands to the amount of one hundred and fifty-five dollars, if so much, adjudged to claimant, Charles W. Pierce." And to this ruling the plaintiff by exceptions has brought the disclosures and evidence before this court.

The plaintiff contends that the assignee's claim against the principal defendant is fictitious, and that the assignment is void by reason of fraud and informality.

The assignee's account against the assignor, in addition to his testimony, is supported by exhibits and books of account, and we think it is proved that the amount of \$155.15 was legally due him at the date of the assignment.

The testimony of the defendant shows that immediately after a conversation with the plaintiff he executed the assignment to the claimant, from whom he expected favors. This fact and other attendant circumstances indicate his intention to hinder and delay the plaintiff in the collection of the debt in suit; but the evidence fails to prove that the claimant at the time acted collusively with the defendant, or knew of his intention, and his rights are not prejudiced by any fraudulent purpose of the assignor to delay or defeat the demands of other creditors.

It is also contended by the plaintiff that the assignment was not legally delivered to the assignee, and that no such notice was given to the administrator as made the assignment effective against his attachment of the fund.

The subject of the alleged assignment was not capable of manual delivery, and an oral assignment might be sufficient if founded upon a valuable and adequate consideration and accompanied by acts which amounted to a constructive delivery; and, even if the written as-

assignment had never been executed by the assignor, we think the transaction between the defendant and the claimant satisfied the requirements of an equitable assignment. *White v. Kilgore*, 77 Me. 571, 1 Atl. 739; *Simpson v. Bibber*, 59 Me. 196; *Porter v. Bullard*, 28 Me. 448.

As between the plaintiff and the claimant, equitable considerations must prevail as fully as possible. *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276. And the execution of the assignment and its record in accordance with a previous understanding of the assignor and assignee removes the question of its sufficiency from possible doubt. *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908.

An assignment is not effective to charge the holder of a fund as debtor to an assignee until notice has been given him of the assignment, but it will be complete as against creditors of the assignor trusteeing the chose in action if the trustee has notice or knowledge of it in season to disclose the fact of the assignment. *Littlefield v. Smith*, 17 Me. 327; *Thayer v. Daniels*, 113 Mass. 129.

The record of the written assignment in this case was not required by law, and was not, therefore, constructive notice to the administrator; but the evidence shows that he was actually informed that it had been made, executed, and recorded before making his disclosure as trustee.

But we think there is another phase of the case which controls the decision. The assignment was not absolute. It was given as collateral security for the amount then due the assignee and for future advancements, and was valid between the parties for that purpose.

It does not appear that there was any adjustment by which the fund was applied in payment or as specific security for a stated amount, but transactions between the parties continued, and the items of debit and credit were the subject of general account up to the time of the hearing on the assignee's claim.

As against attaching creditors, the assignment was not security for advancements made by the assignee to the assignor after notice of the attachments. The writ was served upon the claimant as trustee July 13, 1901, and he thereby had definite knowledge of the plaintiff's attachment of the fund in the hands of Charles A. Howe, administrator, as trustee. And the assignment as security for credits thereafter given was subject to the attachment, and might be extinguished by a payment of the claim secured.

It is shown by the claimant's testimony that on the day he received notice of the plaintiff's attachment there was due him from the principal debtor under the assignment the sum of \$169.75, an increase by advancements of \$14.30 above the amount due at the date of the assignment, which was \$155.45; that subsequently, by credits in excess of debits, the assignor had, on the 6th day of November, 1901, overpaid the debt which was secured by assignment. The plaintiff's attachment

thereupon had precedence over subsequent advancements of the assignee, and defeated his claim to the fund.

Exceptions should be sustained. Charles A. Howe, as administrator, should be charged as trustee for \$104.97, less his costs. Charles W. Pierce should be discharged as trustee, with costs, and judgment for costs should be rendered against him as claimant of the fund in the trustee's hands.

So ordered.

BURGESS, Judge, v. YOUNG et al.

(Supreme Judicial Court of Maine. April 4, 1903.)

EXECUTORS AND ADMINISTRATORS—LIABILITIES OF ESTATE—PRIORITIES AND PAYMENT—LIABILITIES ON BONDS.

1. By Rev. St. c. 66, § 2, when, by proper proceedings in probate court, it is demonstrated that the estate is not sufficient to pay more than the expenses of the funeral and administration and the first four classes of debts named in section 1 of the same chapter, that fact, whenever ascertained, may be pleaded and shown in defense to a suit on the administrator's bond.

2. In a suit upon such bond, any defenses are open to the sureties which they have a right to make, whatever the liability of the administrator alone may be. And while a judgment against an administrator is for the most purposes conclusive upon his sureties, if it be upon the merits, yet they are not in all cases concluded.

3. When an estate is not sufficient to pay more than the funeral expenses and expenses of administration and the first four classes of debts named in Rev. St. c. 66, § 1, the administrator is exonerated from payment of any claim of the fifth class, without representation of insolvency.

4. *Held*, that the nonliability of the sureties was judicially ascertained when the administrator's account was subsequently settled, showing that the estate was exhausted by the expenses and the first four classes named in Rev. St. c. 66, § 1.

5. An administrator was appointed, who gave bond and filed an inventory. After notice and demand, a creditor brought suit against the administrator, in which, no pleadings having been filed, the plaintiff recovered judgment against the defendant as administrator. Execution was issued upon the judgment, and placed in the hands of an officer, who made demand for payment on the administrator, or to show personal estate of the deceased wherewith to satisfy the execution; but the administrator refused to do either, and the execution was returned wholly unsatisfied. Thereupon, the plaintiff brought an action of debt on the administrator's bond in the name of the judge of probate. In the meantime the administrator had done nothing towards settling the estate but file the inventory.

To this action on the bond the administrator and his sureties filed the plea of general issue, and a brief statement that the estate, upon settlement in probate subsequently, was not more than was sufficient to pay the expenses and claims of the first four classes mentioned in Rev. St. c. 66, § 1, and that said administrator has not, and had not at the date of the purchase of the plaintiff's writ, in his hands any estate whatsoever of the intestate over and above the allowance to the said widow, and the expenses of administration and of the last sickness of the intestate. The defendants offered to prove the defense set up

in the brief statement, but the plaintiff objected to it as incompetent and furnishing no defense.

Held, that the evidence offered was admissible, and will constitute a defense to the plaintiff's action.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by James H. Burgess, judge of probate, against D. Benson Young and others. Case reported. Case to stand for trial upon the evidence offered by defendants.

Debt on an administrator's bond in the name of the judge of probate, under Rev. St. c. 72, §§ 10, 13, to recover a judgment obtained against his estate after letters of administration were issued. Plea, general issue, and brief statement that no estate remained in the administrator's hands after having paid the expenses of the intestate's last sickness, expense of administration, and allowance to the widow, as appears by his account settled in the probate court since this action was brought. The estate was not represented insolvent, and the plaintiff contended that the administrator's liability was absolute.

The facts are fully stated in the opinion. Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, and SPEAR, JJ.

D. D. Stewart, for plaintiff. F. J. Martin, H. M. Cook, and L. C. Stearns, for defendants.

SPEAR, J. This case comes up on report upon the following facts: D. Benson Young was appointed administrator on the estate of his father, Charles L. Young, late of Newport, deceased, and gave the bond in suit on the 23d day of February, 1897, and filed an inventory on the 31st day of May, 1898, which disclosed personal estate to the value of \$200. After notice and demand of payment, of which the defendant took no notice, the creditor of said Charles L. Young, on the 11th day of February, 1899, brought suit against the administrator, D. Benson Young, in Somerset county, at the March term of court, 1899, to which the defendant duly answered.

At the following September term of court, on the 18th day of October, 1899, the plaintiff recovered judgment against the defendant, as administrator, and on said day court finally adjourned, no representation of the insolvency of said estate, or of the want of funds or property, or suggestion that the estate fell within the provisions of section 1 of chapter 66 of the Revised Statutes, having been made by said administrator upon the docket of said court during the pendency of said action.

Execution was issued, and placed in the hands of a duly qualified officer, who made demand of payment on the administrator, or

to show personal estate of the deceased wherewith to satisfy said execution, but the administrator refused to do either, and said execution was returned wholly unsatisfied. Thereupon the plaintiff brought an action of debt on the administrator's bond in the name of the judge of probate for Penobscot county, returnable to the January term, 1901, of the supreme judicial court for Penobscot county. In the meantime the administrator had done nothing toward settling said estate but file the inventory.

To this action of the plaintiff on the bond, the defendants filed the plea of general issue and a brief statement, upon which they rely for defense, setting forth the following facts: That on the 30th day of January, 1900, the administrator presented his account, which was, on the 13th day of June following, allowed, and left a balance in his hands of \$146.75; that on the 28th day of February, 1900, the judge of probate, after petition, due notice, and hearing, made an allowance of said balance of \$146.75 to Abba M. Young, widow of said intestate; and that all of the estate of said intestate was not more than was sufficient to pay expenses and claims of the first four classes mentioned in section 1 of chapter 66 of the Revised Statutes; and that said administrator has not, and had not at the date of the purchase of the plaintiff's writ, in his hands, any estate whatsoever of the intestate, over and above the allowance to said widow and the payment of the expenses of administration and of the last sickness of the intestate.

The report presents the exact question to be determined as follows: Without a ruling of the court upon this motion, the defendants offered to prove the proceedings set out in the brief statement by the records of the probate court. The plaintiff objected in limine to any and all such evidence as incompetent and furnishing no defense. By consent of parties the case is reported to the law court. If, against the objections of the plaintiff, the evidence offered by the defendants is admissible, and will constitute a defense in whole or in part, the action is to stand for trial; otherwise, judgment is to be entered for the plaintiff.

We think the evidence offered by the defendants should be admitted. The plaintiff's position is inequitable. If sustained, it will enable him to make the sureties on the administrator's bond his debtors in the sum of over \$300 upon a claim admitted to be of no value against the estate.

Section 1, c. 66, of the Revised Statutes, provides that "an insolvent estate, after payment of expenses of the funeral, and of administration, shall be appropriated:

"(1) To the allowance made to the widow or widower, and children.

"(2) To the expenses of the last sickness.

"(3) To debts entitled to a preference under the laws of the United States.

"(4) To public rates and taxes, and money due the state.

"(5) To all other debts.

"A creditor of one class is not to be paid, until creditors of preceding classes, of which the administrator had notice, are fully paid."

Section 2 provides: "When an estate is not sufficient to pay more than such expenses, and claims of the first four classes, the administrator is exonerated from payment of any claim of the fifth class, without making a representation of insolvency."

The case at bar comes clearly within this section. The brief statement—for the purposes of this case admitted to be true—shows that the estate was not sufficient to pay more than the expenses of funeral and administration and the first four classes enumerated in section 1; in fact, it was all consumed in the payment of the expenses and the first class; hence the administrator was exonerated from payment of the plaintiff's claim, which came within the fifth class, without representation of insolvency.

The statute is entirely silent as to the time when the administrator shall ascertain the condition of the estate of his intestate, or when he shall settle his final account, in order to exonerate himself from paying the debts of the fifth class. The language is "when an estate is not sufficient," etc. That is, at whatever time in the settlement of the estate it is discovered that the estate "is not sufficient," then the administrator is exonerated. In the absence of any statute to the contrary, the discovery of the insufficiency of the estate would be seasonable if the settlement of the final account, showing the facts necessary to exonerate, was entered upon the records of the probate court in time to enable such records to be pleaded in defense to the action on the bond.

The sureties became liable for the faithful administration of all the assets of the estate that might come into the administrator's hands. They assumed liability for any negligence on his part in properly protecting and distributing such estate. The report shows that the administrator did distribute the whole estate according to the order of court, and duly settled his final account, and that the assets of the estate were all consumed in paying the expenses and the widow's allowance—a claim of the first class. These facts clearly brought the procedure in the settlement of the estate under section 2 of chapter 86. But section 2, under these circumstances, expressly relieved the defendants from any liability for the payment of claims of the fifth class without representation of insolvency.

But the plaintiff says that the administrator should have rendered the estate insolvent, and having neglected to do so, and thereby prevented the issue of a judgment against him, he is not now permitted to come into court and make the defense he could, even if his statement is true, and should,

have made against the recovery of the plaintiff's judgment; that by permitting the plaintiff to take judgment the defendant admitted that he had funds of his intestate in his hands sufficient to pay the plaintiff's judgment, and that, such funds being admitted, upon the refusal of the administrator to pay the judgment or point out personal property with which to do so, the sureties on the administrator's bond were thus made liable. Our discussion of this branch of the case will proceed upon the ground that the estate should have been rendered insolvent, but by the neglect of the administrator was not. The plaintiff's theory is that his judgment against the administrator is conclusive upon both the principal and sureties, and not open to the defense of *nulla bona* or *plene administravit*. But it is well established, both in this state and in Massachusetts, that a judgment against the goods and estate in the hands of an administrator is not conclusive as to all defenses against the sureties.

In *Bourne v. Todd*, 63 Me. 434, a case like the one at bar, our court held that the extinguishment of the administratrix's authority at the time the suit was brought against her was available as a defense by the sureties to an action on her bond. The court (page 434) say: "For if, to the plea of general performance, the plaintiff had replied, substantially, the recovery of the judgment, demand, refusal, and return of *nulla bona*, and the defendants had rejoined an extinguishment of the administratrix's authority, we think the rejoinder would constitute a good answer to the replication so far as the sureties are concerned, and the evidence offered admissible, and would sustain it."

In Massachusetts, before separation, it was held that the sureties on an administrator's bond were entitled to plead the statute of limitations to an action against them on the bond. *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80. This decision has never been questioned by the court who made it, but has been cited with special approbation in *Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197, and in *Wells v. Child*, 12 Allen, 336.

Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80, was exactly like the case at bar so far as the plaintiff's claim was concerned. The court (page 9) say: "The administrator, however, in the present case, suffered a judgment to go against him, not having pleaded the statute; and in a suit to which his sureties or their representatives were not parties, so that they had no opportunity to defend themselves under the statute. We are clearly of opinion that, under these circumstances, the executors of the surety have a right in the present action to plead the same matter in their defense; not being barred by a judgment, suffered collusively or negligently by the administrator, from a protection which the law intended for their benefit. If it were otherwise, they would be precluded, by a judgment passed *inter alios*, and which they

had no means of preventing, from asserting a privilege which was manifestly intended to be secured to them by the statutes."

So, in the case at bar, the sureties had no opportunity to defend themselves against the claim of the plaintiff, which culminated in his judgment against the goods and estate of the deceased in the hands of the administrator. If they are now prevented from making the defense set up in their brief statement, they will also be precluded by a judgment passed *inter alios*, and which they had no means of preventing. There seems to be no more reason for permitting the right of the sureties to plead extinguishment of authority, or statute of limitations, than for asserting their right to plead any other defense. It is the neglect on the part of the administrator to make the defense that is injurious. And neglect to make the defense of *nulla bona* is just as injurious as neglect to make the defense of the statute of limitations or extinguishment of authority. The one defense leaves both parties in just the same situation as the other. The plaintiff is no worse off with the defense of *nulla bona* than with that of the statute of limitations, and the defendant no better off. The kind of defense is immaterial. It is the opportunity to make it which is important, and there seems to be no good reason why the opportunity should not extend to the neglect of the administrator to make any kind of defense which could legally have been made. We think that the principle underlying the decision of the last two cases would admit the defendants' evidence.

There is another line of cases which, by analogy, are directly in point. Chapter 87, Rev. St. § 3, provides that, when an officer makes a return of *nulla bona* on an execution against an estate, a writ of *scire facias* suggesting waste may be issued against the executor or administrator. There is no good reason why *scire facias* on a judgment does not rest upon the same ground as an action upon a bond, on the same judgment. The Massachusetts statute relating to *scire facias* is similar to ours, hence the Massachusetts decisions relating to this subject are in point. But it has been held by a long and well-considered line of decisions that the defense of *nulla bona* or *plene administravit* may be interposed to an action of *scire facias*.

In *Fuller v. Connelly*, 142 Mass. 230, 7 N. E. 853, after citing the provision of the statute relating to *scire facias*, the court say:

"This provision, in substance, has been in force since the statute of 1783, c. 32, was enacted. The policy has always been to make an executor or administrator liable *de bonis propriis* to a judgment creditor only on the ground of waste. It may be that the burden is put upon the executor of proving that there has been no waste; but, if he can show this, it is the clear implication of the statute that he shall not be liable on *scire facias*. If, then, he can show that, since the judgment was rendered, there had been an adjudication of

insolvency, or the settlement of the account showing that all the assets have been exhausted in paying preferred charges and claims, he shows that there has been no waste, and, therefore, that he is not liable for the judgment. It was held in the early and well-considered case of *Coleman v. Hall*, 12 Mass. 570, that, in *scire facias* on a judgment recovered against an administrator, it was a defense to show that, after the judgment, a representation and adjudication of the insolvency of the estate was made.

"This was approved in *Shillaber v. Wyman*, 15 Mass. 322, and extended to a case where the estate was represented insolvent after the *scire facias* was brought. It was also approved in *Walker v. Hill*, 17 Mass. 380.

"The other remedy of a judgment creditor is by a suit upon the bond under the Pub. St. c. 143. This statute merely gives the judgment creditor the right to put the bond in suit for his own benefit, but does not define his rights, or the liability of the executors or his sureties. It cannot reasonably be contended that the liability of the executor or his sureties is greater in a suit upon the bond than it is in *scire facias* upon the judgment, and therefore the cases we have referred to are applicable to the case at bar, and show that the defense is maintained."

In *Hayes v. Seaver*, 7 Me. 239, the court says:

"As a general proposition, perhaps it may be admitted that if the executor neglected to plead *nulla bona* or *plene administravit*, but suffer judgment to be rendered against him, he shall be bound by the judgment, and shall not afterward be permitted, in avoidance of such judgment, to deny assets, although he might have done it under the proper plea. But to this general proposition there are exceptions, as in the case of insolvent estates, where the insolvency is established subsequent to the rendition of the judgment against the goods and estate of the deceased in the hands of the administrator; on *scire facias*, suggesting waste, and pray for execution against the administrator *de bonis propriis*, the insolvency may be shown in bar to the execution, notwithstanding judgment. *Coleman v. Hall*, 12 Mass. 570.

"In this case, it may be true, as contended, that the executors themselves, having been defaulted in the original suit, would not now be permitted to deny assets. But we do not admit that a judgment thus rendered against the principal is equally binding upon the surety, even if it had been rendered either originally or on *scire facias de bonis propriis*."

With reference to the liability of the surety the court further says: "He was not a party to any of the previous proceedings, and consequently had no opportunity to show it [his defense]. He is now, for the first time, a party in court, and claiming the right to prove that the plaintiff in interest has suffered nothing by any neglect of the executors;

that she has received from the estate even more than she was by law entitled to. It must be a severe principle that would preclude him from the opportunity of doing so. It is clear that the executors suffered a judgment to be rendered against them which they might have successfully resisted, and, inasmuch as the defendant, their surety, was not a party, he ought not to be barred by that judgment thus negligently or collusively suffered by his principals, even were it *de bonis propriis*, but may now be permitted to avail himself of the same matter in his defense which they might have urged against the original suit or the *scire facias*. *Foxcroft v. Nevens*, 4 Greenl. 72; *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80; *Gookin v. Sanborn*, 3 N. H. 491; *Tarbell v. Whiting*, 5 N. H. 63."

It is worthy of notice in this connection that *Dawes v. Shed*, *supra*, an action upon a bond, is favorably cited by our own court in *Hayes v. Seaver*, *supra*, an action of *scire facias*, in support of the same defense as was sustained in the action on the bond, thereby admitting that the same defense may be pleaded to either form of action.

We think that the principle is well established that the sureties upon an administrator's bond can, in an action like the one at bar, plead *nulla bona* or *plene administravit*. This principle is derived not only from analogous cases but by at least one case directly in point sustaining the defendant's contention, not only as to the liability of the sureties, but the principal as well. *Fuller v. Connelly*, 142 Mass. 227, 7 N. E. 853.

On the other hand, we have not been able to find a case in our state that sustains the contention of the plaintiff. *Sturgis v. Reed*, 2 Greenl. 109, relied on by the plaintiff as on all fours with the case at bar, was a writ of *scire facias* upon a judgment against the estate of the intestate in the hands of the administrator. The question involved in the case was one of pleading, and was whether an execution, having been set aside by order of the court, was regularly issued. To the writ of *scire facias* the defendant pleaded in bar the order of court setting aside the execution, and the court says (page 112) "the order of court is the only material fact stated in the plea." Also, "the record discloses nothing which shows that the execution on which the return was made had issued irregularly or improperly. It is true it appears that the estate of the intestate was represented insolvent before the defendant assumed the defense, and that it actually is insolvent; still, as there was no averment in the defendant's plea in the former actions that the estate was under a representation of insolvency, nor any motion made and entered on the docket, after judgment was rendered, for a stay of execution on account of such insolvency, the clerk was authorized, and it was his duty, to issue execution in the manner before stated."

Therefore the point decided in this case was that the order of court revoking the execution, which had been regularly issued, could not be pleaded in bar to a writ of *scire facias* on the judgment. What other plea or brief statement the court would have admitted in defense in this case, had it been offered, does not appear; hence the above case should be regarded as a precedent only upon the point decided. But it is thoroughly established by the cases already cited that, in *scire facias*, "it was a defense to show that, after judgment, a representation and adjudication of the insolvency of the estate was made." *Fuller v. Connelly*, 142 Mass. 230, 7 N. E. 853; *Coleman v. Hall*, 12 Mass. 570; *Shillaber v. Wyman*, 15 Mass. 322; *Walker v. Hill*, 17 Mass. 380.

Thurlough v. Kendall, 62 Me. 166, is also cited as in direct support of the plaintiff's contention, but Chief Justice Peters expressly says: "But we are not required to decide whether the judgment exhibited here would operate as an estoppel or not."

Chief Justice Morton, in *Fuller v. Connelly*, 142 Mass. 227, 7 N. E. 853, in a well-considered opinion sustaining the contention of the defendant in the case at bar, says: "The case of *Newcomb v. Goss*, 1 Metc. (Mass.) 333, is opposed to this view. It was there held that representation of insolvency, made after the suit upon the bond was commenced, was not a defense, and that the administrator and his sureties were personally liable for the full amount of the judgment without regard to the question whether there was in fact any waste. It is noticeable that the cases which we have cited were not referred to by the court or the counsel in the case of *Newcomb v. Goss*, but it is irreconcilable with those earlier decisions, which seem to us to be founded upon better reasons." This case, overruling *Newcomb v. Goss*, fully sustains the contention of the defendants.

While we think the case at bar comes within section 2, c. 66, Rev. St., and that the administrator was not required to render the estate insolvent at any stage of the proceedings, and that, without doing so, he is entitled to offer evidence under his brief statement, yet, as the greater includes the less, it became necessary, in order to apply legal principles to the case, to proceed farther, and discuss the legal propositions that would apply had it been the administrator's duty to represent the estate insolvent, with which duty he had failed to comply. And the doctrine seems well established that, in the latter case, the sureties would be entitled to make the defense of *nulla bona* or *plene administravit*.

In *Siglar v. Haywood*, 8 Wheat. 676, 5 L. Ed. 713, the administrators were permitted to make a defense to an action of debt on a judgment under the plea of *null debet* and *plene administravit*.

This case was decided in 1823, and Chief

Justice Marshall delivered the opinion of the court, in which he said: "It is now well settled, and the case cited from Oranch in the argument is founded on the principle, that, if an administrator fails to sustain his plea of fully administered, he is not on that account liable to a judgment beyond the assets to be administered. The plea is not necessarily false within his own knowledge. He may have failed to adduce proof of payments actually made. It is not required that the plea should state with precision the assets remaining unadministered, and an executor or administrator would always incur great hazard if he were required to state and prove the precise sum remaining in his hands, under the penalty of being disposed to a judgment for the whole amount claimed, whatever it might be. To state a full administration without proving it would be useless. The rule and usage, therefore, is that, if the plea of fully administered be found against the defendant, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only. The instruction of the court on this point is erroneous, and, consequently, the verdict and judgment founded on it must be set aside and reversed."

We think this view of the law is the just one. If the brief statement in the case is true, the plaintiff could not have collected any part of his claim from the estate. And, inasmuch as he can take out execution against the administrator personally for his costs, he would lose nothing. As stipulated in the report,

Case to stand for trial.

YORK v. CLEAVES et al.

(Supreme Judicial Court of Maine. April 9, 1903.)

NEGLIGENCE—FIRES—FAILURE OF DUE CARE—NATURE OF LIABILITY.

1. In an action on the case to recover damages for negligence in burning the plaintiff's corn factory, the verdict was for the defendants, and two important questions of fact were presented: First, whether the fire that burned the plaintiff's building was communicated by sparks and brands from the defendants' sawmill; and, second, if it was, were the defendants negligent in permitting the sparks to escape?

Held, that by the process of elimination the evidence all points to but one conclusion—that the spark or cinder which set fire to the plaintiff's factory was communicated from the defendants' mill.

2. As to the second proposition, the evidence shows that the defendants' boiler, flues, and smokestack were so constructed that they were well calculated, and liable, in a strong wind, to carry sparks and cinders for a considerable distance through the air, and that a person of ordinary care and prudence, under all the circumstances of this case, should have anticipated such a result.

(Official.)

On motion from Supreme Judicial Court, Cumberland County.

Action by Asa F. York against Augustus H. Cleaves and another. Verdict for defendants. Motion for a new trial granted.

Action on the case to recover damages for the destruction of the plaintiff's corn factory in the town of Yarmouth by defendants' alleged negligence in the maintenance and operation of a sawmill, from which it is claimed the sparks escaped and caused the fire. A verdict was returned for the defendants, and plaintiff moved for a new trial.

Argued before SAVAGE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

L. C. Cornish, N. L. Bassett, G. E. Bird, and W. M. Bradley, for plaintiff. E. Foster and O. H. Hersey, for defendants.

SPEAR, J. This is an action on the case to recover damages for negligence in burning the plaintiff's corn factory. The verdict was for the defendants. The case comes up on motion and exceptions.

Asa F. York, the plaintiff, was the owner of a corn factory and appurtenances connected therewith in Yarmouthville, in the county of Cumberland.

The defendants owned and occupied a sawmill operated by a boiler and steam engine. The plaintiff alleges that the smokestack connected with the boiler was improperly constructed, defective, and out of repair; that on the 13th day of April, 1900, it was a very dry time, and a high wind was blowing in the general direction of the plaintiff's buildings; that the defendants' sawmill was in such close proximity to the plaintiff's buildings that the use of fire in and about said boilers would ordinarily and necessarily threaten and endanger the buildings of the plaintiff, and cause the burning thereof, of all which the said defendants well knew; that, notwithstanding these conditions, the defendants, on said 13th day of April, negligently built, and maintained a great and hot fire in their furnaces about said boilers; that said fires, thus negligently built under said conditions, caused sparks and burning brands to escape from said smokestack, whereby fire and sparks and burning brands were negligently carried to the roof of the plaintiff's buildings, and caused them to take fire, and to be wholly burned and destroyed.

The evidence in the case comprises nearly 400 pages, and contains the testimony of many witnesses on both sides. The testimony does not disclose any direct evidence of how the fire actually occurred, as no witness saw the spark that kindled the flame. The fire was in an early stage of progress when discovered. The truth, therefore, as nearly as it can be ascertained, must be gleaned from the facts, circumstances, and conditions tending to prove or disprove the cause of the fire. These elements of proof, based upon admitted facts, all pointing in the same direction, or so connected one with another as to produce an effect the cause of

which is inevitable, are often more reliable than positive or direct testimony which depends upon the interest, bias, opportunity, eyesight, hearing, and intelligence of the witness.

The first important question involved is whether the fire originated from sparks or brands from the defendants' mill. The admitted facts in this case all concur, we think, in pointing to the defendants' mill as the cause of the fire which consumed the plaintiff's factory.

The defendants came from Freeport to Yarmouthville in the fall of 1899, and there erected their mill and appurtenances on the site which it occupied at the time of the fire, and began to operate it in the early part of 1900. The mill was equipped with a boiler, engine, smokestack, and other machinery, as set forth in the writ. The plaintiff's corn factory, erected in 1887-88, and operated since that time, was situated almost exactly due north of the defendants' mill, and a little over 300 feet therefrom. The plan shows that the distance from the smokestack of the defendants' mill to the point on the roof of the plaintiff's factory where the fire is alleged to have caught is 340 feet—a little over 100 yards. No buildings or other obstacles intervened to break a direct and clear passage between the mill and the factory. The elevation occupied by the two buildings was such that the top of the defendants' smoke stack was considerably higher than the roof of the plaintiff's factory.

The character of the defendants' mill was well calculated to carry sparks or brands when the wind and the weather were such as to act in favorable conjunction with the tendency of the flues and smokestack to scatter fire. It appears from the testimony of the defendants that the engine and boiler set in their mill had been used in another mill some five or six years. The doors and grate of the fire box were more or less broken, and the draft thereby constantly increased. The flues of the boiler were straight, running directly from the fire box into the smokestack, giving a straight passageway for sparks and cinders direct from the fire box to the smokestack. The steam was exhausted directly into the smokestack for the very purpose of increasing the draft, as the defendants themselves and other witnesses admit. The smokestack was about 25 feet high, without any spark arrester on the top, so that, if any sparks, cinders, or embers passed into the smokestack, the draft would have a tendency to at once carry them to the top of the stack, and thence scatter them to a greater or less distance, depending upon the size of the sparks or brands and the velocity of the wind.

The fuel used in the fire box of the boiler, as stated by the defendant Walker, was "slabs, mostly, with a little hard wood." Mr. Knight, who fired the boiler in the winter of 1900, says: "They were mostly green slabs,

but not wholly so. They used some dry wood that they had hauled there." Robert Beers, who was firing at the time of the fire, says, "They were burning green slabs; most all green slabs; a few dry ones." Other witnesses say "that they used slabs, pine limbs, shavings, and sawdust at various times, and that they were burning slabs and dry wood altogether in April." We think it can make but little difference, however, with respect to the carrying of cinders and sparks, whether the wood when it was put into the furnace was dry or green, inasmuch as it must become thoroughly dry in the furnace before complete combustion could take place; and the embers, left from the burning, whether from dry or green wood, would be practically the same in weight and density. We see no reason, even if all the slabs were green, why sparks and cinders might not with sufficient draft be drawn through the straight flues of the furnace and carried up and out of the smokestack, as in fact the testimony shows was done.

Mr. Knight, the fireman, when asked in regard to this matter, testified "that he knew of sparks and brands coming out of the stack; that he noticed them in the evening, the latter part of the day's work." He testified to the same on cross-examination. Mr. Knight worked at the mill during the months of December and January. Mr. Blake, another workman at the mill in the month of January, corroborated Mr. Knight. Mr. Lawrence, who was often at the mill during the whole time of its operation, also said that he saw "sparks and brands coming out of the smokestack." In answer to the question as to how often he had noticed them, he said: "Well, quite frequently when I used to be down there. It would depend on the way of the wind. If the wind was a south wind, it was right in my track going and coming; but if it was a west wind, it would blow them off where I didn't take much notice of them." Thus it appears from the uncontradicted evidence that sparks and brands, during the whole period of the operation of this mill, were observed by several witnesses to be coming from the top of this smokestack. There seems but little question that a wind strong enough and blowing in the right direction would carry sparks and cinders from the smokestack of the defendants' mill a distance a little more than 100 yards to the plaintiff's factory, and, if the conditions were right, communicate fire.

The evidence all shows that April 30th, when this factory was burned, was an unusually dry time for this season of the year. The fact that some 20 other fires were started from the cinders and brands carried from the burning factory is sufficient to show that the roofs of the houses were very dry, and easily set on fire. We think that on the day of this fire the evidence convincingly shows that a heavy wind was blowing from the south directly from the defendants' smokestack to-

wards the plaintiff's roof. The strength of the wind on the afternoon of the fire is characterized by various witnesses as follows: "Almost a gale; heavy wind; blew very hard; very strong; pretty strong wind; quite strong wind; perhaps 20 miles an hour; good strong wind; very strong; unusually strong." The weather bureau gives the velocity on the day of the fire as follows: "12 o'clock, 10 miles an hour; 1 o'clock, 12 miles an hour; 2 o'clock, 16 miles an hour; 3 o'clock, 17 miles; 4 o'clock, 18 miles; the greatest velocity between 1 and 6 o'clock, 23 miles per hour." Mr. Jones, of the weather bureau, thinks this was about 3 o'clock. There was no material controversy as to the strength of the wind. The evidence clearly demonstrates that it was of sufficient force to create a heavy draft in the smokestack, and to carry sparks and cinders a considerable distance.

But with reference to the direction of the wind, as already observed, there was a claimed difference. While the defendants appear to contradict the contention of the plaintiff upon this point, yet we think their own witnesses practically substantiate it, and all the evidence in the case, taken into consideration, overwhelmingly sustains it. Various witnesses testified as to the direction of the wind as follows: Merrill, from the south; plaintiff, from the south, a little west of south; Horn, southwest, southerly; Sawyer, south, or nearly so; York, about south; Ring, nearly south; McKennon, from the south, a little to the westward; Gay, was shifting a little; Humphrey, south; Beeman, about south; nearly parallel with the Grand Trunk Railway, blew right up the track. It should be here observed that the railroad track is nearly parallel with a straight line drawn from the defendants' sawmill to the plaintiff's factory.

The defendants' witnesses testified as to the direction of the wind as follows: Gero, a hoseman of the fire department, says, speaking of the smoke of the fire, it went in a northerly direction; and also that it trended from the depot in a northerly direction; also that it was changeable; Jenness, southerly, about; McKenney, it was very near a south wind; Leighton, the wind was a little west or south, and then varied, shifted about. With reference to the lines upon the plan, representing the railroad track, he testified that the wind was nearly parallel with the lines; it wasn't quite parallel; it was a little west from parallel.

The record of the weather bureau also shows that on the morning of April 30th at 8 o'clock the wind was from the west; at 10 o'clock it was from the west; at 11 o'clock from the southwest; at 12 o'clock set south, and so continued until 4 in the afternoon, when it worked back again towards the southwest. It was testified to by the keeper of the bureau that the wind this afternoon backed from the west towards the south, and then veered again towards the west dur-

ing the evening. The witness said, "We consider the wind as backing when it moves from the south point around by the west point towards the north, and veering when it moves from the north point around by the west point towards the south."

There is no substantial difference between the witnesses of the plaintiff and those for the defendants with respect to the direction of the wind. They vary somewhat as to the exact course, but the conclusion of the whole is that on the afternoon of the fire the wind was substantially blowing from the south, shifting a little from east to west, practically parallel with the railroad tracks. We think there can be but little doubt that the course of the wind was such during this afternoon as to carry sparks and cinders directly towards the plaintiff's factory. The spark or cinder that caused the fire must have come from the south.

The defendants, however, contend that the sparks which burned the plaintiff's buildings might have been communicated from fires along and near the railroad track, or from a passing train. Of course, it is not incumbent upon the defendants to show how the fire did occur, but, as they contend that it might have taken from one of these sources, it is proper here to determine what weight, from the evidence in the case, should be given to the contention. The conclusion already arrived at with respect to the direction of the wind settles this point. The railroad is situated nearly due east of the corn factory, and about 144 feet distant therefrom. The evidence shows that the wind during the whole afternoon would carry sparks from a fire along the railroad, or cinders from a locomotive, in an opposite direction from the railroad to the corn factory.

The wind backed from the north through the west to the south, and during all the time until it reached the south would carry fire to the eastward of the railroad. When it reached the south, it would carry sparks up the railroad in a line parallel with the plaintiff's factory. As the wind was at no time in a quarter calculated to carry sparks towards the plaintiff's buildings, the fire, therefore, could not have been communicated from the direction of the railroad track. Hence it becomes immaterial to consider the character of the fires along the railroad, or whether a train passed along, as contended by one of the defendants' witnesses. It is further contended that the fire might have originated from within the building itself, as several men were occupying a portion of the building engaged in some kind of labor; and to substantiate this theory some of the defendants' witnesses said that they saw, or thought they saw, the fire break through the roof.

Joseph McKearney states that he first saw the fire about midway between the ridgepole and the ventilator, and that when he discovered it it was from a yard and a half to two

yards square. Alvin Goff says that he first discovered the fire in the cupola, and that it seemed to be coming out all around it. He didn't notice the shingles on fire. John W. Kenney says that he first saw the fire on the roof, about halfway between the ridgepole and the ventilator. Mr. Cleaves, in direct contradiction of his own witness Alvin Goff, and also of Mr. Walker, says that he, at the time he saw the ventilator afire, also saw a blaze on the roof five or six feet across it. Mr. Kenney, who notified Mr. Walker of the fire, and who must have looked directly at it with Mr. Walker, saw the fire on the roof, while Mr. Walker saw the ventilator, and only the ventilator, all afire. We have no doubt that each of the above witnesses, as well as the defendants themselves, testified to the location of the fire exactly as they saw it, but the contradictory views expressed by them demonstrates that such testimony is of little or no value in fixing the origin of the fire on the roof.

This leaves for consideration upon this point only the testimony of the witnesses who were within the building. The evidence shows that there had been no fire in the furnace of the boiler at the factory since the previous fall, and that all the workmen, at the time the fire caught, were, at that moment, at work about the only fire inside the building, contained in a fire box about 15 inches in diameter and 18 inches high, in which soft coal was burned and on top of which was a place for melting solder. There was no other fire of any kind in the building; neither could it have occurred from smoking by the men, as at the time of the fire they were all at work in the westerly end of the building, while the fire first appeared on the roof of the easterly end. Without analyzing the testimony further, it clearly appears that the fire did not originate from within the building. The conclusion, therefore, seems irresistible that the spark or cinder which set fire to the plaintiff's factory was communicated from the defendants' mill.

This brings us to the consideration of the second proposition in the case—the defendants' negligence; for, if it is conceded that the fire was caused by sparks from the defendants' smokestack, the plaintiff must go still further, and show that it was by reason of some neglect either in the appliances or in the care and management of the fire by the defendants. The defendants were not insurers, but they were bound to exercise ordinary care and precaution in the control and management of their fire to prevent the destruction of their neighbor's property. Did the defendants, under the circumstances disclosed in this case, exercise such care and prudence in the construction and equipment of their boiler and smokestack, and in the control and management of the fire in the furnace, on the afternoon of April 30th, as ordinarily careful, prudent men would have done

under like circumstances? We think they did not.

The fire box was directly in front of the flues. The flues were straight and horizontal, connecting directly with the smokestack. The smokestack had an increased draft through the agency of the exhaust pipe, had no spark arrester, and presented an opening at the top to the full area of the mouth of the stack. A heavy wind was liable to blow at any time, as it was actually blowing on the afternoon of the fire. A furnace, flues, and smokestack constructed like this one were liable in a strong wind to carry sparks and cinders for a considerable distance through the air, and we think that a man of ordinary care and prudence, under all the circumstances in this case, should have anticipated such a result.

Upon both propositions in the case, the evidence is so overwhelmingly in favor of the plaintiff's contention that the court is of the opinion that the jury must have been influenced in their verdict by some misunderstanding, bias, or prejudice. This conclusion on the motion renders it unnecessary to consider the exceptions.

Motion sustained. New trial granted.

STOCK et al. v. TOWLE et al.

(Supreme Judicial Court of Maine. April 4, 1903.)

SALES—CONSTRUCTION OF CONTRACT—MODIFICATION OF OFFER—DELIVERY—TRANSIT CAR.

1. The phrase "transit car" in a contract for the sale and delivery of merchandise by railroad has a well-defined and uniform meaning. In this case it means a car already loaded with flour, and on its way from the mill to the vendee.

2. The introduction of additional terms in an answer to an offer of sale is a material modification of the terms of offer and operates as a rejection, and constitutes a new proposal, which must be assented to before a contract is completed.

3. When the plaintiffs were informed, during the preliminary negotiations for the purchase of flour, that the defendants wanted it for immediate use, and must have understood that the term "transit car" was inserted in the order by the defendants for the purpose of insuring the delivery of the flour at the earliest practicable hour, held, that the stipulation for a transit car is a substantial and important element in the proposal. Time is of the essence of the contract, and a condition precedent to the plaintiffs' right and the defendants' obligation.

4. A tender of a car load of flour not in transit at the date of the contract, but shipped three days later, is not a sufficient compliance with the condition of sale by transit car, and the defendants' refusal to accept the flour, when tendered under those conditions, is not a breach of their contract.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Action by Frederick W. Stock and others

against Josiah C. Towle and others. Case reported. Judgment for defendants.

Action to recover \$40, claimed to be due the plaintiffs for loss of 20 cents per barrel on 200 barrels of flour alleged to have been sold to the defendants, and the acceptance of which was refused by them. Plea, general issue.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

Geo. C. Wing, for plaintiffs. W. H. Newell and W. B. Skelton, for defendants.

WHITEHOUSE, J. This is an action to recover damages sustained by the plaintiffs by reason of the refusal of the defendants to accept a car load of flour alleged to have been bargained and sold to them by the plaintiffs. The plaintiffs were proprietors of flouring mills at Hillsboro, Mich., with a branch office for the wholesale of flour at Lewiston, Me., and the defendants were wholesale dealers in flour and grain at Bangor, Me. The case comes to this court on report.

At the time of the alleged contract the price of old wheat flour was well advanced, but new wheat flour was coming into the market, and the price was likely to fall. The defendants informed the plaintiffs by telephone that they desired to purchase a car load of old wheat flour for immediate use, but the conversation by telephone failed to result in the mutual assent of the parties to the same proposition. In the afternoon of the same day, however, the plaintiffs, from their office in Lewiston, sent the following telegram to the defendants at Bangor:

"Dated, Lewiston, Me., July 29, 1902.

"To J. C. Towle & Co., Bangor, Me.: Advise quick book one car four ten delivered.

"F. W. Stock, Jr. 4-25."

This telegram was received by the defendants the same day, and at 6 minutes past 5 o'clock the same afternoon the defendants telegraphed to the plaintiffs the following answer:

"Bangor, Me., July 29, 1902.

"To F. W. Stock & Sons: Accept car Stocks best patent at offer transit car.

"J. C. Towle & Co. 5-6 p. m."

The introduction of the term "transit car" in this answer, being a material modification of the terms of the offer, operated in law as a rejection of it, and constituted a new proposal, which, however, was equally ineffectual to complete the contract until it was assented to by the plaintiffs. But the next day—July 30th—the plaintiffs sent the following letter to the defendants:

"Lewiston, Me., July 30, 1902.

"J. C. Towle & Co., Bangor, Me.—Gentlemen: Received your wire last night and have booked you one car flour \$4.10 delivered

Bangor. Will give you the first car to arrive. Thanking you for your favor, I remain,

"Yours truly, F. W. Stock & Sons,
"Per F. W. S. Jr."

This constituted an acceptance of the defendants' proposal. It warranted the conclusion that the plaintiffs had "booked" the defendants a "transit car," as specified in the proposal. It is in evidence, and not in controversy, that the phrase "transit car" had a well-defined and uniform meaning in the trade, well understood by both parties. In this instance it meant a car already loaded, and on its way from Hillsboro to Maine.

No further communication took place between the parties until August 11th, when the following letter was sent from the defendants to the plaintiffs, namely:

"Bangor, Me., August 11, 1902.

"F. W. Stock & Sons—Dear Sirs: July 30th we bought of you one car of your best patent with the understanding that the car was in transit and that we were to have the first car that arrived. As you have not seen fit to give us the first arrival, please cancel the order.

Yours truly,

"J. C. Towle & Co."

To this the plaintiffs made the following reply:

"Lewiston, Me., August 11, 1902.

"J. C. Towle & Co., Bangor, Me.—Gentlemen: Replying to your favor will say that I have plenty of cars on the way but not one arrival that has not been sold. The very first car arriving for my account I expect to forward to you.

Yours truly,

"F. W. Stock & Sons,

"Per F. W. S. Jr."

To this letter the defendants replied as follows:

"Bangor, Me., August 13, 1902.

"F. W. Stock & Sons—Dear Sirs: Yours of the 11th received. Please cancel the order as we shall not take the car flour. Your letter of July 30th says that you will give us the first car that arrives, and as you have not done so, we shall consequently refuse the car.

Yours truly,

"J. C. Towle & Co."

It appears from the evidence that on July 29th and 30th the plaintiffs did not have a car load of best patent flour in transit from their mills at Hillsboro to Portland, and that a car load of this quality of flour did not leave the plaintiffs' mills at Hillsboro, Mich., until August 2d, and did not arrive in Portland until after August 12th. It is in evidence that eight or ten days are required for a car to come from Hillsboro to Portland. It is not in controversy that this car load was duly tendered to the defendants, and that an acceptance of it was refused by them.

The plaintiffs accordingly contend that they performed their part of the contract, and are now entitled to damages for a breach of it on

the part of the defendants. On the other hand, the defendants insist that the plaintiffs failed to perform the contract according to its terms, for the reason that their tender of the flour was more than three days later than it would have been if the car had been in transit July 30th, according to the understanding of the defendants and the requirement of the contract.

It is the opinion of the court that the contention of the defendants must be sustained. The plaintiffs were informed during the preliminary negotiations for the flour that the defendants wanted it for immediate use, and must have understood that the term "transit car" was inserted in the order by the defendants for the purpose of insuring the delivery of the flour at Bangor at the earliest practicable hour. The stipulation for a "transit car" was, therefore, a substantial and important element in the proposal. Time was of the essence of the contract, and a condition precedent to the plaintiffs' right and the defendants' obligation.

But it is contended that the defendants' letters of August 11th and August 13th show that they refused to accept the flour because the plaintiffs did not see fit to give them the first car that arrived from the west, and that they must be deemed from the language of their letters to have waived their right to insist on a "transit car" as a condition precedent in the contract. In the letter of August 11th they say: "We bought with the understanding that the car was in transit and that we were to have the first car that arrived. As you have not seen fit to give us the first arrival, please cancel the order." In the letter of August 13th they say: "Your letter of July 30th says that you will give us the first car that arrives, and as you have not done so, we shall consequently refuse the car."

These letters should obviously be read and considered in connection with all the other correspondence, and interpreted in the light of the facts known to the defendants at that time, and of all the attending circumstances. They ordered and expected a transit car loaded with flour, knowing that in the ordinary course of transportation a maximum limit of 10 days only would be required to bring it to Maine. They had the plaintiffs' assurance that the first car load to arrive would be delivered to them. They knew that 13 days had elapsed, and their reasonable conclusion was that, if a transit car had arrived, the flour had been delivered to some other customer. Construed in the light of these facts and circumstances, the two letters, read together, may fairly be understood to signify that the defendants canceled the order because they believed that the plaintiffs had not given them the first transit car that arrived. The letters do not support the plaintiffs' contention in regard to a waiver.

To entitle the plaintiffs to recover, it was incumbent upon them to show a full performance on their part of all the terms of the con-

tract. A tender of a car load of flour not in transit at the date of the contract, but shipped three days later, was not a sufficient compliance with the condition of the sale; and the defendants' refusal to accept the flour when tendered, under those conditions, was not a breach of their contract.

Judgment for the defendants.

POND v. FRENCH.

(Supreme Judicial Court of Maine. April 4, 1903.)

LIMITATIONS—PARTIAL PAYMENT—NEW PROMISE—REMOVAL OF BAR.

1. A partial payment made on account of an existing indebtedness, accompanied by an oral promise to pay the balance of it, takes the debt out of the statute of limitations up to that time.

2. The identity of the debts sued upon with that with which the payment is made must be established, but, if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute.

3. Such payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance.

Perry v. Chesley, 77 Me. 393, distinguished. (Official.)

Exceptions from Bangor Municipal Court.

Action by Nancy F. Pond, executrix, against Ellen W. French. Verdict for plaintiff. Exceptions by defendant. Overruled.

From the bill of exceptions, it appears that this was an action of assumpsit on an account annexed; the account having been contracted by the defendant with Hartford Pond. Plea, the general issue, with a brief statement setting up the statute of limitations. The debit items run from April 1, 1889, to August 3, 1889. The only credit item was a payment of \$5 on account, made by the defendant to the plaintiff on August 31, 1897. At the time of said payment, defendant orally promised the plaintiff to pay said account. Hartford Pond died in March, 1892. The plaintiff was appointed executrix of his estate January 31, 1894.

Upon the above agreed statement of facts, the court below ruled that the payment on August 31, 1897, revived the cause of action, and rendered judgment for the plaintiff, to which ruling the defendant excepted. And it was agreed that, if said action is not barred by the statute of limitations, judgment shall be rendered for the plaintiff. If said action is so barred, judgment shall be rendered for the defendant.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

R. B. Cookson and A. L. Blanchard, for plaintiff. J. F. Robinson, F. J. Martin, and H. M. Cook, for defendant.

¹ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 642.

WHITEHOUSE, J. This is an action on a grocer's account, comprising numerous small items, delivered between April 1 and August 3, 1889; amounting in the aggregate to \$56.29. During this period no items of credit or part payment appear upon the account. But on the 31st day of August, 1897, after the debt had become barred by the statute of limitations, the defendant made a payment of \$5 on account of the indebtedness, and orally promised the plaintiff to pay the balance of it.

The case was heard in the Bangor municipal court. The defendant pleaded the general issue, with a brief statement setting up the statute of limitations as a bar to the action. The judge of that court ruled that the part payment of August 31, 1897, revived the cause of action, and rendered judgment for the plaintiff. The case comes to this court on exceptions to this ruling, accompanied by a stipulation that, if the action is not barred by the statute, judgment should be rendered for the plaintiff; otherwise judgment should be rendered for the defendant.

In *Sinnett v. Sinnett*, 82 Me. 278, 19 Atl. 458, it was held by this court that a partial payment upon a promissory note after it had become barred by the statute of limitations operated as a renewal of the note, and removed the bar of the statute. "It is common learning," say the court, "that an intentional part payment of a debt is an acknowledgment of its existence and a renewal of its obligation. It cannot matter how old the debt is. The recognition—the acknowledgment—will restore the legal obligation, however late they are made. We find nothing in the statute, in the books, or in reason which requires the recognition—the reinstatement—to be made within six years, and not after. The creditor must bring suit within the six years, but the debtor can pay or renew his obligation at any time."

Section 97 of chapter 81, Rev. St., provides, it is true, that "no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." But section 100 of the same chapter declares that "nothing herein contained alters, takes away, or lessens the effect of payment of any principal or interest made by any person." Thus, while a mere acknowledgment of the existence of the debt, or a mere promise to pay it, must be express and in writing, to render it effectual against the statute of limitations, the act of making a partial payment upon a debt operates as a renewal of the obligation to pay the balance of it, precisely the same as before the passage of the statute.

But "the language accompanying the act of payment is admissible to show the intent with which the payment is made, just as it was admissible before; and that is so whether or not it contains a promise to pay, upon which the creditor could have maintained an

action prior to the requirement that it should be in writing." *Gillingham v. Brown*, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320. In *Benjamin v. Webster*, 65 Me. 170, the facts were similar to those in the case at bar, except that the partial payment in that case was made before the debt was barred by the statute. After discussing the question of "mutual dealings" referred to in Rev. St. c. 81, § 87, the court proceeded to show that the bar of the statute was also removed by force of the payment according to the provisions of section 100. "But the contract," say the court, "upon which the partial payment is made, need not necessarily be a written one, but may be an oral contract as well. Such payment is *prima facie* evidence of a promise by the debtor to pay the balance of the debt, and conclusive evidence of the same, unless the circumstances under which the payment is made, or some proofs in the case, show to the contrary."

In the case at bar it has been seen that the partial payment of August, 1897, was unquestionably made only as a part of the larger debt of \$56.29, accompanied as it was by an oral promise to pay the balance of it. "Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time. The identity of the debt sued on with that upon which the payment was made must, of course, be established. But if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute. The payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance." *Day v. Mayo*, 154 Mass. 474, 23 N. E. 898.

If a promissory note had been given August 2, 1889, for the amount of the debt then subsisting, viz. \$56.29, no question could have been raised that the intentional part payment of August, 1897, would have renewed the obligation, and removed the bar of the statute, upon the authority of *Sinnett v. Sinnett*, supra. But the substance of the debt is the same, whether in the form of an account or promissory note. The fact that the obligation to pay is express in case of the latter, and only implied in case of the former, is immaterial. The effect of a partial payment on account of a specific sum due is the same in the one case as in the other.

But the defendant insists that the action must be deemed barred on the authority of *Perry v. Chesley*, 77 Me. 393, and suggests that this case is in conflict with *Sinnett v. Sinnett*, supra, and must have been overlooked by the court in the decision of the latter case. Upon a careful analysis of the two cases, however, it is manifest that there is no conflict between them. The decision in *Perry v. Chesley* rests exclusively upon the

doctrine peculiar to "mutual accounts" or "mutual dealings" between the parties, under the provision of section 87, c. 81. The effect of a partial payment on account of a larger debt, under section 100 of chapter 81, was not considered by the court in that case, and does not appear from the statement of facts to have been necessarily involved in the decision of the cause. The two cases are in this respect clearly distinguishable.

It is the opinion of the court that the part payment of August 31, 1897, operated as a renewal of the obligation to pay the debt, and removed the bar of the statute of limitations.

According to the stipulation of the parties, the entry must therefore be:

Exceptions overruled. Judgment for the plaintiff for \$51.29, with interest from the date of the writ.

DAVIS et al. v. IVES.

(Supreme Court of Errors of Connecticut.
May 12, 1903.)

BANKRUPTCY—SALE BY TRUSTEE—APPROVAL OF COURT—NECESSITY—DOCKET ENTRIES OF REFEREE—EFFECT—DISAPPROVAL OF SALE BY REFEREE—SALE OF EQUITY OF REDEMPTION.

1. Bankr. Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], directs that "real and personal property belonging to bankrupt estates shall be appraised," and "shall, when practicable, be sold subject to the approval of the court"; but "it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised valuation." *Held* that, even where the property was sold for more than 75 per cent. of its appraised valuation, the purchasers under the trustee's deed had the burden of proving that it was impracticable to make the sale subject to the approval of the court.

2. Bankr. Act July 1, 1898, § 42, 30 Stat. 556, c. 541 [U. S. Comp. St. 1901, p. 3437], makes the docket entries of a referee part of the record of the bankruptcy proceedings; and they are, therefore, so far as they go, the best evidence of the matters therein stated.

3. Under Bankr. Act July 1, 1898, § 38, 30 Stat. 555, c. 541 [U. S. Comp. St. 1901, p. 3435], by which referees are invested, subject, always, to a review by the judge, with jurisdiction to consider all petitions referred to them by the clerks, and make the adjudications or dismiss the petitions, the disapproval by the referee of a sale made by a trustee was, where there was no attempt to review it, equivalent to disapproval by the court.

4. A proper sale by a trustee in bankruptcy of an equity of redemption was a condition precedent to a valid conveyance, without which no suit to redeem could be maintained.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by William E. Davis and another against Sylvia A. Ives to redeem mortgaged real estate. Judgment for defendant, and plaintiffs appeal. Affirmed.

Charles S. Hamilton, for appellants. Harry G. Day, for appellee.

BALDWIN, J. The plaintiffs claim title to an equity of redemption in the premises

in question under a conveyance by a trustee in bankruptcy. After the mortgage to the defendant, and while the mortgagor, George W. Ives, was in partnership with his son, the firm and both of its members were adjudicated bankrupts on a petition filed October 6, 1900, by the defendant and others as creditors. A single docket number, 498, was assigned to all the bankruptcy proceedings, by the District Court. Prior to October 6th, the defendant had brought suit in the superior court to foreclose her mortgage. On December 15, 1900, an order was made by the referee in bankruptcy, entitled, "In the Matter of G. W. Ives & Son, Bankrupts. In Bankruptcy. No. 498"—that the trustee "be authorized to sell any or all of the property of the bankrupts at private sale." On December 31, 1900, an appraisal of the property of the firm and of the individual property of each partner was returned, in which the value of the interest of George W. Ives in the mortgaged premises was put at \$900. In January, 1901, the trustee in bankruptcy, on his own application, was made a party defendant to the foreclosure suit, and in the following March a decree of foreclosure was passed. The law day for the trustee in bankruptcy was put on July 1, 1901. On June 29th, the latter filed in the District Court a paper of the following tenor: "In the Matter of the Estate of George W. Ives, Bankrupt. In Bankruptcy. Respectfully represents Frank L. Stiles, trustee of the estate of said bankrupt, that he has sold the equity in certain portions of the real estate in said estate, pursuant to an order of Hon. Henry G. Newton, referee in bankruptcy, made on the 15th day of December, 1900, to wit [describing the mortgaged premises], to James A. Davis and William E. Davis for the sum of one thousand (1,000) dollars; and it appears for the best interest of said estate that said sale be confirmed by this court, the said trustee praying that said sale be confirmed." On the same day a hearing was begun before the referee in bankruptcy, upon the matters thus presented, and adjourned to July 1st, when the referee refused to confirm the sale as prayed for or to approve the deed (which, during this interval, had been delivered and recorded). Meanwhile, on June 29th, the plaintiffs tendered the amount necessary to redeem the premises to the defendant, and also a quitclaim deed to themselves for execution. On July 1st this was repeated. On each occasion she refused to accept the tender or execute the deed. It did not appear that any consideration for the deed from the trustee to them was in fact paid to him by the plaintiffs, or that it was not practicable to sell the premises at public auction or subject to the approval of the referee.

The bankrupt act directs (Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451]) that "real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers;

they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee." The general orders in bankruptcy (No. 18, 32 C. C. A. xx, 91 Fed. xx) provide that "all sales shall be by public auction unless otherwise ordered by the court," and that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale." For the purposes of this case we shall assume that the order of December 15, 1900, gave the trustee authority to sell all the estate, real or personal, of the partnership, or of either of its members, at private sale. Such sale, however, was by force of the statute to be made, so far as practicable, subject to the approval of the bankrupt court. This remained true, even in case of property sold for three-fourths of its appraised value. The express prohibition in section 70 against selling for less than that without such approval did not qualify the preceding words by an implication that on a sale for more than that no approval need be sought. Both parts of the statute stand well together. The plaintiffs had the burden of proving that the deed under which they claimed was an operative conveyance. They failed to satisfy the superior court that it was impracticable to make the sale subject to the approval of the court. On the contrary, it was shown that the trustee sought such approval, and that, after due notice and hearing, it was refused. It follows that they have no title upon which they could found a right of redemption.

The superior court properly treated the docket entries of the referee as legal evidence of the matters therein stated. The bankrupt act (Act July 1, 1898, § 42, 30 Stat. 556, c. 541 [U. S. Comp. St. 1901, p. 3437]) made them part of the record of the bankruptcy proceedings, and therefore, so far as they went, the best evidence of what those were. *Smith v. Brockett*, 69 Conn. 492, 501, 38 Atl. 57.

Under the bankrupt act (Act July 1, 1898, § 38, 30 Stat. 555, c. 541 [U. S. Comp. St. 1901, p. 3435]), the disapproval of the sale by the referee (there having been no attempt to review it) was its disapproval by the District Court.

The plaintiffs' demurrer was properly overruled. It is unnecessary to inquire whether the averments in the answer that their deed was fraudulently procured and given were sufficient. The other averments to the effect that the sale had not been approved, and had been disapproved by the bankruptcy court, fully met the plaintiffs' case. While the trustee in bankruptcy, when he executed

the deed, held the title to the equity of redemption, he had no power to dispose of it, except in accordance with the provisions of the bankrupt act. A proper sale was a condition precedent to a valid conveyance. *Osborn v. Baxter*, 4 Cush. 406; *Williamson v. Berry*, 8 How. 495, 548, 12 L. Ed. 1170. A valid conveyance was a condition precedent to the maintenance of a suit to redeem. *Dorrance v. Raynsford*, 67 Conn. 1, 34 Atl. 706, 52 Am. St. Rep. 266. In the case at bar, both sale and deed having been disapproved by the court, through which only could come authority to make them, neither could avail to support the plaintiffs' claim.

The finding contained all the material facts, and the exceptions taken to it are overruled. There is no error. The other Judges concurred.

McKAY v. FAIR HAVEN & W. R. CO.

(Supreme Court of Errors of Connecticut.
May 12, 1903.)

TRIAL DOCKETS — STATUTORY PROVISIONS — REQUEST TO PLACE ON DOCKET — JURY TRIAL — CONSTITUTIONALITY OF STATUTE.

1. Pub. Acts 1899, c. 187, p. 1102, being in substance the same as Gen. St. 1902, p. 247, § 720, provided for the maintenance of separate dockets for jury and court cases, and that certain named "classes of cases shall be entered on the jury docket upon the written request of either party made to the clerk within thirty days after the return day," and that when in any of such cases an issue of fact is joined after such period the case may within 10 days thereafter be entered in the jury docket upon the request of either party, and any of such cases may, at any time, be entered in the jury docket by the clerk upon written consent of all parties, or by order of the court, and that all cases not entered in the jury docket under the foregoing provisions should be entered on the court docket, and be disposed of as court cases. Plaintiff failed to make a request to have her cause entered on the jury docket within 30 days after the return day, and an issue of fact was joined within such time. Her request was filed within 10 days after such issue was joined. *Held*, that she failed to comply with either of the provisions of the statute.

2. The regulations of the statute were clearly constitutional ones, and neither deprived parties of their right to a jury trial nor imposed any arbitrary or unreasonable requirements on one desiring such a trial.

Appeal from Court of Common Pleas, New Haven County; Julius C. Cable, Judge.

Action by Mary M. McKay against the Fair Haven & Westville Railroad Company to recover damages for personal injuries. Judgment for defendant and plaintiff appeals for alleged error in striking the case from the jury docket. No error.

Benjamin Slade and Maxwell Slade, for appellant. Henry F. Parmelee and George D. Watrous, for appellee.

PRENTICE, J. This action was made returnable on the first Tuesday of January, 1902, being January 7th. On February 6th the defendant filed its answer. On the fol-

lowing day the plaintiff claimed the case for the jury docket. The clerk thereupon entered it on said docket. The defendant then moved to have it stricken therefrom, which motion the court afterwards granted. The case was then placed upon the court docket, and proceeded to judgment, no request being made to the court for an order transferring it to the jury docket. This action of the court in striking the case from the jury docket involves the only error assigned.

The statute then in force, chapter 187, p. 1102, of the Public Acts of 1899, and being, in substance, the same as section 720, p. 247, of the Revision of 1902, provided for the maintenance of separate dockets for jury and court cases, and then proceeded in its material parts as follows: "The following named classes of cases shall be entered on the jury docket upon the written request of either party made to the clerk within thirty days after the return day, to wit: * * * and except as hereinafter provided civil actions involving such an issue of fact as, prior to January first, 1880, would not present a question properly cognizable in equity; when in any of the above-named cases an issue of fact is joined, after said period, the case may, within ten days after such issue of fact is joined, be entered in the jury docket upon the request of either party made to the clerk; and any of such cases may, at any time be entered in the jury docket by the clerk, upon written consent of all parties, or by order of the court. All cases not entered in the jury docket under the foregoing provisions, including," etc., "shall be entered on the court docket, and shall, together with all issues of law and issues of fact, other than those specified, which may be joined in actions entered on the jury docket, be disposed of as court cases." In passing upon the propriety of the court's action, only two questions are claimed to be involved, to wit: (1) Did plaintiff's counsel, by a compliance with the provisions of the statute, acquire the right to have the cause entered upon the jury docket? and (2) are the regulations of the statute constitutional and valid ones?

The plaintiff was entitled, under the provisions of the statute, to have her cause entered upon the jury docket at any time within 30 days after the return day upon her written request made to the clerk. This request was confessedly not made. She had an additional right upon a like request made within 10 days after joinder of an issue of fact, but this right was expressly conditioned and qualified. It was not left, as it might easily have been, unrestricted, but was limited to those cases in which an issue of fact should be joined after the 30-day period. The plaintiff filed her request within 10 days after the issue of fact was joined, but, unfortunately for her, that issue was joined within, and not after, this period. She has, therefore, failed to comply with either of the provisions of the statute prescribing the manner of her ac-

tion if she would avoid a waiver of her right to a jury trial.

The plaintiff, however, urges upon us that a different interpretation should be given to the statute. We are asked to say that two periods are created by the statute—one a 30-day period, within which cases in which an issue of fact is created without pleadings must be claimed for the jury; and another, a period of 10 days after issue of fact joined, applicable to all other causes. This claim is wholly without warrant in the language in which the Legislature has chosen to express its will. This language is singularly clear and certain. It is too clear to be misunderstood, and too certain to be susceptible of any interpretation other than the simple and obvious one we have indicated. It is not by any possibility open to the charge of ambiguity, indefiniteness, or obscurity. Words could scarcely be chosen which would express with greater precision the requirements to be observed by a litigant to claim his place as a matter of right upon the jury docket. That being so, the judiciary is powerless to intervene even to remedy a mistake. To attempt to do so would be a palpable exercise of legislative functions. "It is not allowable to interpret what has no need of interpretation." *Farrel Foundry v. Dart*, 26 Conn. 382; *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433, 28 Atl. 540; *Priestman v. United States*, 4 Dall. 28, 1 L. Ed. 727; *French v. Spencer*, 21 How. 228, 16 L. Ed. 97. The case of *Noren v. Wood*, 72 Conn. 96, 43 Atl. 649, is not in point. The statute there interpreted was one which the act of 1899 amended. It contained a palpable ambiguity, which the court was required to interpret, and which the act of 1899, passed before the interpreting decision was promulgated, sought to remove, and did effectually remove, by its more carefully chosen language. The statutory regulations under review are clearly constitutional ones. They neither deprive parties of their right to a jury trial nor impose any arbitrary or unreasonable requirements upon one who desires such a trial. *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186; *Colt v. Eves*, 12 Conn. 243; *Curtis v. Gill*, 34 Conn. 49.

There is no error. The other Judges concurred.

PARK BREW CO. v. McDERMOTT.

(Supreme Court of Rhode Island. April 15, 1903.)

ASSIGNMENTS—REQUISITES—FUTURE EARNINGS—RECORDING—VALIDITY.

1. Gen. Laws 1896, c. 254, § 28, allows an assignment of future earnings, provided that it is recorded, but the statute does not require that the debt for which the assignment is security shall be stated. Wages were assigned for a definite time, and the assignment properly recorded. The assignment was to secure a certain indebtedness, but before such indebtedness had been paid a loan was made by the assignee to the assignor. *Held*, that the as-

assignment was valid, as security for the latter loan after payment of the original debt, it not having been necessary to execute a new assignment.

Exceptions from District Court, Providence County.

Action by the Park Brew Company against Charles McDermott. From discharge of garnishee, plaintiff excepts. Exceptions overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

James J. McGovern, for plaintiff. Edward
M. Sullivan, for defendant.

STINESS, C. J. The defendant made an assignment of his wages for one year from December 24, 1902, to Arendt, to secure a debt of \$500. The bill of exceptions shows that the assignee collected all of the defendant's wages, and applied them to the reduction of this debt. Before the debt was paid, the assignee loaned the defendant \$125, and again the same sum. At the time of the attachment the original loan of \$500 had been paid, but a part of the last loan had not been paid. The garnishee disclosed funds subject to the assignment, and he was discharged. Exceptions were taken to the discharge, and the question now is whether the fund was attachable in this suit.

Gen. Laws 1896, c. 254, § 28, allows an assignment of future earnings, provided it is recorded. The assignment in this case was duly recorded, but the plaintiff claims that, as the original debt was paid, the assignment cannot apply to a subsequent loan, but for such loan there must be a new assignment. This claim assumes that an assignment can only apply to the particular debt for which it was first given. Assignments such as this, so far as we have seen them, recite no debt, but purport to convey wages for a definite time for a consideration. They are absolute in terms. They operate as a mortgage only upon equitable grounds. The statute relating to them does not require a statement whether they are absolute or for the payment of a debt. It simply requires notice that the wages are assigned. From this we infer that the purpose of the statute is to give that notice, and nothing more. Before the statute suits were frequently brought attaching wages which were shown in court to have been assigned. In this way creditors were put to much useless expense. Then came the statute requiring that notice should be given of the assignment. The assignment in this case purports to convey the earnings for an entire year. The plaintiff had notice of this from the record. The assignment conformed to the statute.

Are there, then, any equitable grounds to defeat it? There are none on the ground of notice, for he has the same notice from the record that he would have if a new assignment was made and recorded. There is nothing to show that the plaintiff has been

in any way misled or injured by the omission of a new assignment. There is no equity on the ground of consideration, for no question is made of the additional loans on the faith of the assignment. The argument for the plaintiff is that, as soon as the original debt was paid, the validity of the assignment, as against creditors, ceased; a new loan, therefore, would require a new assignment. If this were a mortgage describing a specified debt, there would be force in the argument. But when the plaintiff has all the notice that the statute was designed to provide, namely, the fact of an assignment, and when the instrument is broad enough to carry the title to the property here attached, except upon equitable grounds which do not appear, we do not think that the plaintiff's position can be sustained. If A. should borrow money of B., leaving his watch in pledge, and, before payment, borrow another sum on the same pledge, the pledgee could hold the watch until the second sum should be paid. The same principle applies to this case. The formality of a repledge would not be required in the case just stated, and we see no reason why it should be required in the case of an assignment. The possession of the pledge and the assignment are equally notices of a lien. A repledge or a new assignment could give no more notice.

It is argued that under such a decision there might be secret agreements or devices in fraud of creditors. Possibly, for any arrangement which gives one a lien ahead of other creditors may be fraudulent, yet in most cases it is not so. Help based upon this sort of security must generally come from a friend. A court cannot, however, because of a possibility, apply the rules of law differently in one case than in others where the same rule is involved. Possibility of fraud under one view, which would be excluded by another equally reasonable view, may affect the construction of a statute; but that is not the case here. Perhaps it might be better if the statute required a statement of the debt for which the assignment is made, so as to give the creditor fuller information; but it does not. The creditor has all the notice that the statute requires, and, if he is not affected by fraud or special injury, we do not see that we can say that another loan in good faith is contrary to the statute, or invalid, because a new notice to the same effect is not given. If there is fraud, one assignment is just as invalid as two would be, and there is as much chance for fraud under two as under one. If, knowing the amount of the debt, and that it had been paid, one should give credit, we do not say what the effect might be, for that case is not before us. We have already held in *Robinson v. McKenna*, 21 R. I. 117, 42 Atl. 510, that an assignment which is colorable merely, from which the defendant gets advantage, and which serves to keep creditors from attachment, is void. But here, according to the

bill of exceptions, the assignee drew all the debtor's wages, and applied them to the debt, and the additional loans were made on the same security. Under these facts we do not see that the lack of a second notice to the same effect as that then on record renders the action void as against creditors.

We therefore decide that the discharge of the garnishee was right, and the exceptions are overruled.

WEST v. MUNICIPAL COURT OF PROVIDENCE.

(Supreme Court of Rhode Island. April 3, 1903.)

EXECUTORS AND ADMINISTRATORS—NEGLECT TO FILE ACCOUNT—EXCUSE.

1. Under Gen. Laws 1896, c. 219, § 3, providing that an executor or administrator, who, on being cited, neglects or refuses to render an account within 30 days without assigning a satisfactory reason therefor, shall be held accountable for the full value of personal property of the deceased, with interest, and shall not be entitled to compensation for his services, the fact that an injunction was in force restraining administrator from transferring or incumbering certain alleged partnership assets and effects of his decedent was no excuse for his neglect to file an account in the probate court after being cited so to do.

Appeal from Common Pleas Division.

In the matter of the estate of George J. West, deceased. From a decision of the municipal court, disallowing certain items in the account of Thomas F. West, administrator, he appeals. Verdict sustaining disallowance. Petition for a new trial. Denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Andrew B. Patton and Augustus S. Miller, for appellant. Charles A. Wilson and John Doran, for appellee.

DOUGLAS, J. This cause involves the consideration of the account of Thomas F. West, administrator of the estate of George J. West, which was rendered to the municipal court of the city of Providence, and there partially allowed. From the disallowance of certain charges made by the administrator against the estate he appealed, and claimed a jury trial. Upon trial of the case in the common pleas division the jury found that the decision of the municipal court was correct, and the petitioner now asks us to set aside this verdict as being against the law and the evidence with respect to those items. These are: First, a claim for compensation, for his services as administrator, of \$2,500; secondly, a claim of \$108 for rent of office; thirdly, a claim for money paid a clerk for alleged services to the estate.

The claim for compensation was rejected by the probate court because the appellant had neglected to file his account for 93 days after being cited to do so. Section 3 of chapter 219 of the General Laws of 1896 provides:

"If any executor or administrator, after being cited as aforesaid, shall neglect or refuse to render an account pursuant thereto for the space of 30 days without assigning to said court satisfactory reason therefor, such executor or administrator shall be held accountable for the full value of the personal property of the deceased, with interest, and shall be entitled to no compensation for his services." At the trial of the appeal in the common pleas division the presiding justice instructed the jury to disallow this claim. The ruling of the probate court and of the common pleas division was correct, unless the appellant rendered to the probate court a satisfactory reason for his delay. It is rather uncertain upon the evidence whether the appellant rendered to the probate court any reason for his delay. He says now that his excuse was an injunction, which forbade him to interfere with certain partnership property. He testifies: "Q. 239. You were ordered to file your account in the probate court? A. Yes, sir. Q. 240. Did you file it within the time that you were ordered? A. No, sir. I was instructed by my attorney that we were under a restraining order from the Supreme Court, and not to file it. Q. 244. In what case was that order made? A. I think that was in the Ellen West case. Q. 245. That there was an injunction restraining you from filing your account? A. I didn't know that it was in that particular order. I could not give it verbatim now. Q. 246. That was the reason, you say, was it, why you did not render your account? Was that the reason you gave in the probate court? A. No, sir." The case referred to was bill in equity No. 4,500, *Ellen West, Adm'x, v. Thomas F. West et al.*, Adm'rs, brought to establish a partnership between George J. West and his deceased brother, Ambrose E. West, and to recover an alleged balance due the estate of Ambrose. This bill was filed June 9, 1897, and states on belief that there are accounts owing and unpaid to the partnership, that the office library and furniture were bought with partnership money, and that \$10,000 of partnership money were invested in mortgages on real estate in the name of George. The decree for a preliminary injunction entered July 8, 1897, enjoined the administrators of George's estate "from alienating, transferring, or in any way incumbering the partnership assets and effects described in complainant's bill until further order: provided, that this injunction shall not be construed to apply to the money of the estate of George J. West now on deposit on call in the Rhode Island Hospital Trust Company of Providence." We are unable to see how this order could interfere with the rendering of the account required by the probate court. The appellant had long before returned an inventory of the estate, and all the items charged to himself in the account which he did afterwards return are either items of the inventory or proceeds of those items. The account is simply

a statement of these items, and of subsequent collections and payments, and charge for services. The injunction was still in force when the account now under consideration was filed, and offered no obstacle to it then. If the claims in the bill threatened the title to any of the property with which the appellant was already charged, he could have appended to the account a statement that such claims were made, and so have fully protected himself. The excuse has no merit, and the statute was properly applied to this case.

The second item which was disallowed by the probate court and by the jury is numbered 22 in the original account: "November 7, 1896, rent of offices, \$54.16." In his reasons of appeal he states it as \$108. The appellant originally claimed to be reimbursed for office rent for the months of June, July, August, September, and October. He withdrew the item covering June and July, and the court disallowed the item covering the month of October. The appellant's claim was that the retention of his brother's offices until November 1st was necessary for the work of settling the estate. The evidence on this point was conflicting, and we cannot say that the conclusion of the court and of the jury was erroneous.

The same view must be taken of the third item. The charge is for salary of a clerk employed in the office after the death of George J. West. The appellant claimed that he should be allowed \$98 on this account, being \$7 per week for 14 weeks, or from George's death until November 1st. The court allowed him \$42, and disallowed the balance, \$56. The evidence does not convince us that the services of the clerk to the estate were worth more than the court and the jury allowed.

The petition for a new trial is denied, and the case will be remanded to the common pleas division for entry of decree.

COOKE v. MILLER et al.

(Supreme Court of Rhode Island. April 8, 1908.)

EQUITY — JURISDICTION — FAILURE OF ARBITRATION — EXECUTED CONTRACT — APPEAL — AFFIRMED BY COURT.

1. Equity will entertain a bill by a lessee whose term has expired, and whose landlord has taken possession, to appraise buildings erected by him on the premises under a provision that the landlord should have the right to purchase them at a valuation to be fixed by arbitrators, it appearing that the arbitrators chosen by the parties have failed to agree.

Bill by Frank A. Cooke against Edwin P. Miller and others. On demurrer to bill. Demurrer overruled.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Francello G. Jillson and Cooke & Angell, for complainants. Edward D. Bassett, for respondents.

STINESS, C. J. A written lease provided that at the end of the term the lessor should have the right to buy buildings on the land, built by lessee, at a price to be settled by three arbitrators; one to be chosen by each party, and the third by these two. At the end of the lease the owners took possession of the land, and have since retained it. The parties chose arbitrators, but they were unable to agree. After their failure other arbitrators were chosen, and these also failed to settle a price; whereupon the lessee brings this bill to have the value of the buildings taken by the respondents settled by a master or in some other way. The respondents demur to the bill on the grounds that the facts do not show a case for relief in equity, and that the relief prayed for cannot be given.

This question has been one of rare occurrence, because in most cases a unanimous award is not required. In *Cooth v. Jackson*, 6 Ves. Jr. 12 (1801), Lord Chancellor Eldon said he was not aware of any case, where the judgment of arbitrators is not given in the time and manner of the agreement, that the court have substituted themselves for the arbitrators, and made the award. It is to be noted that this decision related to an executory agreement. See, also, *Milnes v. Gery*, 14 Ves. Jr. 400. *Blundell v. Brettargh*, 17 Ves. Jr. 232, pointed to an exception to the statement in *Cooth v. Jackson* in Lord Eldon's question, "Then was there a part performance or acquiescence?" There being none, the decision was the same as in the previous case. In *Gregory v. Mighell*, 18 Ves. Jr. 328, under an agreement for a lease for 21 years, rent to be fixed by arbitrators, the tenant entered, expended money on the place, and arbitrators were appointed by the parties. The lessor refusing to sign arbitration bonds, the arbitrators refused to proceed; and thus the matter stood for several years, when the tenant brought the bill for specific performance. Sir William Grant, master of the rolls under Eldon, as lord chancellor, referring to the contract, said: "It is in part performance, and the court must find some means of completing its execution. * * * The amount must be fixed in some other mode, and it seems to me that it should be ascertained by the master, without sending it to another arbitration, which might possibly end in the same way." In *Dinham v. Bradford*, 5 L. R. Ch. App. (1869) 519, it was agreed that one partner should purchase, at the close of the partnership, the share of the other, at a valuation by two persons. Trouble arising between the partners, no arbitrators were appointed, and a bill was filed for a valuation. The defendant relied on the doctrine that an agreement for sale, price to be fixed by arbitrators, with nothing more, cannot be carried into effect by the court. Lord Hatherley, L. C., said: "This case is not like that of the sale of an estate, the price of which is to be settled by arbitration, but is a case in which the whole scope and

object of the deed would be entirely frustrated if the court were to apply the well-known doctrine to the present circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was and the money where it was. But here * * * it is much more like the case of an estate sold and the timber on a part to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement. In such cases the court has found no difficulty. If the valuation cannot be made *modo et forma*, the court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price? A more exact statement of the case at bar could hardly be given. The line of law is sharply drawn between enforcing arbitration in executory contracts and those in which there has been part performance, and the matter of arbitration was not the main part, but an incident, of the contract. In the present case the complainant, as lessee, put up buildings on the respondents' land, which the latter were to pay for if the lease was not renewed. The respondents have the buildings. The complainant cannot remove them. The contract has been fully executed, excepting payment. This has been tried according to the contract, and has failed. The parties cannot be put in statu quo, as in an executory contract. If the complainant were to sue at law, the contract could be pleaded. It is a typical case for relief in equity. The English rule sustains the bill, and American cases are in the same line. *Biddle v. Ramsey*, 52 Mo. 153, was almost exactly like the case at bar, and relief was granted in equity. To the same effect are *Hug v. Van Burkleo*, 58 Mo. 202; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161. The same principle was involved in *Town of Bristol v. Bristol Water Works*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740, where the doctrine was fully considered. In that case one of the parties had refused to appoint an arbitrator; in this case there has been no refusal. We think, however, that the remedy is the same in both cases, when there is need to apply it. In *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304, the respondents refused to agree to impartial men to such an extent as to amount to a refusal of the arbitration altogether, and hence relief was granted in equity. This bill rests upon the same principle, since here arbitration has been tried and failed; and it can make no difference, if the method agreed upon fails, whether it be

from the conduct of the parties or of the arbitrators. In either case it is a failure. The contract does not call for two arbitrations, and it would, therefore, be as much beyond the terms of the contract to order another arbitration as to proceed through a master. We think the remedy is well settled on sound reason.

Demurrer to the bill overruled.

MULHOLLAND et al. v. GILLAN.
(Supreme Court of Rhode Island. April 8, 1903.)

WILLS—DISPOSITION OF PROPERTY.

1. An instrument making no disposition of property, further than providing for payment of debts, but which appoints an executor, may be a will.

Appeal by David Mulholland and others from probate of a will appointing William F. A. Gillan and another executors. Appellants petition for a new trial. Denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Peter J. Quinn, for appellants. Doran & Flanagan, for appellees.

DOUGLAS, J. This case comes before us upon a petition for a new trial of an appeal from the probate of an instrument purporting to be the last will and testament of Mary V. McCloskey, late of Providence, deceased. The writing in question is in the words and figures following:

"I, Mary V. McCloskey, of Providence, R. I., make and declare this to be my last will and testament.

"I direct that my funeral expenses and debts, if any, be paid.

"As to my estate at present, I own certain shares of the Elevated Railroad Company in Boston, and certain bonds about which information may be had from Mr. Royce J. Allen, of 92 State street, Boston.

"I appoint as executor of this will and to administer my estate, Dr. William F. A. Gillan, of Pawtucket, R. I., and James Brandley of Walpole, Massachusetts.

"In testimony whereof I hereunto set my hand this 29th day of March, 1901.

"Mary V. McCloskey.

"Signed, published and declared as and for her last will and testament in the presence of us, who at her request and in her presence and in presence of each other hereto subscribe our names as witnesses.

"Margaret A. Reddington,
"John Doran."

It was contended by the contestants that the testatrix did not intend to make a will when she signed this paper, and that she was unduly influenced to execute the same. The evidence upon these points was to some extent conflicting, but, on the whole, clearly preponderates in support of the verdict, which sustained the will.

The objection most seriously urged in the common pleas division was that, in contemplation of law, the writing under consideration is not a will, and ought not to be admitted to probate as such. The presiding justice overruled this objection, and the appellants duly excepted, and now insist upon this claim as ground for a new trial. The document, it is true, lacks the ordinary characteristics of a will, in that it makes no disposition of the testator's estate, further than to provide for payment of debts. It does, however, declare the wish of the testator as to who shall settle her affairs and distribute her property, and we know of no principle of law which forbids a person from exercising such powers. We have a statute (Gen. Laws 1896, c. 212, § 5), which provides that, where part of an estate is disposed of by will, the executor named therein shall become ex officio administrator of the intestate residue; thus favoring the selection by a decedent of the person who shall administer upon property which goes to his next of kin because he does not desire to make a different disposition of it. As was observed by the learned judge who presided at the jury trial, if the testatrix had given the smallest legacy, her right to appoint an executor would have been incontestable, and by the statute that executor would have taken upon himself the administration of the whole estate. Why should her wish be less prevalent in the present case? From the old rule of the common law, which vested in an executor all the personal property, charged only with a trust to pay debts and legacies, it logically followed that the mere appointment of an executor effectually disposed of all the personal property. The modification of the rule by modern statutes simply imposes upon the executor the additional trust of distributing the residue among the next of kin, instead of keeping it for himself. *Hays v. Jackson*, 6 Mass. 149, 152. The most reliable text-writers, as well as the general consensus of decisions, support the proposition that an instrument in the form of a will, and executed with the prescribed formalities, which intrusts to a certain person, as executor, the settlement of the estate, though it does not further affect the disposition of the property, is a will, and, as such, should be admitted to probate. 1 Williams on Executors (7th Am. Ed.) 268 (*182); 2 Redfield on Wills (2d Ed.) p. 67, p. *2; Sch. on Wills, § 1, note 2, § 297, p. 312; Jar. Wills, 18, note 1; Page on Wills, 39, § 45b; 29 Am. & Eng. Enc. L. (1st Ed.) 125, note. In the latter work it is said: "While it is undoubtedly true that any instrument intended to dispose of the testator's property after death, provided the statutory formalities are observed, may operate as a will, yet it seems clear that the term to-day applies equally to instruments framed exclusively with a view to appointing executors, leaving the property to pass under the statute of distributions as

though no will had been made." This principle is recognized in numerous cases where the testator had disposed only of real estate or of trust property and appointed an executor, and the instrument was held to be a will. In *re Goods of Jordan*, L. R. 1, Probate & Divorce, 555; In *re Goods of Lancaster*, 1 Swabey & Tristram, 464; In *re Goods of Cubbon*, L. R. 11 Probate & Divorce, 169; In *re Goods of Miskelly*, 4 Ir. R. Eq. 62; *Brownrigg v. Pike*, L. R. 7 Probate & Divorce, 61.

In *Bayeaux v. Bayeaux*, 8 Paige, 333, the testator had attempted to dispose of his property, but the disposition was unintelligible. The court held the will was void, except as to the appointment of the widow to be executrix and testamentary guardian.

Barber v. Barber, 17 Hun, 72, was an appeal from a decree allowing the following instrument as a will:

"I Jedediah Barber, of the Village of Homer, for my last will and testament as follows:

"I nominate and appoint Samuel McCellan Barber, Thomas D. Chollar and Robert H. McCellan, executors of this my will, and for the purpose of converting my real estate into money I authorize and empower them to sell the same.

"Witness," etc.

"[Signed]

Jedediah Barber."

This was admitted to probate as a will of personal estate, and an appeal taken. Mr. Justice Boardman, in delivering the opinion of the court, cites many of the old authorities to the effect that the bare nomination of an executor entitles a will to probate. He also says, "If a man make a will in which he declared himself to die intestate, the paper will operate as a bequest of his property to the persons designated by the statutes of distribution," and adds, "We find no authority or writer expressing views conflicting with those stated, and hence conclude that the instrument under consideration was a valid will."

In *Joliffe v. Fanning*, 10 Rich. Law, 186, a will, of which the only legal provisions were to revoke a former will and to appoint an executor, was sustained.

In *re Johns' Will*, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, the court says: "Modern jurisprudence stands in support of the will, whether an executor is appointed or not, and yet the appointment of an executor is sufficient to make the instrument a will. It is not uncommon for a testator to make his will for the sole purpose of nominating an executor to administer his estate." To the same effect, see *In re Hickman*, 101 Cal. 609, 36 Pac. 118. And in *Prater v. Whittle*, 18 S. C. 40-46, it is said: "So little has the probate court to do with the contents of a will or its construction, that it is laid down as an elementary principle that the bare nomination of an executor, without giving any legacy or appointing anything to be done

by him, is sufficient to make it a will, and as a will it is to be proved.' "

The decisions cited by the contestants are mostly aside from the question at issue. The paper considered in the case of Williamson's Will, 6 Ohio St. C. P. Dec. 505, was a declaration of the legitimacy of the signer's children, and a revocation of previous testamentary dispositions. In *Williams v. Noland* (Tex. Civ. App.) 32 S. W. 328, the document was a written declaration, under a statute of Texas, that certain persons should be guardians of a child. In *Estate of Meade*, 118 Cal. 429, 50 Pac. 541, 82 Am. St. Rep. 244, it was claimed that a letter to an undertaker, expressing a desire for cremation, and giving various information as to what should be done in case of the writer's death, was held not to be a will; but in respect to one paragraph, which it was urged appointed an executor, and hence made the paper a will, the court say: "If the paper appoints an executor, this contention is sound;" citing *In re Hickman*, 101 Cal. 613, 36 Pac. 118. In *McBride v. McBride*, 26 Grat. 476, a will was drawn up, but never signed. It was held that a letter written by the deceased, referring to this draft as a will, was not an execution of it. In *Coffman v. Coffman*, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69, a paper executed as a will, disinheriting a son, but making no disposition of the estate and appointing no executor, was held not to be a will.

The ruling of the court and the verdict of the jury were right, and the petition for a new trial is denied.

L'ESPERANCE v. HEBRON MFG. CO.

(Supreme Court of Rhode Island. March 27, 1903.)

MASTER AND SERVANT—SERVANT'S INJURIES —INSTRUCTIONS—MISAPPLICATION OF EVIDENCE.

1. In an action for a servant's injuries, claimed to have been caused by the sudden starting of a machine, produced by defective pulley, the evidence of both parties was understood by themselves and the court to refer to a loose pulley on the machine itself, and the court so applied the evidence in instructing the jury. There was a verdict for plaintiff, and it afterwards appeared that the only direct testimony of plaintiff bearing on the subject was not intended by the witness to refer to the pulley on the machine, but to a different one. *Held*, that defendant was so prejudiced by the application of the evidence by the court and jury to the loose pulley, and by being caused to refrain from producing evidence showing that the other pulley was in good condition, as to entitle it to a new trial.

Action on the case, for negligence, by Peter L'Esperance against the Hebron Manufacturing Company. There was a verdict for plaintiff, and defendant petitions for a new trial. Petition granted.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Joseph Osfield, Jr., for plaintiff. Edward D. Bassett, for defendant.

PER GURIAM. This case is brought to recover damages for injuries suffered by the plaintiff from having his hand caught in a machine while he was in the service and employment of the defendant. At the trial it was contended that the accident occurred from the sudden starting of the machine while the plaintiff was cleaning it, and that the starting was automatic; being produced by a defective pulley. All the plaintiff's evidence about the defect was understood to refer to the loose pulley on the machine itself, and all the defendant's evidence on that point referred to that pulley. The court, as well as the counsel, so applied the testimony. The presiding justice charged the jury as follows: "Undoubtedly, the fingers, the hand, or the portion of the hand of the plaintiff was caught in the carding machine, but that in itself is not sufficient to enable you to determine what caused his hand to be so caught. That is the vital question; and if you cannot determine that it was so caught because of the negligence of the defendant corporation in keeping their machines in an improper condition, unless you find it was caught and caused by the wobbling of the loose pulley which thrust the belt upon the tight pulley and caused this machine to operate at a time when it had been stopped by the plaintiff in the performance of his duty, unless you find that, you cannot find for the plaintiff." It now appears that the testimony of Peter Miller, who gave the only direct evidence about the defect, was not intended to refer to this loose pulley on the machine, but to a driving pulley situated upon the main line of shafting. By this mistake, in which all parties participated, the defendant was prejudiced, first, by having the court and jury apply the evidence to the loose pulley; and, secondly, by being caused to refrain from producing evidence to show that the other pulley was in good condition.

We think, therefore, that the defendant is entitled to a new trial.

FIRST NAT. BANK OF PAWTUCKET v. ADAMSON.

(Supreme Court of Rhode Island. March 20, 1903.)

BILLS AND NOTES—INDORSEMENT—WAIVER OF DEMAND AND NOTICE.

1. Where defendant signed an indorsement to a note, guarantying its payment, and waiving demand and notice, the waiver was of demand and notice as indorser, and not as guarantor; the latter not being entitled to notice.

Action by the First National Bank of Pawtucket against Edward Adamson. There was a verdict for plaintiff, and defendant petitions for a new trial. Petition denied.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

James L. Jenks, for plaintiff. Claude J.
Farnsworth, for defendant.

STINESS, C. J. The defendant is sued as indorser of a promissory note. At the trial the note was put in, bearing, under the signature of the indorsers, the following indorsement, signed before maturity by the defendant and another: "We hereby guarantee payment of this note, waiving demand and notice to us." The defendant moved for a nonsuit upon the ground that by reason of the indorsement he became a joint guarantor with Atherton, suable only as such; that, as guarantor, he was entitled to notice; that the waiver applied to that notice, and not to notice to him as indorser; hence, notice not having been given, he was discharged as indorser. The defendant petitions for a new trial upon the ground that the verdict was against the evidence.

At the making of the note the defendant was the payee, and became indorser upon its transfer. The waiver which he signed was clearly that of demand and notice to him as indorser, which has a technical and well-understood meaning, both in law and commercial usage. It is the ordinary notice that payment has been demanded, and the note dishonored. No such notice is required to be given to a guarantor or surety. The defendant relies upon a sentence in *Jackson Bank v. Irons*, 18 R. I. 718, 30 Atl. 420, which he misinterprets. The court there said: "A guarantor of a note is entitled to notice of its nonpayment within a reasonable time, and, in case of the failure of the holder to give the notice, is relieved from liability to the extent of loss resulting from the failure." This statement relates to the equitable rule that notice of nonpayment must be given to a guarantor within a reasonable time, so as to give him an opportunity to save himself from loss. Failure to give notice does not release a guarantor, except in case of consequent loss, and only to the extent of the loss. Such a rule of notice, which is not uniform in all the states, does not change the character of a party as shown by the note itself. It does not release one as indorser, or change him from indorser to guarantor, which is what the defendant here claims. 2 Dan. Neg. Ins. (5th Ed.) § 1788. In *Jackson Bank v. Irons* the defendants were not indorsers at all. The question was "to construe the anomalous writing on the back of the note." *Jackson Bank v. Irons*, 19 R. I. 484, 34 Atl. 951. Under the law of this state as it then stood, they were either joint makers or guarantors. The case has no application to the case at bar. Here the defendant was an indorser. He waived notice in a way that could only relate to notice due to an indorser. His guaranty of the note, if it had validity, did not change his previous relation to it, but

simply added to it an agreement of guaranty. If it had no validity, for want of consideration, clearly it changed nothing.

The verdict was rightly given, and the petition for new trial is denied.

WILLIAMS et al. v. STARKWEATHER.
(Supreme Court of Rhode Island. March 23,
1903.)

BILL OF REVIEW—TIME—FOREIGN EXECUTOR
—IGNORANCE OF THE STATE'S LAWS.

1. A bill of review for correction of a final decree will not be entertained unless it is filed within one year after entry of the decree.

2. A foreign executor cannot excuse his failure to file a bill of review in proceedings concerning the estate within the prescribed time by pleading ignorance of the laws of the state.

Amended bill by George Fred Williams, as executor, etc., and others, against Joseph U. Starkweather, as administrator, etc., to review and reverse a decree entered on a bill brought by respondent against complainants. A demurrer to the original bill was sustained (53 Atl. 870), and complainants filed their amended bill. Heard on demurrer to the amended bill. Demurrer sustained.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Charles E. Gorman, for complainants. Ed-
ward D. Bassett, for respondent.

PER CURIAM. The decree which this bill seeks to review was entered February 2, 1900, and this bill was filed August 4, 1902. Upon demurrer to the original bill, it was held that this court has no jurisdiction to entertain a bill of review filed more than one year after the entry of the decree which it seeks to reverse. The argument for the complainant upon the amended bill is, for the most part, addressed to the merits of the bill itself. The court decided that, regardless of the merit or demerit of the case, the bill was filed too late. So far as the complainant's argument deals with this question, the considerations submitted have been discussed and weighed by the court before rendering the opinion reported in 24 R. I. 512, 53 Atl. 870. The cases now cited to this point do not weaken the conclusion of the court that in Rhode Island the rule has been adopted not to entertain a bill of review for correction of a final decree unless the bill of review is filed within one year after the decree has been entered. In *Lytton v. Lytton*, 4 Brown Reports (Eden) 441, decided in 1793, it is stated that the general rule then in force in England forbade a bill of review to be brought to reverse a decree after 20 years. The Massachusetts cases favor the rule we have adopted. *Plymouth v. Russell Mills*, 7 Allen, 438, was a bill to set aside an award on the ground of fraud, and has no direct application here. In *Evans v. Bacon*, 99 Mass. 215, it is said: "It is true, there is no statute of limitation fixing a precise peri-

od of time after which the right to file a bill like the present is barred. But the limitation of a year for writs of review affords a close and forcible analogy."

Towards the close of our opinion the remark is made that this rule has not deprived the complainant of any substantial right, because the objections which he urges were known to him when the decree was entered. This remark might with equal propriety be made with respect to the excuses for delay recited in the amendment to the bill. All of the circumstances now urged were known to the complainant either when the decree was entered, or shortly afterwards. He knew what the decree was immediately. He found in March, 1900, that it was too late to represent the estate insolvent. His attempt to get relief from the General Assembly was frustrated March 29, 1900, and nothing since then has changed his rights or liabilities. He could have filed his bill of review within six months after the obnoxious decree was entered, with substantially the same allegations which he urges to-day. If the rule were flexible, then we see no special circumstances in this case to require it to be relaxed. The complainant insists with considerable urgency upon his ignorance of Rhode Island law; but, while this might be a valid plea from a foreigner who had unwittingly transgressed some arbitrary regulation of our law, it is manifestly the duty of any person who voluntarily assumes the office of executor to acquaint himself with the statutes which direct and control his official actions.

The demurrer to the amended bill is sustained.

REYNOLDS v. GARST.

(Supreme Court of Rhode Island. April 1, 1903.)

SIDEWALKS—DEFECT—LIABILITY OF PROPERTY OWNER.

1. Where an opening was made in a sidewalk by a contractor for the purpose of carrying machinery into the cellar of a building, the duty to guard the opening was prima facie on the owner occupying the building.

Action on the case for negligence by Thomas J. Reynolds against Sebastian Garst. There was verdict for plaintiff, and defendant petitions for a new trial. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Page, Page & Cushing, for plaintiff. Tillinghast & Murdock, for defendant.

PER CURIAM. This case was brought to recover for damages suffered by the plaintiff, a boy of about four years of age, from falling into an opening in the sidewalk opposite the defendant's land and building. The opening was made by removing a section of the walk, under which the cellar extended, for the purpose of carrying into the cellar materials to

be used in setting machinery in the building. The setting up of this machinery was done by a contractor, and the principal ground of defense was that at the time of the accident the duty of guarding the opening devolved upon the contractor, and not upon the owner of the building. Prima facie the duty to guard the opening was that of the owner, who was likewise the occupant of the building. The burden, therefore, of showing that at the time in question some other party was using the opening, and had the care of it, is upon the defendant. We do not think that he has shown that such was the fact. His own testimony seems to be that the contractor had finished using the opening. The jury were justified in finding that the opening unguarded was dangerous, and that the plaintiff was not guilty of contributory negligence in the premises; hence their verdict should not be disturbed.

New trial denied.

ROTCHFORD v. UNION R. CO.

(Supreme Court of Rhode Island. March 18, 1903.)

LIMITATIONS—EFFECT OF STATUTE.

1. Pub. Laws 1902, p. 49, c. 976, § 1, passed April 3, 1902, to take effect July 1, 1902, providing that an action for a personal injury shall be commenced and sued within two years next after the cause of action shall accrue, and not after, is prospective, and does not shorten the period of limitation of causes of action accruing before July 1, 1902.

Action on the case for personal injury by N. Mary Rotchford against the Union Railroad Company. To a plea of limitations, plaintiff demurs. Demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and BLODGETT, JJ.

Thomas F. Farnell, for plaintiff. David S. Baker, for defendant.

BLODGETT, J. The single question presented by the plaintiff's demurrer is whether the provisions of chapter 976, p. 49, Pub. Laws, § 1, can be pleaded in bar of causes of action existing before July 1, 1902. The act in question was passed on April 3, 1902, to take effect on July 1, 1902, and so much of the same as is material to this case is contained in these words: "Actions of the case for injuries to the person shall be commenced and sued within two years next after the cause of action shall accrue, and not after." This chapter takes the place of chapter 234 of the General Laws of 1896, which allowed an action of this nature to be "commenced and sued within six years next after the cause of action shall accrue and not after." The plaintiff brought her action on November 28, 1902, alleging in her declaration an injury and cause of action on August 12, 1900. If, therefore, the statute is retrospective in its

¶ 1. See Limitation of Actions, vol. 22, Cent. Dig. § 18.

operation, the action must fail; and it follows that the action is seasonably brought if the statute applies only to causes of action accruing after July 1, 1902.

The defendant contends that the statute retroacts, and that the action is barred, claiming that the period between its enactment on April 3, 1902, and the time when it took effect, viz., July 1, 1902, is to be computed as a period within which any cause of action existing prior to the latter date, and not then barred by the lapse of 6 years, might be sued. If the construction for which he contends be the correct construction, then a cause of action arising on, say, July 15, 1896, and which would not otherwise be barred until July 15, 1902, must be sued before July 1, 1902, or 14 days earlier than the law then in force required, in order to be maintained. If action thereon is brought after July 1, 1902, and before July 15, 1902, the 2-year limitation of the present statute would apply, and the plaintiff would find that his right of action had expired on July 15, 1898, or nearly 4 years before. Again, if the defendant's construction be correct, a cause of action accruing just before the passage of this act on April 3, 1902, viz., on April 1, 1902, and which then might have been sued at any time within 6 years thereafter, viz., before April 1, 1908, must by this act be sued in any event before April 1, 1904; thus depriving a plaintiff of 4 years' time in which to sue on an existing cause of action.

It is unquestioned that the Legislature may shorten periods of limitation, and may make such statutes retrospective by express provision; but a construction which gives 5 years and 11½ months as a period of limitation in a certain cause of action existing when it takes effect, and only 2 years to another cause of action of the same nature, is not to be favored, especially when the very object of the limitation is to apply the same rule and to allow the same rights to all who are similarly situated. But the defendant contends that inasmuch as the words of the act under consideration are substituted for, and become the language of, chapter 234 of the General Laws of 1896, unless the words of the act are deemed to apply to all causes of action accruing prior to July 1, 1902, in that case the period of limitation theretofore created by existing laws as to such cases is repealed, and no other period of limitation is substituted therefor, and that such a result is accomplished by the provisions of an act whose ostensible purpose is to reduce the period of limitation theretofore created. Undoubtedly the provisions of chapter 976, p. 49, Pub. Laws 1902, repeal pro tanto the provisions of chapter 234, Gen. Laws 1896, with which they conflict. But by section 16 of chapter 26 of the General Laws of 1896 it is provided that "the repeal of any statute shall in no case affect any act done, or any right accrued, acquired or established, or any suit or proceeding had or commenced in any

civil case before the time when such repeal takes effect." And it follows that if the act shall be held to apply only to causes of action which shall accrue after July 1, 1902, that the statute last cited would still preserve the rights accrued thereunder, and one of those rights was then the right to sue on such a cause of action within the period of six years from the time it accrued. To the foregoing observations there must be added a further observation, derived from an examination of the language used in the act. The period of limitation therein defined is expressed to be "within two years next after the cause of action shall accrue." This expression is by no means equivalent to the words "shall have accrued," inasmuch as the former clearly contemplates only a future event, to occur after the taking effect of the act on July 1, 1902. Indeed, this distinction was clearly made in *Fiske, Adm'r, v. Briggs*, 6 R. I. 563, where the court, speaking of the language of the statute of limitations then before the court, said: "The language is not like that in *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. 568, cited by the plaintiff, 'after such action shall accrue,' which was held in that case to refer to such actions as should thereafter accrue; and the distinction was taken between these words and the terms 'next after such action accrued,' which might leave the act to operate upon the past as well as future causes." And finally it is a familiar rule of construction that statutes of limitations are held to be prospective, only, in their operation, unless by their express terms or by necessary implication they shall be held to express the legislative intent that a retroactive effect is to be given to them. We fail to find such a retroactive effect to be either directly expressed or to be necessarily implied in the language of the act in question, especially if we construe the period elapsing between the passage of the act on April 3, 1902, and the time of its taking effect, on July 1st thereafter, as but a reasonable period of notice to the public that a new period of limitation would be in force from and after the latter date.

We are therefore of the opinion that the act in question applies only to causes of action which shall accrue after July 1, 1902, and it follows that the demurrer is sustained.

DONAHUE v. TOWN COUNCIL OF CUMBERLAND.

(Supreme Court of Rhode Island. March 27, 1903.)

MUNICIPAL CORPORATIONS—POLICE OFFICER—REMOVAL—REVIEW BY COURTS.

1. Pub. Laws 1896, p. 69, c. 495, being a special act conferring powers on the town council of Cumberland, authorized it to appoint police constables, and suspend them on charges preferred by the chief of police, provided that they shall not be subject to removal except for misconduct or incapacity of such a character

as the council might deem a disqualification for office. *Held*, that no appeal lay to the courts from the council's removal of a police officer; the powers given the council not being such as a court could exercise, and Gen. Laws 1896, c. 248, authorizing appeals from courts of probate and town councils, not being applicable, having been in existence when chapter 495 was passed.

Proceedings before the town council of Cumberland for the removal of John Donahue as a police officer. From an order of removal, Donahue appeals. Dismissed.

The statute referred to is as follows: "The town council of the town of Cumberland may appoint so many and such police constables for special duties, including a chief of police, as may from time to time be determined upon, and may at any time suspend any such officer from his office upon charges of official misconduct or incapacity preferred by the chief of police: provided, however, that the members of the paid police department of said town, including those now already appointed, shall not be subject to removal from office at any time, except for misconduct or incapacity of such a character as the town council may deem a disqualification for said office, but all such removals shall be by the town council upon charges made in writing and of which the officer complained of shall have had notice and opportunity to be heard thereon."

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John M. Brennan and Thomas F. Vance, for appellant. Comstock & Gardner, for appellees.

PER CURIAM. We think that the discretion conferred upon the town council of Cumberland, by section 1, c. 495, p. 69, of the Public Laws 1896, is final. The statute provides that upon charges made in writing, and after notice and opportunity to be heard, the town council may remove certain officers "for misconduct or incapacity of such character as the town council may deem a disqualification" for the office. The definition of the qualification of a police officer is a legislative, not a judicial, function, and the settling the qualifications is as much a part of the act of the town council as the decision whether or not the person in question possesses them. From the nature of this power, no appellate court can exercise it. The appointment and removal of subordinate officers employed in the administration of the town government involves so large an element of personal choice that it must of necessity be left to local authority. If there is any irregularity in the action of the council, it may be corrected by certiorari; but we cannot believe that the general words of chapter 248, Gen. Laws 1896, relating to orders or decrees of courts of probate and town councils, were intended to apply to such a case as the present. Chapter 495 was passed subsequently to the provisions of the gen-

eral statutes concerning appeals, and is a special act conferring definite powers upon the town council of Cumberland. Their resolution in this case differs from such orders and decrees of town councils as could have been in the mind of the Legislature when the general statute was passed.

GORMAN v. STILLMAN et al.

(Supreme Court of Rhode Island. Feb. 21, 1903.)

FOREIGN EXECUTORS—ACTIONS—COURTS—JURISDICTION—SERVICE ON RESIDENT AGENT—GENERAL APPEARANCE—EFFECT.

1. Gen. Laws 1896, c. 212, § 45, requires that every nonresident executor, before entering on the duties of his trust, shall appoint a resident agent, and agree that service of any legal process against him as executor, if made on such agent, shall be of the same effect as if made on the executor within the state. *Held*, that where a nonresident was appointed an executor in Rhode Island, and acquired possession of funds there on which it was sought to impose an equitable lien, service of process on such executor's agent appointed under such statute conferred jurisdiction of such executor.

2. Where a nonresident legatee appeared in a suit against the executor in Rhode Island to impose an equitable lien on the funds to which such legatee was entitled, and consented to the granting of a preliminary injunction, and thereafter appeared and testified as a witness in his behalf, the court thereby acquired jurisdiction of such legatee, which could not be ousted by the legatee's subsequent special appearance for the purpose of objecting to the service.

Bill by Charles E. Gorman against James W. Stillman and others to establish an equitable lien on a fund in the hands of defendant George W. Stillman as executor. On motion to dismiss for want of jurisdiction. Motion denied.

See 24 R. I. 264, 52 Atl. 1088.

The following is the rescript referred to in the opinion:

"The complainant brings this bill for an order granting to him an equitable lien upon assets in the hands of George G. Stillman, executor of the will of Harriet M. Utter, belonging to the respondent James W. Stillman, who resides out of this state. The complainant was the attorney of James W. Stillman in a contest of the will, which resulted in a compromise. After the services were ended, the latter gave an order to the complainant upon the executor for the sum of five hundred dollars, to be charged to his account, for the services so rendered. This order, so far as appears, not having been accepted by the executor, the complainant brings this bill. The defense is that the complainant did not obey the instructions of his client (said James), whereby the latter got \$500 less than he expected to get in the settlement. The agreement of settlement was in writing, submitted to said James, himself a member of the bar, and signed by him. He now says that he did not understand the effect of it. There was testimony that it was ex-

plained to him by the complainant, with a statement of figures showing the result. However this may have been, there is no evidence of misrepresentation or unfairness, and the respondent must be presumed to have understood what he signed. The order given after the conclusion of the services must also be taken to have been a contract as to the amount of compensation. There is no evidence to warrant setting it aside. The court therefore decides that the complainant is entitled to an equitable lien upon the fund belonging to said James W. Stillman for the amount of the order."

Argued before STINESS, O. J., and TILLINGHAST and DOUGLAS, JJ.

Charles E. Gorman, for complainant. James W. Stillman, in pro. per.

TILLINGHAST, J. Upon the trial of this case on the merits, in October last, the court decided that the complainant was entitled to an equitable lien upon the fund in the hands of the respondent George G. Stillman, executor, belonging to the respondent James W. Stillman, for the amount of the order given by the latter to the complainant on the said executor, July 11, 1901, to wit, for the sum of \$500. See rescript filed October 24, 1902. The respondent James W. Stillman then moved for a reargument of the cause on various grounds, amongst which were the grounds (1) that the court was without jurisdiction in the case, for the reason that there was no seizure of the property involved in the suit, and hence it was not a proceeding in rem; (2) that the court was without jurisdiction, because the property sought to be reached by the bill was in custodia legis—that is, under the control of the probate court of Westerly—and therefore not subject to the order of this court; and (3) because no legal service of process had been made upon said respondent in Rhode Island. Upon consideration of all the grounds relied upon in support of said motion for reargument, the court denied the same, whereupon the respondents again moved for the dismissal of said suit on the ground that the court was without jurisdiction therein, and this motion is now before us.

The respondent James W. Stillman, who is a member of this bar, but who resides in Boston, vigorously and persistently contends, in argument and in an elaborate brief, that as the respondents are both nonresidents of this state, and have not been personally served with process in this state, the court has obtained no jurisdiction over them, and hence that the judgment which it has rendered in the case is a nullity. If the jurisdiction of the court depended solely upon the personal service which was made on the respondent James W. Stillman in Massachusetts, we might not question the correctness of the claim now advanced. But it does not. In the first place, it appears both by the bill and answer that at the time the bill was

filed there was quite a large sum of money in the hands of the respondent executor in this state belonging to the respondent James W. Stillman. And the bill was brought to obtain an equitable lien on said sum, in order that so much thereof as was necessary to pay the complainant's claim might finally be applied thereto. It also appears that, said George G. Stillman being a nonresident executor, the subpoena issued in the case was served upon Albert B. Crafts, of Westerly, the agent of the executor residing in this state. Under the provisions of Gen. Laws 1896, c. 212, § 45,¹ service of the process upon the agent of the respondent George G. Stillman had the same legal effect as if made on him personally in this state. And of course it goes without saying that, by accepting the office of executor of the will referred to in the former opinion (see 24 R. I. 284, 52 Atl. 1088), the respondent became subject to the laws of this state in the premises.

It further appears that the bill which was filed in court January 25, 1902, contained a motion for a preliminary injunction, and that the subpoena, which was made returnable on February 1, 1902, contained a notice of this motion. On February 11, 1902, a general appearance for the respondents was entered by Arthur P. Sumner, Esq., a well-known member of this bar, and on February 28, 1902, the motion for preliminary injunction was heard, and a decree, to which the respondents' counsel assented in writing, granting the same, was entered. And up to this time no claim was made by the respondents, or either of them, so far as the record shows, that the court was without jurisdiction in the premises. But even if the motion to dismiss had been made immediately after service of process, it must have been denied, because the service upon the agent of the nonresident executor undoubtedly gave jurisdiction to this court. In view of these facts, and particularly in view of the fact, above set out, that service of process was duly and regularly made upon the agent, in this state, of the respondent George G. Stillman, executor, the motion to dismiss for want of jurisdiction as to him is wholly without merit.

We are also of the opinion that the motion is without merit as to the respondent James W. Stillman. The fund sought to be reached by the bill belonged to him. It was within

¹ Every executor, administrator or guardian, appointed in, but residing out of, the state, shall, before entering upon the duties of his trust, in writing appoint an agent residing in this state, and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian, if made on, or acknowledged by, said agent, shall be of the same legal effect as if made on himself personally within this state. Such writing shall give the proper address of such agent, and shall be filed in the office of the clerk of the probate court by which such appointment was made and the notice of appointment of such executor, administrator or guardian, shall state the name and address of his agent.

the jurisdiction of this court, and hence his rights therein could be dealt with and adjudicated by it. He had personal notice of the commencement of the suit, in accordance with the provisions of Gen. Laws 1896, c. 240, § 20;² he entered a general appearance therein by his attorney, and by him assented in writing to a preliminary decree. He was a witness in his own behalf at the trial of the case on the merits, and was fully heard in his defense. And therefore, notwithstanding the fact that, subsequent to the time of his entering a general appearance as aforesaid, he entered a special appearance for the purpose of moving to dismiss the suit for want of jurisdiction, as did also the other respondent, we think it is clear that by first coming in as aforesaid this court obtained full jurisdiction of the case and the parties thereto. That jurisdiction of the person is obtained by his voluntary appearance, either in person or by attorney, there can be no doubt. *Am. & Eng. Ency. of L.* (2d Ed.) vol. 17, pp. 1063, 1064. And having once appeared generally, we understand the ordinary rule to be that objection cannot subsequently be raised to the jurisdiction as to the person of the party thus appearing. Thus, in *Michels v. Stork*, 44 Mich. 2, 5 N. W. 1034, cited by the respondent in his brief, the court held that a general appearance would confer jurisdiction. The general appearance in that case, however, was coupled with a motion to dismiss for want of service; and hence the court held that, as thus modified, it did not give jurisdiction. In the case at bar, as already seen, the first appearance was not coupled with any motion or suggestion regarding want of jurisdiction, and hence it must be construed to be a general appearance. *Ency. Pl. & Pr.* vol. 2, p. 597. The case of *Charter Oak Bank v. Reed*, 45 Conn. 391, cited by respondent, is not in point, for the reason that there, although there was a general appearance by the defendant in the lower court, that court subsequently, on motion of the defendant, permitted him to file a plea in abatement for want of jurisdiction. And the Supreme Court of Errors held (and very properly) that it was within the discretion of the lower court to allow the plea to the jurisdiction to be thus filed.

Of course, we fully agree with the position taken by the respondent—that, if the court should be convinced that it has no

² Whenever any defendant in a suit in equity resides or is without the state, the complainant may take out as many subpoenas to the defendant as he may deem proper, and may have one of them served upon such defendant, personally, by any disinterested person, which person shall make affidavit of the service thereof, and of the manner in which, the time when, and the place where, the service was made; or the service thereof may be made by the admission of such service by the defendant on the back of the subpoena, and by his acknowledgment thereof before some officer authorized to administer oaths.

jurisdiction over the suit, it ought to dismiss the same at any stage of the proceedings. For, as said by Stiness, C. J., in *Hazard v. Coyle*, 22 R. I. 435, 48 Atl. 442, "when a court has no jurisdiction of a cause, it should stop at any point where the fact appears." Indeed, the court of its own motion should do this, because jurisdiction is the primary and indispensable thing in all judicial proceedings. See *Wood v. Helme*, 14 R. I., at page 329. But for the reasons above given, we are clearly of the opinion that the court had full jurisdiction in the case at bar, and hence the respondents' motion to dismiss for want of jurisdiction is again, and finally, denied.

COLE v. LIPPITT et al.

(Supreme Court of Rhode Island. April 15, 1903.)

MISJOINDER OF CAUSES—NONSUIT.

1. Where the evidence in an action for negligent injuries against several defendants tended to show that neither the tort, nor the negligence, nor the liability of each defendant was the same, there was a misjoinder of causes of action, and a nonsuit was properly granted.

Trespass on the case for negligence by Walter S. Cole, administrator, against Charles W. Lippitt and others. Nonsuit granted, and plaintiff petitions for a new trial. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and BLODGETT, JJ.

Irving Champlin and James Harris, for plaintiff. Arnold Green, Edwards & Angell, and Walter B. Vincent, for defendants.

PER CURIAM. When this case was last before the court in 23 R. I. 542, 51 Atl. 202, we said: "The declaration charges a joint invitation. Such an invitation must be proved, in order to recover against the defendants jointly." But the record shows that the evidence offered at the trial tended to establish, not a joint liability of the defendants, but rather, as was said by the court when the case was before us in 22 R. I. 31, 46 Atl. 43, "Three different cases against three different defendants for three different causes of action." The case is, therefore, one of misjoinder of causes of action, rather than one of misjoinder of defendants in the same cause of action, since neither is the tort of each defendant the same, nor is the negligence or the liability of each defendant the same. These questions have been so fully discussed in the opinions heretofore given that we think it is not necessary to again enlarge upon them. And see, also, the recent case of *Wiest v. Traction Co.*, 200 Pa. 143, 49 Atl. 891, 58 L. R. A. 666.

It follows that the nonsuit was properly granted, and that the petition for a new trial is denied.

¹ 1. See *Action*, vol. 1, Cent. Dig. § 538.

STATE v. HUNT.

(Supreme Court of Rhode Island. March 20, 1903.)

PARTNERSHIP—WHAT CONSTITUTES—EMBEZZLEMENT—INDICTMENT—DEFENSES—ADVICE OF COUNSEL—APPEAL—PRESUMPTIONS.

1. Where one is entitled to a certain portion of the net profits of a business as compensation for his services, the capital and all the proceeds thereof belonging to another, there is no partnership.

2. Under the express provisions of Gen. Laws 1896, c. 279, § 18, in a prosecution for embezzlement, it is not necessary for the state to prove that the particular amount charged in the indictment was embezzled.

3. In a prosecution for embezzlement, the evidence considered, and held to warrant a finding that defendant had misappropriated the money in question prior to his having sought legal counsel as to whether he had a right to it.

4. In a prosecution for embezzlement there was evidence tending to show that defendant misappropriated the money prior to his having sought legal advice as to his right thereto. The court instructed that, if defendant consulted an attorney, they could not find him guilty. Held, on appeal from a conviction, that it must be presumed the jury believed that defendant misappropriated the money prior to his having sought legal advice.

5. As a general rule, the advice of counsel furnishes no excuse for the violation of law, and cannot be relied on as a defense in a criminal prosecution.

James T. Hunt was convicted of embezzlement. Petition for new trial denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

The Attorney General, for the State. Franklin P. Owen, for defendant.

TILLINGHAST, J. The evidence does not show that the witness Draper and the defendant were partners in the pawnbroking business. Under the written agreement entered into between them the defendant was simply entitled to one-half of the net profits of the business by way of compensation for his services, the capital invested and all the proceeds thereof belonging exclusively and absolutely to the complainant, Draper, and the defendant being his servant and agent in the carrying on of the business. Such an agreement does not create a partnership. *Boston Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Com. v. Bennett*, 118 Mass., at page 453. If, therefore, the defendant fraudulently converted the money in question to his own use, as charged in the indictment, he was guilty of embezzlement, and the verdict of the jury was right. And it was not necessary for the state to prove that the particular amount charged in the indictment was embezzled. Gen. Laws R. I. 1896, c. 279, § 18.

As to the contention of the defendant's counsel that, if the defendant consulted an attorney at law in the premises, and was advised by him that he had the right to retain possession of the money in question as against the complainant, Draper, until it

should be determined whether it belonged to Draper or to the defendant, he could not be convicted of embezzling said money, we reply that it was competent for the jury to find under the testimony that, before consulting said attorney, the defendant had wrongfully and fraudulently converted said money to his own use as charged. The witness Draper testified, and there was other testimony to the same effect, that when he went to the office occupied by defendant to get the money, in pursuance of a notice from defendant's brother that he was misconducting himself, there was no money in the safe, and that the defendant then and there practically admitted that he had used it for his own purposes. So that, even if we should concede that the defendant's contention was tenable, yet it does not necessarily appear that the facts in the case warrant the conclusion to which the defendant arrives. And as the jury were instructed by the presiding justice that, if the defendant consulted an attorney in the premises, and was advised that he had the right to hold onto the money in his hands until it could be legally determined to whom it belonged, they could not find him guilty, it must be presumed that they did not believe he had the money when he sought this advice, but had previously misappropriated the same as charged, as it was clearly competent for them to do in view of the testimony in the case. It does not appear, therefore, that the jury disregarded the instruction of the court, as contended by defendant.

We do not wish to be understood as holding, however, that the instruction referred to was correct; the general rule of law being that the advice of counsel furnishes no excuse for a violation of law, and cannot be relied on as a defense in a criminal prosecution. 1 Am. & Eng. Ency. of L. (2d Ed.) 897, 898, and cases. It is true, as argued by defendant's counsel, that, in order to convict a person of the crime of embezzlement, a fraudulent intent to deprive the owner of his property must be shown. And we think the jury in the case at bar were warranted in finding such an intent on the part of the defendant, and an actual embezzlement, before he consulted counsel. We think the evidence in the case is sufficient to sustain the verdict.

Petition for new trial denied, and case remanded for sentence.

SLATER et al. v. SCHWEGLER.

(Court of Chancery of New Jersey. May 11, 1903.)

LANDLORD AND TENANT—VOID LEASE—ACTION FOR RENT—INJUNCTION—ADEQUATE REMEDY AT LAW.

1. Equity will not restrain an action for rent, and cancel the lease on the ground that the same is void, because the property was leased for a gambling house, since there is an adequate remedy at law by defense to the action.

¶ 1. See *Injunction*, vol. 27, Cent. Dig. § 85.

2. The fact that the lease is under seal does not warrant the interference of equity.

3. Where, in an action for rent, there is a judgment for defendant because of the fact that the lease was for an illegal purpose, equity will interfere to prevent further suits.

Suit by Sarah E. Slater and others against Louisa Schwegler for the cancellation of a lease and to enjoin an action at law on the same. Preliminary injunction refused.

W. Holt Apgar and James McTrippie, for the rule. Thomas P. Fay, opposed.

REED, V. C. The bill is filed to have a lease canceled, and an action at law upon it enjoined, upon the ground that the lease is void. The nullity of the lease is put upon the ground that the property left was leased for an illegal purpose, namely, for a gambling house. Upon the facts appearing in the affidavits, there is an adequate defense at law to the action which this bill is filed to enjoin. The fact that the lease is sealed does not matter. A seal never protected a contract from attack when the instrument was made to subserve an immoral or illegal purpose. The lease is not a gaming contract, but a contract to let a house for gaming purposes. Even in pure gaming contracts equity will not entertain a suit for cancellation when the defense at law is certain and adequate, particularly where the instrument sought to be canceled is nonnegotiable. It is true the power to cancel is not confined to gaming contracts. But it is confined to cases where the defense at law—for which defense this suit for cancellation is a substitute—is entirely perfect, certain, and adequate.

It is said that actions may be brought for successive installments of rent. If the complainant succeeds in one suit upon the ground set forth in these affidavits, equity will not hesitate to protect her from further suits.

A preliminary injunction is refused, and the rule discharged.

MAY v. BOYD et al.

(Supreme Judicial Court of Maine. April 4, 1903.)

EQUITY—SPECIFIC PERFORMANCE—PROBATE COURT—JURISDICTION—DECREE.

1. Decrees of a probate court touching matters within its jurisdiction, when not appealed from, are conclusive upon all persons.

2. It is provided by Rev. St. c. 71, § 17, that: "When it appears to the judge of probate having jurisdiction, that any deceased person had made a legal contract to convey real estate and was prevented by death from so doing, and that the person contracted with had performed or is ready to perform the conditions required of him by the terms thereof, he may authorize the executor or administrator to execute deeds to carry said contract into effect."

Upon a bill in equity in this court praying for the specific performance of a contract, the same being a bond for a deed for the convey-

ance of real estate, it appeared that the owner of the bond, who was the assignee of the original holder, filed a petition in the probate court having jurisdiction of the matter praying that the defendant executor might be ordered to make a conveyance; that, after due notice and hearing, the petition was denied, and no appeal was taken from the decree, which still remains in full force.

Held, that the bond was a legal contract in force at the death of the obligor; that no reason is suggested, and none is apparent, why the probate court did not have jurisdiction of the case under the above statute.

3. *Held*, also, that the facts as then presented by the same parties involved no special equitable feature which would itself constitute a sufficient ground for equitable jurisdiction, and that the bill should be dismissed.

(Official.)

Report from Supreme Judicial Court, Aroostook County.

Bill by Levi H. May against Robert Boyd, executor, and others, for specific performance. Case reported, and bill dismissed.

Bill in equity praying for a conveyance of certain real estate under a bond for a deed given by Charles H. Randall, deceased, to Hugh McMann. The bond had been assigned by said McMann to the plaintiff, Levi H. May, and the defendants are the legal representatives of said Randall. The case was reported for the determination of this court upon bill, demurrer, answer, replication, and proofs.

The facts are stated in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

P. H. Gillin and Ira G. Hersey, for plaintiff. Don A. H. Powers, Jas. Archibald, and Geo. H. Smith, for defendants.

WHITEHOUSE, J. This is a bill in equity praying for the specific performance of a contract for the conveyance of real estate. The case is reported for the determination of this court upon bill, demurrer, answer, replication, and proofs.

On the 9th day of January, 1895, Charles H. Randall was the owner of a tract of land in Hersey, in the county of Aroostook, comprising 110 acres, subject to a mortgage given by George R. Nickerson, a former owner, to Levi M. Carver, upon which was then due the sum of \$400, and on that day gave to Hugh McMann a bond for a deed of the same, whereby he agreed to execute and deliver "a good and sufficient deed" in consideration of the payment to him by McMann of the sum of \$170 according to the tenor of three promissory notes of that date, one for \$70, payable in one year, and two for \$50 each, payable in two and three years from date, respectively.

On the 17th day of July, 1897, Charles H. Randall died testate. At that time the entire sum of \$170 called for by the terms of the bond had not actually been paid by McMann, and hence no conveyance of the land or of Randall's equity of redemption in the prem-

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1154.

ises had been made to McMann during Randall's lifetime. The defendant Boyd is the executor of Randall's will, and the other defendants are his heirs and devisees. The plaintiff claims from the defendants a conveyance, not simply of Randall's equity of redemption, but of an absolute title to the land, free of the incumbrance, by virtue of an assignment of the bond from Hugh McMann, dated April 5, 1898.

The defendants first interpose an objection that the bill could not, in any event, be sustained by virtue of section 8 of chapter 111 of the Revised Statutes, for the reason that it is neither alleged in the bill nor shown in evidence that any written notice of the existence of the contract relied upon was given to the executor within one year after the "grant of administration," or was ever given to the executor in this case, as required by that section. Secondly, the defendants suggest that it could never have been in the contemplation of the Legislature that such a cause would be maintainable without previous notice under part 3 of section 6, c. 77, Rev. St., conferring upon the court a general power to compel the specific performance of written contracts; otherwise the separate provision of section 8, c. 111, Rev. St., requiring the written notice above mentioned, would have no distinct field of operation, and be entirely superfluous. They further insist that if, in any case, such a bill could be maintained under the general equity power of the court, a specific performance of the contract set up by the plaintiff in this case would be manifestly unjust, inequitable, and contrary to good conscience, for the reason that it is shown by the evidence to be wholly improbable that, according to the mutual understanding of the parties at the time the bond was given, Randall, in consideration of \$170, was to convey to McMann anything more than his equity of redemption in the premises.

But, finally, the defendants say that the plaintiff had an adequate remedy afforded by the provisions of section 17 of chapter 71 of the Revised Statutes; that at the November term, 1898, the plaintiff filed a petition in the probate court having jurisdiction of the matter, representing that Charles H. Randall made a legal contract with Hugh McMann to convey to him the real estate in question upon the terms and conditions therein set forth; that all the conditions of the contract had been performed, and that Randall was prevented by death from making the conveyance called for by the contract, and praying that the defendant executor might be ordered to execute the necessary deeds to carry the contract into effect; that after due notice and hearing upon this petition the court of probate decreed that the prayer of the petitioner be denied, and ordered the defendant Boyd, as executor, not to carry into effect the provisions of the contract set forth in the petition. The defendants accordingly contend that, in-

asmuch as no appeal was taken from this decree, and the judgment of the probate court still remains in full force, neither reversed nor annulled, and the parties and the issue in these proceedings before the probate court were the same as in this bill in equity, the question must be deemed *res judicata*.

Section 17 of chapter 71 provides that: "When it appears to the judge of probate having jurisdiction, that any deceased person, had made a legal contract to convey real estate and was prevented by death from so doing, or that such deceased person, had made such a contract to convey an estate upon a condition, which in its nature could not be fully performed before his decease, and that in either case the person contracted with, or petitioner, has performed or is ready to perform the conditions required of him by the terms thereof, he may, on petition of such person, his heirs, assigns or legal representatives, authorize the executor or administrator, or special administrator of the deceased, or when there is no executor or administrator, the guardian of the heirs of the deceased, to execute deeds to carry said contract into effect."

In *Bates v. Sargent*, 51 Me. 428, the construction of this statute was brought directly in question, and it was there said that it relates only to "legal contracts in force at the death of the obligor, the performance of which was by his death prevented," and that "it was not intended to oust this court of its equitable jurisdiction, or to limit or restrict its exercise." In that case it appeared from the statement of facts that the bond had become forfeited for nonpayment of the notes when due, and it was held that the rights of the parties arising from the fact of a payment indorsed on a note after such forfeiture could only be determined by proceedings in equity.

But in the case at bar the bond was a legal contract in force at the death of the obligor. It is true, as already noted, that the full sum of \$170 called for by the bond had not actually been paid in the lifetime of the obligor, for the last note for \$50 did not become due until January 9, 1898, nearly six months after his death; but it appears from the uncontroverted evidence of McMann, and is conceded by both sides, that on the 16th day of April, 1897, Charles H. Randall accepted from McMann, in settlement of the three notes, a mare and colt and a new note for \$100, payable in four months from that date at the "First National Bank." This note, it will be perceived, did not mature until after the death of Randall, but the bond was recognized by the representative of the estate as a subsisting legal contract, and the full amount due thereon was paid by the plaintiff and accepted by the executor, before the filing of the petition above described in the probate court. Here were no facts or conditions calling for the exercise of the equity power of the court to grant relief from forfeiture.

Any forfeiture arising from McMann's failure to pay the first and second notes at maturity was waived by the obligor, and the bond continued in force by the mutual agreement of the parties made in Randall's lifetime, and evidenced by the new note for \$100.

No reason has been suggested, and none is apparent, why the probate court did not have jurisdiction of the case, under these circumstances, by virtue of the statute above quoted. As the facts then presented themselves, the case involved no special equitable feature which would in itself constitute a sufficient ground for equitable jurisdiction. The plaintiff elected his tribunal and invoked the jurisdiction of the probate court. The question now presented was fully heard and determined after due notice to all parties interested, and a decree entered adverse to the petitioner. No appeal was taken from that decision, and the authorities are substantially uniform in support of the familiar proposition that the "decrees of a probate court touching matters within its jurisdiction when not appealed from are conclusive upon all persons." *McLean v. Weeks*, 65 Me. 421; *Potter v. Webb*, 2 Me. 237; *Merriam v. Sewall*, 8 Gray, 316.

It is therefore the opinion of the court that the entry in this case must be:

Bill dismissed, with one bill of costs for defendants.

HAYFORD v. WENTWORTH.

(Supreme Judicial Court of Maine. March 5, 1903.)

FIXTURES — MERGER — INTENTION — LANDLORD AND TENANT — LAW AND FACT — WATER-CLOSET.

1. The physical character of the annexation of a chattel to land or buildings does not alone determine the question whether the chattel annexed is merged in the realty.

2. To effect a merger of a chattel into realty, there must be (1) an actual physical annexation, at least by juxtaposition, to the realty; (2) an adaptability for use with that part of the realty to which it is annexed; and (3) an intention by the party annexing to make it a permanent accession to the realty. This intention, however, is not the unrevealed, secret intention, but the intention fairly deducible from all the circumstances.

3. The question of the existence of either of these requisites, including the intention, is a question of fact, or at least of mixed law and fact.

4. The burden of showing the existence of these requisites, including the intention, is upon the party claiming a merger.

5. A tenant of a building or of an office, in the absence of objection from the landlord, has the right to annex temporarily thereto chattels for his own comfort or convenience, and may remove them during his term, if such annexation and removal do not materially injure the realty.

6. "A wash-down siphon water-closet" and its appurtenances, put into a business office in the usual manner by a tenant at will for his own use, and which can be removed without material injury to the realty, does not become merged in the realty unless it was so put

in with an intention to make a permanent accession to the realty.

7. The fact that the water-closet was connected with a soil pipe, also put in by the tenant, and left by him affixed to the realty, does not prevent his disconnecting and removing the water-closet.

8. A tenant so putting in a water-closet may transfer the same to his successor in the tenancy, and the last tenant thus acquiring it may remove it during his term.

(Official.)

Exceptions from Supreme Judicial Court. Penobscot County.

Action by Laura Hayford, trustee, against Thomas H. Wentworth. Verdict for plaintiff. Exceptions by defendant. Sustained.

Trespass on the case for removing and carrying away from the plaintiff's premises a water-closet bowl.

The evidence showed that on January 8, 1897, upon an order of one Newcomb, then having a desk (assisted by a female stenographer) in the office described in the plaintiff's writ, occupied by the defendant and Judge Vose, and under their advice (they paying one-third each therefor), a skilled plumber put in a soil pipe, and set up a "wash-down siphon water-closet," in a small closet, a part of the occupied premises, into which the Holly water had previously been introduced for drinking purposes and for a wash-bowl. Cost of closet, set up, \$55, and \$14 for soil pipe and connections with sewer.

The evidence showed that said closet was set up in the usual manner; the flanges on the upper end of the soil pipe being flush with the floor of the closet, to which flange the bowl of the new closet was secured by bolts and nuts.

The evidence showed that said defendant and Vose were the tenants till December 31, 1897, when the said Vose vacated, leaving said defendant sole tenant; he (the said defendant) having purchased the interest of said Newcomb and Vose in the said closet.

The evidence showed that the defendant's tenancy continued till July 1, 1900, and that on the 28th day of June, 1900, he caused the said water-closet to be removed in a manner which the plumber, called by the plaintiff, testified to be the customary, usual, and safe method, by the same plumber who set it up; leaving the soil pipe intact, but securely plugged with newspapers (which said plumber testified was the customary method), to which said soil pipe the plaintiff attached another water-closet.

The only evidence that the defendant did not intend the water-closet to remain a permanent fixture was that he erected it upon premises which he might be obliged to quit at any time in 30 days, and the fact that before the expiration of his term of tenancy he did remove it.

The following instructions were requested by the defendant:

"First. Was this closet so attached that its removal caused material damage to the real-

ty? If it was not so attached, then you will come to the question of the intention of the party or parties when it was set up. Did they intend it should remain as a part of the realty, or only for their better convenience and accommodation while occupying the premises?

"Second. If the jury find that its removal did not cause material damage to the realty, and that it was not the intention of the party or parties to leave the closet after the expiration of their tenancy, then, as a matter of law, the defendant had a right to remove it before the expiration of his term of tenancy."

The court refused to give the instructions asked for by the defendant, and instructed the jury as follows:

"I decline to give you these instructions, gentlemen, because it seems to me that there being no controversy—no question of fact—as to the method in which the closet, and the plumbing necessary for the closet, were put there, I instruct you, as a matter of law, that that becomes a fixture, a part of the realty. So that this defendant, Mr. Wentworth, is liable for having removed that closet."

To which instructions, and refusal to give instructions, the defendant took exceptions.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, POWERS, and SPEAR, JJ.

J. R. Mason, for plaintiff. L. A. Barker, for defendant.

EMERY, J. Under what circumstances articles once chattels lose their character as chattels, and become merged into realty, has been a somewhat troublesome question, decided differently by different courts, and differently by the same court at different periods. The trend of judicial opinion, however, has been away from a tendency toward merger, till now there is tendency toward non-merger. Without taking space here to trace the steps in this development of the law in such cases (a task which has been well done in some of the opinions below cited), it is sufficient to say that courts now very generally discard the old test of the physical character of the annexation, and hold that a chattel is not merged in the realty unless (1) it is physically annexed, at least by juxtaposition, to the realty, or some appurtenance thereof; (2) it is adapted to and usable with that part of the realty to which it is annexed; and (3) it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty. *Readfield T. & T. Co. v. Cyr*, 95 Me. 287, 289, 49 Atl. 1047, and cases there cited. For other authorities to the same effect, see *Baker v. Fessenden*, 71 Me. 293; *Voorhees v. McGinnis*, 48 N. Y. 282; *Dana v. Burke*, 62 N. H. 627; *McMillan v. N. Y. Water-Proof Paper Co.*, 29 N. J. Eq. 610; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 645; *Hill v.*

Wentworth, 28 Vt. 428, 437; *Langston v. State*, 96 Ala. 44, 11 South. 334; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Ames v. Trenton Brewing Co. (N. J. Ch.)* 38 Atl. 353, affirmed in 57 N. J. Eq. 347, 45 Atl. 1090; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452. Further, as said in *Readfield T. & T. Co. v. Cyr*, supra, "while it would be impossible to reconcile all the cases upon this subject, yet the modern and most-approved rule appears to be to give special prominence to the intention of the party making the annexation."

An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty. *Hill v. Wentworth*, supra; *Baker v. Fessenden*, 71 Me. 293; *Munroe v. Armstrong*, 179 Mass. 165, 60 N. E. 475; *Knickerbocker Trust Co. v. Penn Cordage Co. (N. J. Ch.)* 50 Atl. 459.

As to the intention, of course, it is not the unrevealed, secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct, and language of the parties—the intention that should be inferred from all these. *Readfield T. & T. Co. v. Cyr*, supra. Thus in *Munroe v. Armstrong*, supra, where a plumber, as subcontractor, put plumbing material in a house in the course of its construction, it was held to be a necessary inference that he intended the materials to become a part of the realty. So, where the chattel is so annexed that it cannot be removed without material injury to the realty, it would ordinarily be a necessary inference that the intention was not to remove it. So, where the chattel is annexed by a stranger having no interest nor right of occupancy in the realty, he will ordinarily not be heard to say that he intended a trespass. So a special agreement or a known custom may conclusively determine the question. Nevertheless the intention is a fact which must be proved either directly or by inference from other proven facts. Whether there was such an intention is a question of fact, or at least of mixed law and fact, for the jury, in an action at law, where there is any conflict of evidence, or more than one possible logical inference from undisputed facts. *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Moon-ey*, 130 Mass. 155; *Phila. M. & T. Co. v. Miller (Wash.)* 56 Pac. 382, 44 L. R. A. 359, 72 Am. St. Rep. 138. In *Ames v. Trenton Brewing Co.*, supra, the fact that the owner of the chattels, before annexing them to the building leased to him, had agreed to give a chattel mortgage of them to the person from whom he had bought them, was held proper to be taken into consideration in determining the question of his intention as to permanency of annexation. In *Seeger v. Pettit*, supra, the tenant, for the purpose of negating any inference of intention to make the articles

annexed by him a part of the realty, was held entitled to show that he had included them as his property in his schedule of assets.

Turning now to the bill of exceptions in the case at bar, we think the practical effect of the ruling complained of was to wholly exclude from consideration the question of intention, and, indeed, all other questions, except the effect of the undisputed method of the original physical annexation, and to hold, as matter of law, that this method alone, as described in the bill of exceptions, made the chattel a part of the realty, and passed the title to the owner of the realty. Unless, therefore, it is a necessary inference from the method of annexation that the defendant and his associates and vendors intended to make the annexation permanent, as a part of the realty, the ruling was clearly erroneous and prejudicial.

It does not seem to us that such an inference is necessary, even if permissible. The chattel was of substantial value in itself, having cost \$55. The defendant and his associates were then tenants at will to the plaintiff, and liable to be deprived of the use of the leased office within 30 days after annexing the chattel. The law is now liberal to such tenants. The chattel (a "wash-down siphon water-closet" and its appurtenances) was not annexed in the construction, enlargement, or repairs of the office. It was not designed or made for this particular office or place, nor for any particular place. It was a chattel already made for the general market, and kept in stock, and separately by itself an object of sale and purchase in the general market. It could be placed and used in any room or building, and transferred from building to building, and from place to place in the same building. It had a market value before annexation, and a market value after removal. Being such a chattel, the tenants brought it into the leased office, and set it up, not to enlarge, strengthen, or repair the office rooms, but exclusively for their own use and comfort. As one of the three vacated the premises, he sold his interest in the water-closet to those remaining, and they purchased it during their occupancy. The last tenant removed it during his right of occupancy, by merely unscrewing nuts and screws and withdrawing bolts and nails, without damage to the chattel or the realty, so far as appears.

Taking into account all these circumstances, and the rule that the burden of proof of showing the intention to make the annexation permanent is upon the plaintiff, we think that reasonable men might be of the opinion (and not without reason) that an intention to permanently annex the chattel and make it a part of the realty was not shown, and did not exist. This being so, the exceptions must be sustained, and a new trial granted, even if our own opinion were different.

The citation of some authorities may perhaps enforce our reasoning, and make our conclusion more acceptable. [In *Tyler on Fixtures*, 385, it is said: "As a rule, any fixture made by a tenant for his own comfort, convenience, or pleasure, may be removed by him during his term, provided the same can be removed without serious injury to the realty, the same as in cases of fixtures for the purposes of trade or manufactures." In *Taylor on Landlord & Tenant* (8th Ed.), at the end of section 544, it is said: "In modern times the rule is understood to be that, upon principles of general policy, a tenant, whether for life, years, or at will, is permitted to carry away all such fixtures of a chattel nature as he has himself erected on the demised premises for the purpose of ornament, domestic convenience, or to carry on trade, provided the removal can be effected without material injury to the freehold." In section 547 domestic fixtures are defined to be "such articles as a tenant attaches to a dwelling house in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury." This definition would seem to be as applicable to an office room as to a dwelling house. In *Gaffield v. Hapgood*, 17 Pick. 192, 28 Am. Dec. 290, the court said that a fire frame fixed in a common fireplace, with bricks on the sides, laid in between the sides of the fire frames and the jambs of the fireplace, and the facing plastered over, remained a chattel, which a tenant so affixing could remove during his term. In *Guthrie v. Jones*, 108 Mass. 191, gas fixtures screwed upon the gas pipes of a room were held to remain chattels as between landlord and tenant. In *Wall v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64, a cistern and sinks fastened to the floor by nails, or set in the floor by cutting away boards; water pipes fastened by hooks driven into the plastering and walls, and passing through holes cut by the tenant in the floors and partitions; gas pipes passing from the street into the cellar, and thence up through the floor, and branching into different rooms, through holes cut in the floor and partitions (and in some cases through ornamental ceiling centerpieces) by the tenant for that purpose, the pipes being kept in place by metal bands fastened to the walls and ceilings—were all held to remain chattels. In *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353, a portable iron furnace was set upon the earth in the middle of the cellar, and then the cellar bottom was covered with concrete up to and around the furnace. The furnace was connected by hot-air pipes with registers in the various rooms, set in soapstone collars. Gas pipes were also screwed to gas pipes fixed in the house. All these, having been put in the house by the person occupying under a verbal contract to purchase, were held to remain chattels. In *Phila. M. & T. Co. v. Miller* (Wash.) 56 Pac. 382, 44 L. R. A. 559, 72 Am. St. Rep. 138, a mortgagor placed in

his dwelling house a porcelain bathtub, standing on four legs, and connecting in the usual manner with the soil pipes, and also a hot-water heater, connected therewith by the usual methods of plumbing. The case was submitted to a jury, who found that the articles remained chattels, and the court rendered judgment on the verdict. In the opinion, stress was laid upon the circumstance that none of the articles were made or fitted for that particular house, but all were made up and kept in stock by dealers, to be sold for and set up in any house. In *Seeger v. Pettit*, supra, gas fixtures, platform scales, a walnut railing, a staircase and some banisters, a coal bin and some shelving, were put into leased premises by different tenants at different times; each outgoing tenant transferring his interest in them to his successor. A ruling that these articles could not be removed by the last outgoing tenant was held erroneous. The procedure in this case was much like that at bar. The landlord brought an action at law against the outgoing tenant for removing these articles from the building. The case was tried to a jury, and evidence adduced pro and con. The presiding justice ruled, as matter of law, that the articles were not removable by the defendant. This was held to be error. The court said: "The matter of fixtures should have been left to the jury, as a question of intention." In *Hanson v. News Pub. Co.*, 53 Atl. 990 (the latest expression of this court on this subject), partitions placed in a store by a tenant for his own convenience, and nailed to the floor and screwed to the walls, were held not to have become a part of the realty.

It remains to notice a few other points made by the plaintiff in her brief:

(1) She claims that the water-closet was put in by Newcomb, a stranger, and hence as a trespasser. It can be inferred, however, that Vose and Wentworth had hired the entire office room and its appurtenances, and had let desk room therein to Newcomb, without objection from the plaintiff, so that Newcomb was not a trespasser, but a lawful occupant. It was not a case of a tenant at will undertaking to assign his tenancy without the landlord's permission. The three—Vose, Wentworth, and Newcomb—were in lawful occupation under the original lease or hiring. The water-closet was put in by them jointly, though Newcomb may have been the only active agent. As to the want of express permission from the plaintiff to put in such a closet, it is enough to say that in the absence of notice to the contrary, as in this case, a tenant has implied permission to put into the leased tenement such articles as will conduce to his health, comfort, or convenience, without injury or danger to the realty. *Hanson v. News Pub. Co.*, supra.

(2) The plaintiff urges that the chattel annexed was the water-closet and soil pipe combined; that the soil pipe was certainly irremovable, and was in fact left fixed in

the building; and hence that the water-closet must remain with it. It does not appear, however, that either the water-closet or the soil pipe were made to order, the one for the other, or that they were especially adapted the one to the other. It is common knowledge that soil pipes and water-closets are made in standard sizes and styles for the general market, independently of each other. They are manufactured and dealt in separately. Any water-closet can be used with any soil pipe of the proper size. Other water-closets could have been connected with this soil pipe, and, indeed, another was connected by the plaintiff after this one had been removed. We have no occasion to say whether the defendant could have removed the soil pipe, also; but his leaving it did not preclude him from disconnecting and removing the water-closet, any more than leaving gas pipes in place precludes a tenant from removing the gas fixtures he had connected with them.

(3) The plaintiff also urges that the removal of the water-closet without the soil pipe in fact caused an injury to the realty, in that the upper end of the soil pipe was not effectually closed. But the question of injury to the realty, if any such is suggested by the evidence, was excluded from consideration. The ruling was that the original mode of annexation determined the whole case.

The exceptions must be sustained, and the case sent back for another trial.

Exceptions sustained.

CHELLIS et al. v. GRIMES et al.

(Supreme Court of New Hampshire. Cheshire. April 7, 1903.)

REPLEVIN — CONTRACT FOR SALE — VESTING OF TITLE—RIGHT TO MAINTAIN ACTION.

1. Plaintiffs and defendants agreed in writing that, if plaintiffs would perform certain services, defendants would convey to them their homestead, and give them a bill of sale of certain personalty. Plaintiffs performed, and requested performance of defendants, which was refused, whereupon plaintiffs brought replevin for the personal property. Held that, as the contract contemplated a future delivery, until which no title vested in plaintiffs, they could not maintain the action, though defendants would be liable in damages for any breach of contract.

Transferred from Superior Court; Wallace, Judge.

Replevin by Burt Chellis and another against Augustus G. Grimes and another. Trial by the court. Plaintiffs except. Judgment for defendants.

November 21, 1901, the plaintiffs and the defendants entered into a written agreement by which the defendants, in consideration of the agreement of the plaintiffs to build for them five houses, agreed to convey to them their homestead, and to give them a bill of sale of their hack business, including the property in question; possession of the hack business to be given December 1, 1901, and

possession of the homestead to be given May 1, 1902. December 2, 1901, the defendants, although requested, declined to give a bill of sale or deliver the property in accordance with the terms of the agreement. The plaintiffs had no title to the property replevied except under this agreement. Subject to exception, the court ruled that the plaintiffs could not maintain this suit. If this ruling is sustained, there is to be judgment for the defendants.

Batchelder & Faulkner, for plaintiffs. Don H. Woodward and Ira Colby, for defendants.

WALKER, J. While the case does not disclose what the pleadings were, it is apparent that the practical issue tried related to the title of the chattels in question. The plaintiffs, in effect, claimed that the defendants wrongfully detained their property, not that the original taking was wrongful; and the defendants, claiming title in themselves, denied the title set up by the plaintiffs. By statute (Laws 1873, p. 154, c. 21, § 1; Pub. St. 1901, c. 241, § 2) this method of pleading, which may not be in accordance with the rules of the common law (*Page v. Ramsdell*, 59 N. H. 575), is authorized in actions of replevin (*Kittredge v. Holt*, 55 N. H. 621; *Lothrop v. Locke*, 59 N. H. 532; *Sinclair v. Wheeler*, 69 N. H. 538, 45 Atl. 1085). If the defendants' plea had been the general issue, non cepit, the question of title would have been immaterial (*Sinclair v. Wheeler*, supra), and upon that plea the plaintiffs might have been nonsuited (*Carter v. Piper*, 57 N. H. 217). It follows that upon the case as presented the view most favorable to the plaintiffs is to consider the facts in their relation to the plea of property. If they have proved their title, they are entitled to judgment upon that plea.

But the facts do not support the plaintiffs' contention. The written contract between the parties did not vest the title of the personal property in the plaintiffs. The intention of the parties, plainly inferable from the language they employed, shows that the title and possession of the chattels were to remain in the defendants until delivery, which was to take place at a subsequent date. The contract does not purport to furnish evidence of a present completed sale, but merely of an agreement for a sale. Nor are there any facts disclosed in the case indicating that the parties entertained a different intention. *Fuller v. Bean*, 34 N. H. 290, 303. The defendants were the exclusive owners of the property, and entitled to the use and benefit of it after the making of the contract as well as before. There is no evidence that they held the chattels as bailees of the plaintiffs, or that they retained the possession thereof in recognition of, or in subordination to, a title in the plaintiffs. There was no apparent reason for a separa-

tion of the ownership and right of possession; and, as the contract did not in terms require such separation, but postponed the final completion of the sale to a subsequent time, it cannot be inferred that the title passed to the plaintiffs and the right of possession remained in the defendants. For some reason the parties deemed a formal bill of sale necessary or convenient in the consummation of their contract. But how important such a document, if given, would have been on the question of the transfer of the title, it is not useful to consider, since there is no evidence that the title passed at any time.

The mere fact that the defendants committed a breach of their contract by refusing or failing to give the plaintiffs possession of the property on or after the 1st day of December did not transfer the title to the plaintiffs. Their refusal to deliver the property was not equivalent to a performance on their part. It was their privilege to commit a breach of their agreement (*Holmes, Com. Law*, 301), for which they would be liable in an action for damages, but not in an action of replevin for the property (*Mead v. Johnson*, 54 Conn. 317, 7 Atl. 718; *Cob. Rep.* § 289). Nor did the plaintiffs have the legal right to the possession, since that right followed the title which they never had.

The plaintiffs' exception is overruled, and, according to the provisions of the case, the order is: Judgment for the defendants. All concurred.

PETTENGILL v. TOWN OF AMHERST.

(Supreme Court of New Hampshire. Hillsborough. April 7, 1903.)

BOARD OF HEALTH—CONTAGIOUS DISEASE—QUARANTINE—LIABILITY FOR MEDICAL ATTENDANCE.

1. Laws 1899, p. 335, c. 100, § 1, provides that when any one is placed in quarantine the board of health shall assist such person or family in such manner as, in its judgment, may be deemed wise or necessary. A doctor was employed by a private individual to attend a case of scarlet fever in his family. The house was quarantined. Part of the family removed to another house, where another case broke out, and that house was quarantined. The board of health furnished some groceries, knew that the doctor was attending the invalids, and did not object, or furnish other medical attendance. Held that, as the board of health did not employ the doctor, the town was not liable for his services.

Transferred from Superior Court; Peaslee, Judge.

Assumpsit to recover for services as a physician by J. B. Pettengill against the town of Amherst. Facts agreed and plaintiff excepts. Exception overruled.

February 25, 1899, the plaintiff was employed by one Owen to attend a case of scarlet fever in his family. The board of health of the town of Amherst was notified February 28th, and quarantined the house. A part of the family was moved to another

house by the physician without any suggestion from the board of health. March 22d another case broke out in the other house, and that house was also quarantined. The plaintiff finished his services April 12th and the house was fumigated April 25th. The board of health paid for some groceries and other articles furnished to Owen and his family, but these were all ordered and contracted for by the board. The board knew that the plaintiff was attending the parties, and did not object, or furnish any other medical attendance.

Doyle & Lucier, for plaintiff. Brown, Jones & Warren and Allan M. Wilson, for defendant.

WALKER, J. The verdict establishes the fact that the plaintiff's services were not rendered at the request of the town, or under any contract with it therefor. The board of health did not employ the plaintiff, or attempt, as statutory agent of the town, to pledge its credit for the plaintiff's services rendered to Owen. The board did not deem it "wise or necessary" (Laws 1899, p. 335, c. 100, § 1) to employ the plaintiff in this case at the expense of the town. Whether there was a moral obligation, under the circumstances, resting upon the board and the town to provide Owen with medical attendance during the confinement of his family in quarantine, is immaterial in this action. The town could only be liable upon a legal contract, which the case shows did not exist. *French v. Benton*, 44 N. H. 28; *Buxton v. Chesterfield*, 60 N. H. 357, 360.

Exception overruled. All concurred.

HORAN v. BYRNES.

(Supreme Court of New Hampshire. Hillsborough. April 7, 1903.)

ADJOINING LANDOWNERS — ERECTION OF FENCE—PRIVATE NUISANCE—CONSTITUTIONALITY OF STATUTE—WIFE AS HUSBAND'S WITNESS—HOSTILITY TOWARDS OPPOSITE PARTY—FORMER TRIAL—FAILURE TO DENY IMPUTED STATEMENT.

1. Pub. St. 1901, c. 143, §§ 28-30, declare that any fence unnecessarily exceeding five feet in height, and erected to annoy an adjoining owner, shall be a private nuisance, and the person injured thereby may sue for damages, and, if he recover, the defendant shall remove the nuisance within 30 days, or suffer a penalty of \$10 for each day over. Bill of Rights, art. 2, declares that all men have certain natural and essential rights, among which are the acquiring, possessing, and protecting of property. Article 12 provides that every member of the community has a right to be protected in the enjoyment of his property. Const. art. 5, confers power on the Legislature to make such constitutional laws as it may judge to be for the benefit and welfare of the state and for the governing and ordering thereof. *Held*, that Pub. St. 1901, c. 143, §§ 28-30, were not unconstitutional as an invasion of the right of private property, since an unnecessary and unreasonable use of land to the injury of another is not a property right.

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2. A wife testifying for her husband was asked if she had not made a statement showing hostility towards the opposite party. This she denied, and was then asked if the statement had not been testified to at a former trial, when she was present, and failed to controvert it. *Held*, that the question was improper, as her failure to interrupt a judicial proceeding to interpose a denial to the testimony could not be considered as an admission of its truth.

Transferred from Superior Court; Peaslee, Judge.

Action by Jeremiah J. Horan against James J. Byrnes. Verdict for plaintiff, and case transferred from the superior court on defendant's exceptions. Exceptions sustained in part.

Case, under sections 28, 29, c. 143, Pub. St. 1901, for maintaining a structure in the nature of a fence, in violation of the statute. The defendant moved for a nonsuit on the ground that the statute upon which the action is based is unconstitutional. The motion was denied, and he excepted. The following testimony was admitted subject to exception: The defendant's wife, Ann, who was a witness in his behalf, was asked upon cross-examination if she had not said to the plaintiff: "The fence is going higher. We won't leave you a bit of room." Upon her denial of the statement, she was asked if at another trial, when she was present, this statement had not been testified to, and if she did not fall to then deny it. This she admitted. She denied having any ill will toward the plaintiff or his family. The plaintiff's wife testified that she lost her wedding ring on the Byrnes premises, and that the ring came into the hands of Mrs. Byrnes, who refused to deliver it to the witness, but compelled her to go to the police station to recover her property.

Patrick H. Sullivan, for plaintiff. Brown, Jones & Warren, for defendant.

PARSONS, C. J. "Any fence or other structure in the nature of a fence, unnecessarily exceeding five feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Any owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damages sustained thereby.

"If the plaintiff recovers judgment in the action, the defendant shall cause the removal of the nuisance within thirty days from the date of the judgment, and for each day he shall permit the nuisance to remain after the expiration of said thirty days he shall incur a penalty of ten dollars for the use of the party injured."

Pub. St. 1901, c. 143, §§ 28-30.

The act forbids the use by one landowner of his land for the unnecessary erection of a fence exceeding five feet in height when the purpose of such unnecessary height is the annoyance of the adjoining owner or occu-

pant, if such unnecessary height injures the adjoining owner in his comfort or the enjoyment of his estate. The claim of the defendant in support of his motion for a nonsuit that the statute is unconstitutional raises the question whether the statutory prohibition is an unwarranted interference with the defendant's "natural, essential, and inherent" right of "acquiring, possessing, and protecting property," or deprives him of that protection in its enjoyment which is the right of "every member of the community." Bill of Rights, arts. 2, 12.

"The structure here referred to is one designed to take the place of a fence in the ordinary meaning of the term—a structure erected upon or near the dividing line between adjoining owners for the purpose of separating the occupancy of their lands." *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25; *Spaulding v. Smith*, 162 Mass. 543, 89 N. E. 189. The correlative right and duty of adjoining owners and occupants of lands at the common boundary between them is matter of general and public concern. The existence or not of an obligation to fence, what should constitute performance, and what liabilities should follow from nonperformance, are matters as to which the establishment of a definite rule plainly promotes the public peace and comfort and the security of property rights in real estate. All these questions were early settled by the Legislature. It prescribed the obligation to fence as between adjoining owners, provided a method for the enforcement of the duty, declared the legal liability for failure to fence, and defined a sufficient fence. There was legislation upon the subject in 1687, 1692, 1743, and 1792 (1 N. H. Prov. Laws, 200; 3 Prov. Papers, 176; Laws 1696-1725, p. 117; Laws, Ed. 1761, p. 225; Act Feb. 8, 1791; Laws, Ed. 1797, p. 331); while in 1842 (Rev. St. p. 254, c. 136, § 4) the requirements of a sufficient fence were prescribed. Such a fence need not be more than four feet high. Pub. St. 1901, c. 143, § 5. Although these provisions in one sense imposed a burden upon real estate ownership, the purpose of the Legislature, as shown by the titles of the earlier acts "for the regulation of cattle, cornfields, and fences," was to make provision in reference to the control of domestic animals—"to regulate the use and keeping of such property." *Morey v. Brown*, 42 N. H. 373, 375. No one has ever been required to fence his land who does not improve it, or who "lays it in common." Pub. St. c. 143, § 14. The theory of these statutes is simply that, where adjoining owners each desire the exclusive use of their land, the expense of effecting the mutual purpose should be equally divided between them. Pub. St. 1901, c. 143, § 1. The constitutional objection made to the present statute raises the question, if it appears that the statute is an interference with the defendant's property right, whether the interference is or not one which the Legislature

might properly make as a regulation of the use of property. The constitutionality of similar statutes has been upheld upon the latter ground, as being merely a small limitation of existing rights incident to property, which, under the police power, may be imposed for the sake of preventing a manifest evil. "It is hard," it has been said, "to imagine a more insignificant curtailment of the rights of property." *Rideout v. Knox*, 148 Mass. 368, 372, 373, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Karasek v. Peter*, 22 Wash. 419, 61 Pac. 83, 50 L. R. A. 345; *Western Granite & Marble Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192. Similar statutes in Maine, Vermont, and Connecticut have been before the courts, but it has not been suggested that the power of the Legislature to adopt them has been attacked in those states. *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Harbison v. White*, 46 Conn. 106; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182, 183, note.

The present statute was passed in 1887. Laws 1883-87, p. 469, c. 91. In *Hunt v. Coggin*, 66 N. H. 140, 20 Atl. 250, the verdict was for the defendant; and in *Horan v. Byrnes*, 70 N. H. 531, 49 Atl. 569, the defendant waived any objection to the statute upon this ground. In *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25, the question was whether a building was within the terms of the statute. The constitutional question is now presented for the first time.

It is objected in answer to the argument that statutes like the present are within the constitutional exercise of the police power, involving for the general good some slight limitation of existing property rights; that, if one incident of the property right in real estate is the right to use it maliciously for the sole purpose of injuring another, it is as much an invasion of the right to take it from a small portion as from the whole of one's property; and that the matter in question concerns private individuals, and not the public in general, and hence does not come within the police power. *State v. White*, 64 N. H. 48, 50, 5 Atl. 828. It may be thought these objections are successfully answered in the cases cited, or that, if not there answered, a satisfactory answer can be found. But a discussion of these objections does not reach the fundamental question in the case.

"The statute was designed to prevent an act the sole effect of which would be to annoy or injure another." *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25. The primary question, therefore, is whether one's right to use property solely to injure another is a part of his property right in real estate, which is so protected by the constitution that the prohibition of such use is not within the general power of legislation "for the benefit and welfare of this state and for the governing and ordering thereof." Const. art. 5. Upon the question whether a fence on or near the division line between adjoining landowners, maliciously

built to an unreasonable height for the sole purpose of annoying and injuring the adjoining owner or occupant, is a nuisance which can, in the absence of statutory authority, be abated by an injunction, the courts are in conflict. *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, answers the question in the negative, while an opposite conclusion is reached in Michigan. *Burke v. Smith*, 69 Mich. 880, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 881, 8 L. R. A. 183, 21 Am. St. Rep. 510; *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457. In *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560, and *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 38, 50 L. R. A. 345, cases in which the power of the Legislature to enact a statute similar to that under consideration is attacked and upheld, it is conceded "that to a large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which cannot be taken away even by legislation." *Rideout v. Knox*, 148 Mass. 372, 19 N. E. 392, 2 L. R. A. 81, 12 Am. St. Rep. 560.

The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is "based upon a narrow view of the effect of the land titles," and is reached "by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim," "*Cujus est solum, ejus est usque ad coelum*." The courts of this state have had, in some respects, at least, a different understanding of the elements of landownership. As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test has been considered to be not merely whether the act was an exercise of dominion on the land, regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other. *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; *Ladd v. Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Bassett v. Mfg. Co.*, 43 N. H. 569, 577, 82 Am. Dec. 179. It has been said that the rule of absolute dominion is easier of application. *Chase v. Silverstone*, 62 Me. 175, 183, 16 Am. Rep. 419. This view, however, does not seem to be upheld by the difficulties met in its application in reference to surface waters. See *Franklin v. Durgee*, 71 N. H. 186, 189, 51 Atl. 911, 58 L. R. A. 112. But, however that may be, difficulty in administration is not a sufficient reason for the denial of justice. Cases like *Chatfield v. Wilson*, 28 Vt. 49, and *Phelps v. Nowlen*, 72 N. Y. 89, 28 Am. Rep. 93, in which the principle of the maxim relied upon is applied to wa-

ters in the soil, are not authority here, where a contrary view is entertained. *Franklin v. Durgee* and *Bassett v. Mfg. Co.*, *supra*.

Aside from the authorities in cases in which the control of waters was in question, the leading case appears to be *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461. Here, although the plaintiff alleged that the fence complained of was erected solely to injure her, the decision is upon the ground that by the erection of the fence the plaintiff is deprived of no right, but is merely prevented from acquiring a right. If, by enjoyment of light and air across his neighbor's land for the prescriptive period, a landowner could acquire a right to such enjoyment, the building of a fence as an assertion of a contrary right, and to prevent the acquiring of such easement, would be a building for a necessary and useful purpose, and not for the sole purpose of annoying another. The case standing upon a view of the effect of nonuser of a right to build, now generally abandoned in this country (*Wash. Ease*, 490, 497, 498), is not of value in the present discussion. The argument generally is that the motive with which one does an act otherwise lawful is immaterial; and hence, as it must be conceded that a landowner has the right to build on his land as he conceives may best subserve his interests, the act lawful for a useful purpose is not made unlawful and a nuisance merely by the intent accompanying it.

Whether the first proposition is entirely true may perhaps be doubted. Cases cited to support the proposition (*Walker v. Cronin*, 107 Mass. 555; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93) do not support it in its entirety. See *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569. In *Houston v. Laffee*, 46 N. H. 505, which was trespass for cutting an aqueduct pipe maintained by the plaintiff upon the defendant's land by a parol license, it was held that, if the cutting of the pipe was done simply for the purpose of putting an end to the license, and without any malice or intentional wrong, the defendant would not be liable; but if the pipe was cut "wantonly, unnecessarily, maliciously, and with a view * * * to injure the plaintiff," the defendant would be liable. It is true that an act which one has the right to do under all circumstances, like the bringing of a suit upon a valid claim (*Friel v. Plumer*, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190), cannot be made actionable by the motive which accompanies it. But as applied to the use of real estate the argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, because the character of the use is an element of the right.

"As a general proposition, it is safe to say

that the owner of land has a right to make a reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and a cellar as deep as he pleases, but he may erect his building as high as he pleases into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim, 'Sic utere tuo ut alienum non lædas.' The erection and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course, the landowner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others, to be determined by the nature of the rights and interests to be affected, and all the circumstances of each particular case." Ladd, J., in *Garland v. Towne*, 53 N. H. 55, 58, 20 Am. Rep. 164. "Property in land must be considered for many purposes not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. * * * The soil is often called property, and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. * * * So these proprietary rights, which are the only valuable ingredients of a landowner's property, may be taken from him without an asportation or adverse personal occupation of that portion of the earth which is his in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. * * * One of Eaton's proprietary rights was the correlative of R.'s duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation as would be unreasonable, and injurious to the enjoyment of Eaton's farm." *Thompson v. Androscoggin Co.*, 54 N. H. 545, 551, 552, 554. "Excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable." *Swett v. Cutts*, 50 N. H. 439, 447, 9 Am. Rep. 276.

"If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously, and without profit or benefit to himself? By analogy, it seems to me that the same principle

applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. * * * It must be remembered that no man has a legal right to make a malicious use of his property * * * for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property of one's neighbor for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner. * * * The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor." *Morse, J., in Burke v. Smith*, 69 Mich. 380, 37 N. W. 838, approved and unanimously adopted in *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510, above cited.

"While one may, in general, put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. * * * What standard does the law provide? * * * Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances." *Ladd v. Brick Co.*, 68 N. H. 185, 186, 37 Atl. 1041. "The common-law right of the ownership of land, in its relationship to the control of surface water, as understood by the courts of this state for many years, does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another" (*Franklin v. Durgee*, *supra*), but makes the test of the right the reasonableness of the use under all the circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances—the advantage and profit to one of the use attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary. There is no sound ground upon which a distinction can be made against the plaintiff's right to use his land for the enjoyment of the air and light which naturally come upon it in

favor of his right to use it to enjoy the waters which naturally flow upon or under it, except the fact that the use of land for buildings necessarily cuts off air and light from the adjoining estate. The fact that the improvement of real estate in this way for a useful purpose, universally conceded to be reasonable, may affect the adjoining owner's enjoyment of his estate to the same extent as a like act done solely to injure the other, is not a sufficient reason for distinguishing the right to build upon the surface from the right to dig below it, or to control the surface itself. Jurisdictions which reject the doctrine of reasonable necessity, reasonable care, and reasonable use, which "prevail in this state in a liberal form, on a broad basis of general principle" (*Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176), as applied to the ownership of real estate, in favor of the principle of absolute dominion, may properly consider a malicious motive immaterial upon the rightfulness of a particular use; but in this state to do so would be to reject the principle announced in *Bassett v. Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, and repeatedly reaffirmed during the last forty years.

It is to be conceded that the maxim, "*Sic utere tuo ut alienum non lædas*," is to be applied as forbidding injury, not merely to the property, but to the right of another. *Ladd v. Brick Co.*, 68 N. H. 185, 87 Atl. 1041; *Bonomi v. Backhouse, E., B. & E.* 622, 643; *Jeffries v. Williams*, 5 Exch. 792; *Pittsburgh, etc., Ry. v. Bingham*, 29 Ohio St. 369; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177. But the landowner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a landowner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a right inherent and essential to the common enjoyment of property by the limitations of an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*; though in particular cases it may be said that no right is invaded unless something comes from the one lot to the other. *Lane v. Concord*, 70 N. H. 485, 488, 489, 49 Atl. 687, 85 Am. St. Rep. 643; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 552; *Wood, Nuis.* § 611. As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right. Hence it is not necessary to inquire whether as an invasion of property rights the limitation of

the statute is one which might properly be made for the general good.

Other grounds suggested at the trial in support of the motion for a nonsuit have not been argued, and are understood to be waived. The objection based upon the unconstitutionality of the statute is not sustained, and the exception to the denial of the motions for a nonsuit and to direct a verdict upon that ground is overruled.

The defendant's wife, Ann, being a witness in his behalf, whether she had any bias, prejudice, or hostility toward the plaintiff which might affect her testimony was a material question. *Martin v. Farnham*, 25 N. H. 195. As she denied having any ill will toward the plaintiff or his family, it was, therefore, proper that she should be inquired of upon cross-examination as to statements made by her tending to show such feeling of hostility as might tend to color her testimony. She denied making such statement, but admitted that at another trial, when she was present, the statement in question had been testified to, and that she did not then deny it. The inquiry as to the testimony at the former trial was not made for the purpose of calling the matter to the witness' recollection, and thereby enabling her to withdraw the denial if erroneous, but for the purpose of establishing the falsity of her denial that she had made the statement, and as tending to show that the declaration was in fact made by her. The question, therefore, is whether, from the fact that a person present at a judicial proceeding hears in silence a statement testified to by a witness, it can be inferred that by such silence he admits the truth of the statement. "No principle is better settled than that a man's silence upon an occasion when he is at liberty to speak, and the circumstances naturally call upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence. * * * The circumstances must not only be such as afforded an opportunity to * * * speak, but properly and naturally called for some action or reply from men similarly situated." *Corser v. Paul*, 41 N. H. 24, 29, 77 Am. Dec. 753; 1 Gr. Ev. § 198. The neglect to reply to statements made in one's presence is not an admission of their truth, unless they are addressed to the party, or made under such circumstances as to require a reply. *Gale v. Lincoln*, 11 Vt. 152; *Hersey v. Barton*, 23 Vt. 685, 687, 688.

The only fact appearing in the case—that the witness Ann was present at the trial when the statement in question was testified to—does not bring the case within the rule. She would have had no right to interrupt the proceedings to interpose her denial. Her attempt to do so would have been a violation of the rules of order in judicial proceedings, and, if persisted in, might have subjected her to punishment. Even if she were a party to the suit on trial, she would have had no more right to interrupt a witness up-

on the stand than any bystander, and her attempt to do so would be an equally grave impropriety. Even if she was or could have been called as a witness, her position as a party would give her no right to volunteer testimony upon the stand. Her duty would be to answer such interrogatories as might be put to her by counsel, whose duty it would be to elicit such testimony as was material and important in the case on trial; not to call upon her to testify for the purpose of guarding against future controversies. The statement may have been immaterial in the former trial. It may have been made by a witness so wanting in credibility as not to merit denial, or the case itself may have utterly failed on the merits against the witness, so that no reply to any part of it was advisable. The fact, therefore, that the witness did not deny the statement when made in her presence at a former trial was incompetent as tending to establish the falsity of her testimony, and should not have been admitted. *Gr. Ev. § 198, note; Melen v. Andrews, Moo. & M. 336; Commonwealth v. Kenney, 12 Metc. (Mass.) 235, 237, 46 Am. Dec. 672; Blackwell, etc., Co. v. McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404; Broyles v. State, 47 Ind. 251.* The suggestion in *Blanchard v. Hodgkins, 62 Me. 121*, that the rule is changed by the admission of the parties to testify, is not sustained by the reasons for the exclusion or the modern authorities. *Blackwell, etc., Co. v. McElwee and Broyles v. State, supra.* Whether the evidence of the plaintiff's wife as to the loss of her wedding ring had any tendency to show such ill will on the part of the defendant's wife toward the plaintiff or his family as would affect her credibility was a question of remoteness determinable at the trial. The evidence improperly admitted was, upon a material issue, and had a plain tendency to prejudice the defendant. For this error the verdict must be set aside.

Exception sustained. All concurred.

OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. Feb. 25, 1903.)

STATES — CONTRACTS — VALIDITY — EMPLOYMENT OF AGENT TO PROSECUTE CLAIM AGAINST UNITED STATES.

1. Laws 1861, p. 2435, c. 2479, § 8, in force in 1897, empowered the Governor, with the advice and consent of the Council, to adjust and settle all questions between the state and the United States in any way growing out of any contracts or expenditures that may be made for the public defense or the payment of troops. Laws 1865, p. 3120, c. 4076, § 1, empowered the Governor and Council "to pay the authorized agent or agents employed by the state in prosecuting the claims of said state against the United States." *Held*, that the Governor was authorized in 1897 to appoint an agent to prosecute the claims of the state against the United States in the proper tribunal.

2. Authority to employ agents necessarily implies power to contract with them for their compensation.

3. A contract between the state and an agent appointed to prosecute a claim could not be regarded as against public policy on account of a provision making compensation contingent on success.

Opinion of the Justices in Response to a Resolution of the House of Representatives.

At a session of the House of Representatives held February 18, 1903, the following resolution was adopted:

"Resolved, that the House of Representatives requests the opinion of the Supreme Court upon the following, namely:

"First. Did his excellency George A. Ramsdell, governor of New Hampshire, have authority to make and execute the following appointment and agreement in behalf of this state or otherwise?

"'Agreement.

"'Memorandum of an appointment and agreement, made this eleventh day of May, A. D. 1897, by and between the state of New Hampshire by the honorable George A. Ramsdell, its Governor, on the one part, and Horace S. Cummings, of Washington, in the District of Columbia, on the other part, witnesseth:

"That the said state of New Hampshire in consideration of the things to be done by said Horace S. Cummings as hereinafter set forth, hath appointed, and by these presents doth appoint, said Horace S. Cummings, its agent and attorney, to present, prosecute, and recover before the Congress, any department, the Court of Claims, or the Supreme Court of the United States, any claim or claims of said state against the United States, for costs, charges, and expenses properly incurred by said state for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting the troops of said state, employed in aiding to suppress the insurrection against the United States between the years 1861 and 1865, both inclusive, under an act of Congress entitled "An act to indemnify the states for expenses incurred by them in defense of the United States," approved July 27th, 1861. And said Horace S. Cummings shall have and receive for his legal services in and about said matter, a sum equal to fifteen per cent. of the entire sum collected, payable only out of any sums that may be collected hereunder, and without any liability on the part of the state for expenses in connection therewith.

"And in consideration of the premises said Horace S. Cummings agrees to undertake the presentation and prosecution of said claims at the compensation above stated and without any liability on behalf of the state for his expenses in connection therewith.

"In witness whereof said state of New Hampshire has caused these presents to be signed by the said George A. Ramsdell, its Governor, and its seal to be hereto affixed and said Horace S. Cummings has hereunto

set his hand and seal, the day and year first above written.

"The State of New Hampshire.

"By Geo. A. Ramsdell, Governor.

"Horace S. Cummings.

"[Seal of State.]

"(1) The foregoing agreement and appointment was duly executed and delivered to said Cummings at the date thereof.

"(2) Said Cummings thereupon entered on the work of prosecuting the claim mentioned in said agreement before the honorable the Secretary of the Department of the Treasury of the United States, the Court of Claims, and the Congress of the United States.

"(3) The claim against the United States accrued to the state of New Hampshire between the years 1861 and 1864, and, by the statute of the United States at the date of the agreement aforesaid, had become barred by the statute of limitation of the United States, so that no judgment against the United States thereon could be obtained in any court of the United States. But not being a stale claim, it could be, and was, audited, allowed, and paid by the Treasury Department, under laws existing at the time Cummings' contract was made. The accounting officers of the Department of the Treasury claimed that said claim could not be audited because it was a stale claim, and such proceedings were had as is set forth in Volume 36, Court of Claims Reports.

"(4) The Treasurer of the state of New Hampshire in the year 1864 considered said claim as worthless, and the same was in the year 1865 carried to the deficiency account. Said Cummings prosecuted the work of collecting said claims before the Department of the Treasury and the Court of Claims, which resulted in the auditing of said claim on behalf of the state of New Hampshire in the amount of \$108,372.52; and thereafter the Congress of the United States appropriated said sum on said audit, and the Secretary of the Treasury issued a warrant of the United States, payable to the order of the Governor of the state of New Hampshire, for said sum, and delivered the same to said Cummings as the agent of said state. Immediately upon the receipt of said warrant, said Cummings transmitted by mail said warrant to the Governor of the state of New Hampshire, inclosing therewith a copy of said agreement and appointment, and requested the Governor to forward to him his check for the amount of fees due him as said agent, in accordance with the terms of said agreement and appointment. The Governor did not comply with the request of said Cummings, but thereafter, to wit, on March 4, 1902, turned the said \$108,372.52 into the treasury of said state of New Hampshire, where it was on the date aforesaid entered upon the books of the state, and commingled with other moneys of the state, and has since been used and disposed of for state purposes. Said Cummings

protested that the moneys representing the fees aforesaid were not the proper moneys of the state of New Hampshire, but belonged to him by virtue of his contract of agreement and appointment, but said moneys have never been paid to said Cummings.

"Second. Is said Cummings entitled to receive from the state fifteen per centum of the amount so collected and paid in to the State Treasury?"

Edwin G. Eastman, Atty. Gen., for the State. Streeter & Hollis, for Cummings. Daniel C. Remich, pro se.

To the House of Representatives:

In answer to the foregoing resolution, the undersigned, the Justices of the Supreme Court, respectfully submit their opinions upon the questions therein contained:

As the claimant cannot sue the state under the contract of May 11, 1897, to which the resolution relates, and as no money can be paid him, except by direction of the Legislature (Const. art. 55; Pub. St. c. 16, § 4; Id. c. 20, § 1), it might be argued that the legality of that agreement was unimportant, and that the only question for the Legislature to determine was one of expediency, upon which our opinion could not be constitutionally required. Const. art. 73. But assuming that it is the policy of the house to provide for the liquidation of this claim, if it was legally incurred, we have considered the questions submitted as though they had arisen in an authorized suit. The fact that no suit can be maintained against the state affords the Legislature a proper occasion for requiring our advice as to the legal validity of the contract in question.

By section 3, c. 2479, p. 2435, Laws 1861, the Governor, with the advice and consent of the council, was authorized and empowered to negotiate, adjust and settle all questions, accounts, matters and things, between this state and the United States, in any way * * * growing out of * * * any contracts or expenditures which may be made for the public defense or the payment of troops." The Governor and Council at the date of the appointment in question (this act being still in force) were therefore expressly authorized to negotiate, adjust, and settle any accounts or claims of this character then existing in favor of the state against the general government. That there were such claims appears to have been then contended, and is now established. The power so conferred, by necessary implication, included authority to do whatever was reasonably necessary for its proper and efficient execution. It is not to be supposed the Legislature understood the Governor and Council would or could personally perform all the services incident to the proper investigation, proof, and prosecution of such claims by the state. Such matters are commonly conducted by persons having special training, experience,

and skill. The appointment of suitable persons to represent the state in the prosecution of its claim before the appropriate tribunals must therefore have been understood to have been embraced within the general terms by which power in the matter was conferred upon the executive. Evidence in support of this conclusion is furnished by section 1, c. 4076, p. 3120, Laws 1865, in which the Governor and Council were empowered "to pay the authorized agent or agents employed by the state in prosecuting the claims of said state against the United States." No other statutory provision in the matter being found, this act appears to be a legislative recognition of the legal employment of "agents" for the purpose named, under the act first cited. We therefore conclude that the Governor and Council had authority, May 11, 1897, to appoint Mr. Cummings to prosecute the claim of the state in the matter in question before the proper tribunals.

The authority to employ agents and other persons necessarily implies the power to contract with them for their compensation, according to the method usual in matters of the kind. *Bohanan v. Railroad*, 70 N. H. 526, 49 Atl. 103. There is nothing in the facts submitted to us establishing, as matter of law, that the provisions made were out of the usual course, or improperly induced. A contract between private individuals, in which the compensation was contingent upon success, might be claimed to be void, as against good morals and public policy. *Edgerly v. Hale*, 71 N. H. 138, 150, 51 Atl. 679; *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573. But the Legislature can determine for itself what public policy requires or permits to be done in the prosecution of claims in favor of the state. *Davis v. Commonwealth*, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743. If there are reasons why the state should refuse to recognize and comply with the agreement made in 1897 by his excellency Governor Ramsdell, legal ground therefor is not to be found in absence of power in the executive to make the appointment and agreement in question, or in any objection arising as matter of law upon the facts stated to us. We, therefore, upon these facts, answer in the affirmative both questions submitted.

Whether, under the provisions of the Constitution requiring the Governor and Council, "from time to time, to hold a council for ordering and directing the affairs of the state, according to the laws of the land" (Const. art. 61), or under any power constitutionally inherent in the executive, in the absence of legislation, authority exists for the action taken in 1897, has not been considered.

FRANK N. PARSONS.
WM. M. CHASE.
REUBEN E. WALKER.
JAMES W. REMICK.
GEORGE H. BINGHAM.

MAUCK, for Use of HELMICK, v. MERCHANTS' & MANUFACTURERS' FIRE INS. CO.

(Superior Court of Delaware, Kent. May 8, 1903.)

INSURANCE—PAYMENT OF PREMIUMS—PAYMENT TO AGENT—WAIVER OF PAYMENT—RATIFICATION OF PAYMENT—PROOFS OF LOSS—PROVISIONS OF POLICY—STATEMENT OF INTEREST—TRIAL—FUNCTIONS OF JURY.

1. A provision in a fire policy that the preliminary proof of loss should state the interest of insured and all others in the property has no application to the interest which a party acquired after destruction of the property by fire.

2. Where insured paid a premium to one who was the agent of the insurance company or of its general agent for the purpose of effecting insurance and collecting premiums, such payment was in effect a payment to the company, and as valid as if made directly to it.

3. Payment of an insurance premium is necessary to give validity to the policy unless duly waived.

4. Where an insurance company, after delivery of a policy to insured, and until the destruction of the premises by fire, fails to repudiate the contract of insurance as invalid for nonpayment of premium, the jury may infer that the company has in fact received the premium, or waived payment of the same, unless there is satisfactory proof to the contrary.

5. Where an insurance premium is paid to one who, by the terms of the policy, is not authorized to receive it, and the company or its duly authorized agent afterwards receives such payment, the payment is sufficient.

6. Where an insurance premium is paid to one who, by the terms of the policy, is not authorized to receive it, and the company or its duly authorized agent never in fact receives the premium, and the company, after delivery of the policy, and before the fire, treats it as a contract binding on it, without objection or qualification, such act on its part is equivalent to an adoption or ratification of the contract of insurance.

7. The jury are the sole judges of evidence, and if, in the statement thereof by the court, there is any error or omission, they should not rely upon such statement, but be governed solely by the evidence as introduced in the course of the trial.

Action by William K. Mauck, for the use of Abraham L. Helmick, assignee, against the Merchants' & Manufacturers' Fire Insurance Company, a corporation of the state of Delaware. Verdict for plaintiff.

The plaintiff prayed the court to instruct the jury as follows: "(1) That if the jury believe from the proof of loss that the policy of insurance in this case was delivered unconditionally to the plaintiff by the agent of the company, and that he received in settlement of the premium therein specified a negotiable promissory note, payable at some future date, such a settlement of the premium was sufficient in law to make the policy valid and binding on the defendant company; and, if the loss occurred before the maturity of said note, the defendant cannot object on the ground of a failure to pay the premium. (2) That the sufficiency of the preliminary proof is a question for the court. (3) That

the requirements of the policy as to preliminary proofs of loss have been substantially and sufficiently complied with. (4) That, if the jury find a verdict for the plaintiff, it should be for the value of the property destroyed, not exceeding one thousand dollars, with interest thereon from a date ninety days after the delivery of the proof of loss to the defendant company." The defendant prayed the court to instruct the jury, *inter alia*, as follows: "(1) The insurance policy declared on was, by its terms, void, and of no effect, until the premium in said policy mentioned should be paid, which premium was never paid. (2) That the plaintiff must prove that a proof of loss conforming in all particulars with lines 72 to 121, inclusive, of said policy, was duly filed with or rendered to the defendant company within thirty days after the occurrence of the fire. (3) That, in order for the plaintiff to recover, he must have paid the premium mentioned in the said policy of insurance to the defendant company or its duly authorized agent. (4) That no person could have been the agent, duly authorized, of the defendant company, unless so authorized in writing, and unless he shall have countersigned the insurance policy in question."

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Robert H. Van Dyke, for plaintiff. George M. Jones and William M. Hope, for defendant.

SPRUANCE, J. (charging the jury). This is an action brought by William K. Mauck, for the use of Abraham L. Helmick, against the Merchants' & Manufacturers' Fire Insurance Company, a corporation of this state, upon a policy of the defendant company dated October 19, 1901, purporting to insure against loss or damage by fire, for the term of one year thereafter, the household furniture and sundry other personal property in a certain hotel building situate in Thomas, W. Va., to an amount not exceeding \$900, and the stock, supplies, and fixtures in the restaurant in the same building to an amount not exceeding \$100. There is evidence before you to the effect that one Robert Hironimus, representing himself to be the agent of the defendant company, solicited the plaintiff to insure said property in said company, and, upon the plaintiff objecting that he was not then prepared to pay the money for the premium, it was agreed that he should give his bankable note for the same, amounting to \$35, to the order of the said Hironimus, payable in 30 days; and that thereupon said note was made and delivered to the said Hironimus with the written application for insurance drawn by the said Hironimus; and, that a few days thereafter the said Hironimus sent to the plaintiff the policy of insurance sued upon; and that afterwards, on the night of November 11, 1901, all of the said

insured property was totally destroyed by fire; and that a few days thereafter, and before said note became due, the plaintiff offered to pay the amount of the same to the said Hironimus, but that he declined to receive the same, saying that it could be deducted from the amount which the company owed the plaintiff for the loss; and that said note has never been paid by, or presented for payment to, the plaintiff, and that he does not know who held the note at its maturity or since.

It is conceded that the preliminary proof of loss in evidence before you, dated December 4, 1901, was received by the defendant company within the time required by the policy. The only objection made to its sufficiency is that it does conform to the requirement of the policy that the preliminary proof of loss shall state "the interest of the insured and all others in the property" in this: that it does not state the interest of Abraham L. Helmick under a certain deed of assignment executed by the plaintiff to the said Helmick, dated November 18, 1901, which is in evidence. Whatever may have passed to the said Helmick under the said deed, it is clear that no interest so passed to him in the insured property, which had been destroyed before the execution of said deed, and said recited provision of the policy has no application to the interest which by said deed the said Helmick may have acquired in said policy or in the debt which may be due thereunder from the defendant company to the plaintiff.

The defendant company insists that the policy was void until the payment of the premium; that said premium was never paid; that such payment could have been made only to the defendant company, or its duly authorized agent; that no such payment could have been made to an agent unless such agent was so authorized by the defendant company in writing, and unless such agent countersigned the policy sued upon; and that C. A. Vananden & Co., who countersigned this policy as agents, were the only agents authorized to receive such premium. In support of this contention the defendant relies upon the following provisions of the policy: "In any matter relating to this insurance, no person unless duly authorized in writing, and who shall have countersigned this policy, shall be deemed the agent of this company; and the assured agrees with this company, by the acceptance hereof, that this company shall not be bound by the acts of any other person. Any other person shall be deemed to be the agent of the insured, and the payment of the premium to any such person shall be at the sole risk of the insured, and shall not be deemed a payment to the company, and by the acceptance hereof the assured agrees that this company shall not be liable for any loss or damage by fire or other risk or casualty herein mentioned until the assured shall have paid the pre-

mium hereinbefore mentioned in full to the company or its duly authorized agent whose name is subscribed hereto; and until such premium is so paid this policy shall remain wholly void, and of no effect." If you find from the evidence that Hironimus was the servant or the agent of the said C. A. Vananden & Co. or of the defendant company for effecting the insurance and collecting the premium, and that the plaintiff paid the premium to said Hironimus as such agent, then such payment was, in effect, a payment to the said C. A. Vananden & Co. or the defendant company, and was as valid as if made directly to the said C. A. Vananden & Co. or to the defendant company. Payment of the premium was necessary to give validity to the policy, unless such payment was duly waived. If you find from the evidence that the defendant company, after the delivery of the policy to the plaintiff, and until the fire, failed to repudiate the contract of insurance as invalid for nonpayment of the premium, you may infer that the defendant company, or its agents, C. A. Vananden & Co., had in fact received the premium, or waived the payment of the same, unless there be satisfactory proof to the contrary. If the premium was paid to one who, by the terms of the policy, was not authorized to receive it, and the defendant company or its duly authorized agent afterwards received such payment, it would be a sufficient payment, without regard to the method or channel through which such payment reached the company or its authorized agent. If the company or its duly authorized agent never in fact received such payment, and the company, after the delivery of the policy, and before the fire, without objection or qualification, treated the policy as a contract binding upon it, this would be equivalent to an adoption or ratification of the contract of insurance, and would be sufficient. If a company makes a policy complete in form, and sends it out for delivery to the insured, and after such delivery and before a loss by fire treats the policy as a valid and binding contract, these are facts from which may be inferred, in the absence of satisfactory proof to the contrary, the payment of the premium to the company or to its duly authorized agent, or a waiver of such payment.

This statement of law upon this point is fully sustained by the case of *Weisman et al. v. Fire Insurance Company*, 3 Pennewill, 224, 50 Atl. 93, tried in this court about two years ago. As a general rule, the payment of a debt by a note, if accepted as such, is a good payment. In *Joyce on Insurance*, vol. 1, § 73, it is said: "Where a policy is delivered to an agent with authority to deliver it to the insured and receive the premium, and the agent delivers the policy and accepts a note for the premium, and discounts it on his own account, but does not pay the amount to the principal, the company is liable, although the policy provides that such

agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium." You are the sole judges of the evidence, and if in the statement of it by the court for the purpose of presenting to you the issues to be determined by you there is any error or omission, you should not rely upon such statement, but be governed solely by the evidence as it was delivered to you in the course of the trial.

If you find a verdict for the plaintiff, it should be for the value of the property destroyed, not exceeding \$900 for the first class of property described in the policy and \$100 for the second class of property so described, and not exceeding \$1,000 for the whole, with interest thereon from a date 90 days after the delivery of the preliminary proofs of loss to the defendant company.

Verdict for plaintiff for \$1,069.62.

SWEENEY v. JESSUP & MOORE PAPER CO.

(Superior Court of Delaware. New Castle.
March 5, 1903.)

SERVANT'S INJURIES—PLEADING—NEGLIGENCE —IGNORANCE OF PLAINTIFF—KNOWLEDGE OF DEFENDANT.

1. In an action for negligent death of a servant, it is not necessary that the declaration allege that plaintiff was ignorant of the facts and circumstances which constituted the negligence complained of.

2. In an action for negligent death of a servant, it is not necessary that the declaration allege that the defendant had, or should have had, knowledge of any facts or circumstances which would constitute negligence on his part.

Action on the case for negligence by Margaret Sweeney, widow of Bartley Sweeney, deceased, against the Jessup & Moore Paper Company. On demurrer to the declaration. Demurrer overruled.

The declaration was as follows: "(1) For that heretofore, to wit, at the time of the happening of the grievances hereinafter complained of, the said the Jessup & Moore Paper Company was, and still is, a corporation existing under the laws of the state of Delaware, and the said Bartley Sweeney, on the 20th day of August, A. D. 1902, at New Castle county aforesaid, was the husband of the said plaintiff, and a servant in the employ of said defendant; that on the day aforesaid the said Bartley Sweeney, while he was a servant of the said defendant, to wit, at the county aforesaid, was working in the pulp factory of said defendant, then owned and operated by the said defendant, in the hundred of Christiana and county aforesaid, wherein was certain machinery, steam boilers, wood pulp digesters, tools and appliances, used in the wood pulp manufacturing business of said defendant; that on the day and year last aforesaid, at the county afore-

said, while said Bartley Sweeney was so engaged at work for the said defendant at the said wood pulp factory and works of said defendant, and while said Bartley Sweeney was in the exercise of due care and caution on his part, by and through the negligence and carelessness of said defendant a certain wood pulp digester then and there being in said factory of said defendant, and the property of said defendant (being a large, hollow receptacle, made of metal, and then and there employed by said defendant in its process for reducing wood to wood pulp by the use therein of steam and other reducing agencies to the plaintiff unknown, in contact with the wood in said digester contained, by means and force of the pressure of the steam created in and caused to be in said wood pulp digester by the defendant aforesaid for the purpose aforesaid), exploded, whereby and by means whereof, and of the wrecking and destruction of the factory of said defendant resulting then and there from the explosion aforesaid, the said Bartley Sweeney then and there was so crushed, shocked, broken, and injured in his limbs and head that he then and there immediately died; that the death of the said Bartley Sweeney was caused by the said negligence of the said defendant. Wherefore the said plaintiff, Margaret Sweeney, the widow of the said Bartley Sweeney, says that she is injured and hath sustained damage as such widow to the amount of twenty thousand dollars (\$20,000), and therefore she brings her suit."

The demurrer, *inter alia*, was as follows: "(3) That it is not alleged in said count that the defendant had, or should have had, notice or knowledge of any facts or circumstances which would constitute negligence on the part of the defendant." "(5) That it is not alleged in said count that the plaintiff's husband was ignorant of the facts or circumstances which constituted the negligence complained of."

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Herbert H. Ward and Sylvester D. Townsend, Jr., for plaintiff. Saulsbury, Ponder & Curtis, for defendant.

PER CURIAM. Demurrer overruled.

GRUELL v. CLARK.

(Superior Court of Delaware. Kent. May 6, 1903.)

AUCTIONS—REFUSAL TO DELIVER PROPERTY SOLD—MEASURE OF DAMAGES—JUSTICE OF THE PEACE—JURISDICTION—TERMS OF SALE—TENDER.

1. The purchaser at public auction, on compliance with the terms of the sale, is entitled to have the property delivered to him, under the implied contract on the part of the vendor to make such delivery; and a refusal to deliver is a breach of the contract, for which the purchaser is entitled to recover any damages he may have sustained.

2. On breach of contract for the sale of personalty, where there is no proof that plaintiff has sustained actual damages, he is entitled to recover nominal damages only.

3. On breach of a contract to sell personalty, the measure of damages is the difference between the contract price and the value of the goods at the time the seller was bound to deliver them.

4. Under Rev. Code 1852, c. 99, § 1, amended in 1893, conferring on justices of the peace jurisdiction in all causes of action arising from contracts for delivery of produce, chattels, goods, wares, and merchandise, a justice has jurisdiction of an action for damages resulting from breach by the seller of a contract to sell personalty.

5. Where the terms of an auction sale provided that all sums of \$10 and under should be "cash on day of sale," and "on sums over that amount a credit of eleven months will be given on notes * * * with approved security," it was optional with a purchaser of property exceeding \$10 in value either to pay cash or take a credit of 11 months, and a tender of cash instead of a note was good.

Appeal from Justice of the Peace, Kent County.

Action by John F. Clark against Robert B. Gruell. Judgment for plaintiff before a justice, and defendant appeals.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Kenney & Magee, for appellant. Henry Ridgely, Jr., for respondent.

LORE, C. J. (charging jury). John F. Clark, the plaintiff, claims that on the 5th day of October, 1901, he bid upon a brown horse belonging to John B. Gruell, the defendant, which was put up for sale by the defendant at public auction; that the horse was knocked off to him by the auctioneer at the highest bid, \$20.75; that thereupon he tendered in lawful money the amount due for the horse to the defendant, who refused to accept the same in payment, and to deliver the horse in pursuance of the sale. The plaintiff has brought this suit to recover damages for such nondelivery.

Where personal property is put up for sale at public auction, and knocked off to the highest bidder, the purchaser, upon complying with the terms of the sale, is entitled to have such property delivered to him, under the implied contract on the part of the vendor to make such delivery. It is a breach of such implied contract for the vendor to refuse to make such delivery. For such breach the purchaser may sue and recover whatever damages he may have sustained thereupon. The refusal on the part of the vendor to deliver to the purchaser the property bought at auction, upon the tender of the price at which it was knocked off according to the terms of the sale, will constitute a breach of such implied contract.

Where a breach of contract on the part of defendant is proved to the satisfaction of the jury, and there is no evidence that the plaintiff has sustained actual damages from such breach of contract, the plaintiff is entitled to recover nominal damages only; but the meas-

ure of damages for the nondelivery of goods sold is the difference between the contract price and the value of the goods at the time the defendant was bound to deliver them.

The defendant contends that, as this action sounds in damages—being for the nondelivery of the horse—it was not within the jurisdiction of a justice of the peace, where the case originated, and that therefore no recovery can be had in this court. Section 1, c. 99, p. 740, Rev. Code 1852, amended in 1893, expressly confers upon justices of the peace jurisdiction in all causes of action arising from express or implied contracts for "delivery of produce, chattels, goods, wares or merchandise." We think that this case, although sounding in damages, purely, is within the jurisdiction of justices of the peace, upon a reasonable construction of the language of the foregoing statute, and in principle has been so held by our courts in the following cases: *Barr v. Logan*, 5 Har. 52; *Cannon v. Matthews*, 3 Houst. 97; and *Spahn v. Willman*, 1 Pennewill, 125, 39 Atl. 787.

The terms of the sale were as follows: "All sums of ten dollars and under, cash on day of sale; on sums over that amount a credit of eleven months will be given on notes bearing interest with approved security and payable at the Farmers' National Bank of Dover, Del." The defendant claims that even if the plaintiff did tender to the defendant, in lawful money, the amount of the purchase money, he is not entitled to recover, because, the amount being over \$10, the tender, to have been good, should have been in a note payable at 11 months, bearing interest. We think the option was with the purchaser either to pay in cash the amount due, or to take a credit of 11 months.

If you are satisfied from the evidence that the plaintiff offered to settle for the horse in pursuance of the terms of sale, and that the defendant or his agent refused to permit him so to do, and refused to deliver the horse, this would constitute a breach of the contract on the part of the defendant. It is for you to say from the evidence before you whether there has been any breach of contract in this case, and, if so, what damages the plaintiff has sustained therefrom.

The jury disagreed.

STATE v. WHITE.

(Court of General Sessions of Delaware.
New Castle. Jan. 3, 1902.)

OBTAINING MONEY BY FALSE PRETENSES— ELEMENTS OF OFFENSE—PARTY DECEIVED.

1. The statute punishing the obtaining of money by false pretenses applies to the obtaining of money from a county by false pretenses.

Henry M. White was convicted of obtaining money by false pretenses. Motion to quash the indictment. Denied.

The indictment was as follows:

"November Term, 1901.

"New Castle County—ss:

"The Grand Inquest of the State of Delaware, and the body of New Castle County, on their oath and affirmation respectively, do present:

"That Henry M. White, late of New Castle Hundred, in the County aforesaid, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at Wilmington Hundred, in the County aforesaid, designing and intending to cheat and defraud a certain Horace G. Rettew, the said Horace G. Rettew then and there being the Receiver of Taxes and County Treasurer of the County of New Castle aforesaid, of certain money, goods, chattels and property, unlawfully, knowingly and designedly did then and there falsely pretend to a certain George D. Kelley, the said George D. Kelley then and there being the County Comptroller for the County of New Castle aforesaid, that a certain Henry A. Enos, commonly known as Harry Enos, of the County of New Castle aforesaid, had done, performed and furnished certain work and labor for the said County of New Castle to the value of sixty-two dollars and twenty-five cents, the which false pretence was embodied in a certain false and pretended bill, whereas, in truth and in fact, the said Henry A. Enos had not then and there done, performed, and furnished the said certain work and labor as so falsely pretended as aforesaid, which said bill was then and there in the following words and figures, to wit:

Wilmington, Del., Mar. 21st, 1899

Levy Court, New Castle County,

To Harry Enos or Bearer Dr.

Fourth District.

To work for County \$62.25

Rec Pay

H. M. White L. C. C.

—Which said false and pretended bill the said Henry M. White then and there further falsely pretended to the said George D. Kelley, the said County Comptroller for the said county of New Castle, had been duly rendered by the said Henry A. Enos in and by the name of Harry Enos or bearer, whereas, in truth and in fact the said bill had not been so rendered by the said Henry A. Enos, and which said bill, in furtherance of the said false pretence and pretences and of the said design and intention of the said Henry M. White to cheat and defraud the said Horace G. Rettew, the Receiver of Taxes and County Treasurer of said County as aforesaid, was then and there made by him, the said Henry M. White, and then and there, in furtherance of said false pretence and pretences and of said design and intention so to cheat and defraud as aforesaid, the said bill was by him, the said Henry M. White, presented to the

said George D. Kelley, said County Comptroller for New Castle County, for the approval of him, the said George D. Kelley, said County Comptroller, the said Henry M. White then and there and thereby further falsely pretending to the said George D. Kelley, County Comptroller as aforesaid, that the said Henry A. Enos was entitled to receive pay for the work and labor so falsely pretended to have been done, performed and furnished as aforesaid as falsely so shown as aforesaid, whereas, in truth and in fact the said Henry A. Enos was not then and there entitled to receive pay for the said work and labor so falsely pretended to have been done, performed and furnished as aforesaid, and which said bill was then and there, by color, means and force of the said false pretence and pretences of him, the said Henry M. White, approved by the said George D. Kelley, County Comptroller as aforesaid, by imprinting and writing upon the face of said bill his official certification to the correctness thereof in manner and form and in the words and figures as follows:

CORRECT

MAR 21 1899

G. D. KELLEY

COMPTROLLER

—As he, the said Henry M. White, then and there well knew, and which said pretence and pretences the said Henry M. White then and there knew to be false, and which said bill now bears the imprint of a stamp containing the following words and figures, to wit:

LEVY COURT, NEW CASTLE CO. DEL.

MAR 21 1899

APPROVED

—By color, force and means of which said false pretence and pretences he, the said Henry M. White, did then and there unlawfully, knowingly and designedly secure, obtain and cause to be made and drawn, in further pursuance of said false pretence and pretences and of said design and intention of the said Henry M. White so to cheat and defraud as aforesaid, a certain warrant bearing date the twenty-first day of March A. D., one thousand eight hundred and ninety-nine, directed to the Receiver of Taxes and County Treasurer for said New Castle County, being the said Horace G. Rettew, and commanding him, the said Receiver of Taxes and County Treasurer, being him the said Horace G. Rettew, to pay to the order of Harry Enos or bearer the sum of sixty-two dollars and twenty-five cents, the which said certain warrant was signed by William A. Scott by the style of W. A. Scott, as president of the Levy Court of said New Castle County, and countersigned by the said George D. Kelley by

the style of G. D. Kelley, as County Comptroller for said New Castle County, and the which County warrant was then and there in the following words and figures, to wit:

Wilmington, Del., Mar 21 1899 189 No. 18893
Receiver of Taxes and County Treasurer,
New Castle County, Delaware.

Pay to the order of Harry Enos.....or Bearer

Sixty-two 25/.....Dollars, \$62.25

and charge to appropriation for.....

.....4th Dist.....

Countersigned

G. D. Kelley
Comptroller.

W. A. Scott
President Levy Court,
New Castle County.

—Which said certain warrant the said Henry M. White then and there, in further pursuance of the said false pretence and pretences and of the said design and intention of said Henry M. White to so cheat and defraud the said Horace G. Rettew, Receiver of Taxes and County Treasurer as aforesaid, received into the possession of him, the said Henry M. White; and the said Henry M. White having so as aforesaid unlawfully, knowingly and designedly secured and obtained and caused to be drawn the said certain warrant, and having so as aforesaid received the same into the possession of him, the said Henry M. White, in further pursuance of said false pretence and pretences and of the said design and intention of said Henry M. White so to cheat and defraud the said Horace G. Rettew, Receiver of Taxes and County Treasurer as aforesaid, then and there did endorse the said certain warrant with the name of him, the said Henry M. White, under the style of H. M. White; and in further pursuance of the said false pretence and pretences and of the design and intention of the said Henry M. White so to cheat and defraud the said Horace G. Rettew, Receiver of Taxes and County Treasurer as aforesaid he, the said Henry M. White, then and there did cause and procure the said certain warrant then and there to be paid and cashed out of the funds, cash and monies then and there the property and in the possession and control of him, the said Horace G. Rettew, the said Receiver of Taxes and County Treasurer; and in further pursuance of said false pretence and pretences and said intent so to cheat and defraud him, the said Horace G. Rettew, the said Receiver of Taxes and County Treasurer, the said Henry M. White did then and there receive into his possession the cash and money, being the proceeds of the said warrant, and did then and there convert the sum of fifty-four dollars and seventy-five cents, being part and parcel of the said proceeds of said warrant to his own use; and then and there well knowing the said pretence and pretences to be false, he, the said Henry M. White, by force, color and means of the said false pretence and pretences, and by force and virtue of the premises, did then and

there unlawfully, knowingly and designedly obtain from the said Horace G. Rettew, Receiver of Taxes and County Treasurer for said New Castle County as aforesaid, sundry coins, the kind and denomination of which are, to the Grand Inquest, unknown, of the aggregate value of fifty-four dollars and seventy-five cents, lawful money of the United States of America, and certain paper money, the kind and denomination of which are, to the said Grand Inquest, unknown, of the aggregate value of fifty-four dollars and seventy-five cents, like lawful money as aforesaid, of the money, goods, chattels and property of the said Horace G. Rettew, Receiver of Taxes and County Treasurer as aforesaid, which said money, goods, chattels and property the said Henry M. White then and there as aforesaid obtained unlawfully, knowingly and designedly from the said Horace G. Rettew, the said Receiver of Taxes and County Treasurer for said County, with intent then and there, and by means of the premises, to cheat and defraud the said Horace G. Rettew, Receiver of Taxes and County Treasurer of said County, to the great damage of the said Horace G. Rettew, said Receiver of Taxes and County Treasurer for said New Castle County, against the form of an Act of the General Assembly in such case made and provided, and against the peace and dignity of the State.

Herbert H. Ward,
"Attorney General.

"By Robt. H. Richards,
"Deputy Attorney General."

Counsel for defendant moved to quash the indictment on the ground that the statute did not apply to or include offenses against a county government or quasi corporation.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State. Alexander B. Cooper and John H. Rodney, for defendant.

LORE, C. J. After listening to the able arguments made by counsel on both sides in this case, we see no reason for quashing this indictment, and therefore refuse to quash it.

PORTER'S ADM'X v. SHATTUCK'S ESTATE.

(Supreme Court of Vermont. Windsor. May 6, 1903.)

MORTGAGES—INTEREST ON NOTE—LIMITATIONS.

1. Though a mortgagee may, by real action, recover possession of the mortgaged premises at any time within 15 years after the mortgage debt became due, unless the mortgagor pays the debt, with interest, according to the terms of the mortgage note, nevertheless the mortgagee's right of action against the mortgagor personally for the recovery of interest accruing on the mortgage note is barred by limitations

at the same time that the right of action for the recovery of principal is barred.

Exceptions from Windsor County Court; Rowell, Judge.

Appeal from the disallowance by the commissioners on the estate of Joseph A. Shattuck of a claim in favor of Chas. W. Porter's estate. From a pro forma judgment for the defendant estate, the plaintiff estate brings exceptions. Affirmed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Edward H. Deavitt, for plaintiff. William E. Johnson, for defendant.

START, J. The question is whether the statute of limitations bars an action for the recovery of interest that accrues on a promissory note secured by mortgage on realty, and payable on demand, with interest annually, after the right of action for the recovery of the principal is barred by the statute. The claimant contends that inasmuch as the mortgagee could recover the possession of the mortgaged premises, in an action of ejectment or foreclosure proceedings, at any time within 15 years after the mortgage debt became due, unless the mortgagor paid the mortgage debt within the time fixed by the court, and inasmuch as the mortgagor, in order to redeem the premises, must pay the mortgage note, with interest, according to the terms, the right of action for the recovery of interest that accrues is not barred by the statute of limitations so long as the right of action for the recovery of the possession of the mortgaged premises continues, and that the mortgagor is estopped from availing himself of the statute.

The mortgagee's right to maintain an action at law or in equity for the recovery of the possession of the mortgaged premises is in no way dependent upon whether the mortgagor's personal liability for the payment of the mortgage debt is barred by the statute, but upon his continued ownership of the premises, subject to the mortgagor's equity of redemption; nor is the mortgagor's right to redeem the premises dependent upon whether he is personally liable for the mortgage debt. The right attaches to, and may be exercised by, the owner of the equity of redemption, irrespective of whether he is, or ever has been, personally holden for the payment of the mortgage debt. Therefore the right to maintain a real action for the possession of the premises is not determinative of the right to maintain a personal action against the mortgagor for the recovery of the mortgage debt. In *Houghton v. Tolman*, 74 Vt. 467, 52 Atl. 1032, it is held that a note secured by mortgage upon realty is within the statute limiting actions of assumpsit founded on contract, express or implied, to 6 years after the cause of action accrues. In that case it is said that a mortgagee has two

distinct remedies—one upon the note, barred in 6 or 14 years, according to whether the note is witnessed or not, and one upon the mortgage, barred in 15 years, in analogy to the statute barring the right of entry into houses and lands in that time—and that the loss, for any reason, of either of these remedies, does not affect the other, if the debt remains unpaid. Interest accruing upon a promissory note is regarded as an incident of the principal of the note, and, when this is barred by the statute, no recovery can be had for interest that thereafter accrues. In *Bank v. Doe*, 19 Vt. 463, 47 Am. Dec. 697, the court, in holding that interest that becomes due yearly upon a promissory note is not barred so long as the right of action for the principal continues, said: "The statute does not begin to run upon the demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portions. The accruing interest from year to year is not thus separated from the principal demand, and consequently the statute of limitations does not run upon it until the principal is barred by the statute."

Judgment affirmed.

HANKS v. HANKS et al.

(Supreme Court of Vermont. Addison. May 6, 1903.)

INJUNCTION—RESTRAINING PAYMENT OF MONEY—EQUITABLE JURISDICTION—TRUSTEES.

1. Where a mother conveyed property to her son in consideration of his agreement to support her, the son did not hold the property as trustee for the mother.

2. A mother deeded property to her son in consideration of his agreement to support her. Subsequently the mother brought an action at law against the son for breach of the agreement, and caused the son's arrest therein as an absconding debtor. The son, without consideration, conveyed all his property to his wife, in fraud of the mother's rights as a creditor, and the wife sold the property and removed from the state; leaving no property in the state except a sum deposited in the hands of a party who became bail for the son's appearance after his arrest. The son absconded from the state, leaving no property therein, and leaving the mother without means of support. *Held*, that the mother was entitled to an injunction restraining the party who became bail for the son from paying over the money in his hands to the son or his wife during a reasonable time for the prosecution to judgment of the action at law against the son.

3. If, prior to the bringing of the bill for the injunction, plaintiff had discontinued her action, so that she could not obtain satisfaction at law for the breach of the agreement, the chancery court had jurisdiction to determine whether there had been a breach of the contract, and, if so, to determine the damages, and decree satisfaction out of the proceeds of the real estate fraudulently conveyed by the son.

Appeal in Chancery, Addison County; Stafford, Chancellor.

Bill by Martha Hanks against Carlton Hanks, Lenora Hanks, and Norman D. Moore, praying for an injunction requiring the defendant Moore to hold certain funds in his hands subject to the direction of the court, for an accounting, and for general relief. From a pro forma decree overruling the defendants' demurrer to the bill, defendants appeal. Affirmed.

Argued before TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

W. H. Davis, for appellants. I. H. La Fleur and W. H. Bliss, for appellee.

START, J. The bill cannot be maintained on the ground that the contract between the mother and son was entered into with a fraudulent intent on the part of the son to cheat and defraud the mother. The allegations do not tend to show that the contract was induced by false and fraudulent representations, or that an undue advantage was taken of the mother's age, circumstances, and situation, or that the son did not receive the mother's property, and, in consideration thereof, in good faith, promise to support her during the remainder of her life; nor can the bill be maintained on the ground that the son received the money to hold in trust for the mother. He received it as a consideration for his agreement to support the mother, and the mother received, therefore, the right to have and demand such support. But the bill can be maintained on other grounds. It shows that process cannot be served upon the son, for the reason that he has absconded from the state, leaving no property within this state; that the mother brought an action at law, and caused the son's arrest therein as an absconding debtor; that defendant Moore became bail for the son's appearance; that defendant Lenora Hanks placed the sum of \$800 in the hands of Moore to indemnify him as such bail; that, on granting an injunction restraining Moore from paying said money over to either of the other defendants, the mother will discontinue her action at law, and thereby relieve Moore from the liability he is under as bail for the appearance of the son; that the son owned a farm, valued at \$2,200, and mortgaged for \$500; that the farm and some personal property thereon constituted all of the available property of the son; that the son, without consideration, through a third party, conveyed the farm to his wife, defendant Lenora Hanks, in fraud of the mother's rights as a creditor of the son; that Lenora Hanks sold the farm, and received \$1,700 therefor, and removed from the state, leaving no property in this state, except the money so placed in the hands of defendant Moore; that the money now in the hands of Moore is a part of the proceeds of the sale of the farm of Lenora Hanks; that said money cannot be reached by an action in a court of law; and that the mother

is left without means of support. By these allegations the oratrix makes a case over which the court of chancery has jurisdiction. If her action at law is still pending, chancery has jurisdiction for the purpose of keeping the proceeds of the farm, which it is claimed was conveyed in fraud of the oratrix's rights as a creditor of defendant Carlton Hanks, where they will be available for the purpose of satisfying the oratrix's debt, if any she has against him, when the same shall be established by a judgment in the action at law. It also has jurisdiction, if it is found by the court of chancery that the farm was conveyed in fraud of the rights of the oratrix, and that defendant Moore holds the proceeds thereof, to appropriate such proceeds to the payment of the judgment, if one is obtained. Therefore the cause and the injunction order therein should be retained for such time as the court of chancery shall consider a reasonable time for the oratrix to establish her debt, if any she has, by a judgment in her action at law; and, if she does so within such time, the court of chancery should proceed with the cause, and if it is found that the farm was conveyed in fraud of the oratrix's rights as a creditor of defendant Carlton Hanks, and that the proceeds thereof are in part in the hands of defendant Moore, decree satisfaction of the judgment out of such proceeds. *Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427; *Missionary Society v. Eells*, 68 Vt. 497, 35 Atl. 463.

Defendant Carlton Hanks, having removed from the state, is beyond the reach of the process of the courts of this state. Therefore the oratrix cannot now obtain a judgment against him in a court of law, unless her action heretofore brought in the law court is still pending. If that action has been discontinued, and defendant Carlton Hanks has no property in this state, the oratrix cannot obtain satisfaction for the claimed breach of contract for her support in the law courts of this state; and the court of chancery has jurisdiction of all the matters alleged in the oratrix's bill, and may ascertain whether there has been a breach of the alleged contract, and, if so, the damages resulting therefrom, and decree satisfaction thereof out of the proceeds of real estate found to have been conveyed in fraud of the oratrix's rights, and now in the hands of defendant Moore, provided the oratrix, in discontinuing her action at law, acted in good faith, believing it was necessary to do so in order to obtain satisfaction for the claimed breach of the alleged contract out of the money in the hands of defendant Moore. *Bank v. Paine*, 13 R. I. 592; *Pendleton v. Perkins*, 49 Mo. 565; *Overmire v. Haworth*, 48 Minn. 373, 51 N. W. 121, 31 Am. St. Rep. 660; *Bump on Fraudulent Conveyances*, § 549; 14 Ency. of Law (2d Ed.) 318.

The pro forma decree is affirmed, and cause remanded.

MOFFAT v. CALVERT COUNTY COM'RS et al.

(Court of Appeals of Maryland. April 22, 1903.)

TAXES—ENJOINING COLLECTION—BILL—SUFFICIENCY—AFFIDAVIT.

1. An affidavit to a bill for an injunction made by one not a party to the cause, who simply swears that the matters and things stated in the bill are true to the best of his knowledge and belief, but does not inform the court as to the source of his information, or what knowledge he has on the subject, is insufficient.

2. A bill averred that complainant purchased certain property from the C. B. Ry. Co. May 31, 1901; that the county commissioners, "at its annual session in the year 1901 for the purpose of assessing property," assessed the property to the C. B. Imp. Co.; that no notice was given to the C. B. Imp. Co. or to the complainant; and prayed that the assessment be declared void, and the collection of the tax enjoined. The statute provided for the making of the levy in the county in which the property was located in April of each year. *Held* that, in the absence of allegations to the contrary, it would be presumed that the annual session of the commissioners at which it was averred the assessment was made was held before May 31st, the date of complainant's deed, when, so far as appeared from the bill, the C. B. Ry. Co. was owner of the property, and, as it was not alleged that that company had no notice of the assessment, but only that no notice was given to the C. B. Imp. Co. or to complainant, the bill was insufficient.

3. Error in an assessment in describing the owner of the property, the C. B. "Railway" Company, as the C. B. "Improvement" Company, cannot be made the foundation of a proceeding in equity seeking to have the assessment avoided.

4. Complainant in a bill for an injunction must make a full and candid disclosure of all the facts on which he relies for relief.

Appeal from Circuit Court, Calvert County, in Equity; John P. Briscoe, Judge.

Bill by David H. Moffat against the County Commissioners of Calvert County and others. Decree dismissing the bill. Complainant appeals. Affirmed.

Argued before FOWLER, BOYD, JONES, PEARCE, and SCHMUCKER, JJ.

John B. Gray and J. S. Flannery, for appellant. J. Frank Parran, for appellees.

BOYD, J. The appellant filed a bill in equity against the county commissioners and treasurer of Calvert county, praying that an assessment and levy of taxes therein mentioned be declared illegal, null, and void, and that the treasurer be enjoined from the collection of the taxes. The defendants demurred to the bill, and the court below passed a decree sustaining the demurrer and dismissing the bill. From that decree this appeal was taken.

The bill alleges that the complainant purchased of the Chesapeake Beach Railway Company on the 31st day of May, 1901, certain lots of ground described in a deed filed as an exhibit; that the said land was im-

proved by a building known as the "Club House," and the county commissioners, at their annual session in the year 1901 for the purpose of assessing property, assessed the "Chesapeake Beach Improvement Company" with certain improvements which are set out, including the "Club House." It is alleged that before making the assessment the county commissioners failed to notify the Chesapeake Beach Improvement Company, or the complainant, the owner of said lots and improvements, of the assessment, and that the property was not assessed and returned by a collector or assessor whose duty it was to assess and return the same. The levy of the taxes on that assessment, and the fact that the treasurer was about to proceed to collect them, are also charged. The bill purports to have been sworn to by an agent and attorney in fact for the complainant, who made oath "that the matters and things stated in the foregoing bill of complaint are true, to the best of his knowledge and belief." There can be no doubt that the bill was defective, because it was not properly verified. We held in the recent case of *Fowble v. Kemp*, 92 Md. 630, 48 Atl. 379, that an affidavit to a bill for an injunction made by an "attorney and agent for the company" was not sufficient, as it did not show that the affiant had personal knowledge of the facts alleged in the bill. It was there said: "When the affidavit on its face shows, as this one does, that it is made not by a party to the cause, but by a person who could not know the facts except by hearsay, unless his means of knowing them in such a way as to authorize him to testify be disclosed, a court has no right to assume that his knowledge is personal, rather than hearsay, if it may be either the one or the other. If it be hearsay, it is not sufficient to verify a bill for an injunction. If his knowledge be personal, it ought to appear that it is." The reason of the rule is that there must be at least *prima facie* evidence of the facts on which the complainant's equity rests, so that the confidence of the court may be obtained, before it can be called upon to issue an injunction. That cannot be done by an affidavit of one not a party to the cause, who simply swears that the matters and things stated in the bill are true to the best of his knowledge and belief, but does not inform the court as to the source of his information or what knowledge he has on the subject. That defect in the bill was, therefore, sufficient to justify the court in refusing to grant an injunction.

But there are other objections to the bill, which apply to all the relief sought. It does not even allege when the assessment complained of was made, further than to say that it was at the annual session of the county commissioners in the year 1901 for the purpose of assessing property. The brief of the appellees states that the meeting was in March. Although the record does not disclose that fact, there is nothing whatever to

inform the court when it was. Section 49 of article 5 of the Code of Public Local Laws contemplates the making of the levy for Calvert county in April of each year, and it may, therefore, be presumed, in the absence of some allegations to the contrary, that the annual session of the county commissioners referred to was held before the date of the deed to the appellant. It was executed May 31, 1901, and prior to that time the Chesapeake Beach Railway Company was the owner of the property, while the bill only alleges that the county commissioners failed to notify the Chesapeake Beach Improvement Company and the complainant of the assessment, and does not allege that the Chesapeake Beach Railway Company was not duly notified. If the property belonged to the latter company, there was no occasion to notify the improvement company or the complainant, conceding the appellant's position to be correct that the owner was entitled to notice. There is no allegation that the appellant was the owner at the time the assessment was made, and the only inference to be drawn from the bill is that he was not, and it is alleged that the improvement company has neither title nor interest in the property. It is not even alleged that there is, or ever was, a corporation named the "Chesapeake Beach Improvement Company." It may be that it was intended to assess the property to the "Chesapeake Beach Railway Company," and that the word "Improvement" was erroneously substituted for the word "Railway," as that is the only difference between the two names mentioned in the bill. If that be the case, that error cannot be made the foundation for a proceeding in equity. In *O'Neal v. Virginia & Maryland Bridge Co.*, 18 Md. 1, 79 Am. Dec. 669, the entry in the assessment book was "Potomac Bridge Company," while the corporate name was "The Virginia & Maryland Bridge Company at Shepherds Town." The court said: "We have no power to make the correction for the benefit of the public which the commissioners might have done, and, if courts of equity were to interfere in such cases, parties taxed, instead of going before the proper tribunal to have errors corrected, and thereby, whilst protecting themselves, secure to the state or county their just demands against the property, would wait until the time had elapsed, and then, by proceeding in equity, escape altogether;" and relief was refused. But, if there be two corporations, and the property actually belonged to the railway company, although it was assessed to the improvement company, there is, as we have seen, no allegation in the bill that the railway company did not have notice, and, if any person or corporation was entitled to notice, that company would, under those circumstances, be the one so entitled.

Acts 1890, p. 186, c. 183, prescribing the duties, etc., of the treasurer of Calvert county, was referred to by the solicitors for the ap-

pellant, and it was contended that the treasurer's power to enforce the collection of taxes for the year 1901 ceased on the 31st of December, 1902, and therefore he should now be restrained from doing what he had no legal right to do. As the bill was filed before that time, we do not understand upon what principle that statute could be invoked, if we were called upon to pass on it, and it was admitted that the appellant's construction of it was correct. But there is no suggestion in the bill of the lack of power on the part of the treasurer to collect these taxes by reason of the provisions of that statute, and it furnishes no such information as would enable us to intelligently pass on the subject.

Other objections to the bill might be pointed out, but it is not necessary to do so. There is no principle better established than that which requires a complainant in a bill for an injunction to make a full and candid disclosure of all facts upon which he relies for relief. As is said in *Miller's Equity Proc.* § 580 (page 688): "The court must be informed by the bill itself, and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may be seen whether there is a just and proper ground for the application of the summary remedy of injunction. There should be no misrepresentation, or concealment, or keeping in the background important facts of which the court ought to be advised, and which the court thinks are material to enable it to form its judgment." From what we have said it is apparent that we do not think this bill so complied with those requirements as to entitle the appellant to an injunction. It is equally defective in reference to the other relief sought—to have the assessment and levy of taxes declared illegal, null, and void. If the county commissioners and tax officers are to be required to meet such indefinite and vague allegations as are contained in this bill, much of their time would be occupied in defending suits which should be devoted to the discharge of the duties imposed on them by law. The court below was right in sustaining the demurrer, and, as no relief could be granted under the bill, it was properly dismissed.

Decree affirmed, the costs to be paid by the appellant.

HAYMAN et al. v. LAMB DEN.

(Court of Appeals of Maryland. April 1, 1903.)

APPEAL—FINAL JUDGMENT—APPEAL BY STIPULATION—JURISDICTION—NOTES—JOINT MAKERS—ACTS OF ONE MAKER—AUTHORITY TO BIND OTHER.

1. Where no final judgment has been rendered in the trial court, the Court of Appeals cannot hear the case by agreement of counsel.

2. Where a joint note is given in part settlement for a sawmill and a contract to cut timber, a promise by one of the makers to pay, after knowledge that the mill was not in good

order and that the contract was worthless, was not binding on the other.

Appeal from Circuit Court for Somerset County; Chas. F. Holland, Judge.

Action by Thomas S. Lambden against Charles W. Hayman and another. Appeal by stipulation, no judgment having been rendered. Appeal dismissed.

Argued before MCSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, PAGE, SCHMUCKER, and JONES, JJ.

Miles & Stanford, for appellants. Gordon Tull, for appellee.

FOWLER, J. This is an appeal from the circuit court for Somerset county. The case was submitted on briefs, without argument. Upon examination of the record, we find that no final judgment has been rendered, and that therefore the appeal has been prematurely taken, and must necessarily be dismissed. In order to avoid this result, counsel have entered into an agreement, and have filed it in this court, that, inasmuch as "no final judgment had been entered up before the appeal was taken in this case, it is agreed * * * that hearing may be had and judgment rendered in this court to the same effect and extent as if final judgment had been regularly entered of record in the court below before this appeal was taken." But the difficulty cannot be overcome in this manner. This court has no jurisdiction to hear the case until after final judgment has been rendered by the court below, and jurisdiction cannot be conferred by agreement of counsel. The appeal will therefore have to be dismissed. We may say, however, that we have examined the record; and, if the case were properly before us, we would be compelled to reverse upon the ground that the theory of the plaintiff's first prayer, which was granted by the court below, is based upon an erroneous proposition of law.

It appears from the record that the plaintiff sued the defendants on their joint promissory note. They pleaded the general issue, fraud, and set-off, etc. At the trial they offered evidence tending to show that the note in question was given to the plaintiff in part settlement for a sawmill and a contract to cut timber, that the mill was not in good order, and that the contract was worthless. Evidence was offered in rebuttal by the plaintiff tending to prove acts, admissions, and agreements of one of the joint makers (Chas. W. Hayman) to establish a waiver of any rebate on account of the condition of the mill, and to prove that he had promised to pay the note after knowing the condition of the wood-cutting contract, and that he had asked for an extension of time on said note, and promised to pay the same in full, with knowledge of the condition of the mill. Without undertaking to state the facts fully, for it is not necessary, we need only say that on these facts, and others re-

lating entirely to the acts, admissions, and waivers of Chas. W. Hayman, the court instructed the jury that, if they found them, the plaintiff was entitled to a verdict against both the joint debtors. It is not pretended that the other joint debtor had done anything to waive her defenses, but the theory of the learned counsel for the appellee is (quoting from the opinion of this court in *Wilmer v. Gaither*, 68 Md. 343, 12 Atl. 10, 253) that "payment by one joint debtor is payment by all, and an admission by one is an admission by all." This language was used with regard to the effect to be given to the promise of one joint maker of a note when the statute of limitations is pleaded. It has long been the established rule that a promise or admission of one of several joint debtors, made before the statute has become a bar, will arrest the statute. But if such promise is not made until after the statute has run and become a bar, then such promise will only be effectual as against the party making it. We have nothing to do here, however, with the statute of limitations; and the question is whether one of two joint makers of a promissory note is bound by the acts and admissions of the other as fully as if they were partners, or each were the authorized agent of the other. We know of no principle of law which would justify us in sustaining such a proposition, and none has been cited by the learned counsel for the appellee. Indeed, it would seem to follow that, if we adopt the proposition involved in the plaintiff's first prayer, we would have to hold not only that joint makers of a promissory note, as to that note, are partners, but that they stand in relation to each other, respectively, as principal and agent.

Appeal dismissed.

BOARD OF SUP'RS OF ELECTION FOR WICOMICO COUNTY v. TODD et al.

(Court of Appeals of Maryland. April 15, 1903.)

CONSTITUTIONAL LAW — DEPARTMENTS OF GOVERNMENT — DUTIES OF JUDICIARY — INTOXICATING LIQUORS — SALE — ELECTION.

1. Act 1896, p. 314, c. 195, providing, as a condition precedent to the submission of the question of the sale of intoxicating liquors as beverages in W. county, that a petition shall be presented to the circuit court, which is required to count the names on the petition, and ascertain whether such names are the names of persons who voted at the last election for governor, and thereupon to order an election, is void as imposing on the court nonjudicial duties in violation of the Constitution.

Appeal from Circuit Court, Wicomico County; Chas. F. Holland, Judge.

Mandamus by George W. Todd and others against the Board of Supervisors of Election of Wicomico County. From a decree directing the issuance of a writ as prayed, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Joseph N. Ulman, for appellant. Elmer H. Walton, for appellees.

JONES, J. The act of assembly of 1896 (page 314, c. 195), a public local law of Wicomico county, enacted in its first section "that whenever such of the registered qualified voters of Wicomico county, or of any election district, city or town thereof, as constitute one half of all the votes cast for all of the candidates for Governor at the last election in said county, or in any election district, city or town thereof, shall petition the circuit court for said county for the submission, at the next regular congressional election held in said county of the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein, the said circuit court shall, within ten days after the receipt of said petition, issue an order for an election on this question to the sheriff of the county, whose duty it shall be to give the same notice and perform all other acts required of him for the holding of elections under the election law of this state, and subject to like penalties in case of his default in his performance of said duties." The second section enacts "that such election shall be held and conducted under the provisions of the election law applicable to the said county." The third section provides that after an election so held there shall be no other such election within four years. The fourth section provides how the question thus to be submitted to vote shall be indicated on the ballots, how the preference of the voters upon the question is to be made to appear and be ascertained, how the ballots are to be counted and canvassed in respect to this question, how the result of the voting is to be certified, and how notice is to be given of the result in case it shall "appear that the majority of the votes cast is against the sale of intoxicating liquors for beverages." The succeeding sections of the law in question are provisions for carrying into effect the prohibition of the sale of intoxicating liquors for beverages in the county, election district, city, or town as the case may be, according to the submission made in respect to locality, when it appears that a majority of the votes cast upon "the question of granting or not granting any license for the sale of intoxicating liquors," etc., is against the granting of such license. This case arises under this law, and originated in a petition for the writ of mandamus filed in the court below on the 24th day of October, 1902, by the appellees, George W. Todd and William A. Crew, against the appellants, in which it is alleged that the petitioners, "together with four hundred and forty (440) other voters and residents" of the Ninth Election District of Wicomico county, on the 18th day of October, 1902, presented to the

¶ 1. See Constitutional Law, vol. 10, Cent. Dig. §§ 103, 124.

circuit court for that county a petition verified by affidavit praying the court "to submit to the voters of said district the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein * * * in pursuance of the provisions contained in section 1 of chapter 195, p. 314, of the Acts of Assembly of Maryland of 1896"; that upon "the hearing of said petition and the motion of the objectors thereto" the said court passed the following order: "No sufficient cause to the contrary having been shown, it is, this 23d day of October, 1902, ordered by the circuit court for Wicomico county, Maryland, that, in pursuance of section 1, chapter 195, p. 314, of the Acts of 1896, the sheriff of Wicomico county, Maryland, shall submit to the voters of the Ninth Election District of Wicomico county the question of granting or not granting licenses for the sale of intoxicating liquors for beverages in said district, and the clerk is hereby directed to serve a copy of this order on the said sheriff of Wicomico county immediately"; that in pursuance of said order the sheriff on the 24th day of October, 1902, notified the county commissioners of said county and on said day the county commissioners notified the supervisors of election of said county, but said supervisors refused "to advertise the question," and were "preparing the official ballots to be used in said district without any provision for the submission of the aforesaid question to the voters." It is then prayed that the writ be issued "directed to the said supervisors of election of Wicomico county," who are the appellants here, "commanding them to advertise said question, and to prepare the official ballots to be used in the Ninth District of Wicomico county * * * at the election to be held on November 4, 1902, in accordance with the provisions of section 4 of said chapter 195, p. 315, of the Acts of 1896." Upon this petition the court below passed an order that cause be shown immediately by the appellants why the writ of mandamus should not issue. On the same day that this order was passed the appellants filed their answer, in which they admitted the allegations of fact in the petition, and rested their refusal to advertise the question of granting or not granting licenses for the sale of liquor and to place such question upon the ballots at the approaching election, as set out and stated in the petition, upon the ground that the act of 1896, p. 314, c. 195, is unconstitutional and void; that, if not unconstitutional, it is in conflict with the provisions of chapter 202, p. 327, of the act of 1896, from which the appellants, as supervisors of elections, derive all of their powers and authority over elections in said county; and that by section 47, p. 355, of the said chapter 202 of the act of 1896 "all questions of local concern which are to be submitted for approval to the vote of the people" of a county must be certified to the board of supervisors of elections by the coun-

ty commissioners of the county not less than 30 days before the election at which such question is to be submitted; and that the question of granting or not granting any license for the sale of intoxicating liquors in the Ninth Election District of Wicomico county had not been so certified 30 days before the election as a question to be submitted for approval. The appellees demurred to the answer, and upon hearing the court on the same day the answer was filed, October 24, 1902, ordered the writ of mandamus to issue as prayed. From such order this appeal was taken.

In the view we take of this case, the ground of defense first set up in the answer of the appellants against the application for mandamus is sufficient to dispose of the case upon this appeal, and it will be unnecessary to consider any other. We think it advisable to dispose of it upon this ground because future litigation under the law in question will thus be avoided. The Legislature has seen fit to prescribe as a condition for the law (chapter 195, p. 314, of the act of 1896) being called into existence and put into operative effect that an application shall be made to the circuit court for Wicomico county for a submission of the question of the adoption of the law to the voters of the county or of a town or election district of the county, as the case may be; that the said court shall order the submission of such question to a vote upon conditions prescribed; and that, upon the vote being had, a majority of the votes of the locality to be affected according to the submission shall appear to be in favor of putting the law into operation. The existence of the law with operative effect is made to depend upon the observance of these prescribed proceedings, the initial step in which is the application to and the order from the circuit court for the submission of the question whether the law shall be put into effect to the voters within the territorial limits to be affected. The question raised is as to the validity of this legislation. The inquiry as to this is whether it is within the constitutional power of the Legislature to impose upon the judiciary, or invest them with, a function of this character, and whether the judiciary, in the attempt to discharge such a function, are not acting without constitutional warrant. In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the Legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the Constitution—the fundamental law—and we are limited to the question of constitutional power. As was said in the case of *Thomas v. Owens*, 4 Md., at page 225: "Under our system of government its powers are wisely distributed to different departments. Each and all are

subordinate to the constitution, which creates and defines their limits. Whatever it commands is the supreme and uncontrollable law of the land." This distribution of the powers of our state government was declared in our original Bill of Rights accompanying the Constitution of 1776 in this language: "That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." Article 6, Bill of Rights 1776. There are a number of decisions of this court having reference to this article of the Bill of Rights sanctioning its wisdom, and enforcing practically the principle involved in the declaration. Only those which may have more immediate reference to the case at bar need be referred to. Among those which arose under the Constitution of 1776 is that of the *State v. Chase*, 5 Har. & J. 297, in which Judge Buchanan in the course of his opinion says: "New judicial duties may often be unnecessarily imposed, and services not of a judicial nature may sometimes be required. In the latter case a judge is under no legal obligation to perform them"—which was to say that the opinion of the court was that duties "not of a judicial nature" could not legally and constitutionally be imposed upon the courts or the judges. In the subsequent Constitutions adopted in this state in 1851, 1864, and 1867 the declaration which has been quoted from the Bill of Rights of 1776 has been incorporated, and emphasized by adding thereto this language of exclusion: "And no person exercising the functions of one of the departments shall assume or discharge the duties of any other." Article 6, Bill of Rights, Const. 1851; article 8 in each of the Constitutions of 1864 and 1867. And in each of these subsequent Constitutions there is this further declaration: "No judge shall hold any other office, civil or military, or political trust or employment of any kind whatsoever, under the Constitution and laws of this state, or of the United States, or any of them." Article 30, Bill of Rights 1851; article 33 in each of the Constitutions of 1864 and 1867. The force of the opinion of the court, speaking through Judge Buchanan, in case of *State v. Chase*, supra, is enhanced, therefore, not only by the subsequent more emphatic declarations of the fundamental law in reference to the separation of the powers of government, but by the express inhibition against the exercise by a judge of any other "political trust or employment whatsoever." It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall not only not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the

judicial function is not only without constitutional warrant, but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge. In accord with this are recent decisions of this court. In the case of *Robey v. Prince George's County*, 92 Md. 150, 48 Atl. 48, a statute which required the judges of the circuit court to approve the accounts of certain county officers before payment of the same by the county commissioners was held unconstitutional as to this requirement because it imposed on the judges a nonjudicial duty. For the same reason, in the case of *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61, a statute that imposed upon the judges of the circuit court the duty of appointing members of a board of visitors for the county jail of Anne Arundel county was pronounced unconstitutional. Therefore, to test the constitutionality of the law here in question in respect to the duty assigned by it to the circuit court, we have only to inquire whether the duty so assigned to the court is a judicial duty. It is quite unnecessary to undertake to define here the essential qualities of a judicial act, or to prescribe the precise limits to be observed by the legislative branch of the government in assigning duties to the judiciary. Such attempt could, in its results, only be misleading and confusing. It would not be practicable to lay down a rule for all cases, and it would be inappropriate that the courts should undertake to do this. It is only necessary in this case to say that counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election is not a judicial function is a proposition that would seem to be too plain to need argument to enforce it. The order which, by the statute here under consideration, the court is required to pass is not to be the result of any judicial inquiry. It is not to be passed in the course of or in connection with any judicial proceeding. It is not to be made as preparatory or preliminary to the bringing of any matter within the judicial cognizance, nor as a means necessary or appropriate to aid in any way the efficient and appropriate exercise of the judicial function. In short, there is no view in which the duty to pass the order required by the statute presents itself as a judicial act. In assuming the duty to pass the order in question, therefore, the court assumes a political trust or duty distinct from its constitutional duty as a court. Again, if the court can be required to take one step in proceeding to hold an election for the object indicated in the statute in question, or for such other purpose as the Legislature, within its powers, may see fit to order an election, why may not all the duties in connection with the holding of such election be devolved upon the courts? Why may they not be required to name time and place of holding such election, appoint the judges and

clerks of election, canvass the votes, and declare and certify results? The initial step in holding such elections would be no more judicial in its character than all the other necessary proceedings therein. It is not reasonable to impute to the fundamental law, in view of the declarations therein heretofore noticed, an intention to make the courts subject to have devolved upon them duties so distinct from those pertaining to the exercise of the judicial function, and which could be imposed to such an extent as to seriously interfere with the efficient discharge of the duties of the judicial office. This being so, the provision of the act of 1896 (page 314, c. 195) which requires of the circuit court for Wicomico county the duty of ordering elections as therein prescribed is repugnant to the Constitution and Bill of Rights, and therefore void. As these elections, by the terms of the act, must depend upon the orders from the circuit court, the act must fall.

No reference has been made to authorities or precedents in other states, among which there is more or less conflict as to the questions herein considered. It is sufficient that the views expressed and the conclusions reached seem to be the logical and inevitable consequence of the principles embodied in our organic law and of our decisions expounding them. As authorities, however, maintaining similar views in analogous cases, we may refer to *Dickey v. Hurlburt*, 5 Cal. 343, and *Case of Supervisors of Election*, 114 Mass. 249, 19 Am. Rep. 341. As a result of our views, we must reverse the order of the circuit court for Wicomico county from which the appeal in this case was taken.

Order reversed, with costs to the appellants.

MERCANTILE LAUNDRY CO. OF BALTIMORE CITY v. KEARNEY.

(Court of Appeals of Maryland. April 1, 1903.)

SERVANT—INJURIES—NEGLIGENCE—QUESTION FOR JURY.

1. A servant employed in a laundry was standing beside a wringer, in the discharge of his duties, when a sheet flew out and wrapped around him in such a way that his arm was torn off. Several witnesses testified that wringers were dangerous machines, and one witness testified that one had to have a good light in order to properly "pack" a wringer, and that if it is not properly packed the clothes are liable to fly out. Plaintiff testified that he had had no instructions, but was merely told to take a wringer and go to work, and that he had had no experience, save helping another man on some of the work connected with the wringer, but that he had never arranged the clothes. There was testimony that the light was not sufficient to enable plaintiff to see distinctly and to do his work with safety. *Held* sufficient evidence of negligence to go to the jury.

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by Charles E. Kearney, an infant, against the Mercantile Laundry Company of

Baltimore City. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Wm. L. Marbury and George Weems Williams, for appellant. J. Cookman Boyd and Charles R. Schirm, for appellee.

FOWLER, J. This is another of the numerous actions brought to recover damages resulting from personal injury. The plaintiff, a boy 18 years of age, was in the employ of the Mercantile Laundry Company of Baltimore City. He had been driving the company's wagon for some months, when, on December 17, 1900, he was employed to run certain machines in the laundry, called "wringers" or "extractors," which were used for the purpose of wringing or drying out the clothes. He had been engaged in this occupation four or five days when the accident happened. It is unnecessary to minutely describe the machinery which was being operated by the plaintiff. It is sufficient to say, for the present purpose, that the wringers, after having been filled with the wet clothing, were rapidly revolved by steam power, in order to expel the water from them. While the wringer was thus in motion, and the plaintiff was standing in the proper and usual position to do his work, at the side of the machine, the accident happened. He thus describes it: "I was standing at the side of the wringer, and I had reached my hand up to give this wringer more steam at the valve. I was standing between the wall and the wringer, almost—this hand near the wringer—and I just turned to give it more steam, and a sheet flew out and wrapped around me." His arm was torn off about two inches below, and broken in three places above, the elbow. In reply to the question if he could tell how the accident happened, he replied, "All I can tell is, I was standing there, and a sheet flew out and caught my wrist and pulled me in."

The single question presented by this appeal is whether the court below erred in refusing to take the case from the jury. The principles applicable here are the same which we applied in the case of *Chas. W. R. Yentsch, Infant, v. The Chloride of Silver Dry Cell Battery Co.* (decided at this term) 54 Atl. 877, and are so well settled that they do not admit of discussion. We may start with the statement that it is a well-settled rule "that, if the operation of a machine involves danger to an inexperienced person, both justice and humanity impose upon the employer, when directing a youth without previous knowledge of the machine to work upon it, the duty of giving him such warning or instruction as would enable him to operate it safely by the use of that degree of care which might reasonably be expected of him." *Nat. Enam. Co. v. Brady*, 93 Md. 650, 49 Atl. 845; *Levy v. Clark*, 90 Md. 146, 44 Atl. 990.

And it is equally well settled that it was the duty of the defendant to furnish sufficient light to enable the employés to perform their labor with reasonable safety, while exercising due care and caution on their part to avoid the known dangers incident to the employment. It only remains, therefore, to examine the record to ascertain if there was any testimony offered by the plaintiff at the trial below legally sufficient to show, first, that the machine the plaintiff was employed to run was dangerous, that he was an inexperienced youth, and that the defendant failed to give him any instructions or to warn him of the danger; and, second, that the place where he worked was not sufficiently lighted to enable him to do his work with safety.

Several witnesses testified that the wringers are dangerous machines. One of them said that these machines "are especially dangerous; that everybody is afraid of, and had to be careful of, them; that she had often seen things fly out of them, and that the reason she thinks the machines are dangerous is because they should be packed carefully, and have somebody who knows something about it to run them; they should be instructed in all these machines; * * * that one has to have light to see to pack the wringer, and, if it was dark, one could not see to pack it, and it has to be packed right, or the pieces will fly out." There was other testimony to the effect that it was not an unheard-of thing for pieces of clothing to fly out of the wringer when it was in motion. The plaintiff testified that no instructions were given him; that he "was just told to take the wringers and go to work." In regard to his experience, he testified that he had none, except helping another man; that he had worked these machines six or seven times an hour each time, and perhaps once a half a day; that he never, until he went regularly to work to run the wringer, had arranged the clothes in the basket so that it would balance. There was testimony, also, which, if believed by the jury (and, as the case is now presented, it must be conceded to be true), that the light was not sufficient to enable the plaintiff to see distinctly and to do his work with safety; "that he could not see with the light he had after Mr. Moffit [the manager] turned it down; * * * that, if there had been sufficient light at the time of the accident, he could, without putting his head down in the wringer, have told whether or not these clothes were wobbly; and that, as slow as the wringer was going, he could have seen whether anything looked like it was coming out or not, and could have shut the wringer down and fixed it."

We think it is clear, therefore, that there was evidence legally sufficient to go to the jury, and the jury alone can determine its weight, in point of fact. It follows that the judgment appealed from must be affirmed. Judgment affirmed.

MILLER v. ADDISON.

(Court of Appeals of Maryland. March 31, 1903.)

HIGHWAYS — FRIGHTENING HORSES—MOVING TRACTION ENGINE — NEGLIGENCE — QUESTIONS FOR JURY—INSTRUCTIONS.

1. In an action for injuries resulting from the running away of a horse, frightened by defendant's traction engine on a public highway, the court refused to instruct that the evidence was not sufficient to establish defendant's negligence, that defendant had a right to operate her engine on the highway, using due care, and that the verdict should be for her if she had used such care; but did instruct that plaintiff had the burden of proving defendant's negligence, and that unless he did prove it, the verdict should be for her. *Held* that, if there was evidence tending to show defendant's negligence, she could not complain of the court's ruling.

2. Evidence examined in an action for injuries resulting from the running away of a horse frightened by a traction engine on a public highway, and *held* sufficient to make it a question for the jury whether defendant was guilty of negligence.

3. The law imposes on the owner of a traction engine the duty to act with due regard for the rights and safety of persons traveling on a public road in moving the engine over such road, and he is liable for injuries due to negligence on his part.

Appeal from Circuit Court, Howard County; L. Thomas Jones and Jas. Revell, Judges.

Action by Richard H. Addison against Annie E. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Alex. Kilgour and E. O. Peter, for appellant. Talbott & Talbott, M. F. Burke, and E. Hammond, for appellee.

BRISCOE, J. The appellee brought a suit against the appellant in the circuit court for Montgomery county to recover for the loss of services of his wife and injury to a horse and buggy, resulting from the running away of the horse while being driven by the wife along one of the turnpikes of the county. The accident is alleged to have been caused by the fright of the horse from noise of escaping steam and from the propulsion of a traction steam engine being carried along a public highway called the "Chaney Road," leading from the Columbia Road to the Ashton and Columbia Turnpike, and owned by the defendant. The case was removed to the circuit court for Howard county, and on trial before a jury resulted in a verdict for the plaintiff, and the defendant has appealed from the judgment entered thereon.

The questions in the case are narrow, and relate solely to the ruling of the court upon the defendant's rejected prayers. By the defendant's first and second prayers the court was asked to rule as a matter of law that there was no evidence legally sufficient to show that the injury was caused by the negligence of the defendant or her servants.

The seventh and eighth prayers submitted the proposition that the defendant had the legal right to operate her engine on the public highway, provided due care and diligence were used and exercised in so operating it, and, if the jury believed that the engine was so used, their verdict must be for the defendant. These prayers were rejected, and form the basis of the appeal. The defendant's third prayer, which was granted by the court, ruled that the burden of the proof is upon the plaintiff to show that the injury complained of was caused by the negligence of the defendant or her agent, and, unless the plaintiff shall so satisfy the jury by the preponderance of proof, their verdict must be for the defendant. If there was evidence, then, legally sufficient to be left to the jury, the defendant cannot complain of the court's ruling, because the law was properly submitted by her third prayer, and, as granted, contained the whole law of the case.

The first point for us to determine, as raised by the first and second prayers, is whether the evidence was legally sufficient to be submitted to the jury to show negligence on the part of the defendant to warrant a recovery by the plaintiff. This question is usually presented in every damage case, and it has been so often and so recently passed upon by us that we do not deem it necessary to refer to the cases establishing the rule upon the subject. It is well-settled law that, if there is no evidence legally sufficient to entitle a recovery, the court will so instruct the jury, and withdraw the case from its consideration. On the other hand, if there is any evidence from which a jury can reach a conclusion, or, as the rule is stated, "if a rational mind can fairly deduce the conclusion sought to be established by the evidence," it becomes the duty of the court to submit the case to the jury. Each case, however, must necessarily be determined upon its own facts. The statute (Code Pub. Gen. Laws, art. 27, § 259) requires that every traction engine, when propelled by steam upon or over any public road in the state, shall be accompanied by at least two men, whose duty it shall be to so conduct the engine as to cause as little harm as possible to horses ridden, driven, or led upon such road, and to render at all times all reasonable assistance to persons so driving or leading horses upon such road. By section 260 of the same act it is declared to be the duty of the person in charge of the engine, at the signal or request of any person driving a horse attached to a vehicle, or at the indication of a horse becoming alarmed by the engine, to remain stationary until the horse has passed, and to make as little noise as possible with the steam. The evidence upon the part of the plaintiff is to the effect that the plaintiff's wife was, on the 16th of July, 1895, the day of the acci-

dent, driving a horse attached to a dog cart along one of the turnpikes of the county, and when within a short distance of what is called the "Chauey Road," and within 30 yards of where it intersects with the turnpike, the horse became frightened by the noise of a traction engine owned by the defendant and being propelled by steam along the road, ran away, and caused the injury for which this suit was brought. At the time of the accident the engine was on the Chaney Road, and about from 75 to 110 yards from the intersection of the road with the turnpike. There was no one in advance of the engine or stationed at the intersection of the roads. Mrs. Addison testified that while passing the intersection of the two roads her horse became unmanageable, and as she passed she waved her hands, and called to the men in charge of the engine for assistance, but they gave none, and did not stop the engine. There was testimony that the horse was gentle, and well broken to harness, and that she had frequently driven him; that the engine could have been seen from the point the horse became frightened and where it backed into the fence. The defendant's witnesses testified that a man was preceding the engine at the time of the accident for the purpose of warning travelers of the approach of the engine, and was within eight or nine yards of the intersection of the roads; that the engine could not have been seen at the point where the horse began to run on account of the corn in the field; that the engine was being propelled by steam, and was being handled with proper care and caution. Now, without prolonging this opinion by an analysis of the evidence, we think it was legally sufficient to have been submitted to the jury, and the court committed no error in rejecting the defendant's first and second prayers.

The plaintiff's wife, in traveling the public highway, was in the exercise of a lawful right, and the duty rested upon the defendant, in moving the traction engine from place to place over the public highway, to act with a due regard for the rights and safety of persons who travel upon the public roads. The law imposes this duty for the safety of the public, and, if persons are negligent and careless in the exercise of an employment such as the defendant was engaged in on the day of the accident, and injury results therefrom, they will be required to respond in damages, or be subject to the penalty imposed by the statute in such case made and provided. There was conflict in the testimony in the case, and it was not the duty of the court to decide on the comparative weight or upon the preponderance of evidence. Finding no error in the rulings of the court that will justify a reversal, the judgment will be affirmed.

Judgment affirmed, with costs.

OLDEWURTEL v. WIESENFELD et al.

(Court of Appeals of Maryland. April 2, 1903.)

LANDLORD AND TENANT—SEALED LEASE—ABANDONMENT OF PREMISES—ACCEPTANCE—RE-RENTAL—RECOVERY OF RENT—NATURE OF ACTION—COVENANT—MODIFICATION OF LEASE—REVIEW.

1. Where defendants covenanted in a lease under seal to pay rent for a certain term, and that the lease and its covenants should continue in force from term to term after its expiration, subject to the right of either party to terminate the lease at the end of the term, or of any year thereafter, by giving 90 days' previous notice, the fact that the lessor allowed the lessee a credit or reduction of rent for 6 months, after which the lessee paid the rent reserved and continued in possession according to the lease without a new agreement, did not constitute an abandonment of the lease, so as to preclude the lessor from recovering rent accrued by an action of covenant.

2. Where a tenant abandoned the leased property, and attempted to surrender the keys to the lessor, which he refused, the fact that the landlord thereafter relet the premises without the tenant's consent, after notice that he would do so subject to the covenants of the lease, and credit the tenant with rent received during the unexpired term of the lease, did not constitute an acceptance of the tenant's surrender, so as to deprive the landlord of his right to recover the difference between the amount so received and the rent reserved in the lease for the unexpired term.

3. Error in the exclusion of evidence will not be reviewed where the same was afterwards admitted.

Appeal from Court of Common Pleas; J Upshur Dennis, Judge.

Action by Bernard Wiesenfeld and Joseph Miller, as executors, etc., against Henry Oldewurtel. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Argued before FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Hugo Steiner and Lewis Putzel, for appellant. Gans & Haman and Vernon Cook, for appellees.

BRISCOE, J. On the 8th day of June, 1900, the appellees instituted a suit in covenant in the superior court of Baltimore City against the appellant to recover rent due and owing under a lease dated the 1st day of April, 1895, for a store and dwelling known as No. 507 South Broadway, Baltimore. The lease is in writing, and is fully set out in the record. The property was rented for the term of five years, beginning on the 1st day of April, 1895, and ending on the 31st day of March, 1900, at \$900 a year, payable in equal monthly installments on the first day of each and every month. It was provided by the terms of the lease that its provisions and covenants should continue in force from term to term after the expiration of the term mentioned therein, provided the parties thereto, or either of them, could terminate it at the end of the term, or of any year thereafter,

by giving at least 90 days' previous notice thereof in writing. It was further provided, in case the rent should be 10 days in arrear, and not paid when the same should become due, then the lessor may re-enter and take back the premises without demand. There was no covenant in the lease for making repairs to the premises.

The declaration states that the sum of \$605 was due and unpaid for rent, with interest from April 1, 1900, over and above all discounts, according to the following bill of particulars, which was filed, on demand, in the case:

Bill of Particulars.

Mr. Henry Oldewurtel to Bernard Wiesenfeld and Joseph Miller, Trustees of the Estate of Betsey Wiesenfeld.

To 5 years rent of No. 507 S. Broadway, at \$900 per year, as per lease of April 1st, 1895.....	\$4,500
Less \$10 per month, waived for the months of Aug., Sept., October, November and Dec., 1897, and Jan'y, 1898, respectively.....	60
	\$4,440

Credits.

By cash, from April 1st, 1895, to June 1st, 1898	\$2,865
By Hughes & Co. from Sept. 1st, 1898, to Jan'y 1st, 1899	280
By Wheeler & Hughes, from Feb. 1st, 1899, to Aug. 1st, 1899	370
By C. Walmacher from Oct. 19th, 1899, to Mar. 31st, 1900	320
	\$3,835
To balance	605

The declaration was in covenant, and the lease, which was in writing, under seal, was filed with the declaration. To the declaration as thus filed the defendant interposed a demurrer upon the ground that the lease sued on had been varied by a subsequent parol agreement, and the suit should have been in *assumpsit*, and not in covenant. The action of the court on overruling the demurrer presents the first question for our consideration. We find no error in the court's ruling upon the demurrer. There was no such subsequent parol agreement between the parties in this case as varied the original lease and prevented a suit in covenant thereon. The mere credit or reduction of the rent for six months to the extent of \$10 a month, when the defendant, at the end of the six months paid the rental reserved in the lease, and continued in possession according to the terms of the lease, without a new agreement, can hardly be held to be such a waiver, alteration, or abandonment of the lease as to defeat the action in this case. *Herzog v. Sawyer*, 61 Md. 344; *Bodey v. Cooper*, 82 Md. 631, 34 Atl. 362; *Zihman v. Cumberland Glass Co.*, 74 Md. 310, 22 Atl. 271.

The case of *O'Brien v. Fowler et al.*, 87 Md. 565, 11 Atl. 174, relied upon by the appellant is unlike this. In that case the plaintiff brought an action of covenant against the defendant, and in the fifth count of the declaration sought to recover for extra work and materials furnished, which were not embraced in the written contract. The contract stipulated that no extra work would be allowed unless the same should be performed through a written order, signed by the en-

¶ 2. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 732.

gineer, and approved by the examiners. The written orders, as required by the contract, were waived by the defendant for the extra work, and the court held upon demurrer that, while the plaintiff could not recover for the extra work on the original contract under seal, he might recover in an action of assumpsit for the value of the extra work. In the case here the plaintiff seeks to recover for rent due under the contract, less a gratuitous abatement in rent of \$10 for six months before a breach of the contract, under seal, and other credits, as given.

The other questions raised on the record arise upon exceptions to the rulings of the court upon the prayers, and to the admissibility of evidence. The undisputed facts of the case, out of which the controversy arose, briefly stated, are these: The defendant, the lessee, continued in possession of the demised premises until June 1, 1898, when he paid the rent to that date, and left the key at the office of the plaintiff in his absence, stating to the clerk "that he had moved out the house, and here was the key." On June 2d—the next day—the plaintiff wrote him the following letter: "Henry Oldewurtel, Esq.—Dear Sir: I have been informed that you left the key of No. 507 South Broadway at my office. I beg to notify you that I refuse to accept the key and that it is still at my office at your risk and disposal. I also hereby notify you that we will hold you subject to all the covenants of the lease executed by you. Very truly yours, Bernard Wiesenfeld." The plaintiff not receiving a reply to the foregoing letter, a second letter, dated June 3, 1898, was written the defendant, as follows: "Henry Oldewurtel, Esq.—Dear Sir: I herein beg to notify you that I intend to make an effort to get a tenant for the premises known as No. 507 South Broadway, without abandoning any rights Mr. Miller and myself as executors and trustees may have against you as tenant under our lease to you for rent. In case we get a tenant we will allow you credit for such rent as we may collect, and hold you for the balance as due under your lease. Yours truly, Bernard Wiesenfeld." Subsequently a sign was put in the window of the premises that the property was for rent, and it was rented from time to time, and the defendant credited with the rent to the date of the expiration of the lease. The plaintiffs testified that they refused to accept a surrender of the premises, never made any alteration of the original lease by a subsequent agreement, and never ousted the defendant from the premises, and that necessary repairs were made to the property. The defendant, on the other hand, testified that he vacated the property because it had been condemned by the building inspector of Baltimore, and was not tenantable, and he notified the clerk when he paid the rent that he would no longer be liable under the lease. There was other evidence in the case, but, as the material facts

are not disputed, and have been heretofore stated, it will not be necessary to further set them out. At the trial below the court granted the two prayers offered on the part of the plaintiff, and rejected those presented by the defendant, except the fifth. It also granted the plaintiff's special exception to the defendant's first prayer that there was no legally sufficient evidence to show that the terms of the lease were ever modified by any legally binding agreement. The whole case was presented on the prayers and the special exception, and we shall proceed to consider them.

The prayers on the part of the plaintiff were demurrers to the evidence, and were to the effect that, as a matter of law, there was no legally sufficient evidence of the acceptance of a surrender or of an ouster by the plaintiff. The general rule is well settled that, to constitute a valid surrender of rented premises by a tenant during the term, there must be the assent of both parties to the rescinding of the contract of renting, and such assent may be expressed or implied from such acts as would reasonably indicate that the parties have agreed that the tenant shall abandon the premises, and the landlord assume its possession. *Biggs v. Stueler*, 93 Md. 110, 48 Atl. 727. The appellant admits that the defendant returned the key before the expiration of the lease. It was not accepted, and therefore up to this time no surrender took place. It is further conceded that the plaintiff had a right to enter for the purpose of taking care of the property, of repairing the premises, and to put a "for rent sign" in the window. But it is earnestly urged that the re-renting of the property for the benefit of the tenant without his assent was an acceptance of a surrender, an ouster of the tenant, and released him from liability for rent under the lease. There are some authorities to the effect that a re-entry and re-letting of abandoned premises by the landlord without the consent of the tenant would create a surrender by operation of law. *Underhill v. Collins*, 182 N. Y. 271, 30 N. E. 576; *Gray v. Kaufman*, 162 N. Y. 388, 56 N. E. 903, 49 L. R. A. 590, 76 Am. St. Rep. 327; *Day v. Watson*, 8 Mich. 535; *Rice v. Dudley*, 65 Ala. 68. The best approved cases, however, assert the contrary doctrine, and hold that, where a tenant repudiates the lease, and abandons the demised premises, and the lessor enters and relets the property, such re-renting does not relieve the tenant from the payment of the rent under the covenants of the lease. *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *Meyer v. Smith*, 33 Ark. 627; *Bloomer v. Merrill*, 1 Daly, 485; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; *Rich v. Doyenn*, 85 Hun, 510, 33 N. Y. Supp. 841; *Alsup v. Banks*, 68 Miss. 664, 9 South. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294. In *Biggs v. Stueler*, 93 Md. 111, 48 Atl. 727, this court said the acts upon which the appellee in this case relies to prove a surrender are the ac-

ceptance of the keys by the appellee, the repairs to the house, and the reletting. But those are insufficient of themselves to show acceptance, unless, under all the circumstances, they are of such a character as to show a purpose on the part of the tenant to vacate and on the part of the landlord to resume possession, to the exclusion of the tenant. In the case now under consideration all of the acts of the lessor, including the letters of June 2d and 8d, clearly show that the appellees did not intend to accept a surrender of the property, and to release the tenant from his liability for rent. On the contrary, the letters distinctly state the property would be rented subject to the covenants of the lease, and, if a tenant could be secured, and rent collected, the lessee would be credited therewith, and be liable for the difference. The case of *Biggs v. Stueler*, supra, is also relied upon by the appellant to sustain the proposition urged by him that the assent of the tenant is absolutely necessary before the landlord can relet demised premises. In that case there was a statement that would seem to sustain the appellant's contention, but an examination of the whole case will clearly show that the case cannot be given such a construction. It was not necessary for the decision of the case, and would not be in accord with the conclusion reached by the court, under the facts of the case.

As to the rulings of the court on the first and second exceptions upon the admissibility of evidence but little need be said, as the evidence was afterwards admitted, and the defendant was not injured thereby.

The plaintiff's special exception to the defendant's first prayer was properly sustained. There was no evidence legally sufficient to show that the terms of the lease had been modified by an oral agreement, and what was said by us on the demurrer to the declaration disposes of this question.

For the reasons we have given, the defendant's prayers were properly rejected, and, as the correctness of the court's rulings on the plaintiff's prayers established the right of the plaintiff to recover, the judgment will be affirmed. Judgment affirmed, with costs.

HORNER v. PLUMLEY et al.

(Court of Appeals of Maryland. April 22, 1903.)

FILING PLEAS—DISCRETION OF COURT—MOTION NE RECIPIATUR—ACTION EX CONTRACTU—VERDICT AGAINST PART OF DEFENDANTS—DENIAL BY AFFIDAVIT TO PLEA—OBJECTION TO EVIDENCE—ACTION ON NOTE—EVIDENCE.

1. Under Baltimore City Charter, § 312 (Acts 1898, p. 392, c. 123), providing that the court, for good cause shown, may extend time for filing pleas, granting leave to file is in the discretion of the court, and is not the subject of appeal.

2. A motion ne recipiatur, if regarded as one not to receive pleas, is inappropriate where the pleas have been already received and filed,

and, if regarded as one to strike out the pleas, is also inappropriate; the proper course being to move to rescind the order granting leave to file them, and to strike out the pleas.

3. Granting leave to file pleas being in the discretion of the court, refusal to rescind the order and to strike them out is also in its discretion.

4. Under Code Pub. Gen. Laws, art. 50, § 12, providing that, in an action ex contractu against alleged joint debtors, plaintiff may recover as in actions ex delicto against such one or more of them as the evidence shows to be indebted to him, the verdict, in case of recovery against part only of defendants, should be for plaintiff against them, and for the others against plaintiff, and the judgment should conform thereto.

5. In an action on a note under Baltimore City Charter, § 312 (Acts 1898, p. 392, c. 123), denial of defendant's signature, made in the affidavit to the plea, is sufficient to require proof of execution, though the plea contains no denial.

6. Objection by counsel for the wife, in an action against P. and wife on a note, to its being offered in evidence till its execution is properly proven so far as Mrs. P.'s signature is concerned, because P.'s signature is not denied, is not a general objection, and the sustaining of it only excludes the note as evidence against her.

7. There is not sufficient evidence to entitle plaintiff to recover on a note, plaintiff not having read it to the jury, and they being without evidence to find that anything was due.

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by Albert N. Horner against Elvencedore Plumley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

William S. Bryan, Jr., and Charles F. Harley, for appellant. R. B. Tippet, for appellees.

PEARCE, J. Albert N. Horner, the plaintiff below, brought suit against Ira Plumley and Elvencedore Plumley, his wife, September 8, 1900, under section 312 of the charter of the city of Baltimore (being chapter 123, p. 392, of the Acts of 1898), upon 10 promissory notes, aggregating \$7,500, and purporting to be jointly executed by both defendants, but without witnesses to either signature. Within the time prescribed by section 312, joint general issue pleas were filed, with the required affidavit, made by the husband for himself and on behalf of his wife, setting forth that he was authorized to do so by her, and with the necessary certificate of counsel attached. On March 8, 1902, defendants' counsel, R. B. Tippet & Bro., struck out their appearance for Ira Plumley, and filed a petition for Mrs. Plumley, alleging that she never knew until that time the nature of the suit; that no copy of the declaration was ever delivered to her; that the pleas mentioned were filed by her husband without her knowledge or authority; that she never authorized or ratified these pleas, and never knew of their existence until a few days before filing the petition; and

she prayed leave to withdraw said pleas, and to file other pleas distinct from those of her husband. This petition was sworn to by Mrs. Plumley, and on the same day the court ordered the pleas filed on her behalf to be stricken out, and ordered her to plead anew to the declaration within one day. On the same day, Mrs. Plumley, through the same counsel, pleaded never indebted and never promised as alleged, and annexed to these pleas an affidavit conforming to the requirements of section 312, and specifically denying that any of the signatures to said notes, purporting to be hers, were written by her or by her authority, and accompanied said pleas and affidavit with the required certificate of counsel. On March 10th other counsel entered an appearance for the husband, and on March 13th plaintiff's counsel filed a motion ne recipiatur to the pleas of Mrs. Plumley; setting forth at great and unusual length 16 reasons why said pleas should not be received, and should be stricken from the files of the court. Some of these reasons alleged that the averments of Mrs. Plumley's petition were false in fact, and affidavits and counter affidavits of several persons were filed in support of and against said motion. Upon consideration of these matters, the court sustained the motion ne recipiatur, but ordered the original pleas first filed to remain in the case, with leave to Mrs. Plumley to file other pleas. Thereupon a second and more detailed petition was filed by Mrs. Plumley, asking that the original pleas in her behalf be stricken out, and that she be granted leave to plead within two days. The court then passed an order in writing striking out the original pleas in behalf of Mrs. Plumley, and extending the time for her to plead until May 18, 1902. She then renewed the pleas, affidavit, and certificate filed under her first petition, and the plaintiff renewed his motion ne recipiatur, which was overruled by the court, whereupon issues were joined on the pleas, and a jury was sworn as to both defendants, and a trial was had, resulting in a verdict and judgment for both defendants, under instructions from the court.

Sixteen exceptions were taken by the plaintiff. The first was to the action of the court in granting leave to file a new petition for leave to file new pleas setting up the defense of forgery, and the second to the order granting leave to file such new pleas. These may be considered together. Section 312 of the charter, under which this suit was brought, provides that "the court, for good cause shown, may by its order in writing, passed at any time before judgment, extend the time for filing such pleas and affidavits, which extension shall suspend until the expiration thereof, the plaintiff's right to enter judgment under this section." This section was originally taken from the practice act (chapter 184, p. 307, of 1896), which was considered in *Gemmell v. Davis*, 71 Md. 465, 18

Atl. 955; and the section, as now incorporated in the charter, was considered in *Griffith v. Adams* (decided in this court April 2, 1902) 52 Atl. 66. It is sufficient to say that, the leave being within the discretion of the court, its action is not the subject of appeal; but we may properly add that in this case we think the discretion was wisely and reasonably exercised to promote the purposes of justice, in permitting a meritorious defense to be presented to the jury.

The third exception was to the action of the court in overruling the motion ne recipiatur. If regarded exclusively as a motion not to receive the pleas, it was inappropriate and ineffective, as the pleas were already received and filed, and this motion "is presumably made before a plea is filed and made part of the record." *Spencer v. Patten*, 84 Md. 423, 35 Atl. 1098. Viewed in that light, it was therefore properly overruled. If, on the other hand, it be regarded merely as a motion to strike out these pleas, it was equally inappropriate and ineffective—inappropriate because, leave having been granted to file these pleas by the written order of the court, the proper course would have been to move to rescind the order granting leave, and to strike out the pleas; and ineffective, even in the latter form, because the rescission of the order and the striking out of the pleas were matters as much within the discretion of the court as was the granting of leave to file them.

At the trial, Ira Plumley was sworn by the plaintiff as a witness, and, being on the stand, but before testifying, he was handed one of the notes sued on, and plaintiff's counsel said, "I now offer in evidence the promissory note referred to in the seventh count of the declaration, and filed in this case," to which counsel for defendant Mrs. Plumley replied, "I object to the note being offered in evidence until its execution is properly proven so far as Mrs. Plumley's signature is concerned, because the signature of Mr. Plumley is not denied. None of the notes are in evidence." The court then asked if plaintiff's counsel proposed to prove the signature of the maker, to which he replied that he declined to prove any signatures, whereupon the court sustained the objection to the offer of this note in evidence. The fourth exception was taken to this ruling. The witness being still on the stand, plaintiff's counsel again handed him the same note, and asked him to state where he got it, but this question was objected to unless followed up by proof of execution by Mrs. Plumley, and this objection was sustained by the court; and the fifth exception was taken to this ruling. The sixth was to the refusal to allow the witness to state whether the note was purchased in good faith, unless followed up by proof of execution by Mrs. Plumley; and the remaining exceptions, down to and including the fourteenth, were to the exclusion of similar questions relating to the value given,

the existence of credits, and the circumstances under which the note was acquired, unless in each case assurance were given that it would be followed by proof of execution by Mrs. Plumley, which plaintiff declined to give. The plaintiff's case was then closed, no testimony whatever having been received; and the court instructed the jury that there was no evidence legally sufficient to warrant a recovery against Mrs. Plumley, to which ruling the fifteenth exception was taken. Defendants' counsel then said to the court, "We are now prepared to go to trial on the issues as to Mr. Plumley," to which plaintiff's counsel replied, "We have produced all our testimony." Defendants' counsel then said, "We offer the same prayer as to Mr. Plumley, and desire it noted that the plaintiff has been invited to offer proof." The record then states that counsel for plaintiff did not read, or offer to read, the promissory notes to the jury, as against Mr. Plumley, whereupon the court directed the jury that there was no evidence legally sufficient to entitle the plaintiff to recover as against him, and verdict and judgment were accordingly entered for both defendants.

Section 12 of article 50 of the Code of Public General Laws provides that, in suits brought against alleged joint debtors in actions *ex contractu*, the plaintiff "shall be entitled to recover as in actions *ex delicto*, against such one or more of the defendants as shall be shown by the evidence to be indebted to him; and judgment shall be rendered in his favor against such one or more of said defendants, as fully as if the defendant or defendants against whom he shall fail to establish his claim had not been joined in the suit." Though it is not here specifically provided how the verdict shall be rendered, and the judgment entered thereon, in event of recovery against some and failure to recover against others, it necessarily results that the verdict must be rendered for the plaintiff as against some of the defendants, and for the other defendants against the plaintiff, and that the judgment on such verdict must conform thereto, since otherwise the verdict and judgment would not determine, to the full extent, the issues joined between the parties. We have not been able to discover any decided case under this section of the Code, but this practice is clearly indicated by analogy in the case of *Edelen v. Thompson*, 2 Har. & G. 31, and by the practice in actions *ex delicto* generally. Here we have only two defendants, jointly bound, if bound at all, one of whom admits his signature, while his codefendant denies hers, so that if this case is to be governed exclusively by the requirements of section 312 of the charter of Baltimore City, without invoking also the provisions of article 75, § 23, subsec. 108 [Code Pub. Gen. Laws], as contended by the appellee Mrs. Plumley, the note offered in evidence was not admissible, as against her,

without proof of execution by her, but was admissible as against Mr. Plumley without proof of his signature; that being conclusively admitted, as matter of law, because not denied either in the next succeeding plea, as required by article 75, § 23, subsec. 108, if that were applicable, or in the affidavit to the plea, as allowed by section 312 of the charter, if that is to control this case.

It will conduce to brevity, as well as to clearness, to consider the liability of Mr. and Mrs. Plumley as if they could have been and were separately sued; and, so considered, it is, of course, clear that the view taken by the court as to Mrs. Plumley, was that, under her pleadings, the plaintiff was required to prove the execution of the note by her before it could be received or be offered in evidence, or before any evidence whatever relating to said note could be received as against her; and this view, we think, was correct. When this case was argued the question was an open one, but it has since been held, in the *Farmers' & Mechanics' Nat. Bank of Westminster v. Hunter* (decided April 1, 1903) 54 Atl. 650, in a similar case, arising under the local practice act of Carroll county, that a denial of defendant's signature, made in the affidavit annexed to the plea, is a sufficient denial to require proof of execution from the plaintiff, though the plea itself contained no denial, and that the procedure provided by that practice act was complete in itself, and exclusive of article 75, § 23, subsec. 108. The practice act of Carroll county will be found to be identical with section 312 of the charter in every provision material to this case, and is almost identical in language. Without, therefore, repeating the views expressed in the case above mentioned, we refer to them as conclusively establishing that the note offered in evidence was not admissible as against Mrs. Plumley without proof of its execution by her; and it follows, without further consideration, that all the rulings of the court upon the evidence, so far as it could affect Mrs. Plumley, and its ruling upon the prayer directing the jury that there was no evidence legally sufficient to entitle the plaintiff to recover as against Mrs. Plumley, were correct.

Coming now to the admissibility of the note offered in evidence as against Mr. Plumley, and of the subsequent questions relating thereto, the situation is altogether different. His signature, having been nowhere denied in the record, must, in the language of section 312 of the charter, "be deemed to be admitted for the purposes of said cause," and this admission dispenses with proof of execution by him. The note was therefore admissible against him without any proof, as were also the various questions embraced in the exceptions from the fifth to the fourteenth, inclusive. It is true that, "where proof is offered generally, the party offering it is not required to declare the purposes specially for

which it is offered, and it would be error to reject it if admissible for any purpose under the pleadings, and that where evidence is offered for several purposes, and it is admissible for any one of them, a general objection will not be sustained." Byers v. Horner, 47 Md. 23. In the case before us the note was offered generally, to prove the case against both defendants, though only admissible under the pleadings to establish the liability of one; and if the objection thereto could be fairly held to be a general one, and its exclusion by the court to be a total exclusion, we should be constrained to hold there was error in such ruling. But we do not think the objection can be fairly so held, in view of the qualified language restricting the effect of the objection to Mrs. Plumley's liability. The ruling of the court should be viewed in its relation to the character and extent of the objection, and ought not to be given a wider effect by the appellate court than was designed by the objection, unless it clearly appears that the trial court gave it such wider effect to the prejudice of the appellant. So viewed, we cannot regard the exclusion of the note as total. We think the ruling of the court only excluded it as evidence against Mrs. Plumley, and that, under that ruling, plaintiff was at liberty to read to the jury, as evidence against Mr. Plumley, not only that particular note, but any one of the 10 notes sued on—none of the signatures thereto being denied—and also that the rulings upon the various questions relating to said notes operated only to exclude these questions as against Mrs. Plumley. There was therefore no error in any of these rulings.

This brings us to the ruling on the prayer instructing the jury that there was no evidence legally sufficient to entitle the plaintiff to recover as against Mr. Plumley. The plaintiff closed his case without reading to the jury the particular note referred to in the fourth exception, which we have said he was at liberty to put in evidence under that ruling, and without offering to read any of the notes declared on, although under that ruling he could have offered all these notes. The jury knew nothing whatever about these alleged notes—neither the amounts alleged to be secured thereby, nor when such amounts were due and payable. They did not even know that they were obligations for the payment of money, and they were absolutely without evidence from which to find that anything whatever was due from Mr. Plumley to the plaintiff. It does not appear why this course was pursued by the plaintiff, but it does appear that it was not inadvertent, because, after closing his case, when invited by Mrs. Plumley's counsel to proceed with the issues as to Mr. Plumley, he declined to proceed further, saying, "We have produced all our testimony."

In this situation, the court was clearly cor-

rect in its ruling on the prayer as to the right of recovery against Mr. Plumley.

Judgment affirmed, with costs above and below.

WHITE et al. v. SHAFFER.

FOCKE et al. v. SAME.

(Court of Appeals of Maryland. April 22, 1903.)

REFORMATION OF INSTRUMENTS—BILL—SUFFICIENCY—PARTIES—LACHES—RELIEF TO PERSONS OPPOSING REFORMATION.

1. A bill to reform a deed which avers that by mutual mistake it failed to express the true intention of the parties as to the location of a roadway therein reserved, and which, in addition, expressly avers what was the real intention as to the location of the road, is sufficient.

2. An owner of a lot deeded the same to one of the defendants, expressly reserving a roadway for the use of herself, her heirs, and assigns. By mistake the location of the roadway was improperly stated in the deed. Later the grantor conveyed another lot to plaintiff, and, as appurtenant thereto, the use of the roadway. Held, that the grantee in the later deed could sue to reform the first deed.

3. A bill for the reformation of a deed for mistake in the description of a roadway reserved, which set up that plaintiff delayed filing the bill in "the hope and belief" of the success of overtures for an amicable adjustment of the controversy repeatedly made by her to the defendants, and not definitely rejected by them until shortly before the bill was filed, and, further, that the status of the roadbed had continued to be such that the defendant had not, in fact, been prejudiced by the delay, is sufficient, prima facie, to rebut the presumption of laches.

4. Mortgagees of land, with constructive notice of the intention of the parties to the deed to the mortgagor to convey the land subject to a roadway, are entitled to be protected from any loss arising from a reformation of the deed so as to change the location of the roadway.

Appeal from Circuit Court, Baltimore County, in Equity; David Fowler and N. Charles Burke, Judges.

Bill to reform a deed, brought by Martha Porter Shaffer against Mary Carter White and husband and against Maria L. Focke and others. Demurrers overruled, and defendants, as above named, separately appeal. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

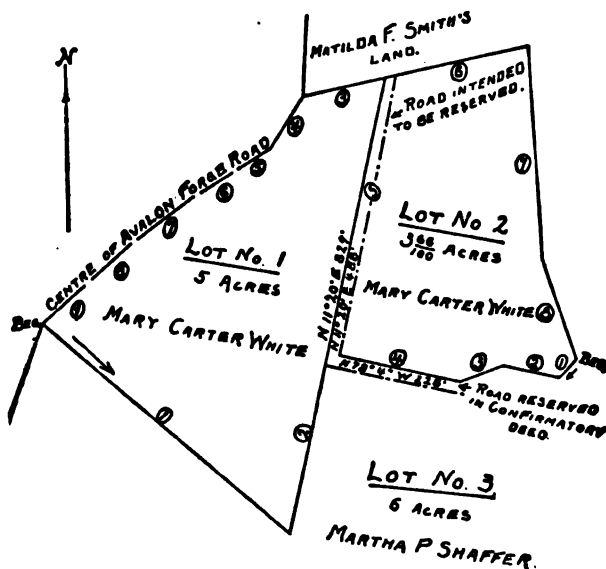
Shirley Carter and Richard M. Duvall, for appellants. Osborne L. Yellott and Forest Bramble, for appellee.

SCHMUCKER, J. The appeal in this case is from an order of the circuit court for Baltimore county overruling the demurrers of the appellants to an amended bill in equity filed by the appellee as plaintiff below. The question, therefore, presented for our consideration, is whether the amended bill, admitting those of its allegations which are well pleaded to be true, presents a case entitling the plaintiff to relief.

The substantial allegations of the bill are as follows:

Matilda F. Smith, being the owner of a valuable tract of land in Baltimore county, subdivided it, for purposes of sale, into a number of smaller lots. Three of these lots, which, for convenience, will be designated as Nos. 1, 2, and 3, lie adjacent to each other, east of the Avalon Forge road, in the relative positions indicated on the following plat:

the said Matilda Frances Smith her heirs and assigns of a road 16½ feet wide to be forever kept open for the benefit of the said Matilda Frances Smith her heirs and assigns and lying to the east and bounding on the fifth line of the lot now intended to be conveyed"; said fifth line being the north, 11 deg. east, 488 feet, line, of the description contained in the deed, which was the dividing line between lots 1 and 2, and such reservation was



Mrs. Smith, having thus subdivided her land, sold and conveyed lot No. 1 to the appellant A. Robinson White on August 22, 1889, and he granted and conveyed it to his wife, Mary Carter White, on March 4, 1890. Mrs. White, having acquired lot No. 1, desired also to secure lot No. 2, and made application to Mrs. Smith for its purchase; but, as a sale of lot No. 2 in its entirety would have resulted in cutting off access from lot No. 3 northerly to the Avalon Forge road through other lands owned by Mrs. Smith lying north of lots 1 and 2, she refused to sell the latter lot without the reservation of a roadway through it along its western boundary from her lands on the north to her lot No. 3 on the south. Mrs. White and her husband then agreed to the reservation out of lot No. 2 of a roadway as aforesaid, and purchased the lot upon those terms, and on May 15, 1891, took a deed therefor from Mrs. Smith, in which the road was expressly reserved. In view of the reservation of this road, it was agreed between the parties to the deed that Mrs. White should not pay for the ground embraced in the roadbed, and in pursuance of said agreement the area of lot No. 2, as purchased by her, was computed at 3.06 acres; that being exclusive of the bed of the road. In the deed from Mrs. Smith to Mrs. White of lot No. 2, the grant was therefore made "subject however to the use by

in exact accord with the intention of both parties to the deed. After the acquisition by Mrs. White of lots 1 and 2, she requested of Mrs. Smith, who had not then sold lot No. 3, for the benefit of which the said road had been reserved, permission to extend the fences on the north and south sides of lot No. 2 across the ends of the roadway, in order to save Mrs. White the expense of building a line fence along the eastern side of the road; that Mrs. Smith granted the permission, thus asked of her, with the understanding that the fences across the roadway should be removed whenever she might sell lot No. 3, or might otherwise have need for the use of the road, and that the appellants extended their fences across the right of way with the understanding aforesaid. Sometime after the execution of the deed to Mrs. White of lot No. 2, the appellant discovered that it contained some slight errors in the description of the lot; and A. Robinson White acting on behalf of his wife, presented to Mrs. Smith what purported to be a confirmatory deed from her to Mrs. White of lot No. 2, and asked her to execute it; stating that its purpose was to correct some slight errors in the description contained in the original deed, but saying nothing whatever in reference to the use of the road as reserved in the original deed. Mrs. Smith, having full confidence in Mr. White, who was and for sometime had

been her confidential agent and broker in the sale of portions of her real estate, and being herself ignorant of the significance of the terms used in the description of lands by metes and bounds, and trusting in the honor and integrity of Mr. White, executed the confirmatory deed without seeking further advice on the subject.

It is to be observed, in connection with the allegations of the bill thus far mentioned, that an examination of the original and confirmatory deeds of lot No. 2, copies of which are filed with the bill as exhibits, discloses the fact that the description of the lot is substantially the same in both instruments; the difference being that in the original deed the fifth line of the description is said to coincide with the ninth line of the deed from Mrs. Smith to Mr. White of lot No. 1, and in the confirmatory deed the fifth line is said to coincide with the second line of that lot. The confirmatory deed, however, differs materially from the original one, in that it locates the roadway reserved to the grantor not inside of the lot along its fifth line, where it would run north and south, and connect lot No. 3 with the grantor's other lands, but makes it run east and west along the fourth line of the deed, and outside of the lot, where it would serve no intelligible purpose. This reserved road, as located along the dividing line between lots 1 and 2, where the bill alleges that it was intended to be placed, would be highly beneficial, although perhaps not essential to the use and enjoyment of lot No. 3, which the grantor retained; but, so far as the record shows, it would have been of no advantage whatever to her where the confirmatory deed located it. It is further to be observed that, although the confirmatory deed changes both the location and direction of the road, it does not recite or mention any purpose to make those changes. It simply recites as the reason for its execution that the "parcel of land" conveyed by the original deed had been "erroneously described" therein, and that the new deed is made for the purpose of "correcting said error" and "confirming said deed." The bill distinctly alleges that the recital in the confirmatory deed of the reservation of the road "as being of a road to the west and along the fourth or north, 78 degrees 40 minutes west, 220 feet, line of said deed, was a mistake, and was meant by both parties to said deed to be to the east, and along the fifth line of said description." The bill further alleges that on September 20, 1894, after the execution of the several deeds to Mrs. White for lots Nos. 1 and 2, Mrs. Smith sold and conveyed, with covenant of special warranty, to the appellee Martha Porter Shaffer, lot No. 3, together with the use and benefit of the 16½-foot roadway reserved or intended to be reserved in the confirmatory deed to Mrs. White; that at the time of such purchase by the appellee she had an agreement with her grantor, Mrs.

Smith, that she should have an additional right of way, over Mrs. Smith's land there situate, from the northern terminus of the way reserved over Mrs. White's lot No. 2 out to the Avalon Forge road; that the appellee, believing the title to lot No. 3 and the said rights of way so purchased from Mrs. Smith to be good, paid part of the purchase money therefor, and proceeded with the erection of a house upon the lot, before the completion of an examination of its title; after the house had been partially erected, the facts already mentioned touching the several deeds to Mrs. White of lot No. 2 were brought to light in the course of the examination of the title; that those facts were brought to the attention of Mrs. Smith, who, in view of the errors in the said deeds to Mrs. White, was unable to execute to the appellee a deed with an absolute right to use such road as located in the original deed to Mrs. White of lot No. 2, but agreed to execute, and subsequently, on September 4, 1894, did execute, to the appellee, a deed for lot No. 3, together with the use of the roadway reserved or intended to be reserved in the confirmatory deed to Mrs. White of lot No. 2, whereupon the appellee paid to Mrs. Smith the balance of the purchase money for lot No. 3; that since the receipt of her said deed the appellee has demanded of the appellants, and particularly of Mrs. White, that they remove their fences erected as aforesaid across said roadway, and has proffered and tendered to them a correct confirmatory deed of lot No. 2, properly executed by Mrs. Smith, but that they have refused to accept such deed, or to remove their said fences, or to permit the appellee to use the said roadway as intended to be reserved. The bill then explains the apparent delay of the appellee in instituting her suit, by averring that, since the discovery by her of the errors of description in the deeds to Mrs. White, she has frequently made to her and her husband offers and suggestions looking toward an amicable settlement of the differences between them, without getting a decided or final rejection of those offers until shortly before filing her bill, and that she had delayed filing the bill in the "hope and belief" that the said appellants, who were her neighbors, and on good terms with her in respect to other matters, would agree amicably to the correction of the said confirmatory deed. And it further alleges that the appellants have not been prejudiced by the delay in filing the bill, as the bed of the said right of way has been used by them merely for farming purposes, and no buildings or improvements have been erected thereon. The bill also avers that the appellants Maria L. Lamina F., and Emelia G. Focke, who hold a mortgage from Mr. and Mrs. White for \$1,200 on lot No. 2, will not be prejudiced by the reformation asked for, as the lot is assessed for taxes at \$3,599, and is in fact worth \$4,000, and, further, that the appellee has offer-

ed to give the said mortgagees a good and sufficient bond, in such penalty as they might require, to indemnify them against any possible shortage in the future foreclosure of their mortgage, if they would interpose no objection to the granting of the relief asked for by the bill, and has also offered to pay the mortgagees the full amount of the mortgage, and take an assignment of it without recourse, and also pay them such additional sum as they might lose by giving up their investment, but they declined to accept any of such offers. The appellee also tenders herself ready to indemnify the mortgagees in any reasonable manner against loss to them by reason of granting the relief for which she asks, and to have conditions to that effect inserted in the decree which may be passed.

The prayers of the bill are that the confirmatory deed of lot No. 2 from Mrs. Smith to Mrs. White may be so reformed as to accord with the true intention of the parties thereto, by substituting in the clause reserving the right of way the words "and lying to the east and binding on the fifth line," in lieu of the words "and lying to the west and binding on the fourth line," and for further relief.

Mrs. Smith was a coplaintiff with the appellee in the bill as originally filed. The defendants having demurred to that bill, the court sustained the demurrer on the ground of the misjoinder of Mrs. Smith, but granted leave to the appellee to amend the bill by striking out her name as a plaintiff and making certain changes in its allegations, which was accordingly done; thus producing the amended bill which is now under consideration.

We think the learned judges below were right in overruling the demurrer to this bill. It is true that portions of the bill are somewhat obscure, but the substantial facts upon which the plaintiffs' right to relief must rest are stated with sufficient clearness. The original deed from Mrs. Smith to Mrs. White for lot No. 2 reserves on its face to the grantor and those claiming under her "a road sixteen and a half feet wide," and "lying to the east and binding on the fifth line of the lot." The bill alleges that it was the intention of both parties to the deed that this road should be reserved, and should run along the dividing line between lots Nos. 1 and 2. It is true that in the original deed the fifth line of the description was erroneously said to coincide with the ninth line of lot No. 1; but in the confirmatory deed that error of description is corrected, and the fifth line of lot No. 2 is there declared to coincide with the second line of lot No. 1; thus placing it, by the deed under which Mrs. White now claims title, along the division line between the two lots. Again, the bill distinctly alleges that the recital in the confirmatory deed of the location of the road

intended to be reserved as being to the west of and along the fourth (or north, 78 degrees 40 minutes, 220 feet) line of said deed, "was a mistake, and was meant by both parties to said deed to be to the east of and along the fifth line of said description." We find, therefore, in the bill, not only an allegation that through a mutual mistake the confirmatory deed, which it is asked to have reformed, failed to express the true intention of the parties to it as to the location of the road therein reserved, but also a distinct allegation of what was the real intention of both parties to the deed as to the location of the road. The authorities agree that under such circumstances a court of equity will correct and reform a deed so as to make it conform to the true intention of the parties. *Tyson v. Tyson*, 31 Md. 134; *Cooke v. Husbands*, 11 Md. 492; *Showman v. Miller*, 6 Md. 479; *Bond v. Dorsey*, 65 Md. 310, 4 Atl. 279; *Boulden et al. v. Wood* (not yet officially reported) 53 Atl. 911.

Nor do we regard as tenable the position, so ably contended for in argument by the counsel for the appellants, that the appellee has not, in her bill, alleged the possession of such substantial interest in the subject-matter of the suit as to entitle her to be heard in reference to it. She does not appear before the court as the assignee of a mere right of action. The deed to her of lot No. 3 from Mrs. Smith expressly conveys, as appurtenant to the lot, the use of the road or right of way reserved or intended to be reserved by Mrs. Smith in her confirmatory deed to Mrs. White of lot No. 2. Now, both of the deeds of that lot to Mrs. White, on their face, grant the lot subject to a road to be left open for the use of Mrs. Smith and her assigns. The dispute alleged in the bill is not as to the intention of the parties to the deeds that the road should be reserved, or as to the dimensions of the road. It is as to its location. The right of way acquired by the appellee from Mrs. Smith, under the circumstances set up in the bill, was, therefore, more than a mere right of action. It constituted such a substantial interest in the road itself as to give her standing to maintain the suit, if in other respects her title to relief is good. The right to file the bill is incidental to the conveyance of the lot with the use of the road. *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498; *Dickinson v. Burrell*, L. R. 1 Eq. 337; *McMahon v. Allen*, 35 N. Y. 403; *Bradshaw v. Atkins*, 110 Ill. 323; *Baker v. Pyatt*, 108 Ind. 62, 9 N. E. 112; *May v. Adams*, 58 Vt. 74, 3 Atl. 187; *Grossbach v. Brown*, 72 Wis. 458, 40 N. W. 494; *Schultz v. Keener*, 87 Ind. 258. In *Haslett v. Stephany*, supra, the owner of a parcel of land divided it into six lots for purposes of sale, with the intention of running an alley across the rear of the six lots for their common use. He sold to the person under whom the plaintiff claimed one of

the lots, reserving in the deed the alleyway over it, but, through inadvertence, inserted therein no grant of the way over the other lots. He afterwards sold the other five lots, but, through mistake, omitted from the deed conveying them the reservation of the alleyway over them. The plaintiff was held entitled to a reformation of his deed as against the purchasers of the other lots, so as to give him the right of the alleyway over these lots. It was there held that the purchasers of the five lots had notice from the recording of the deed for the plaintiff's lot of the existence of the alleyway. And in *Grossbach v. Brown*, supra, a deed which granted a roadway, but erroneously described and located the way, was reformed on the bill of the grantee against a party claiming title to the land over which the way passed, under a deed made after the recording of the deed, which erroneously described and located the way.

The allegations of the bill in the present case explanatory of the delay in filing it might be more specific than they are, but we regard them as sufficient to afford a prima facie rebuttal of the presumption of laches on the part of the appellee in asserting her rights. These allegations, in substance, are that she delayed filing the bill in "the hope and belief" of the success of overtures for an amicable adjustment of the controversy, which she asserts were repeatedly made by her to the defendants, and not definitely rejected by them until shortly before the bill was filed, and, further, that the status of the roadbed had continued to be such that the appellants had not in fact been prejudiced by the delay in filing the bill. Those of the appellants who hold the mortgage on the lots of land through which the appellee claims the right of way had constructive notice from the contents of the deeds to Mrs. White, which were recorded and are referred to in the mortgage, of the fact that the intention of the parties to those deeds was to convey the land subject to a roadway; but the mortgages are entitled to be protected in the decree, if one should ultimately be passed in favor of the plaintiff, from any loss arising from the reformation of the deed so as to change the location of the road. The plaintiff, in her bill, tenders herself ready to submit to and perform any such terms and conditions in that respect as the court may put upon her by the decree. It does not yet appear whether the appellee will ultimately be entitled to the relief for which she asks, when the appellants have answered and testimony has been taken; but the allegations of the bill, and the contents of the exhibits filed with it, are, in our judgment, sufficient to require answers from the appellants.

The order appealed from will be affirmed, and the case remanded for further proceedings. Order affirmed, with costs, and case remanded for further proceedings.

BALTIMORE & O. R. CO. v. STUMPF.

(Court of Appeals of Maryland. April 1, 1903.)

RAILROADS—INJURIES AT CROSSING—GATES—FAILURE TO OPERATE—DUTY TO STOP—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.

1. An instruction that, if the crossing over defendant's tracks was a grade crossing, it was defendant's duty, under a city ordinance, to maintain safety gates, and keep the same closed on the approach of every train, and if such gates were maintained, but were open on the approach of a train, and plaintiff was struck and injured thereby while crossing the track, and if the gates had been closed the accident could have been avoided, then there was a want of ordinary care on defendant's part, was not objectionable as excluding the question of contributory negligence.

2. The instruction was not objectionable as ignoring the causal connection between the violation of the ordinance and the happening of the accident.

3. In an action against a railroad for injuries at a crossing, the burden was on defendant to show that plaintiff was guilty of negligence, and that such negligence directly contributed to the injury.

4. A requested instruction that, in order for plaintiff to recover for injuries at a railroad crossing, it was not sufficient for him to show a possibility that the accident was caused by defendant's negligence, but he must convince the jury that the accident was more likely to have been directly caused by defendant's negligence, without negligence on the part of plaintiff directly contributing thereto, than that there was such negligence of plaintiff directly contributing to cause the accident, was properly refused as imposing on plaintiff the burden of proving the absence of contributory negligence.

5. Where plaintiff was injured at a grade crossing in a city by reason of defendant's failure to close safety gates maintained at the crossing, and, though plaintiff looked and listened before crossing the track, his view of the track on which he was struck was obstructed by cars standing on intervening tracks, and the train by which he was struck approached without sound, sign, or warning of any character, plaintiff was not guilty of contributory negligence in failing to stop before attempting to cross the track.

6. Where defendant railroad company maintained safety gates at a grade crossing in a city, at which plaintiff was injured by defendant's failure to have the gates closed while the train which struck plaintiff was traveling over the crossing, requested instructions as to plaintiff's duty to stop, look, and listen before going on the track, and to know whether a train was coming, which ignored the implied assurance of safety from the open gates, were properly refused.

7. A requested instruction that plaintiff could not recover for injuries at a grade crossing if at the time he drove on the track "he knew that he was unable to tell" whether a train was coming or not, but relied absolutely on the open gates and the watchman's absence, was erroneous, as substituting actual knowledge that no train was approaching for due care to ascertain such fact, as the test of plaintiff's right to recover.

Appeal from Baltimore Court of Common Pleas; Henry D. Harlan, Judge.

Action for personal injuries by Frederick Stumpf against the Baltimore & Ohio Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff's fourth prayer, and defendant's first, sixth, and seventh prayers, referred to in the opinion, are as follows:

Plaintiff's fourth prayer: "In order to defeat a recovery in this suit on the ground of contributory negligence on the part of the plaintiff, the burden of proof is upon the defendant to show that the plaintiff was guilty of negligence, and that such negligence on his part directly contributed to produce the injury."

Defendant's first prayer: "It is not sufficient, in order to recover, that the plaintiff should show a possibility that the accident was caused by the defendant's negligence, but the plaintiff, in order to recover, must convince the jury, by evidence, that the accident is more likely to have been directly caused by the negligence of the defendant, without negligence on the part of the plaintiff directly contributing thereto, than that there was such negligence of the plaintiff directly contributing to cause such accident."

Defendant's sixth prayer: "The court instructs the jury that if the plaintiff could, by stopping, looking, and listening before going on the defendant's track, have known of the approach of the train in time to have avoided the accident, and that the said plaintiff went upon the defendant's track without knowing whether a train was coming or not, and the accident happened for that reason, then the said plaintiff is not entitled to recover."

Defendant's seventh prayer: "Plaintiff cannot recover if at the time he drove upon the track he knew that he was unable to tell whether a train was coming or not, but relied absolutely upon the open gates and the watchman's absence."

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

W. Irvine Cross and Duncan K. Brent, for appellant. Wm. Colton and William S. Bryan, Jr., for appellee.

PEARCE, J. At the trial of this case two exceptions were taken by the defendant to the admission of evidence, but these were abandoned at the argument in this court, and the only remaining exception is to the ruling on the prayers.

On April 17, 1901, the plaintiff was driving a grocery wagon, drawn by a quiet horse, on Bayard street, in the city of Baltimore, at a point where the tracks of the Baltimore & Ohio Railroad cross said street at grade, and where safety gates are maintained by the railroad company as required by section 791 of the city charter (Laws 1898, p. 543, c. 123). There are four tracks at that point, and the plaintiff's view of trains approaching from the west was obstructed for about 600 feet from the crossing by a row of coal cars standing upon one of these tracks. He testified that as he drew near the cross-

ing he saw the safety gates were open, but he did not see the watchman; that he looked four times both ways, and saw no train or engine approaching, nor any smoke or other sign of an engine; that he listened, and heard no bell nor whistle, nor any sound of any approaching train, and kept on till he was on the crossing; that while crossing the second track he was struck by an express train coming from Washington, which he could not see or hear until just before it struck him, destroying his wagon and injuring him, for which the jury awarded him \$1,800.

The plaintiff offered four prayers all of which were granted, and the defendant offered seven, of which the second, third, and fourth were granted, and all the others were refused. The plaintiff's first and second prayers have been repeatedly sanctioned by this court where the case is allowed to go to the jury, and need not be again considered. But it was very earnestly argued that there was error in granting the plaintiff's prayers 1½ and 4, and in refusing the defendant's first, fifth, sixth, and seventh prayers.

By the plaintiff's first prayer, and by defendant's second, third, and fourth prayers, the finding of the two essential elements of recovery in any case of this character, namely, the negligence of defendant directly causing the injuries sustained, and the absence of negligence on the part of the plaintiff directly contributing thereto, was fully and fairly submitted to the jury.

The plaintiff's prayer 1½ told the jury that, if they found the crossing in question was a grade crossing, then, under the section of the charter offered in evidence, it was defendant's duty to maintain a safety gate at that point, and to keep the same closed on the approach of every train or locomotive until the same has fully passed, and if they found said gate was maintained, but was open, and not closed, on April 17, 1901, on the approach of a train and locomotive, and that plaintiff was struck and injured thereby while crossing said track, and that, if said gate had been closed on the approach and during the passage of said train, the accident could have been avoided, then there was a want of ordinary care on the part of the defendant, as mentioned in the plaintiff's first prayer. The defendant objects to this prayer, first, that it excludes the question of contributory negligence; and, second, that it ignores the causal connection between the violation of section 791 and the happening of the accident. The first objection might be valid if the prayer went to the right of recovery, but it does not so conclude. It merely declares that certain facts, if found by the jury, constitute want of ordinary care, and identifies that want of ordinary care as the same which must have caused the injury complained of, without any contribution thereto from any want of ordinary care on the part of the plaintiff. It can-

not be questioned that the violation of such a requirement is negligence, though not causing injury; and although the jury might find all the facts, under that instruction, which the court declared would establish want of ordinary care on the part of the defendant, yet they could not, either under that instruction alone, or in connection with the first prayer, to which it referred, find for the plaintiff, unless they also found he was not guilty of contributory negligence. Nor does it ignore the causal connection between the violation of section 791 and the happening of the accident. The criticism to that effect is a mere verbal criticism, upon which grammarians might differ; but to practical men, not concerned about nice discrimination in words, this expression could not be understood otherwise than as meaning that the accident would not have happened, and would not suggest any question of supervening negligence, as argued by defendant's counsel. This prayer is a nearly literal reproduction of the plaintiff's second prayer in *McDonnell's Case*, 43 Md. 537, and in approving it Judge Grason said, "The defendant was certainly guilty of negligence in so running its cars, if the jury believe from the evidence that the accident could have been avoided if the car had not been running at a greater speed than was allowable under the ordinance," and these words were used in reply to the exact argument made by counsel in the present case as to supervening negligence. We find no error in granting this prayer, which we think is quite within the ruling in *Stebbing's Case*, 62 Md. 517.

The plaintiff's fourth prayer, as to the burden of proving contributory negligence, is the same approved in *Hogeland's Case*, 66 Md. 162, 7 Atl. 105, 59 Am. Rep. 159, and there said to have been repeatedly sanctioned. A late and interesting consideration of this question is found in *Tucker v. State*, Use of Johnson, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181, where death resulted from a pistol shot fired in alleged necessary defense of defendant's servant. The court said on page 480, 89 Md., page 781, 43 Atl., 46 L. R. A. 181: "It has been held over and over again in this state that, if a suit is brought under this statute for the negligence of the defendant, the burden is on the plaintiff to prove the negligence, yet, if the plaintiff's testimony makes out a prima facie case of negligence, and does not disclose want of care on the part of the deceased, the burden is on the defendant to establish contributory negligence, if that is relied on. *Frech's Case*, 39 Md. 574; *Hauer's Case*, 60 Md. 462; *Steever's Case*, 70 Md. 75, 18 Atl. 1032; and many others that might be cited. So, although by the terms of the statute the plaintiff in such cases can only recover by proving that the death of the person was caused by the negligence or default of the defendant, the defendant has the burden cast on him to prove that the proximate cause of the injury

was the negligence of the deceased, and that, too, notwithstanding the plaintiff is required to prove, as part of his case, that the negligence of the deceased did not directly contribute to the injury. The latter may be satisfied by the presumption of due care, and the known and ordinary disposition of men to guard themselves against danger, when the plaintiff's testimony as to the accident does not show affirmatively that the deceased did directly contribute to the injury." In opposition to this clear and logical statement of the law upon this point, the defendant's counsel, in his brief, says: "It is the duty of the plaintiff to show how the accident happened, as proof that it was caused by the negligence of defendant. In doing this, he must necessarily negative the other possible explanations. The theory of pure accident, or the theory of plaintiff's negligence, original or contributory, are open as possible causes. He must show negligence of defendant as direct cause, and, in doing so, must negative negligence of the plaintiff." To sustain this argument he cites this passage from *Balt. Traction Co. v. Helms*, 84 Md. 525, 36 Atl. 119, 36 L. R. A. 215: "By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant, and the injury which followed, but he is bound also to establish by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of defendant's negligence." However that language might have been regarded if it stood apart from any qualifying language, and if that case had been the first in this court dealing with this rule, it is impossible to suppose that the learned and careful judge who delivered that opinion intended to overrule, without even mentioning, the various cases in which it had been held that the burden of proof in this regard is on the defendant; and it is perfectly apparent from the very next sentence in that opinion that the defendant's counsel in this case has misconceived the meaning of the language cited, for the court goes on to say, "The right to recover depends upon two distinct propositions of fact: First, the negligence of defendant; and, secondly, the exercise of due and ordinary care by the plaintiff; and if he fail to prove negligence on the part of the defendant, or if it appears from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover." In the face of all the authorities in this state, we cannot perceive how the correctness of this prayer can be seriously questioned.

The defendant's first prayer is an attempt to impose by ingenious indirection upon the plaintiff the burden of proving absence of contributory negligence, and is wholly irreconcilable with plaintiff's fourth prayer. The first three lines of defendant's first prayer assert an admitted proposition—that the neg-

ligence of defendant causing the injury must be a legitimate deduction or inference from established facts, and not a mere speculation or conjecture, which is never the equivalent of proof. But the prayer then proceeds to assert that the plaintiff must convince the jury by evidence that it is more likely that there was, than that there was not, contributory negligence on plaintiff's part; thus practically reversing the established rule as to the burden of proof upon this point, and permitting contributory negligence to be founded upon speculation or conjecture, while denying resort to this means for establishing defendant's negligence. This is not only unreasonable and without authority, but in direct disregard of *Geis' Case*, 31 Md. 367, 100 Am. Dec. 69, where a prayer in a case of this character was disapproved because it required "affirmative proof, as a condition to the right to recover, that the deceased did not by his own neglect or want of care contribute to the accident." These objections are fatal to this prayer.

The defendant's fifth prayer, which was refused, asked that the jury be instructed that the fact that the safety gates were open, and the gateman absent, did not in itself justify the plaintiff in going upon the track, but that it was his duty to stop, look, and listen before going on the track. As it is a conceded fact that the plaintiff did not stop, though he did look and listen, this prayer, if granted, would, in effect, have taken the case from the jury. This is the first case in this court in which it has been sought to apply the rule of stop, look, and listen, arbitrarily, to a case where safety gates required by law to be kept closed on the approach of a train, were open as the traveler approached the crossing, and we have given it careful consideration. It may be conceded unhesitatingly that the mere fact that such gates are open cannot alone, and in all cases, justify a traveler in going upon the track at the crossing, and that there are cases in which it may be the traveler's duty to make independent observation by stopping, as well as by looking and listening, before doing so. The case of *Pa. R. R. v. Pfuell*, 60 N. J. Law, 278, 37 Atl. 1100, is such a case. There the proof was that, though the gates were up as plaintiff approached, an east-bound train was then passing, and he waited until it passed, and then went upon the track, and was struck by a train coming in the opposite direction, which he could not have failed to see if he had looked; and the court properly said, "He knew the gateman had neglected his duty, and that he could not rely with confidence upon the fact that the gates were up." So, also, if one seeing the gates up, but also seeing an approaching train near at hand, should attempt to cross before it merely because the gates were open, or because he chose to risk the experiment, the open gate could not relieve him of the consequences of his own want of due and ordinary care.

None of the cases in this court in which the failure to stop, look, and listen before crossing a railroad track has been declared negligence per se, from *Hogeland's Case*, in 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, to *Roming's Case* (October term, 1902) 53 Atl. 672, have involved the question of safety gates, and none of them have announced any principle which would either require, or, in our opinion, justify, the application of the rule invoked to such a case as the present. In *Roming's Case* the Baltimore & Ohio Railroad voluntarily maintained a gate at the crossing in question, but it was operated only in the daytime, and did not enter into the consideration of that case. The rule has been so applied in Pennsylvania, but the great weight of authority in England and America is the other way. In *Directors, etc., of North-eastern Ry. Co. v. Wanless*, 7 Eng. & Irish Appeals, 12, Lord Cairns held, where it was the duty of the railway to keep the gates closed when any train is approaching, that the fact that they were open "amounted to a statement and notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury"; and the same was held in *Stapley v. London, B. & S. C. Ry. Co.*, L. R. 1 Exch. 21, and in *Lunt v. London & N. W. Ry. Co.*, L. R. 1 Q. B. 277. In the last case, Lord Blackburn observed: "It could make no difference whether the gatekeeper expresses that the road is safe, by opening the gate, or by words or gestures." This is the view held in the following cases in this country: *Grand Trunk Railroad v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Dolan v. Del. & Hudson Canal Co.*, 71 N. Y. 288; *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. N. Y. Cent. R. R.*, 112 N. Y. 234, 19 N. E. 678; *Chicago, Rock Island & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Rohde v. Chicago & Northwestern R. R.*, 86 Wis. 312, 56 N. W. 872; *Evans v. Lake Shore & Mich. Sou. R. R.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; *Wilson v. N. Y., N. H. & H. R. R. (R. I.)* 29 Atl. 258; and in many other cases which might be cited. In *Glushing v. Sharp*, supra, the court said, "The open gate was a substantial assurance of safety—just as significant as if the gateman had beckoned or invited him to come on—and that an ordinarily prudent man would not be influenced by it is against all human experience." In *Dolan v. Del. & Hudson Canal Co.*, supra, it was held that the negligence of a flagman to give warning and properly to discharge his duty, or in absenting himself from his post, even where no law required the keeping of a flagman, is imputable to the company, and that where plaintiff's evidence tended to show that he looked and listened for the usual signals and evidences of danger, and neither saw nor heard any, and where obstructions by cars standing on the tracks prevented his seeing and hearing the approaching train, it could not be held, as matter of law, that it

was the plaintiff's duty to have stopped his horses and gone forward to see if a train was approaching. Chief Justice Church said: "The vigilance which the evidence tended to show that the plaintiff exercised is all that has been required as matter of law. There may be cases where a higher degree of vigilance might be regarded as proper, but those are exceptional cases, which must be left to the jury on the facts." In *Wilson v. N. Y., N. H. & H. R. R. (R. L.)* 29 Atl. 258, Chief Justice Matteson said: "The word 'invitation,' though sometimes used in the opinions of learned courts, evidently was designed to mean only that the leaving open of the gates amounted to an implied assurance that the track might be safely crossed. Thus understood, the authorities are numerous (the only cases to the contrary that have come to our attention being cases in Pennsylvania) that open gates, or the absence of the usual signals of an approaching train or engine, are implied assurances that no train or engine is approaching the crossing with intent to cross the street, upon which travelers on the street have a right to rely, and that, if a traveler on the street be injured while crossing the railroad in such circumstances, the question whether he was guilty of contributory negligence is for the jury." In *Evans v. Lake Shore R. R.*, *supra*, the court said: "The public have a right to presume, in the absence of knowledge to the contrary, that the gate-men are properly discharging their duty, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties." In *Palmer v. N. Y. Cent. R. R.*, 112 N. Y. 241, 19 N. E. 678, the court said: "When, therefore, he moves on upon the track under an assurance of safety from those owning it, and from their servants, whose special duty it is to keep their attention fixed upon it, and who have within their power the means of avoiding the infliction of injury, and whose business it is to use them so as to prevent danger, it is for the jury to say whether the traveler exercised that ordinary care and prudence which, under the circumstances, it would be natural to expect." Even in Pennsylvania, where, as we have seen, the traveler is held to stricter account than in any other state, in the recent case of *Roberts v. Del. & Hudson Canal Co.*, 177 Pa. 190, 35 Atl. 723, the following instruction was held correct: "Safety gates, which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross; and, while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances." We have thus, perhaps at undue length, endeavored to extract from some of the leading cases the views of the courts upon the point under consideration; and while we have not been furnished with, and have not

found, any Maryland case involving the exact question, the principle deduced from the cases we have cited, seems to be plainly recognized in *Phil., Wilm. & Balt. R. R. v. State, Use of Gunther*, 66 Md. 510, 8 Atl. 272, in which Judge Alvey said: "If the equitable plaintiff was really misled by any such misconduct of the flagman as was calculated to mislead a rational person, in the exercise of reasonable care, under all the circumstances of the case, and, by reason of the fact that he was so misled, the accident occurred, then the right of action would exist, and the plaintiff would be entitled to recover." For the reasons that we have stated, we think this prayer was properly rejected.

The defendant's sixth and seventh prayers both ignore all question of the assurance of safety implied in the open gates, which was a fact necessary to be considered by the jury; but, apart from this objection, they are defective in declaring that if the plaintiff went on the track without knowing whether a train was coming or not, and the accident happened for that reason, then the plaintiff could not recover. He knew the gates were required to be closed when a train or engine was approaching, and, if he knew a train or engine was approaching, he knew the open gates were not then an assurance of safety; and, under such circumstances, if he were injured, his own negligence would defeat his recovery. On the other hand, if he in fact actually knew a train or engine was not approaching, there would be no source of danger, and no occasion for vigilance or caution. These prayers substitute, as the test of recovery, actual knowledge that no train or engine was approaching, for the due care and caution required by the law in endeavoring to ascertain this fact. The right of recovery does not depend upon the accuracy of the plaintiff's information as to the approach of the train, but upon the measure of care and caution exercised to obtain accurate information under all the circumstances of the case.

We think the whole law of the case was fully covered by the granted prayers, and the judgment will be affirmed.

Judgment affirmed, with costs above and below.

WEST ARLINGTON IMP. CO. v. MOUNT HOPE RETREAT et al.

(Court of Appeals of Maryland. April 2, 1903.)

WATER COURSES—DETENTION—POLLUTION—INJUNCTION—DEFENSES—LACHES.

1. A riparian proprietor owning lands on a nonnavigable stream is entitled to obstruct the flow of the water for the purpose of forming a lake or pond, in order that the waters of the stream may be more advantageously used for domestic purposes, in the absence of any showing of objections from lower riparian proprietors.

2. In a suit to restrain the pollution of a water course by an upper riparian owner, equity would not deny complainant relief on the ground

that complainant also polluted water taken from the stream, and eventually turned it on the land of others in a polluted condition, or that certain foul matter from complainant's land was permitted to flow into the stream and contributed to the pollution, where complainant had no knowledge of such pollution prior to suit brought, and indicated an intention to immediately remedy the condition.

3. Where an improvement company constructed a sewer system and discharged sewage from residences into a nonnavigable stream from which complainant, a lower riparian proprietor, drew water for the use of its hospital, etc., and the pollution of such stream rendered the water unfit for domestic use, complainant was entitled to an injunction to restrain the same.

4. In a suit to restrain an upper riparian owner from polluting a nonnavigable stream, it was no defense that others than defendant contributed to the nuisance complained of.

5. Where complainants, lower riparian proprietors on a nonnavigable stream, did nothing to induce defendants to construct a sewage system which discharged into the stream, the fact that they did not sue to enjoin the pollution of the stream until sometime thereafter, when they became convinced that the same rendered the water unfit for use, did not bar their right to relief on the ground of laches.

Appeal from Circuit Court, Baltimore County, in Equity; David Fowler and N. Charles Burke, Judges.

Suit by the Mount Hope Retreat and others against the West Arlington Improvement Company to restrain the pollution of a water course. From a decree in favor of complainants, defendant appeals. Affirmed.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Edgar Allan Poe and Frank I. Duncan, for appellants. David G. McIntosh, for appellees.

BOYD, J. A bill in equity was filed by the appellees against the appellants asking for an injunction to restrain them "from polluting and contaminating the water flowing into the lake of your orators, and especially forbidding the use by the West Arlington Improvement Company of the pipes laid by them for the discharge of sewage matter from adjoining houses, or any houses, into the sources of the stream flowing into complainants' lake, and from laying further pipes for the discharge of sewage in the same manner, and from doing anything the direct result of which will be the necessary contamination of the water so flowing into complainants' lake," etc. The bill also prays that the individual defendants be restrained from discharging sewage and water-closet contents, or other foul and offensive matter, from their respective houses into the stream supplying complainants' lake, or into the sources of said stream, or in such manner that they are directly emptied into it. A preliminary injunction was granted, and, after hearing, a decree was passed making the injunction perpetual. From that decree this appeal was taken.

It is alleged in the bill, and admitted by the answer, that the Sisters of Charity of St. Joseph, a religious association formed for the purpose of carrying on works of piety, chari-

ty, and usefulness, and especially for the care of the sick, the succor of the aged, infirm, and necessitous persons, were incorporated by chapter 95, p. 67, of the Acts of the General Assembly of Maryland for the year 1816. They acquired tracts of land by three deeds, dated in 1856, 1858, and 1873, respectively, and by the act of 1870, p. 78, c. 65, certain sisters of charity were incorporated under the name and style of "Mount Hope Retreat," in Baltimore county, and thereupon the possession of all the lands referred to, and the management, supervision, and control of the same, together with the hospital building and appurtenances thereunto belonging, were turned over to the Sisters of Charity so incorporated, and the care of the sick and afflicted being treated therein confided to them. It is alleged that there was, when the complainants first became possessed of the premises, "a stream of water of good and wholesome character running through said grounds westerly of the hospital buildings, and some distance therefrom, the sources of which are chiefly beyond the limits of complainants' grounds, and which flows through land now owned by the West Arlington Improvement Company." It is contended on the part of the appellants that there was not a living stream of water running through the lands of the improvement company when it purchased them and laid them out into streets, avenues, lots, etc., but the evidence abundantly shows that there was such stream, and Mr. Rossiter, the farmer of the appellees, testified "It is sufficient to supply the demands of the institution for all purposes at all times in the year." It is not necessary to refer to other testimony on that subject, as we are convinced that it is a well-established fact in the case. In 1881 and 1882 the appellees constructed a lake in and along the bed of the stream, so as to accumulate water, and by means of a steam pump and pipes conveyed it to the hospital buildings. About 1895 a larger pump was placed there, and the cisterns into which the water is pumped have a considerable capacity. Mr. Rossiter said "when the lake was first constructed, to all appearances and to our knowledge, the stream was pure; that is, as pure as any ordinary stream would be in the country"; and that "its condition has been for the last two years or more filthy; there is a visible sewage, that is (dis)charged from the West Arlington property into this stream." That testimony is in substance sustained by other witnesses. The West Arlington Company has laid in some of the streets terra-cotta pipes from 8 to 24 inches in diameter, and there is a system of sewers and open drains which conduct the sewage and other things coming from the houses with which they are connected into this stream, and much of them eventually gets into the lake. The secretary of the Arlington Company says the sewers "were constructed to carry off the water and closet stuff." The water taken from the lake

is contaminated by sewage, although the appellants deny that they are responsible for its condition, as we will see in the discussion of the defenses made by them. There are between six and seven hundred inmates of the hospital—many of them insane—besides about one hundred employes of different kinds. The appellants deny that the appellees are entitled to the aid of a court of equity, and assign a number of reasons for their position.

1. It is contended that the appellees have not come into court with clean hands. In the first place, it is said that they had no right to make a lake on the stream and divert the water. It is not denied that they have the rights of a riparian owner. As such, they unquestionably have the right to make such use of the water as belongs to one who owns the land through which such a stream runs. The general rule is that each of the riparian proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and what is reasonable with respect to the rights of others must depend upon circumstances, such as the character and size of the stream, and the uses to which it can be applied. One of the common uses of a stream which is not navigable is to detain and obstruct its flow with dams in order to utilize the water power, and hence it cannot be said that building a lake in a stream is necessarily interfering with the rights of others. Each case must largely depend upon its own peculiar facts, so far as the quantity that can be taken is concerned, and here there is not only a total absence of evidence to show that any one is injured by the use the appellees make of this water, but, although this plan has been in operation for about 20 years, there is not a suggestion of complaint from any one. For aught that appears, the appellees may have acquired from the lower riparian proprietors all rights they had, or the latter may be perfectly satisfied with such diversion of water as there is. So, without deeming it necessary to determine to what extent an institution of this kind can use water out of a stream running through its lands for the purposes for which this is used, there is nothing in the record from which we could say that it is being used in such way as to make it so inequitable on the part of the appellees as to deny them any relief against an upper riparian owner that they would otherwise be entitled to.

2. Then it is said that the appellees pollute the water thus taken to their hospital, and then eventually turn it upon others in that polluted condition. What we have just said applies with equal force to this contention. The sewage from the hospital is emptied into another stream, which eventually reaches Gwynn's Falls. There is nothing to show the character of that stream after it leaves the Mount Hope property, how it is used, if at all, by others, or whether the pollution from Mount Hope does in fact injure

it or any person, or whether the rights of any riparian owners that ever did exist have been acquired by the appellees. In both of those contentions it would unquestionably be incumbent upon the appellants to establish what the facts really were before they could ask a court of equity to deny the appellees the relief here sought on the ground that they were acting in an inequitable way towards others. There certainly would have to be more than there is in this record shown by them to justify us in determining the conduct of the appellees to be so inequitable as to deprive them of the aid of a court of equity. It might as well be said that A. could not enjoin B. for destroying his property, if other proper grounds were shown, because A. was probably or possibly destroying that of C. We are not aware of any authority that would go to that extent.

3. Another ground relied on for this defense is that the evidence shows that what is spoken of as "Hogpen Run," which empties into this stream above the lake, is polluted by the hogs of the appellees. If the pollution was of the same character as that complained of, there might be some reason for questioning the right of the appellees to the relief sought. If, for example, the sewage from the hospital was emptied into this stream above the lake, it would be asking a great deal of a court of equity to enjoin the appellants when the appellees were doing the same thing they were complaining of. In short, they would then be contributing to the very wrong they seek to hold the appellants responsible for. They are not, however, complaining of pollution by the appellants from hogpens, but from what is far worse. The testimony is very conflicting as to the pollution from this run. The expert on the part of the appellants condemned it as very dangerous, while the one offered by the appellees said: "This is fairly good water; this is potable water, but would not advise to use it domestically without boiling it; it measures very nearly to the city water; in no cases it approaches the limits which would compel me to call it bad water." But conceding that there was some pollution from that stream, it is, as we have said, not only not of the character that was being complained of—emptying the excrement and urine of human beings from which such diseases as typhoid fever may be contracted—but Dr. Hill, the physician in charge of the hospital, said: "The 'Hogpen Run,' as termed, there, is such a small tributary to the lake we did not consider it of any importance; we never suspected any contamination from that source. If we had suspected anything, we would have had the hogpen removed long ago. As analysis shows some effect; we will see that there shall no longer be any trouble; we will have it attended to." The evidence differs as to the distance the hogpen is from the stream—one witness said about 50 feet, another about 20 feet—but a stone wall was built there by

the appellees for the purpose of protecting the stream, and it is perfectly apparent that they were not aware of any contamination from that source, and now, when their attention is called to it, they propose to remove it. If the condition of the water complained of could be attributed to this or any other act of the appellees, there would be some foundation for the defense based on that, but no one can read this record and suppose for a moment that the hogpen was in any wise responsible for the horrible condition of the water described by the witnesses, as at most it only furnished another source of pollution, altogether different from that complained of, both in kind and degree. As the appellees were ignorant of any pollution or danger from that source, and as its removal will not in any degree relieve them of the conditions for which they seek to hold the appellants responsible, it would be carrying the maxim of coming into a court of equity with clean hands further than is either necessary or proper if they were denied relief on account of the hogpen. All streams are liable to be more or less polluted. As we said in *Helfrich v. Catonsville Water Co.*, 74 Md. 276, 22 Atl. 73, 13 L. R. A. 117, 28 Am. St. Rep. 245: "The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure. And so the habits of cattle, according to their natural instincts, would lead them to stand in the water and befoul the stream. But nevertheless the owner of the land must not lose the beneficial use of it. The inconveniences which arise from the pollution of the water by these causes must be borne by those who suffer from them." Would a farmer who was thus permitting the pollution of a stream be denied relief against those who were emptying sewage and other such foul matter into a stream, merely because he was responsible for such pollution, although of altogether a different character from that complained of? We do not think that under the circumstances of this case the plaintiffs are precluded from obtaining relief on account of such pollution as has been shown to exist, either on Hogpen run or the other small tributary which has its source on their land.

4. Without deeming it necessary to state the evidence in detail, we are satisfied that it establishes the fact that the appellants were materially contributing to the pollution of the stream in a manner calculated to do serious injury to the inmates of this institution and to materially injure the appellees. Cases of this character sometimes present conditions that cause courts to seek some solution that will enable them to grant relief to the complainants, and at the same time not require the other parties to sacrifice all they have invested in the properties owned or controlled by them. As this country has become more thickly settled, as manu-

factories have been established, and water has been introduced into residences and other buildings for purposes that were unknown years ago, the problem of protecting running streams, and at the same time permitting industries to be carried on, and of having proper drainage, has become a serious one. This improvement company has expended large sums of money for the development and drainage of its property, and it is to be regretted if the location be such that no method of drainage can be reasonably adopted which will not affect the rights of others; but if we are to be governed by legal principles that are thoroughly and clearly established, in this state as well as elsewhere, there can be no doubt that the facts proven admit of but one conclusion, to be reached. The case of *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419, answers most, if not all, of the contentions of the appellants. The right of the owner of a flourmill to enjoin the owner of a slaughterhouse from emptying into a stream blood, offal, and other matter from slaughtered animals was there fully sustained. In the case of *Baltimore v. Warren Manufacturing Co.*, 59 Md. 96, this court, through Judge Alvey, after saying that the statement that each riparian owner had the right to have the water of a natural stream flow through his land in its natural purity must be understood in a comparative sense, added: "But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose." When then it is shown that the appellants not only empty into this stream substances which are offensive to taste and smell, but such as are liable to produce disease, can a court of equity hesitate to grant relief merely because the offenders may be subjected to loss or inconvenience? If courts are to enforce rights and redress wrongs impartially, there can be but one answer to that question. Although it may not be necessary to cite other authorities, the case of *Barrett v. Cemetery Association*, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168, is very much in point, and the notes to it, as reported in 3 Am. & Eng. Dec. in Equity, 647, etc., refer to many authorities.

5. The fact that other parties have been contributing to the nuisance complained of is no excuse. As was said in *Woodyear v.*

Schaefer: "It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained." In that case the defendant apparently contributed in a very small degree to the nuisance, while in this there can be no doubt the appellants are largely responsible for the present condition of the water, although others have contributed to the same character of pollution. In *Barrett v. Cemetery Association*, supra, it was attempted to show that the waters were already polluted, but the court said, "We know of no rule of law that sanctions one wrong because another has preceded it." And, again, it was there said, "The mere fact that in the case at bar the waters of this stream may have, to some extent, been rendered unwholesome when flooded by the washings from manured lands, or by the connections of other drains, is no excuse for the threatened pollution by the cemetery companies."

6. Nor can the appellants successfully rely upon the alleged laches of the appellees. There is some evidence tending to show that the officers of the improvement company were warned against emptying these drains into this stream, but, whether that be so or not, it is not pretended that the appellees ever did anything to induce the appellants to proceed with their improvements. The officers of the company probably knew, and certainly by a little investigation could have ascertained, that the appellees were using this stream for the purposes they now use it when the company commenced its improvements. They are presumed to have known what rights in the stream the law gives riparian owners, and why should the appellees be denied relief merely because they were not hasty in seeking a remedy from the courts? In *Woodyear v. Schaefer*, the pollution of the stream had been going on for some years—gave "trouble of material importance" about eight years before it was sought to be enjoined, after which time it gradually grew worse. As the court there said, "It was natural for the complainant to bear evil as long as it was slight, rather than engage in a tedious and expensive litigation;" and in this case it was not until the appellees became convinced that typhoid fever had been contracted by some of the inmates of the institution from the condition of the water that they sought the aid of the law. They should not be denied relief because they delayed as long as they believed it to be safe to those in their care before resorting to extreme measures.

So, although it is to be hoped that some means can be adopted by the parties which will not only protect the appellees, but will avoid material injury and great inconvenience to the appellants, there is nothing left for us, under the law and the facts proven in this case, but to affirm the decree below,

whatever the consequences to the appellants may be.

Decree affirmed; appellants to pay the costs.

EDGER v. BURKE et al.

(Court of Appeals of Maryland. March 31, 1903.)

FALSE IMPRISONMENT—JUSTIFICATION—PLEA —QUESTION OF LAW—BURDEN OF PROOF —ARREST—UNNECESSARY FORCE.

1. A plea of justification by a deputy sheriff to an action for false arrest and imprisonment is not demurrable for not averring that plaintiff's arrest for a felony was made under authority of a warrant, as an officer who has reasonable grounds to believe that a felony has been committed is not required to have a warrant to arrest the one suspected.

2. In an action for false arrest and imprisonment, one of the defendants pleaded that at the time of the arrest he was a deputy sheriff, and had been informed and had reasonable cause to believe that plaintiff had committed an assault on a named female, and consequently arrested him and brought him before a magistrate. *Held* not to sufficiently set out the facts relied on as a justification.

3. Evidence of justification would not be admissible under the general issue.

4. It is for the court to determine whether the facts justified an officer in making an arrest for a felony without a warrant.

5. Defendant, a deputy sheriff, in an action for false arrest and imprisonment, proved as a justification for arresting plaintiff without a warrant that his belief that a felony had been committed was founded on positive information direct from the victim, and that his suspicion that plaintiff was the guilty party was founded on facts stated by the victim. *Held*, that the court properly rejected a prayer that would have enabled the jury to find that the arrest was founded on a suspicion engendered in defendant's mind by suspicion in the victim's mind.

6. A deputy sheriff pleading justification for an arrest without a warrant in an action for false arrest and imprisonment has the burden of proving the defense.

7. To justify handcuffing a prisoner arrested for felony, it is not necessary that he should be a notoriously bad character, nor that he should be unruly and attempt to escape.

8. Where plaintiff's prayers in an action for false arrest made no discrimination between the liability of the defendants—one being an officer, and the other a private person assisting him—the trial court was justified in rejecting them.

9. Though a plea by a deputy sheriff, in an action against him and another for false arrest and imprisonment, that he had been informed and had reasonable cause to believe that plaintiff had committed a felony, was insufficient to admit evidence of justification for an arrest without a warrant, and a demurrer to his plea should have been sustained, yet, plaintiff having pleaded over on the overruling of the demurrer, and defendant having made full proof of the justification pleaded, and there being no showing of surprise or injury to plaintiff, the overruling of the demurrer was not ground for reversal.

Appeal from Circuit Court, Harford County; James D. Watters, Judge.

Action by George W. Edger against Eugene Burke and another. Judgment for defendants, and plaintiff appeals. Affirmed.

¶ 4. See *False Imprisonment*, vol. 23, Cent. Dig. § 118

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Harrison J. Barrett, Allan C. Girdwood, and Robert H. Williams, for appellant. Frank I. Duncan, John Grason, and Geo. L. Van Bibber, for appellees.

PEARCE, J. This is an action brought on May 22, 1901, by George W. Edger against Eugene Burke and Edward Stewart for false arrest and imprisonment. Burke was at that time, and still is, deputy sheriff of Baltimore county, where the crime was committed; and Stewart was a citizen summoned by Burke to aid in the arrest, which was made without a warrant. The facts, as disclosed by the record, show that Burke was an experienced officer, having filled the position for 11 consecutive years; that on the evening of January 8, 1901, he and his wife returned from Baltimore to their home, which had been left in charge of a colored woman about 60 years of age, who had lived in his family for 4 years, and in his wife's family for many years, and who was thoroughly truthful and trustworthy, though not very bright; that on their return he left his wife at the door of the house, and drove to the stable to put up his horse, and, on reaching the house, heard some one crying, and called his wife to inquire into the cause, and she said "Eliza was crying and carrying on," and that her clothes were torn nearly off, but that she could not find out what was the matter, but that next morning, after he left home, Eliza gave to his wife an account, which she communicated to him on his return at night; and that on the following morning Eliza repeated to him the account, as follows: That about 1 o'clock of the day of their absence she answered a knock at the door, and found a man standing there; that he asked if Mr. or Mrs. Burke were at home, and, being informed neither one was at home, said that he had been at the Sims place on Sunday, and Sims told him that place was for rent, and he wanted to see it, to which she replied that no one was at home, and he could not see it; that he said he lived in the Henrietta house, near by, and knew Mr. and Mrs. Burke, and wanted to go upstairs and see the house, but she refused to allow it, when he put his foot within the door, so that she could not shut it; that just then Mr. Fastey's carriage was passing on the road, and that when the carriage went down the hill he forced himself into the house, threw her down upon the corner of the stairway, and committed a rape upon her person; that he said he lived in the Henrietta house, and she said that he was the same person she had seen hauling fodder from Mr. Herman's. Burke testified that he knew the plaintiff lived in the Henrietta house, and that he had hauled the fodder from Mr. Herman's, though he had no personal acquaintance with him, and only knew him by sight;

that, on receiving Eliza's account, he summoned Stewart to go with him as a deputy, and they went to Edger's house and found him at home; that he asked Edger if he was looking for a house to rent, and he said he was; that he also asked him if he had been to Sims' place on Sunday, and he said he had; that he then told plaintiff he had information a crime had been committed, and he must arrest him; that he did then arrest him, handcuffed him, and drove him in a carriage to Burke's house, and called Eliza out to see him; that she came, looked into the carriage, and said, "That is the man, but he hasn't on his spectacles, nor the same hat, but that is the man;" that he then took him to Towson, saw the state's attorney, and, on his advice, swore out a warrant, and plaintiff was committed for a hearing; that next day he was thinking about the case, and he went to see Mr. Fastey, and stated the case to him, and he said: "Eugene, you have got the wrong man. There was a man on your porch, and I had been talking with him, and, while he is a similar looking man, and a good many people would take him for Mr. Edger, you have got the wrong man;" that he then drove at once to Towson, withdrew the charge, and drove Edger home. It was also shown that, when plaintiff was arrested, he asked the charge, and was told he would find out soon enough.

There was a demurrer to each count of the declaration except the first, but this was overruled, and no question was made as to this in the briefs on which the case was submitted. Burke pleaded (1) that he did not commit the wrong alleged; and (2) that, at the time of the assault and arrest complained of, he was a deputy sheriff of Baltimore county, and that, being informed and having reasonable cause to believe that the plaintiff had committed a felonious assault upon one Eliza Preston in Baltimore county, he, in the discharge of his duty as deputy sheriff, arrested the plaintiff, and carried him before a justice of the peace for Baltimore county, who duly committed him to the custody of the sheriff of said county. Stewart pleaded (1) that he did not commit the wrong alleged; and (2) that he was a citizen of Baltimore county, and, as such, was summoned and deputized by Eugene Burke, a deputy sheriff of said county, to assist him in making the arrest of the plaintiff upon a charge of felonious assault upon one Eliza Preston, and that what he did was by virtue of being thus deputized. There was a demurrer to the second plea of each defendant, which was overruled, after which issue was joined on all the pleas, and the case went to trial before a jury. At the close of the testimony on both sides the plaintiff offered seven prayers, all of which were rejected, and the defendants offered two, both of which were granted, to which rulings the plaintiff excepted; and, the verdict and judgment being against him, he has brought this appeal.

The demurrer to the special pleas will be first considered. In 2 Addison on Torts (7th Ed.) p. 150, it is said: "A constable or sheriff, having reasonable ground to suspect that a felony has been committed, although in fact none has been, is authorized to detain the person suspected (not being an infant under the age of seven years, incapable of committing a felony) until he can be brought before a justice of the peace to have his conduct investigated." In *Samuel v. Payne*, 1 Doug. 359, Lord Mansfield said: "If one man charges another with felony, and requires an officer to take him into custody and carry him before a magistrate it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of, the charge. The officer does his duty in carrying the accused before a magistrate who is authorized to examine and commit or discharge." And in *Davis v. Russell*, 2 Moore & Payne, 590, Chief Justice Best, stating this rule, said: "This has been decided so often that it is unnecessary to refer to cases on the subject." The absence of a warrant for the arrest, therefore, is no ground of demurrer. But it is contended that both these special pleas are defective, in failing to set out the facts and circumstances constituting the justification pleaded, so that the plaintiff may be apprised of these facts and circumstances, and the court may judge of their sufficiency; and, so far as this relates to the plea of Burke, we think the objection is well taken. This is the rule laid down in the leading case of *Mure v. Kaye*, 4 Taunton, 34, and is the rule recognized in 1 Chitty's Pleading (16th Ed.) 258; *Stephen on Pleading* (5th Ed.) 356; 1 Tidd's Practice, 653; 8 Enc. Pleading & Practice, 850. It was so held in *Perryman v. Lister*, L. R. 3 Exch. 197; *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *Spencer v. Anness*, 32 N. J. Law, 100; *Wasson v. Canfield*, 6 Blatch. 406; *White v. McQueen*, 96 Mich. 249, 55 N. W. 843; and *Bean v. Beckwith*, 18 Wall. 510, 21 L. Ed. 849. In the last-mentioned case, Justice Field says: "This is an old rule of pleading, which in the modern progress of simplifying pleadings has not lost its virtue." In *Hamilton v. Conine*, 28 Md. 646, 92 Am. Dec. 724, referring to the legislation in this state simplifying the forms of pleadings, Judge Miller, citing *Stirling v. Garritte*, 18 Md. 468, said: "The substantial principles underlying our system of jurisprudence, and to some extent governing the forms of action, must still be recognized, however the form may be changed or simplified." This language is as logically and justly applicable to the substance of a pleading as to the form of an action, and Mr. Poe seems so to regard it in section 732 of his work on Pleading. Evidence of justification would not have been receivable under the general issue plea. If, therefore, the plaintiff had stood upon the demurrer, and allowed judgment to be entered for the defendant Burke, it would have been necessary

to reverse such judgment. But having pleaded over, and full proof having been made of the justification pleaded, as will hereafter be shown, there was no reversible error in that ruling.

It follows from what we have heretofore said that the plaintiff's first prayer, which relies solely upon the absence of a warrant was properly rejected. The second, third, and fourth prayers of the plaintiff and the first prayer of defendants raise the question of reasonable grounds of belief that a felony had been committed, and that the plaintiff was the guilty person. The authorities all agree that it is for the jury to find the facts which are supposed to constitute probable cause, and to draw their conclusions from these facts under the instructions of the court. *Davis v. Russell*, supra; *Kirk v. Garrett*, 84 Md. 405, 35 Atl. 1091, in which this court said: "It is wholly immaterial whether the suspicion arises out of information imparted to the constable by some one else, or whether it is founded on the officer's own knowledge. In either event, what amounts to a sufficient ground of suspicion to justify an arrest by a constable without a warrant is for the court, and not for the jury, to determine."

The plaintiff's second, third, and fourth prayers seem to have been framed with the purpose of bringing them within the definition of probable cause given by Judge Washington in *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926, adopted by this court and approved by it in numerous cases, but there are several good reasons for their rejection.

The second prayer would enable the jury to find that the arrest was founded upon suspicion engendered in Burke's mind by suspicion in Eliza Preston's mind, whereas his belief that a felony had been committed was founded upon positive and definite information from her, and his suspicion that the plaintiff was the guilty party was founded upon facts stated by her, and apparently corroborated by the plaintiff himself upon inquiry by Burke; and to have granted this prayer would have been serious error.

In reference to the third and fourth prayers, it is said in *Pollock on Torts*, pp. 192, 193: "It does not follow because it would be very reasonable to make further inquiry that it is not reasonable to act without doing so. It is obvious, also, that the existence or nonexistence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time." And in *Central Railway Co. v. Brewer*, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63, this court said: "We do not sanction the idea that the rights and liabilities of the citizen can be trifled with, and unfounded charges preferred, without holding the accuser to a just responsibility. * * * But if a person act upon appearances in making a criminal charge, and the apparent facts are such as to lead

a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was deceived, and the party accused was innocent, yet he will be justified." In *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603, the court said that, where such an investigation was made into the facts and circumstances as the particular case admitted, the officer would not be liable to one who turns out to be innocent, adding: "The law encourages every one—as well private citizens as officers—to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or apprehension, although the party charged turns out not to be guilty, unless the arrest is made or the prosecution is instituted without probable cause and from malice." And in *Brockway v. Crawford*, 48 N. C. 434, 67 Am. Dec. 250, where the chief ground for probable cause was the strong resemblance of the party arrested to the person suspected, who in fact had disappeared, Chief Justice Pearson said: "What has the plaintiff, if he be a good citizen, to complain of? A felony is committed, and the felon escapes. * * * The plaintiff bears a close resemblance, both in dress and personal appearance, to the suspected person. His fixedness in his position as a member of the community does not place him above the marks of honest suspicion as the man who figures as a fugitive from justice. Has he cause to complain? Ought he not rather to congratulate himself that he lives in a land where justice is administered with a steady hand? And if occasionally 'the wrong passenger is waked up,' every good citizen should bear in mind that it was meant for the best, and will work around for the good of the whole." This language may perhaps be regarded as somewhat freer than is usual in judicial opinions, but its reasoning is sound and strong. Applying the principles of the cases cited to the plaintiff's third and fourth prayers, and to defendants' first prayer, there can be no difficulty in determining that the former were properly rejected, and that the latter, which sets out fully and clearly all the facts constituting the grounds of suspicion and belief, was correctly granted.

Coming to the plaintiff's fifth prayer, we think the burden of proof was upon Burke to prove the facts alleged in justification, as was held in *Blake v. Damon*, 103 Mass. 199, approved in *Sellman v. Wheeler* (decided in this court November 20, 1902, and officially unreported) 54 Atl. 512. But this burden was fully met in the proof, and the plaintiff suffered no injury from the rejection of the prayer.

There was no evidence legally sufficient to warrant giving punitive damages, and for that reason the sixth prayer was properly rejected.

The seventh prayer requires the jury to

find that defendants used unnecessary and brutal force in arresting the plaintiff, of which there was not a particle of evidence, unless the use of handcuffs constituted such brutal force; but as was said in *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266, "some discretion must be reposed in an officer making an arrest for felony as to the means taken to apprehend and safely keep the prisoner. In order to justify handcuffing a prisoner arrested for felony, it is not necessary that he should be unruly or attempt to escape, or do anything indicating a necessity for such restraint, nor, in the absence of these indications, that he should be of notoriously bad character." This prayer was properly rejected.

Another objection to all the plaintiff's prayers, and which alone would have justified their rejection, is that they make no discrimination between the liability of Burke and Stewart. We have said Stewart would not be liable in any event if he responded in good faith to the call of Burke, and kept within his orders and directions.

The defendants' second prayer goes further than the circumstances of this case demand, in requiring the jury to find all the facts set forth in plaintiff's first prayer, before Stewart could be exonerated from liability, and the granting of that prayer is not the subject of complaint by the plaintiff.

There is nothing in the record to show that the failure of Burke to set out in his plea all the facts and circumstances constituting probable cause worked any surprise or caused any injury to the plaintiff, and there is no suggestion of such surprise or injury in his counsel's brief. The facts and circumstances showing justification were fully proved, and the court could judge of their sufficiency as well—indeed, better—after proof, upon instructions offered, than upon demurrer, if they had been set out in the plea. If this had been done, and a demurrer had been interposed, it must have been overruled, and it is therefore obvious that the judgment should not be reversed for technical error without injury.

Judgment affirmed, with costs above and below.

SPUCK et al. v. LOGAN et al.

(Court of Appeals of Maryland. April 2, 1903.)

FRAUDULENT CONVEYANCES — CONTINUING INDEBTEDNESS—SUBSEQUENT CREDITORS—TRUSTS FOR GRANTOR—EVIDENCE—CONSIDERATION.

1. Where at the time S. fraudulently conveyed property for the purpose of preventing the satisfaction of any judgment a servant might recover against him in an action then pending for injuries S. was indebted to plaintiffs for goods sold and delivered, and, though balances due on such indebtedness were paid monthly, the indebtedness for additional purchases each month continually increased until S. became insolvent, such indebtedness was

continuous, and plaintiffs were not precluded from attacking such conveyance on the ground that they were subsequent creditors.

2. Where S. conveyed property in order to prevent satisfaction of a judgment in a suit against him for injuries, and the grantee, participating in the fraud, did not claim to have an interest in the land, and admitted that he held the same to protect the grantor, such conveyance was void as against both the grantor's prior and subsequent creditors.

3. Where property was fraudulently conveyed to prevent satisfaction of any judgment that might be recovered against the grantor in an action by a servant for injuries, the fact that the servant had not recovered a judgment did not affect the fraudulent intent of the conveyance, so as to preclude other creditors in fact defrauded thereby from suing to vacate the same.

4. Where a conveyance was made with intent to defraud the grantor's creditors, and the grantee participated in the fraud, the fact that he paid a full consideration for the property was not sufficient to sustain the same as against the grantor's creditors defrauded.

5. A grantor conveyed property to D. for an express consideration of \$850 for the purpose of preventing the satisfaction of a judgment which might be recovered in an action for injuries then pending against him. No consideration was in fact paid, and D. accepted the same with knowledge, participated in the purpose of the conveyance, and admitted that he held the property in trust for the grantor. Thereafter the grantor became indebted to D. in a sum of \$400, and two months before the grantor made an assignment for creditors, under which less than 1 per cent. was paid, he executed new deeds to the property through another to D. for the purpose of correcting a supposed defect in the title, which deeds expressed a consideration of \$5, but for which D. surrendered a note for the \$400 indebtedness and paid the grantor \$450 in cash. *Held*, that both such conveyances were fraudulent and void as against the grantor's creditors.

Appeal from Circuit Court No. 2 of Baltimore City; Pere L. Wickes, Judge.

Action by David Logan and another, trading as Logan & Uhl, against Christian Spuck and others. From a decree in favor of plaintiffs, defendants appeal. *Affirmed*.

Argued before BRISCOE, SCHMUCKER, BOYD, PEARCE, and JONES, JJ.

Robert H. Smith, for appellants. S. & S. Field, for appellees.

BOYD, J. This is an appeal from a decree declaring certain deeds fraudulent and void as against the appellees, who are creditors of Christian Spuck, and directing a sale of the property mentioned therein. On the 11th day of January, 1898, Spuck and wife conveyed two ground rents in the city of Baltimore to Solomon Haas, and on April 30th of that year Haas and wife conveyed them to William Deebling, one of the appellants, in pursuance of the original arrangement made between them when deed of January 11th was made. Each of those deeds recites a consideration of \$850, but it was admitted that no consideration was in fact paid at the time of the execution or delivery of either of them, and it is conclusively shown by the

testimony that the transfers were made to prevent one Charles H. Snack from recovering against Spuck on any judgment he might obtain in a suit for damages instituted on March 1, 1898. Deebling, Haas, and Spuck admit that such was the object of the deeds, and that no consideration was in fact paid. Snack, who had been in the employ of Spuck, claimed he was injured by reason of the latter negligently allowing the machine which Snack was operating to become in an unsafe, dangerous, and unsuitable condition, which he claims resulted in the loss of his arm, and he claimed \$10,000 damages in the declaration filed by him. That suit was never tried, and is still pending in one of the courts of Baltimore City. On October 3, 1899, Deebling loaned Spuck \$400, for which he took his note, payable one year after date, and on October 3, 1900, a new note was given, payable 12 months after date. Deebling owned a leasehold interest in one of the lots, and he agreed with Spuck in December, 1900, to purchase the two ground rents for \$850—\$450 in cash and the cancellation of the \$400 note. The cash was paid, and the note surrendered, and there seems to be no doubt about the price named being a fair estimate of the value of the property. Deebling and wife and Spuck and wife then conveyed the two lots to J. W. Oast by deed dated December 19, 1900, in which the consideration recited was \$5, and the same day Oast conveyed them to Deebling and his wife, the same consideration being mentioned in that deed. Mr. Strohmeier, who drew these deeds, testified that: "While examining the title, I discovered that there had never been a lease executed for the ground rent which was intended to be conveyed to Mr. Deebling, and for the purpose of wiping out any flaw by putting the property in fee in Mr. Deebling I suggested that Mr. and Mrs. Spuck and Mr. and Mrs. Deebling convey to Mr. Oast, by which deed all the interest of all the parties was conveyed to Mr. Oast, and then a deed by Mr. Oast to Mr. and Mrs. Deebling." He also said that the original conveyance by Spuck and wife to Deebling "was an assignment of a leasehold interest in one of these lots, subject to a ground rent of '\$26.26,' and in reply to the interrogatory, 'Had any leasehold interest been previously created?' replied, 'No, sir, there had not.'"

The principal question presented by the record may be thus stated: As the deeds executed in 1898 were confessedly made by or at the instance of Spuck, and accepted by Deebling for the express purpose of preventing any recovery by Snack for damages alleged to have been sustained by him for the injury he held Spuck responsible for, and as the title was thus kept in Deebling until December 19, 1900 (although Spuck regularly collected the ground rents and acted as owner,) are the deeds of the latter date fraudulent, so far as the appellees are concerned, conceding that full consideration was

¶ 4. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 610.

then paid for the lots conveyed? A number of questions are involved in this case, but, inasmuch as it would not afford the appellees relief to set aside the two deeds of 1898 unless those executed in 1900 can be, the validity of the latter is the important inquiry. It will be well to first ascertain the relation that existed between Spuck and the appellees. The latter obtained a judgment against the former before this bill was filed on an account running from January 1, 1898, to February 5, 1901. In the early part of the account the course of dealing seemed to be that for purchases made one month Spuck paid the appellees the next month. That was apparently continued for some time, although the indebtedness was growing. On January 1, 1898, there was a balance from the previous year of \$305.84, which was paid that month, but an indebtedness of \$383.43 was incurred that day, which was paid in February, and the balances struck in the account filed were as follows: December 31, 1898, \$574.61, which was the amount of purchases in that month; June 30, 1899, \$741.00, the amount purchased in June; January 1, 1900, \$785.07, which is \$135.51 more than the purchases during the previous December; and finally, on February 5, 1901, there was a balance of \$1,031.32, on which \$6.95 was paid in October. There never was a time from January 1, 1898, to the filing of this bill, when the appellees were not creditors of Spuck, and on December 19, 1900 (the date of the last deed), he owed them \$923.85. It cannot be said, therefore, that the appellees were not subsisting creditors of Spuck when he made the deed of January 11, 1898, although the amount owing to them at that time was subsequently paid. But before it was paid Spuck had in the meantime incurred other indebtedness to them for a larger amount, and that course of dealing continued between them until finally Spuck was indebted to the appellees in the sum stated. If that was all, we would find difficulty in reaching the conclusion contended for by the appellants that the appellees were merely subsequent creditors. In *Paulk v. Cooke*, 39 Conn. 572, it was contended that the debts which existed at the time of the conveyance attacked was made had been paid with one exception, and that a voluntary conveyance could only be impeached by existing, and not by subsequent, creditors, but that court thus replied: "This principle clearly has no application where there has been a continued, unbroken indebtedness. The debts are owed, though they may be due to new creditors. It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt." In *Wait on Fraud*, Con. § 103, that author, in speaking of the subject, says, "The case should be treated as if the prior indebtedness had continued throughout, or as a case of a continued or unbroken indebtedness." In this case

there is all the more reason to adopt that rule, as Spuck was indebted to the appellees (not merely to new parties) constantly, and without interruption, from January 1, 1898, and to say that under those circumstances they must be denied any rights that subsisting creditors have against a fraudulent conveyance would be protecting fraud by a distinction that should not be made in favor of the guilty against the defrauded.

But, if such distinction could be made, it would not avail the appellants. There can be no doubt that whatever fraud was committed on January 11, 1898, when the first deed was made, continued up to the execution of the deeds of December 19, 1900. The real ownership of those lots was in Spuck during all that time. He collected the rents, and did everything an owner of ground rents could do. Deehring does not pretend to have had any interest in them, and he held them to protect Spuck from Snack, and professed to the world to have paid their value for them when he had not paid a dollar. He does not claim that the \$400 represented by the note was intended to be applied to the purchase of them, but, on the contrary, he swore that was a loan. He was during all that time concealing the true ownership of the property, with the confessed intention of hindering one asserting a claim against Spuck. In effect he, by the deed to him, said, "This is my property, and I have paid \$850 for it," when in fact it was Spuck's property, and he had paid nothing for it. During the whole time he thus held the property the fraud was as great as it was the day it was begun by the transfer of the property; in fact it was probably more injurious, as other people were likely to be affected by it. During the latter part of 1899 and in 1900 Spuck was getting more in debt to the appellees, and, as we have seen, he owed them on December 19, 1900, \$923.85. In *Jones v. King*, 86 Ill. 229, it is said the rule is settled that, where the conveyance is merely colorable, and a secret trust and confidence exists for the benefit of the grantor, it is void not only against prior but subsequent creditors; and the reason of the rule is given in a quotation from *Bump on Fraudulent Conveyances* that "it is in such case a continuing fraud, and may actually operate as such, as well in reference to debts contracted after as before the conveyance." See, also, 14 Am. & Eng. Ency. of Law, 268. There would seem, therefore, to be no room to doubt that the deeds of 1898 were not only liable to be successfully attacked by creditors of Spuck in existence when they were made, but could be by any persons who became such creditors while the title to the lots were held under those deeds, or either of them.

In 14 Ency. of Law, 266, it is said: "It is not necessary, however, that the fraud should have been directed particularly against the complainant. A conveyance executed to defraud one creditor may be avoided by any

other occupying a similar position; that is, a fraudulent intent against an existing creditor will avoid the conveyance as to all existing creditors, and a conveyance made with like intent against a subsequent creditor may be avoided by any standing in that relation." It was said in *Cooke v. Cooke*, 43 Md. 522, that the object of the statute of 13 Elizabeth, c. 5, "was the suppression of frauds, and ought to receive a liberal construction." We there quoted from *Twyne's Case*, 3 Coke Reports, 83, "That the statute of 13 Eliz. c. 5, extends not only to creditors, but to all others who had cause of action or suit, or any penalty or forfeiture;" and we added that "since then it has been repeatedly held to embrace actions of slander, trespass, and other torts." In *Welde and Logan v. Scotten*, 59 Md. 72, we repeated, in substance, that language, and it was there said that a creditor who had obtained judgment for personal injuries had such a cause of action as justified him in attacking any conveyance made pending the suit as fraudulently made and executed against him, if he had cause to so suppose, and that he could either go into equity to set aside the conveyance, or purchase the property at a sale under a *fiel facias*, and institute an action of ejectment. It is said, however, on behalf of the appellants that in those cases judgments had been obtained, and, until a judgment is obtained, a person occupying the position of Snack cannot have a conveyance set aside on the ground of fraud. If it be conceded that section 46 of article 16 [Code Pub. Gen. Laws] is not broad enough to enable Snack to file a bill to set aside the conveyance until he obtains judgment, does that necessarily preclude the appellees from doing so? We have already said that they could have filed a bill to set aside the deeds of 1898. If they had done so, there would seem to be but little room to doubt that Snack could have sought relief against the proceeds of sale. In *Gebhart v. Merfeld*, 51 Md. 325, a deed was set aside and objection was made to the form of the decree because "all persons having claims against Engels are notified to file their claims, without regard to their nature," and this court said with reference to that: "It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its provisions as to creditors. It enacts that every conveyance made to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, etc., shall be void," and continues with what we have quoted from *Cooke v. Cooke*. The court there, in effect, said that such a claim as Snack had might be filed, but, it being unliquidated, we think the correct practice would be to give such plaintiff a reasonable opportunity to have his case determined at law, before distributing the proceeds, although, of course, he should use due diligence in the prosecution of his suit. If that were not so, the plaintiff in such action might be

prevented from any recovery, if creditors who were entitled to proceed without judgment had the property sold before he could get his judgment. But this case does not depend upon the question whether Snack could at the time have filed a bill to set aside those deeds. He is undoubtedly included in the terms of the statute of Elizabeth, if, as is conceded, the transfers were made to delay, hinder, or defraud him. The fraud was in the transfer of the property with that intent, and merely because he had not yet obtained a judgment did not make the intent to delay, hinder, or defraud him less fraudulent. The fact that he had not obtained a judgment only affected his remedy, and, if he establishes his claim by judgment, his right to attack the deeds relates back to the time of the transfers, provided, of course, no intervening rights of bona fide purchasers, etc., stand in the way. Although not a creditor, in the technical sense, until he gets a judgment, he occupies a similar position to that of a technical creditor under the statute of Elizabeth, and an intent to hinder, etc., him affected the validity of the deeds just as if he had been a creditor in the sense that term is ordinarily used.

Under these circumstances, are the deeds of 1900 valid? Payment of full consideration is not sufficient to protect Deehring if the conveyance was not bona fide. "If it be established that the deed was made by the grantor and accepted by the grantee with intent to hinder, delay, and defraud the creditors of the former, it matters not that full consideration has been paid." *Chatterton v. Mason*, 86 Md. 236, 37 Atl. 990; *Downs v. Miller*, 95 Md. 602, 53 Atl. 445. In 14 Ency. of Law, 475, it is said that "a fraudulent grantee can by no subsequent matter confirm the deed to him, or purge it of its vice, so as to render it effectual as a conveyance to vest a title in himself." For that statement the author cites *Halcombe v. Ray*, 23 N. C. 340. See, also, *Halbert v. Grant*, 4 T. B. Mon. 581; *Bunn v. Ahl*, 29 Pa. 391, 72 Am. Dec. 639; *Head v. Harding*, 166 Ill. 353, 46 N. E. 890; *Gentry v. Field*, 143 Mo. 413, 45 S. W. 286; *Martin v. Rice*, 24 Mo. 581; *Lynde v. McGregor*, 13 Allen, 172; *Bump on Fraud*. Con. §§ 628, 629. We are aware that there are authorities of high standing apparently in conflict with that statement of the law. In most of them the apparent conflict is not real when the facts are examined. There have been cases in which it would have been very inequitable to hold the grantee in a deed responsible, or cause him to lose property which he subsequently paid for, or gave the creditors of the grantor the benefit of, merely because he had accepted a voluntary conveyance, although he did so in good faith, and without intending to defraud any one. But when there is fraud in fact on the part of both grantor and grantee, and there has been no attempt to return the property thus fraudulently acquired to the grantor, there must

be some very peculiar facts proven to justify a court in declaring that the fraud is purged by a subsequent payment of a consideration. As was said in *Bunn v. Ahl*, supra: "There is no valid repentance without entire restitution, when this is possible; and a judgment obtained in order to defraud creditors cannot be purified by merely abandoning the fraudulent purpose, and using it for an honest one. All the benefits of the fraudulent arrangement must be foregone." In *Massachusetts* the doctrine that a fraudulent conveyance may be purged of the fraud by a matter *ex post facto* has been carried as far as in any court of such high standing brought to our notice, but in *Lynde v. McGregor*, supra, it was said: "But no authority has been found, and we cannot believe that any exists, for the proposition that, where a contract expressly and intentionally fraudulent has been made, it is possible to give it a partial validity by any subsequent payment or advance in part, without rescinding the whole. If any part of the original purpose is fraudulent, the whole may be avoided, though made upon sufficient consideration. And in like manner, if any part of the fraudulent purpose remain, it vitiates the whole." Without quoting from other cases, or attempting further to reconcile them, it seems to us there can be no question about the invalidity of the deeds of 1900 under the facts proven, some of which we will recall as reflecting upon this branch of the case.

Spuck and Deehring both went on the stand, and swore to circumstances which the law condemns as fraud in fact. The one conveyed and the other received these lots with the deliberate intent to do what the law pronounces fraudulent. Taking them with that intention, Deehring held them over two years and a half under a deed that professed that full consideration had been paid for them, and that they were his, and not Spuck's. In the meantime he had become a creditor of Spuck for nearly half of the value of the property. He got that indebtedness paid in full, and paid the balance in cash. Two months afterwards Spuck made an assignment for the benefit of his creditors, and paid less than 1 per cent. to his other creditors. If Deehring had paid full value at the time the property was originally conveyed to him, the fraudulent intent with which the deed was taken would still have made it void; and upon what principle can it be said that, although the conveyance was originally executed and accepted in fraud, yet when the grantee paid for it several years afterwards his payment was bona fide, and therefore gave it new life, freed from the infirmities attaching to a fraudulent instrument? During that time he apparently checked Snack from all efforts to obtain a judgment—at least his suit was not brought to trial; and, if the deed to Deehring was bona fide, as it purported to be, it would perhaps have been useless for Snack to get judgment, if he was entitled

to it; and, after accomplishing that, Deehring now claims the property by paying \$450 and surrendering a note which was not at the time worth its face value, if we are to judge from what the other creditors got, under an assignment made two months later. Under those circumstances it is clear that he could not have held these lots under the deed of April, 1898, and can he by this new deed get any better title? We think not. We have already quoted the testimony of the conveyancer as to the reasons for adopting that plan. It was because he thought there was some defect in the deed from Spuck to Deehring. The deeds are not set out in the record, and hence we do not know what the recitals are beyond what we find in some memoranda of them, which refer to both deeds of 1900 as "conveying the same property for recited consideration of \$5." They do not state it to be \$850, as those of 1898 did, which was, we presume, because the conveyancer was simply aiming to correct the defect he had discovered, and for that reason doubtless united Mr. and Mrs. Spuck with Mr. and Mrs. Deehring in the deed to Mr. Oast. But for the supposed defect discovered by the conveyancer, they would probably have relied on the old deeds. Certainly as between Spuck and Deehring they would have been sufficient. Spuck could not have recovered the lots from Deehring by reason of his participation in the fraud, and after the purchase money was paid him there could have been no possible ground for him to base any claim for them. Therefore Spuck, by joining in the new deed to Mr. Oast, conveyed nothing, so far as these ground rents are concerned, even if it was necessary to perfect the leasehold title. But beyond all that the suit of Snack was still pending, and, although Spuck had the additional intention of getting the purchase money, it is not shown that his intent or that of Deehring to hinder Snack ever lessened one particle from what it was originally, and the presumption is that it still continued, as there was, so far as the record discloses, as much reason for it then as before. There might have been some indication of repentance, and a desire to restore Snack to the position he occupied before the deeds of 1898 were made, if the property had been reconveyed to Spuck; but that was not done. The transaction was, in effect, an attempted payment of the purchase money named in the fraudulent deeds, which, in our opinion, could not confirm them, or purge them of the fraud; for, as we have said, if that had been paid when the deeds of 1898 were made, they would still have been fraudulent by reason of the intent to hinder Snack. In the new deeds \$5 was named as the consideration, and the only instruments where the consideration of \$850 is mentioned are those of 1898. Spuck and Deehring thus undertook to convey to a third party a title not only tainted with fraud, but up to that time admitted to be so held as to make it fraud-

ulent, with the understanding that it should immediately be conveyed to Deehring and his wife. If Deehring had conveyed that title without having Spuck to unite in the deed, with the understanding that it should at once be reconveyed to him and his wife, it certainly could not be pretended that he would thereby have acquired any better title than he had under the deeds of 1898, and how can the fact that Spuck united in it give the transaction any validity? If Mrs. Deehring had been a bona fide purchaser for value, without any knowledge of the prior transaction, there might be some ground for contending that her interest could not be reached; but the proof shows that the cash paid was Deehring's money, which he had deposited in bank in the joint names of himself and wife, and the note used in part payment was his.

We have not thought it necessary to dwell on the fact that Mrs. Deehring was the daughter of Spuck, or to discuss the probabilities of knowledge by her and her husband of Spuck's financial condition, although they are circumstances proper to be considered with the other facts. Nor have we discussed the use of the money paid by Deehring to Spuck. If the appellees actually received \$143 of the \$400 borrowed from Deehring when the note was given in 1899, as appellants contended, that fact cannot reflect on this question. It is not pretended that the appellees knew how Deehring was holding the property, or that they ever had the slightest reason to suppose that Spuck had borrowed any money from him. They received none of the cash payment of \$450, although considerably more than half of Spuck's indebtedness was due to them. Nor will we attempt to point out all the different ways by which the appellees and other creditors have probably been injured by the conduct of these parties. One is sufficient. In July, 1900, the appellees employed counsel to examine the records. He reported that Spuck had no real property, so far as he could find; that he had owned two ground rents, which he conveyed to Haas on January 11, 1898. If the deeds of 1898 had not been made, and on December 19, 1900, Spuck had conveyed the lots to his son-in-law, Deehring, is it not probable that when he made the deed of trust, less than two months after that date, the appellees or some of the creditors would have investigated the transaction? If they had done so, they might at least have avoided the preference Deehring obtained for the \$400 debt Spuck owed him; but when they found the transfers of 1898, which recited a proper consideration, they were easily misled by them; and, if the deeds of December, 1900, were apparently made to correct errors, they would not suggest any fraud in the original transaction, even if the records had been again examined, which would have seemed useless. But this only illustrates how such fraudulent transactions do in fact injure

creditors, and therefore how proper it is for courts to strike them down when the circumstances justify it.

We are of opinion that by reason of the facts disclosed in this record the court below was right in declaring all of the deeds fraudulent and void as against the appellees. The decree provides for the sale "of the two ground rents," and therefore the leasehold interest of Mr. Deehring was not intended to be affected by it. That interest should not be sold, and, understanding that to be the meaning of the decree, we will affirm it.

Decree affirmed, the appellants to pay the costs.

MERIGAN v. MCGONIGLE.

(Supreme Court of Pennsylvania. April 20, 1903.)

TRUST DEPOSIT—NOTICE TO DONEE—EVIDENCE OF GIFT.

1. A trust deposit in a savings bank will not be defeated because there is no affirmative evidence that the donee had notice of it during the life of the donor.

2. The rules of a savings bank required that deposits made for the benefit of another should be expressed to be "in trust." Another rule limited deposits of any person during one year to \$300. A depositor opened a deposit in trust for her niece, who had been a member of her family from childhood. The niece did not know of the deposit, the aunt retaining possession of the book until her death. The aunt deposited \$300 to the trust account for nine successive years. In an action to determine the ownership of such deposit on the death of the aunt, there was evidence that the aunt had declared that the deposit in the niece's name was for her benefit. *Held*, that a verdict for the niece was sustained by the evidence.

Appeal from Court of Common Pleas, Philadelphia County; Beitler, Judge.

Action by Mary A. Merigan against John McGonigle, executor of Mary Fitzgerald, to determine the ownership of a savings bank deposit. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph P. McCullen and Crawford & Loughlin, for appellant. F. B. Bracken, for appellee.

MESTREZAT, J. In August, 1889, Mary Fitzgerald, a widow, opened an account in her own name with the Philadelphia Saving Fund Society, and deposited \$300. On December 12, 1889, she deposited a like sum with the society in the name of "Mary Fitzgerald, in trust for Mary Agnes Fitzgerald." Annually thereafter up to 1897, except the year 1891, Mrs. Fitzgerald deposited at the same time a similar amount to the credit of each account. The annual interest of the deposits was added to the accounts. A rule of the society limits the deposits of any person during one year to \$300. When Mrs. Fitzgerald opened her account she was given

a passbook containing the rules and regulations governing deposits made with the society, and she was required to signify her assent to the rules and regulations by signing the book. Rule 4 is as follows: "Every deposit made by one person for the benefit of another person shall be expressed to be 'in trust,' or stating the fiduciary capacity in which the depositor is acting as 'executor,' etc., and no deposit shall be received, or expressed to be received, from one person 'by' another person or by one person 'for' another person." At the time these deposits were made, the members of Mrs. Fitzgerald's household were herself, her two stepdaughters, and her two foster daughters, Mary Hyland and Mary King. The latter was the niece of Mrs. Fitzgerald's husband, and was taken into her family when quite young, and remained there until her aunt's death. She assumed, and was known by, the name of Mary Agnes Fitzgerald, and was the cestui que trust of the fund deposited with the society. Mrs. Fitzgerald died June 9, 1899, without having withdrawn from the society any part of the money she had deposited in trust for Mary Agnes Fitzgerald, and leaving it all there as she had deposited it, in her own name as trustee. She retained possession of the passbook until her death. Mrs. Fitzgerald's executor and the cestui que trust both claimed the fund, and, the latter having brought suit, the society took a rule to compel the parties to interplead. The rule was made absolute, and an issue was framed to determine the ownership of the fund, in which Mary Agnes Fitzgerald, now Mary A. Merigan, was plaintiff, and Mrs. Fitzgerald's executor was defendant. The trial of the issue resulted in a verdict and judgment for the plaintiff, and the defendant has taken this appeal. The cestui que trust is the appellee.

The appellant alleges that the court below erred in not directing a verdict for the defendant, and in refusing to admit certain testimony offered by the appellant to show the declarations of Mrs. Fitzgerald, after the account had been opened, as to her purpose in making the deposit in trust for Mary Agnes Fitzgerald. It is contended by the appellant that the question of Mrs. Fitzgerald's intent in making the deposit was not fairly submitted to the jury, and that, if it was, the intent was not consummated and the trust was not executed.

The question of intent, we think, was properly and fairly left to the jury. At least, we are confident that the appellant has no just ground of complaint of the court's action in that respect. The account stood upon the books of the bank and upon the passbook in trust for Mary Agnes Fitzgerald, and, though the passbook had not been delivered to the cestui que trust, she was prima facie entitled to the fund on the death of the depositor. *Gaffney's Estate*, 146 Pa. 49, 23 Atl. 163. When Mrs. Fitzgerald made the deposit, the

rule of the society, of which she had knowledge and to which she assented, disclosed to her the proper form of a deposit when made "for the benefit of another person." She adopted that form in depositing the fund in controversy. In addition to these facts, it appears from the testimony that, during the time these deposits were being made, Mrs. Fitzgerald said that "she had taken out a book" in the appellee's name at the bank, and declared that the money was the appellee's and was deposited for her. The facts thus disclosed by the testimony, considered in connection with the relations existing between the parties, were amply sufficient to justify their submission to the jury on the question of the intent to create a trust in favor of the appellee. While the learned trial judge submitted this question to the jury, there was no evidence that would have warranted a finding in favor of appellant. It appeared that Mrs. Fitzgerald had an individual, as well as a trust, account, with the Philadelphia Saving Fund Society, and from that fact appellant argued that she desired to deposit beyond the amount limited to any one person, and for that purpose she had one of the accounts entered in trust for the appellee. The court left the fact with the argument to the jury on the question of Mrs. Fitzgerald's intent in making the deposit. The evidence was little more than a scintilla, and could not prevail against the admitted facts disclosing a contrary purpose. It is clear that the question of the intention of the donor in making the deposit was, under the evidence, for the jury, and was not submitted in a manner prejudicial to the appellant.

The declarations of the depositor made at the time the account was opened with the bank, and hence part of the *res gestæ*, were evidence of her intention in making the deposit. They were clearly competent. *Sayre v. Well* (Ala.) 10 South. 546, 15 L. R. A. 544; *Connecticut River Savings Bank v. Albee* (Vt.) 25 Atl. 487, 33 Am. St. Rep. 944; *Mable v. Bailey*, 95 N. Y. 206. But the subsequent declarations of the depositor against the interests of the cestui que trust were not competent to invalidate the trust. *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925; *Connecticut River Savings Bank v. Albee*, supra. The same rule would exclude as evidence the will of Mrs. Fitzgerald, by which she gave her property in equal shares to her two stepdaughters and to her two foster daughters. But the competency of this testimony need not be determined. Its rejection by the court did the appellant no harm, as it was admitted on the trial that after Mrs. Fitzgerald's death the appellee received her equal share of the decedent's estate.

The case at bar is not distinguishable from *Gaffney's Estate*, supra. There Hugh Gaffney boarded with Polly McKim, a widow, from 1881 until his death in 1888. By his will he gave her a legacy. At the time of

his death he had two accounts with a savings bank, one in his own name and the other in the name of "Hugh Gaffney, Trustee for Polly McKim." His executors claimed and obtained from the bank the money deposited in the trust account. On the settlement and distribution of the decedent's estate, however, it was awarded to the cestui que trust. The passbook was found in the possession of Mrs. McKim after Gaffney's death. It was there, as here, claimed that Gaffney's only object in depositing the money in a trust account was to increase his deposit in the bank over the limit allowed to one person. But, as here, the only evidence to support that theory was the fact that the depositor had opened two accounts in the bank. It was held that a valid trust was created, and on the death of Gaffney the cestui que trust was entitled to the deposit. Chief Justice Paxson, delivering the opinion, said: "Granted there was no direct evidence of a gift, there is evidence of a trust. This appears upon the face of the bankbook, as well as upon the books of the bank. * * * In the case in hand, Hugh Gaffney made this deposit in his name as trustee for Polly McKim, and the deposit so stood at the time of his death. An argument was based upon the allegation that he had never delivered the deposit book to Polly McKim. This, however, was not necessary, as it would have been in the case of a gift inter sese. * * * We have, then, the case of a deposit on the books of the bank of a sum of money in the name of Hugh Gaffney, trustee for Polly McKim. This makes out at least a prima facie case for the appellant. Upon the face of the bankbook the money belonged to Polly McKim, and there is not sufficient upon the record to rebut this presumption. This money should have been awarded to the appellant."

Here the account, when opened with the society, was entered upon its books and upon the passbook of the depositor in the name of "Mary Fitzgerald, in trust for Mary Agnes Fitzgerald." With a single exception, this fund was increased by an annual deposit of a like sum for nine years. There is not a particle of evidence to show that Mrs. Fitzgerald had made the deposit for any other purpose than that disclosed by the books of the bank. She lived 10 years after she opened the account, and expressed no desire to withdraw the money and apply it to her own use, and made no attempt to revoke the trust she had created for the appellee. Retention of the passbook by the depositor is not, under the circumstances here, decisive against the validity of the trust. *Martin v. Funk* (N. Y.) 31 Am. Rep. 446; *Atkinson's Petition* (R. I.) 16 Atl. 712, 3 L. R. A. 392, 27 Am. St. Rep. 745; *Smith v. Bank* (N. H.) 9 Atl. 792, 10 Am. St. Rep. 400; *Connecticut River Savings Bank v. Albee*, supra. Its possession was necessary, as in other cases of a deposit by a trustee, in order to enable the depositor to perform her duties as trustee

of the fund deposited. Without anything disclosing a contrary intention, it will be presumed that she retained the book as trustee, and not in her individual capacity. The trust account was not a single transaction, but was composed of deposits made at intervals for a period of nine years. It was therefore necessary for the depositor to retain the passbook that the various sums might from time to time be entered in it. And each deposit by Mrs. Fitzgerald entered in that book was not only a declaration of a trust as to the sum thus deposited, but a recognition of the trust created by former deposits. These were acts which, unrebutted, aided in fastening a trust upon the fund, and in disclosing the intention of Mrs. Fitzgerald that the appellee should be the beneficiary owner of it.

If a trust created by a deposit in a savings bank is otherwise complete and in existence at the death of the trustee, we can see no good reason why it should be defeated because there is no affirmative evidence that the donee had notice of it during the life of the settlor. This is, in effect, decided in *Gaffney's Estate*, supra, and is so held by the courts of other states. *Connecticut River Savings Bank v. Albee*, supra; *Ray v. Simmons* (R. I.) 23 Am. Rep. 44; *Mutual Insurance Co. v. Deale* (Md.) 79 Am. Dec. 673; *Minor v. Rogers* (Conn.) 16 Am. Rep. 69; *Martin v. Funk*, supra. We therefore do not think that the claim of the cestui que trust to the fund in controversy can be defeated by reason of the fact that the evidence fails to show that she had knowledge of the creation of the trust before the death of the depositor.

We are aware that the Massachusetts decisions are in apparent conflict with the rule here recognized as to the effect of the retention of the passbook by the depositor and the failure to give notice of the trust to the donee in cases of this character, but it is sustained by the New York cases, and by the great weight of authority elsewhere in this country.

The assignments of error are overruled, and the judgment is affirmed.

FINNERTY v. BURNHAM et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

INJURY TO EMPLOYEE—SAFE APPLIANCES—DUTY OF MASTER.

1. It is the duty of a master to furnish his employees with safe appliances.

2. In an action for the death of plaintiff's decedent a verdict for plaintiff will be sustained where the evidence shows that decedent was killed by the breaking of a chain which was defective when bought, and of such a character that it could have been discovered by due inspection.

3. Where the defect through which an injury

§ 3. See *Master and Servant*, vol. 34, Cent. Dig. § 245.

to an employé occurs is in the original construction of the appliances, knowledge by the master will be presumed.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Finnerty against George Burnham and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frank P. Prichard and John G. Johnson, for appellants. John M. Vanderalice and Clarence Vanderalice, for appellee.

MESTREZAT, J. The plaintiff is the widow of John Finnerty, who was killed September 24, 1901, while in the service of the defendants at their locomotive works in the city of Philadelphia. He was a laborer, and on the day of the accident he and three other employés were engaged in hoisting a heavy article known as a "taper waist" for the purpose of placing it on a wagon. The work was done with a crane and a chain which had a ring in the middle and a hook at each end, and which was suspended from a hook on the arm of the crane. The hooks on the chain were fastened to the object to be raised. When the waist had been lifted to the required height, and was almost on the wagon, the chain broke, and the waist fell on Finnerty, and killed him. The plaintiff alleges as the basis of this action that the defendants negligently furnished a chain of insufficient strength to safely lift the heavy object which the deceased and his fellow workmen were required to place on the wagon. The trial judge submitted the case to the jury, and instructed them that, in order to hold the defendants responsible, the plaintiff must show that the chain "was defective when it was supplied; and, further, that the defect was apparent when it was supplied." The question thus submitted to the jury was determined in favor of the plaintiff, and the defendants have appealed. Their contention here is that they are relieved from liability for the death of Finnerty, because it appears from the evidence that they "had purchased the chain of one of the most reputable manufacturers, had put it in stock in their shop, had furnished other tools of a similar kind so that the employé could select the one he desired, and had given general instructions to report and have repaired any defects."

The duty of the master to furnish, maintain, and inspect appliances and instrumentalities used by his employés is thus stated in 20 Am. & Eng. Ency. of Law (2d Ed.) 38, citing numerous authorities, including some of our own decisions, to sustain the text: "It is the duty of the master to use reasonable care to furnish his employés with a reasonably safe place of work and with reasonably safe machinery and appliances. The master's duty in this regard does not end here, but is a continuing one. The law

imposes on him the further obligation of using reasonable care to keep such place of work and such instrumentalities in a reasonably safe condition, and this, of course, is to be accomplished by a proper and timely inspection for defects, and the repair thereof." And on page 93 of the same work it is said: "Where the defect through which the injury occurs is in the original construction of the appliance or instrumentality, notice thereof to the master is unnecessary. In case of structural defects, knowledge thereof by the master will be inferred. This doctrine is no more than the application of the general rule that it is the master's duty to exercise ordinary care in providing tools, machinery, and appliances that are reasonably safe." By the verdict of the jury it has been settled that the chain, the breaking of which caused the death of Finnerty, was defective in its original construction, and that the defect was apparent when it was purchased by the defendants. It is necessarily conceded by the defendants that this finding as to fixed machinery would impose on them responsibility for the accident, but it is contended that the chain in question was a portable tool, and that "as to tools which are portable, which are kept in stock, as to which the employé can use or not use any particular one, and which he naturally handles and sees every day, the rule is that the employer may rely upon his inspection, and it would be impracticable to carry on any manufactory under any other rule." But we do not agree with the defendants that they were relieved from the duty to furnish or maintain a reasonably safe chain with which the employé was to perform his work; nor that the employé assumed the risks of the defects in the chain which his inspection would not discover. That the defendants neither supplied nor maintained a reasonably safe chain is apparent from the evidence submitted to the jury, and which amply justified the verdict. The chain was an instrumentality or tool necessary in the performance of the work assigned Finnerty and the other employés. While not attached, yet in the operation of the crane it was necessarily a part of it, and without which the service of the employés could not have been performed. The same rule that imposes upon the defendants the duty of supplying a reasonably safe and suitable crane, therefore, required them to furnish a chain of like character. It was not a common tool or appliance with which every person of ordinary intelligence is presumed to be conversant. In such case the employer has a right to rely upon his employé to detect any defects, and to protect himself against them. But here the great weight of the object to be placed upon the wagon required a chain of exceptional size and strength, exempt from structural defects. As the evidence disclosed, it required an inspection by a person having technical knowledge to dis-

cover the insufficiency of or defects in the chain. It was not necessary, and could not be presumed, that the employé should have such knowledge to enable him to perform the duties of his employment. It was, therefore, not expected of him, and hence not his duty, to make an inspection of the chain, which would have resulted in no information to him. Common observation would not have availed him nor protected him from the defects in the chain, which the testimony showed, and the jury found, existed from its origin.

The learned counsel for defendants, we think, base their argument upon a misconception of the facts of the case. The chain was not one of several chains similar in kind and size kept for use on this crane. While there were small chains for like work lying about the shop, to be used as needed, this was the only chain in the shop of sufficient strength and size for moving objects of the weight of the "taper waist." It was near, or suspended from, the crane when the employés began their work, and it is therefore apparent that they were expected by their employers to use it when objects of a large size were to be moved. It is true, the defendants had another chain sufficient for the purpose, but it was not, at the time, in this shop. The rule, therefore, sought to be enforced by the defendants, which relieves an employer from liability when he furnishes safe and suitable materials or tools from which the employé can make a selection, is not applicable here.

The evidence in the case conclusively establishes the fact that the chain was defective in material and construction, and therefore unfit for the services expected of it. It was constantly breaking, and as constantly repaired. The foreman of the shop knew it had been broken, but there was no evidence that Finnerty knew the fact, or knew that the chain was insecure or unsafe. No inspection nor any other means were taken to protect employés against its inherent weakness and unfitness. It was clearly shown on the trial that an inspection by one skilled in ironwork would have revealed its structural and other defects. With the knowledge of its defects disclosed by its frequently breaking, common prudence suggested an inspection of it which would have resulted in its repair or withdrawal from service, thus saving two human lives.

The judgment is affirmed.

IN RE BURK & MCFETRIDGE'S ASSIGNED ESTATE.

(Supreme Court of Pennsylvania. April 20, 1903.)

PAYMENT—EVIDENCE.

1. In proceedings to distribute the proceeds of a sale of the estate of an insolvent corporation, a married woman showed by com-

petent proof that she had loaned money to the corporation, and the auditor found this as a fact, and the wife and her husband testified positively that the debt had not been paid. *Held*, that such evidence was not overcome by entries on the corporate books showing payment to the woman, made by the defaulting book-keeper or treasurer of the company.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Burk & McFetridge. Appeal of Elizabeth McFetridge from an order overruling the exceptions to an auditor's report. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

William F. Johnson, for appellant. John Dickey, Jr., for appellee.

MESTREZAT, J. For some years prior to March 20, 1893, John R. McFetridge and William M. Burk were associated as partners in the printing business. On the day mentioned the partnership was dissolved, Burk selling his interest therein to McFetridge. The assignor company was then incorporated, and took the assets of the late firm as the property of McFetridge, who became the president and manager of the corporation. Burk was paid \$60,000 for his interest in the partnership—\$39,000 in cash, and the notes of the corporation for \$21,000, payable in three years. In 1896 the indebtedness due Burk on the notes had been reduced to \$13,000. He then desired the amount paid, but the corporation was without funds to meet the obligation. Mrs. Elizabeth McFetridge, the appellant, offered to, and did, furnish to the corporation \$13,000 with which it paid Burk's indebtedness. She raised the money by mortgaging her separate real estate. The above facts were found by the auditor. Subsequently Mrs. McFetridge was paid \$2,000 on the loan, leaving still due her the sum of \$11,000.

On April 21, 1900, the Burk & McFetridge Company made an assignment for the benefit of its creditors. The assignees filed their first account in June, 1901, showing a balance in their hands for distribution of \$32,071.99. The account was referred to an auditor to make distribution. Mrs. McFetridge appeared before him, and presented for allowance her claim of \$11,000. The auditor found "that the amount of loan made by Elizabeth McFetridge to the Burk & McFetridge Company has been paid back, and that the debt has been satisfied, and he therefore disallows the claim." The court below, without filing an opinion, and evidently with little consideration, entered a decree dismissing Mrs. McFetridge's exceptions to the auditor's report.

The error of the auditor in disallowing the appellant's claim is manifest on the face of his report. In the report it is said: "Mrs. McFetridge, the claimant, has testified that she loaned the sum of \$13,000 to the company in October, 1896, which money she ob-

tained by mortgages created by her on her separate estate, in which statement she was corroborated by her husband, John R. McFetridge. There was no evidence to contradict that statement, and in the absence thereof we must assume that the money was paid by Mrs. McFetridge." The auditor therefore finds that the appellant in October, 1898, loaned the corporation \$13,000 of her own separate estate, and that the money was applied to the payment of the corporation's indebtedness to Burk. Unless the loan had been paid at the time of the audit, it should, of course, participate with other claims in the distribution of the money in the hands of the accountants. After the appellant's claim had been established by undisputed testimony and to the satisfaction of the auditor, the burden of showing payment was on those alleging it, and, unless this responsibility was met by competent and satisfactory testimony, the claim should have been allowed. The auditor undertakes to show from the evidence that the claim was paid, and then concludes as follows: "In this case the weight of the evidence is against the claimant, and, while it may seem hard that the claimant should lose money which she took from her private estate to loan to the company, it would be equally hard upon the other creditors to allow her claim, unless sustained by the clearest kind of proof." This language is not only self-contradictory, but, as we have seen, the auditor had already found, in a former part of his report, that by the uncontradicted evidence the loan had been made to the corporation, and the money had been used to pay its debts. From the fact that he disallowed the claim under the evidence submitted, the auditor evidently meant that the appellant was required to show "by the clearest kind of proof" that it had not been paid. He admitted as evidence, against the appellant's objection, certain cashbooks of the insolvent debtor, by which it appeared that various sums of money, aggregating \$17,000, had been paid by the corporation to Mrs. McFetridge. Many, if not all, of the entries or charges in these books against Mrs. McFetridge were made by the defaulting bookkeeper or treasurer of the company. The books did not disclose upon what account these payments were made, and hence did not show that they were applicable to the loan on which this claim is made against the corporation. Recognizing the total insufficiency of the evidence, even if it were competent as tending to establish payment of the claim, the auditor, presumably in corroboration of it, says that Samuel L. McFetridge testified that he made some of the entries in the books after 1898, and "that he believed Mrs. McFetridge received the money." Save the fact that Mrs. McFetridge is the wife of John R. McFetridge, to which the auditor alludes as discrediting the claim, he neither quotes nor refers to any other testimony as sustaining his conclusion that "the weight

of the evidence is against the claimant." We have carefully read all of the testimony printed in the paper books, and there is nothing to be found in it that shows payment of any part of Mrs. McFetridge's claim. The evidence on which the auditor rests his finding does not, as is apparent from his report, support the conclusion that the claim was paid. Conceding the cashbooks to have been properly kept, and that the money therein charged against Mrs. McFetridge was received by her, there is a total absence of evidence tending to show that the money received by her was to be applied to her \$13,000 loan. The auditor admits that the books of the corporation show there had been a prior loan of \$15,000 by Mrs. McFetridge to the corporation, but he infers that the moneys paid her, as disclosed by the cashbooks, were not applicable to that loan, because her counsel stated that the loan had been paid, and that her husband said he had assumed the indebtedness. But McFetridge did not testify that the payments to his wife, shown by the cashbooks, were made on the \$13,000 loan, and not on the \$15,000 loan. On the contrary, as stated by the auditor in his report, both John R. McFetridge and Mrs. McFetridge testified that, except the credit of \$2,000, which was admitted, no payments whatever had been made on the \$13,000 loan. This evidence was not impeached nor contradicted, except by the evidence alluded to by the auditor, from which he drew the unwarranted inference that the loan had been paid. So clearly erroneous, as disclosed by his own report, was the conclusion of the auditor in rejecting the claim of the appellant, that the learned court below should have sustained the exceptions to the report and directed the allowance of the claim.

It should be said that the auditor is not alone responsible for the incorrect result at which he arrived. The course pursued by appellant's counsel in proving the claim logically resulted in confusion and in a misapprehension of the merits of the claim. Had he rested on the oral testimony, which was undisputed, and from which the auditor found the loan to have been made, and had he himself not attempted to introduce into the case the books of the corporation, the chances for an erroneous conclusion by the auditor would have been greatly diminished. This, however, cannot be allowed to prevail against the manifest right of the appellant to have her claim paid out of the fund for distribution.

We do not have before us the distribution made by the auditor, and must therefore direct that the error be corrected by the court below. The decree is reversed at the cost of the appellee, and it is now ordered and directed that the court below recommit the matter to the auditor, with instructions to allow the claim of the appellant to participate in the distribution of the funds in the hands of the accountants.

DUFFY v. PLATT et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

INJURY TO EMPLOYE—QUESTION FOR JURY—FELLOW SERVANT.

1. In an action by an employé for injuries received, where his testimony shows that the foreman was thoroughly competent, it was error to submit such an issue to the jury.

2. The foreman of a carding room in a mill, cleaning a revolving cylinder, and negligently leaving it open, in consequence of which an employé is injured, is a fellow servant of the injured employé.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Nathaniel Duffy by his mother and next friend, Mary Madden, against Ammon Platt and Adolphus C. Platt. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Morton Z. Paul, for appellants. Patrick F. Dever, for appellee.

FELL, J. No question of the competency of the foreman who had charge of the carding room in which the plaintiff was employed was raised by the pleadings or by the testimony. He had had 34 years' experience in managing carding machines, and the testimony adduced by the plaintiff affirmatively showed that he was fully competent. Yet in the general charge, and by the answer to the defendants' first point, the question of his competency was submitted to the jury. This error requires a reversal.

In determining whether a new venire should be granted or judgment entered for the defendants, we have considered the other questions raised. The facts established by the plaintiff's testimony were these: The plaintiff was over 15 years of age, and had been employed at the defendants' mill for two years. A few days before the accident he had been advanced and put to work in the carding room as an operator, where a part of his duty was to remove the waste which accumulated on the machines. While he was doing this, his hand was caught by a revolving cylinder. It was intended that this cylinder should always be covered when the machine was in operation. A proper cover was provided for it, which should have been removed only when it became necessary to do so in cleaning the machine. On the day of the accident the workman whose duty it was to clean and regulate the machines was called to another room, and the foreman did his work. Why the cylinder was uncovered at the time of the accident, and whose fault it was, did not appear, except by inference from the fact that two hours before the fore-

man had cleaned the machine. But his negligence in this regard imposed no liability on the defendants. He was a foreman in charge of this room and another, and worked under the direct supervision and instruction of the defendants, receiving his orders from them each day; and in cleaning the machine he was doing the work of an ordinary workman. He was clearly a fellow servant, for whose negligence his employers were not answerable. *Ricks v. Flynn*, 196 Pa. 263, 46 Atl. 360; *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792; *Hughes v. Leonard*, 199 Pa. 123, 48 Atl. 862.

The judgment is reversed, and judgment is now entered for the defendants.

FLOWERT v. BLANK.

(Supreme Court of Pennsylvania. April 20, 1903.)

FOREIGN RECEIVER—CONTROL OF ASSETS—INSOLVENT BENEFIT ASSOCIATION—RIGHTS OF CERTIFICATE HOLDERS.

1. While the assets of an insolvent corporation are still in the state, a foreign receiver, by virtue of his appointment, cannot assert his control over the assets as against domestic creditors.

2. Where a foreign benefit association has become insolvent, holders in the state of matured death certificates are entitled to priority in payment out of a fund of the association in the state in the hands of an ancillary receiver in the state, before any portion of the fund is given to the receiver of the association appointed in a foreign state.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles G. Frowert against Hannah Blank and others. From an order dismissing exceptions to the auditor's report, Isaac B. Barrett, receiver of the Order of United Friends, appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

Hampton L. Carson and M. W. Van Auken, for appellant. Joseph A. Slattery and Joseph Savidge, for appellee.

MESTREZAT, J. The Imperial Council of the Order of United Friends was a corporation created by and under the laws of the state of New York, with its principal place of business in the city of Albany, in that state. It was a fraternal beneficial association, without capital stock, and was authorized to insure its members against death and disability. To meet the liabilities thus incurred, it had power to make and levy the necessary assessments upon its members. Of the membership about 900 resided in Pennsylvania and nearly 5,000 elsewhere. Dr. Charles G. Frowert, a citizen of Pennsylvania, residing in Philadelphia, was the imperial treasurer of the corporation. The association, being insolvent, presented a petition to the Supreme Court of the State of New York, sitting at

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 452.

Albany, praying for the dissolution of the corporation and the appointment of a receiver of its property and effects. The court granted the prayer of the petition, and on April 11, 1890, appointed Isaac B. Barrett the receiver of the corporation. At this time Dr. Frowert, as imperial treasurer, had in his hands on deposit in the Third National Bank of Philadelphia \$32,175.49, collected from assessments upon all the members of the association, which sum he had received from the imperial recorder, who resided in the city of New York. There were then about 65 death claimants, and only 15 of these resided in Pennsylvania. On a bill filed in the court of common pleas No. 2 of Philadelphia county on April 17, 1890, by Dr. Frowert, Isaac N. Solis was appointed ancillary receiver of the association in Pennsylvania. After paying the claims of certain attaching creditors out of the fund in his hands, Dr. Frowert paid the balance to the ancillary receiver. The latter having subsequently filed an account, the common pleas appointed an auditor to distribute the money in his hands. There were two claimants of this fund—one, Isaac B. Barrett, the New York receiver; the other, the creditors of the association residing in Pennsylvania. These creditors were beneficiaries of the corporation under certificates which had been issued to members of the order who subsequently died. The auditor awarded the fund to the creditors, and the court below affirmed his adjudication. The receiver has appealed, and alleges that the court below erred in not awarding the fund in the hands of the accountant to him, as "receiver appointed in the state of New York of the Order of United Friends." This is the only question in the case.

Solis v. Blank, 199 Pa. 600, 49 Atl. 302, decided by this court two years ago, was a bill filed by Dr. Frowert to restrain the prosecution of certain writs of foreign attachment which had been issued in the common pleas of Philadelphia county by Pennsylvania creditors against the funds in his hands as imperial treasurer, and for the appointment of an ancillary receiver of the association. The court refused the injunction, but appointed Solis ancillary receiver of the corporation, and directed Frowert to pay to him such moneys in his hands as were in excess of the amounts required to satisfy the claims of the attaching creditors. The judgment of the court below was affirmed, and we there held that the beneficiary named in the contract in this case becomes, after the death of the principal, a creditor of the association; and that the appointment of a receiver of a foreign corporation by a court of the state of its domicile does not defeat foreign attachments issued in Pennsylvania by Pennsylvania creditors after the appointment of the receiver. In the present case the learned counsel for the appellant asks us to decide that the holders of matured certificates who were determined in *Solis v. Blank* to be creditors of

the association are not business creditors, and hence do not have the rights of such creditors to participate in the fund for distribution. His argument is based upon the proposition that "in point of fact they [the beneficiaries] are but 'representatives' of deceased members of a beneficial association." We have ruled directly the reverse of that proposition, and for that reason have held the beneficiary under the matured certificate to be a creditor of the corporation. In discussing the right of the beneficiary to the fund secured by the certificate and the relation of the deceased member to it, in *Hamill v. Supreme Council*, 152 Pa. 537, 25 Atl. 645, Justice Green said: "The deceased never had any right to the benefit which was to be paid to his wife. It was hers, and hers only, payable to her exclusively, and, of course, no one but she could maintain any action for its recovery. She is a living person, and no other person ever had or could have the right to recover this money. As between her and the defendant, there is a clear contention as to whether the funds shall be paid by the defendant to her, and there is no contention, and cannot be, upon that subject, as between the defendant and the legal representatives of the deceased. The plaintiff is not such a representative. She takes, if she takes at all, in her own right alone as the beneficiary of the fund, and she does not represent any right or interest of her deceased husband in the fund. She represents herself and her own rights only in the subject in controversy." We have no doubt that on the death of a member of the association an indebtedness is created in favor of the beneficiary which makes him a creditor, entitled to all the rights and remedies as such to enforce his claim against the assets of the corporation.

The appellant here is receiver of an insolvent corporation of New York, and was appointed by a court of that state. By virtue of that authority he claims the assets of the corporation within this jurisdiction regardless of and against the claims which resident creditors have against the corporation. But this position is not tenable. It ignores the well-settled principle that a receiver of a corporation possesses no power or authority beyond the jurisdiction of the court appointing him. His powers are necessarily circumscribed by the territorial limits of the jurisdiction that created him. This rule, it is true, has been relaxed by modern decisions so as to permit a receiver, on the principle of comity, to exercise in another state the functions vested in him by his appointment; but this is permitted only where it will not violate public policy, or infringe or defeat the rights of domestic creditors. Such we believe to be the well-settled doctrine in this country, recognized alike by state and federal courts. In 13 Am. & Eng. Ency. of Law (2d Ed.) 912, it is said: "Every state owes a duty to its citizens to protect them in the assertion of their claims against

insolvent bodies by retaining within its own jurisdiction and control such of their property as may be there located until the just claims and rights of its own citizens have been satisfied, and therefore this comity or favor will not be indulged where to grant it would permit the receiver to take the property out of a state to the injury of domestic creditors." Mr. Beach in his work on Receivers (section 268) says: "The effect of the appointment of a receiver upon the property of the defendant in another state and the power and rights of the receiver there are founded solely on the principle of comity, which is a rule of courtesy and favor recognized and enforced between the courts of the several states, but which is never extended or enforced to embarrassment or loss to local creditors." In *Catlin v. Plate Co.* (Ind. Sup.) 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338, Chief Justice Mitchell, speaking for the court, says: "In *Hurd v. City of Elizabeth*, 41 N. J. Law, 1, the court said: 'That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this state the assets of the debtor, is a proposition that appears to be asserted by all the decisions.' The principle upon which the decisions rest is that it is the policy of every government to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and hence the right of the receiver of a foreign court to sue, which is allowed only upon consideration of comity, will be denied when it comes in conflict with the interests of domestic creditors." In *Hurd v. City*, referred to in the *Catlin* Case, it is also said in the opinion of the Chief Justice: "It [authority of receiver conferred by his appointment] could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied." In discussing the authority of a receiver in another jurisdiction than that of the domicile of the corporation in *Holbrook v. Ford* (Ill.) 39 N. E. 1091, 27 L. R. A. 324, 46 Am. St. Rep. 917, Justice Magruder, delivering the opinion, says: "A foreign receiver, holding his office by operation of a foreign law, will not be allowed to maintain a right of action against the assets of an insolvent debtor in this state as against a creditor resident in this state." And New York, the state whose receiver asks that this fund be transferred to its jurisdiction as against the citizens of this state who are creditors of the New York corporation, has declared by her highest court that she will permit a foreign receiver to sue in her courts only where the claim does not conflict with the rights of citizens of that state. *Willitts v. Waite*, 25 N. Y. 577; *Peterson v. Chemical Bank* (N. Y.) 88 Am. Dec. 208.

It is contended, however, by appellant that the facts of this case take it out of the rule recognized in the foregoing authorities, in that the domestic creditors "issued no process, acquired no lien, and made no demand for payment out of the funds in the hands of the ancillary receiver until after that fund had been demanded by the receiver." Mr. Beach (Receivers, § 261, citing authorities to sustain the text) thus defines an ancillary or auxiliary receiver: "In general, an auxiliary receiver is merely a custodian of the property within the state where he is appointed for the purpose of preserving the assets belonging to the party or corporation proceeded against within the state, in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims." When the funds of the insolvent corporation in Pennsylvania were placed in the hands of the ancillary receiver, they were subject to the claims of the creditors of the corporation in this state. The New York receiver had no lien upon them, and could not take possession without authority of the court, which, as has been seen, would not be granted as against the rights of domestic creditors. The claims of these creditors were duly presented to and proved before an auditor appointed by the court while the funds were still in the hands of the receiver, and within this jurisdiction, and hence subject to the orders of the court. Until the assets of an insolvent foreign corporation have been taken possession of by a receiver appointed by the court of the domicile of the corporation, and while they are still within the domestic jurisdiction, a foreign receiver, by virtue of his appointment, is not in a position to assert his control over the assets, nor to exercise any authority over them as against domestic creditors. The manner in which payment may be enforced by domestic creditors is immaterial, and necessarily depends upon the character of the assets, and how and by whom they are held. The appointment of a receiver here and his possession of the funds kept them within the jurisdiction of the court and subject to its order. No attachment or other process could avail to reach the money in the hands of the receiver. The creditors here had but one course to pursue to enforce their claims against the money in the hands of the ancillary receiver, and that was to prove them before the auditor appointed to distribute the fund. This was, in effect, an action to recover the amount of the indebtedness due the claimants, and it was instituted before the foreign receiver had obtained possession of the debtor's assets here, and before his claim to them had been recognized in this jurisdiction. Payment of the claims was thus properly enforced against the assets of the insolvent corporation in this state. We think there was no error committed by the court below in awarding the funds in the hands of the ancillary receiver to the domes-

tic creditors as against the claim of the foreign receiver.

The assignments of error are overruled, and the decree is affirmed.

PRINCE v. TAKASH.

(Supreme Court of Errors of Connecticut.
May 12, 1903.)

PLEADING—BILL OF PARTICULARS—AMENDMENTS—COURTS—JURISDICTION—AMOUNT INVOLVED—DETERMINATION OF AMOUNT.

1. Where an action is commenced by using the form of complaint denominated the "common counts" in the rules under the practice act, before any default can be entered or judgment rendered plaintiff must file a bill of particulars of his claim.

2. Where a complaint alleges that plaintiff sold and delivered to defendant specified merchandise at stated times, amounting to a certain sum, and that defendant has not paid for the same, and that plaintiff claims damages in a certain less sum, the variance is immaterial, as the claim for damages may be amended during trial, or the proof may reduce the amount of the agreed price.

3. Plaintiff, in commencing his action, used the form of complaint denominated under the practice act the "common counts," and thereafter, after the action was returned, filed a bill of particulars showing that plaintiff had sold and delivered goods to a certain amount, and claimed damages in a certain sum less than the sale price of the goods. *Held*, that it was error to require plaintiff to amend his complaint by stating whether any part of the claim or demand had been paid, payment being a defense which, under the practice act, must be specially alleged and proved by defendant.

4. Gen. St. 1902, §§ 533, 534, provides that a justice of the peace shall have jurisdiction of all civil actions where the matter in demand does not exceed \$100, and that the court of common pleas shall have jurisdiction where it exceeds \$100 but does not exceed \$500. By section 540 all actions within the jurisdiction of a justice may, after judgment, be transferred to the court of common pleas for trial de novo. St. 1821, p. 41, § 23, expressed the limit of jurisdiction as follows: "Wherein the debt, trespass, damage or other matter in demand does not exceed," etc. *Held*, that the amount of matter in demand in a cause in the common pleas is determined by the plaintiff in stating his cause of action and demand for relief, and an allegation of payment by defendant, which reduces the demand below the jurisdictional amount, does not deprive the court of jurisdiction.

Appeal from Court of Common Pleas, New Haven County.

Action by Adolf Prince against Rosalie Takash for goods sold and delivered, brought to the court of common pleas, and erased from the docket for want of jurisdiction, after the plaintiff had been required to amend his bill of particulars by showing payments claimed to reduce the amount unpaid to a less sum than \$100. Plaintiff appeals. Reversed.

Verrenice Munger, for appellant. Denis T. Walsh, for appellee.

HAMERSLEY, J. This action is brought to recover the price of goods sold to the defendant. In commencing the action the plaintiff used the form of complaint denominated in the rules under the practice act "common counts," and authorized for that purpose only. After the action was returned, the plaintiff filed a bill of particulars for the purpose of restating his cause of action so that the same shall be stated as required by the practice act. Until this is done either by a bill of particulars or other amendment or substituted complaint, there is no complaint for the purpose of taking a default or rendition of judgment or requiring the defendant to answer. When this is done, the cause of action thus stated stands for the form of complaint used in commencing the action, and the date of this restatement is treated, for purposes of answering, as the return day of the action. In legal effect the bill of particulars, as filed by the plaintiff, framed a complaint which alleges that the plaintiff sold and delivered to the defendant at stated times specified merchandise at specified prices, amounting in the whole to \$235.80; that the defendant has not paid for the same; and that the plaintiff claims \$150 damages. Such a complaint states a good cause of action.

The fact that the amount agreed to be paid is greater than the amount claimed as damages is immaterial to any question before us. The claim for damages may be amended during trial, or the proof may reduce the amount of the agreed price. The gist of the action is the breach of the defendant's duty to pay for the goods at the time of the sale and delivery. It is plain that the complaint disclosed no ground for a dismissal of the action for want of jurisdiction.

The defendant moved for an order of court directing fuller and more particular statements of the ground of the plaintiff's claim set forth in his complaint, and included in his motion a request that the plaintiff be ordered to amend his bill of particulars (meaning his bill of particulars filed for the purpose of completing his complaint by restating his cause of action in the manner required by law) by stating "whether any part of the claim or demand contained therein has been paid." This motion was allowed, and the court ordered the plaintiff to amend his pleading by stating "whether any part of the claim or demand contained therein has been paid," and this order is recited in the judgment. The plaintiff, under protest, and to avoid the penalties he might incur through disobedience of an order of court, amended his complaint by stating that certain payments had been made. The agreed price of the goods sold exceeded in amount the payments stated by a sum less than \$100. Thereupon, on motion of the defendant, the court ordered the case to be stricken from the docket. The reason of the action is thus stated in the judgment appealed from: The court "ordered and di-

rected that said case be stricken from the docket of said court on the ground that it appears from the bill of particulars filed in said case by the plaintiff that said court had no jurisdiction of said case." This judgment is erroneous. The court went too far in ordering the plaintiff to state in his complaint the fact of payment. If the plaintiff had relied upon a book account as the ground of his claim or demand, and the court had ordered him to state the whole account, a different question would be presented. But the ground of action is the failure of the defendant to make the payments he was bound to make at the time of each sale alleged. Payments subsequent to this breach of duty, which is the ground of the plaintiff's claim, need not be stated nor negatived in his complaint. Payment is a defense consistent with the truth of the plaintiff's claim, and by the express terms of the practice act must be specially alleged and proved by the defendant. The court erred in making that portion of its order which directed the plaintiff to amend his complaint by stating whether or not payments had been made, and the plaintiff is entitled to have the statement of payments made in obedience to this order erased.

The power of a trial court, as affirmed in the practice act, to direct a fuller and more particular statement of the ground of a claim or defense contained in any pleading is largely discretionary, to be exercised with caution, and never for frivolous or unsubstantial reasons. It may be said in the present case that, if the statement of payments should be erased from the complaint, yet the defendant would undoubtedly allege them in the answer, and the plaintiff would be obliged to admit the allegation, and it would thereupon appear on the face of the pleadings that the court had no jurisdiction, and the same judgment of erasure must then be rendered, and so it appears that the plaintiff suffers no real injury. Such a claim is suggested by the record, and, even if not urged in argument, demands attention, for it goes to the root of the substantial question before us.

A justice of the peace has jurisdiction of civil actions for legal relief wherein the matter in demand does not exceed \$100. The court of common pleas has jurisdiction in such civil actions wherein the matter in demand exceeds \$100 but does not exceed \$500. Gen. St. 1902, §§ 533, 534. All actions, except summary process, within the jurisdiction of a justice, may, after judgment, and at the option of either party, be transferred to the court of common pleas for trial *de novo*. Gen. St. 1902, § 540. The precise question is, what rule governs the court of common pleas in applying the limit thus placed upon the exercise of its jurisdiction to an action like the one before us? It is not the purpose of this legislation to compel the settlement of all controversies involving a small amount by a justice court, nor to prevent the court of common pleas from exer-

cising any jurisdiction in such controversies. Its main purpose is to send such causes in the first instance to a justice court when the relief demanded by the plaintiff does not exceed \$100. The limit was formerly expressed as follows: "Wherein the debt, trespass, damage or other matter in demand does not exceed," etc. St. 1821, p. 41, § 23. The meaning has not been altered by the condensation in language made in the revision of 1875.

When a plaintiff brings his action to a court of common pleas upon a money demand to recover damage caused by the defendant's breach of duty, and the amount of damage claimed exceeds \$100, and the recovery of that sum is legally possible upon proof of his cause of action as stated, that court has jurisdiction of the action, and its jurisdiction is unaffected if, in the course of subsequent proceedings, the plaintiff fails to prove his cause of action as stated or to prove a damage in excess of \$100, or if the defendant succeeds through proof of payment or similar defense in reducing the amount of damage recovered to less than \$100. In other words, the amount of the matter in demand in such a case is determined by the plaintiff in stating his cause of action and demand for relief. This rule has been practically applied in many cases, and is one most consistent with the evident purpose of our legislation, and most convenient in practice. *Grether v. Klock*, 39 Conn. 133, 135; *Hunt v. Rockwell*, 41 Conn. 51; *Hannon v. Bramley*, 65 Conn. 193, 200, 32 Atl. 336. If, upon the trial, the defendant reduces the amount of judgment below \$100 by proof of payment, that fact can have no more effect upon jurisdiction than a like reduction of judgment through failure of the plaintiff to prove any allegation of his complaint, and as affecting jurisdiction there is no distinction between payment alleged by defendant and proved by witnesses, and payment so alleged and proved by admissions of the plaintiff, whether in open court or by failure to deny the allegation or express admission in his reply. In either case the court adjudges the amount due the plaintiff in the exercise of its jurisdiction, determined by the complaint. The plaintiff may, upon return of his action to court, so amend his complaint that the amount of the matter in demand will clearly appear upon the face of his writ and complaint not to exceed \$100, and, such amendment relating to the return day of the writ. It is apparent upon the face of the writ that the court had no jurisdiction. But where the writ as returned shows jurisdiction, and the defendant has appeared and submitted to the jurisdiction, it is at least doubtful how far the plaintiff can use his right to amend for the mere purpose of avoiding a jurisdiction he has himself invoked. Certainly, when an inadvertent statement in an amendment may accomplish such a result, the court will permit him to further amend by erasing

the statement. *Grether v. Klock*, 89 Conn. 133.

It is unnecessary to consider how the court may deal with a plaintiff who knowingly makes false statements of fact in his complaint for the purpose of deceiving the court and injuring the defendant. In this case there can be no question of the good faith of the plaintiff in bringing the action to the court of common pleas. His statement of the cause of action and of his claim for damage determined the amount in demand as within the jurisdiction of the court. This jurisdiction could not be affected by the amount of damages actually recovered, whether the adjudication of that amount might depend in part upon admissions contained in pleadings subsequent to the complaint or wholly upon the facts established by testimony.

There is error, and the judgment of the court of common pleas is reversed. Further proceedings may be had in that court according to law. The other Judges concurred.

BROWN et al. v. CITY OF WATERBURY.

(Supreme Court of Errors of Connecticut.
May 12, 1903.)

WATERWAYS—CONDEMNATION—DAMAGES— BENEFITS—ASSESSMENT—EVIDENCE— —ADMISSIBILITY.

1. A city condemned a right of way through certain land in order to make a waterway for the waters of a brook which flowed through the land, the channel of the brook at other points not being of sufficient capacity to care for the flow of water at all times. The strip of land taken for such purpose embraced an existing conduit. The landowner, on an assessment of damages and benefits, was permitted to show that for some years the waters of the brook had increased to more than their former and natural flow by the erection of a number of mills within the watershed of the brook. *Held* that, the court having found that the conduit was entirely adequate to take all the water at all times coming through the brook, the admission of such evidence was not prejudicial to the city.

2. The landowner claimed, as part of his damage, that he had been deprived of the right to shift the bed of the brook, and was so prevented from increasing the cellar room of his building. *Held*, that the admission of evidence as to the extent of such damage was not prejudicial to the city; the court having found that it "was not proven with reasonable certainty," and having assessed only nominal damages therefor.

3. Questions asked witnesses, which were not answered, furnished no ground for a new trial, even if the questions were inadmissible.

4. A brook ran through certain land; its waters being confined by a conduit, the sides of which were walls of masonry. The city, determining that a wider waterway was necessary, condemned a strip of land which embraced the existing waterway. *Held* proper, on an assessment of damages and benefits, to regard the land covered by the walls of masonry as of more value to the landowner than that covered by the waterway; it appearing that the former could be used for some purposes which the latter could not.

5. A finding that damages were assessed by "taking into consideration the existence of the brook and its walls, and the extent to which

they affected the value of the land taken," did not support a claim that the court regarded the land covered by the side walls of the old waterway as unincumbered.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action in the nature of an appeal from an assessment of benefits and damages on account of a local public improvement made by the city of Waterbury, brought by Robert K. Brown and others against the city. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Charles G. Root and John P. Kellogg, for appellant. William H. Williams and Willson H. Pierce, for appellees.

TORRANCE, C. J. In 1899 the present appellees were the owners of a certain lot of land in the city of Waterbury, through which flowed a natural water course, called "Little Brook," in a conduit made by the predecessors in title of the appellees in accordance with the provisions of a resolution of the common council of the city of Waterbury passed in 1867. The waterway in this conduit was four feet wide and four feet deep. Each side wall of the conduit was of masonry one foot in thickness. The bottom of it was cobbled, and the top was covered with flagstones. Said conduit was entirely sufficient to take care of and conduct all the water of the brook, but the channel of the brook on the lands of others above and below the land of the appellees was not of sufficient capacity to take care of the flow of the brook at all times, and in consequence thereof the water at times overflowed the banks of the brook and caused damage. To remedy this, the city, in 1899, by condemnation proceedings, laid out and took, for the waters of this brook, a right of way ten feet wide through the land of the appellees, and of others above and below them on this brook; following substantially the course of the brook as it then was. As a part of said condemnation proceedings, the city caused to be assessed to the appellees, as damages for the layout of said right of way through their land, the sum of \$532, and as benefits the sum of \$1,719. From this assessment of damages and benefits the present appellees took an appeal to the superior court, and upon the trial of that appeal that court assessed as damages to them the sum of \$1,810, and found that there were no benefits resulting to them from said layout of said right of way, and rendered judgment accordingly; and from that judgment the present appeal was taken.

The city now contends that the court below erred in the trial of said cause (1) in its rulings upon evidence; and (2) in overruling a certain claim made by the city in the court below.

The claimed erroneous rulings upon evidence will be first considered.

The city apparently claimed that the con-

duit for this brook, through the land of the appellees, was inadequate, and therefore a larger one was necessary, and that this was a benefit to the appellees. The appellees were permitted to show by the witness Cairns that during the last 12 years the waters of Little Brook had been increased to more than their former and natural flow by the erection of many buildings within its watershed. The city objected to this evidence as not being within the pleadings. It was apparently offered merely to show that, if the conduit was inadequate at times, it was because of the addition so made to the natural flow of the brook. The court has found, however, that the old conduit was entirely adequate to take all the water at all times coming through the brook; and, in view of this, the evidence objected to clearly did the city no harm, and furnishes no ground for a new trial, even if we concede, without deciding, that it was not admissible.

On the trial below the present appellees claimed, as one element of their damages, that they had, by the layout, been deprived of their right to shift the bed of Little Brook on their own land at pleasure, and were thus prevented from increasing the cellar room of their building fronting on Main street, and occupied as a dry-goods store. In proof of the amount and extent of such damages, Curran, Brown, and Gaffney, witnesses for the present appellees, were permitted, against the objection of the city, to give certain evidence detailed upon the record. The court has found that the extent and amount of the damages to the appellees from this cause "was not proven with reasonable certainty," and assesses only nominal damages therefor. In view of this finding, the admission of the evidence in question clearly did the city no harm, whatever view may be taken of its admissibility—a point which need not here be considered.

The question asked of the witness Brooks as to the value of a given-sized strip of the appellees' land, and his answer thereto, were, we think, admissible, under the circumstances detailed upon the record with reference thereto.

The questions asked of the witnesses Gaffney and Broughton, as set forth in paragraphs 37 and 38 of the finding, to which the city objected, do not appear to have been answered, and therefore furnish no ground for a new trial, even if the questions were inadmissible.

The foregoing includes all the rulings upon evidence of which the city complains, and none of them furnish grounds for a new trial. The remaining errors assigned relate to a certain claim made by the city in the court below, and the ruling of the court thereon.

The court finds, in effect, that by the condemnation proceedings the city took a permanent easement in a strip of the appellees' and 10 feet wide and about 200 feet long,

and laid a new conduit thereon; but, in estimating the damages caused by such taking, the court held, and took into account the fact, that the appellees were still entitled to use said strip for any purpose not inconsistent with said easement. Within the 10 foot wide strip thus taken by the city ran the old conduit, with its 4 foot wide waterway, and its side walls, each 1 foot thick. As we understand the finding, which is not as clear as it might be upon this point, the city claimed, in effect, that the appellees, prior to the condemnation proceedings, were deprived to the same extent and as effectually of the use of the land covered by the side walls of the old conduit as they were of the use of the land covered by the waterway, and that consequently their damages for the land covered by the walls should be no greater than their damages for a like quantity of the land covered by the waterway. The court, in effect, overruled this claim, and held, in substance, that the land covered by the walls was of more value to the appellees than that covered by the waterway. Inasmuch as it is apparent, from the facts found, that the land covered by the walls of the old conduit could be used for some purposes for which the land covered by the waterway could not be used, we think the court was right in holding that the former was more valuable than the latter.

In its brief the city claims, in effect, that in assessing damages the court regarded the land covered by the side walls of the old conduit as unincumbered; but this claim does not appear to have been made in the court below, nor to be supported by the finding. The finding is that damages were assessed by "taking into consideration the existence of the brook and its walls, and the extent to which they affected the value of the land taken." We think the record fails to show that the trial court erred in its assessment of damages.

There is no error. The other Judges concurred.

SCHLOSSNAGLE v. KOLB.

(Court of Appeals of Maryland. May 8, 1903.)

TRESPASS — POSSESSION — RESTORATION BY LEASE FROM RIGHTFUL OWNER — ADVERSE POSSESSION — INTERRUPTION.

1. Land was patented to plaintiff's grantors. Afterwards it and other land was patented to defendant's grantors, who went into possession of part of it. Later plaintiff's grantors entered peaceably on it, in assertion of their title, and persons in possession of parts of it, in acknowledgment of the right of said grantors to the possession, took from them leases of the parts of which they had possession. *Held*, that the possession of all the land embraced in the patent to plaintiff's grantors, and who were the rightful owners thereof, was thus restored to them, arresting the running of the statute, and giving the necessary possession for maintenance of an action of trespass.

Appeal from Circuit Court, Garrett County. A. Hunter Boyd, Judge.

Action by J. George Kolb against George Schlossnagle. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PHAROE, SCHMUCKER, and JONES, JJ.

R. T. Semmes, for appellant. Edward H. Sincell, for appellee.

JONES, J. This is an appeal from a judgment of the circuit court for Garrett county in a case of trespass "*quare clausum fregit*." The action was instituted in that court by the appellee against the appellant for an alleged trespass upon a tract of land called "Friedland," the title to and possession of which the appellee claimed to be in him. The appellant took defense on warrant; and the evidence, in connection with the return made under the warrant, shows little or no dispute about the facts which must control the decision of the case. At the conclusion of the testimony the appellant asked of the court two instructions that related to the right of recovery against him. These having been rejected by the trial court, he excepted. The exception thus taken presents the only question which the record brings up.

It appears from the proofs that in 1840 a patent issued from the state of Maryland to George Templeman and David Stewart for the tract of land, Friedland, to which the controversy here relates. In regular course of devolution, through sundry mesne conveyances, the paper title to this land became vested in the appellee. It was conveyed to him by deed dated the 30th day of March, 1896, from Margaret Sturgis and Russell Sturgis, her husband, which was duly recorded, and under which it appears he immediately went into possession. The locus in quo of the trespass alleged is embraced within the lines of the patent for Friedland, and of the appellee's deed. Friedland, as patented, contained 200 $\frac{1}{4}$ acres of land. There were no inclosures around the tract, and none of the parties through whom the title passed in course of devolution to the appellee ever lived upon or actually occupied, in person, any part of the same; but the land had been duly assessed to the parties under whom the appellee claims, and the taxes thereon were paid by them before, and by him since, he bought it. In 1874, John W. Fike obtained a patent from the state for a tract of land by the name of "Fike's Venture," which consisted of 316 acres, and, together with other land, embraced within its lines all of the land covered by the patent for Friedland. In 1871, Christian Fike, father of John W. Fike, had obtained a warrant from the Land Office, and upon this a certificate of survey locating Fike's Venture, but did not get out a patent. This location was identical with the location of the same land in the patent issued to John W. Fike in 1874, except that this patent along its eastern boundary, which was identical with

the eastern boundary of Friedland, included a strip of land not embraced within the lines of the location made in the certificate of survey of 1871. Christian Fike entered upon this land, and built a house and erected a sawmill on Bear creek, as shown upon the plats. He died before obtaining a patent, and by his will, dated in 1872 and probated in 1878, he devised to his son, John W. Fike, "a certain tract of land lying on Bear creek, formerly vacant, but recently known as my [his] sawmill property, containing one hundred and fifty acres, more or less." The buildings erected by Christian Fike were within the lines of the patent for Fike's Venture subsequently obtained by John W. Fike, and of the certificate of survey made prior thereto for his father; but neither the buildings, nor any inclosures in connection with them, were within the lines of Friedland. It was in evidence that, in 1876, John W. Fike gave to the appellant a paper under which the latter claims to have entered into possession of land described in a deed subsequently executed to him by Fike on the 3d day of January, 1878. This deed embraced within its outlines that part of Fike's Venture upon which the sawmill and house had been built, and also, besides other land within the patent for Fike's Venture, all that part of the tract of land covered by the patent for Friedland which lay within the lines of the certificate of survey made in 1871 for Christian Fike. It contained, however, an exception from the grant, as follows: "Excepting * * * eighty acres heretofore sold to Catherine Geiss, also thirty-one acres and 132 perches sold to Michael Harden." The land referred to as sold to Catherine Geiss is described in a deed to her from A. J. Fike, administrator of John W. Fike, which is dated on the 4th day of December, 1884, and was recorded on the 21st of February, 1885. This deed, with other land, includes a small part of Friedland, and recites that a deed was executed to Catherine Geiss on the 3d day of January, 1878, by John W. Fike, for the land therein described, but that through negligence this last-named deed was never delivered to her and was never recorded. It does not appear just when her occupancy or possession began; but she and her husband, William Geiss, were on the 17th day of December, 1884, in occupancy of a part of the land described in her deed which lay within the bounds of Friedland. The land referred to as sold to Michael Harden is described in a deed to him from John W. Fike, bearing date January 3, 1878, but not recorded until November 10, 1892, and lies wholly within the lines of Friedland. In December, 1884, he had cleared and was in occupancy of a part of this land. In addition to the inclosures of parts of Friedland in the occupancy of Geiss and Harden, there was one by Henry Kolb which covered a part of Friedland that lay within the lines of the appellant's deed, and also a part of the strip of land on the eastern

boundary of that tract which was not included in the bounds of said deed. Kolb had no paper title, and how he first came into occupancy of the land does not appear in the evidence. He testified that in 1876 the appellant came to him with two men who, he (appellant) told him, were owners of the land and wanted to sell it to him (Kolb), and proposed that he and appellant should buy it in partnership; that after this he (Kolb) was in possession of part of the land, and cleared it himself; that he "held it under somebody—Stewart was one of them"; that "he found it out from the Land Office"; that he "never entered the land under any agreement" with Fike, and "never made any agreement with Fike in reference to the timber"; that "later he cleared about an acre"; and that he "began clearing in 1858, and kept on until Fike ran off the land." With the exception of the improvements and inclosures which have been noticed, all the land patented as "Fike's Venture" was wild, uncultivated, and uninclosed. There was testimony on behalf of the appellant that he and his grantor had cut timber on the land, Fike's Venture; had pastured it; had made sugar from sugar trees on it; and had kept off trespassers. Some of these acts were done upon Friedland, but do not appear to have had special reference to assertion of title to or possession of that tract as distinct from Fike's Venture, or as a distinct part thereof, but to have been done indiscriminately as respects the two tracts. Land by the name of "Fike's Venture" was assessed to the appellant's grantor, and taxes were paid accordingly by both the appellant and his grantor. In December, 1884, an agent of the appellee's grantors went upon the land "Friedland," and, in assertion of their title and right to the same, leased to William Geiss and Michael Harden the parts of the tract then inclosed and occupied by them respectively. Geiss and Harden both recognized the title thus asserted, and executed with the agent leases for one year each, under seal. Each lease expressed that it was made on behalf of Russell Sturgis, Jr., and Margaret Sturgis, his wife, as lessors "for that portion of the tract of land known as 'Friedland,' situated in Garrett county, state of Maryland, now inclosed and occupied by him"—being in the one case Geiss, and in the other Harden. In like manner in May, 1895, the same agent leased, on behalf of the appellee's grantors, to Henry Kolb, "that portion of the tract of land known as 'Friedland,' * * * and which the said Kolb has had under fence." This lease was for one year from May 1, 1895, and was current at the date of the appellee's deed.

Upon this state of facts the appellant, by the prayers set out in his exception, asked the court to say, as matter of law, "that there is no sufficient evidence in this case of possession in the plaintiffs as to enable them to recover in this action"; and, further, that if the court (sitting without a jury) should

find that the appellant "entered into possession of that part of the tract called 'Fike's Venture,' described in the deed to him, * * * and hath continued in the possession thereof from that time until the beginning of this suit, and by actually occupying with a mill and other outbuildings a portion of said land and claimed title to the extent of the outlines of his deed * * * by cutting timber thereon for the use of his mill, paying taxes thereon, and pasturing the same, and keeping off trespassers; and if they further find the acts of trespass complained of to have been committed * * * within the lines of a tract of land called 'Fike's Venture,' as described and held under said deed"—then the plaintiffs were not entitled to recover; and further asked the court to say "that the lease * * * to Michael Harden, and that to William Geiss, and that to Henry Kolb, cannot have the effect of placing the grantors of the said leases in possession of any part of the tract called 'Friedland' which is not described in said several leases; and if they further find that the only act of entry by the plaintiff consisted of the recording of his deed, and the forcible occupation of the land on which the trespass is claimed to have been committed, then the plaintiff is not entitled to recover; * * * provided that they shall find that George Schlossnagle [appellant] was in actual occupancy of the premises at the time the plaintiff's deed was recorded, under the deed to him as aforesaid." Without stopping to inquire whether or not these prayers, as framed, may or may not be faulty in other respects, and looking only to the legal propositions they were intended to assert, they were properly refused upon the state of evidence in this case. The theory upon which they are based is that there was, by the appellant and his grantor, a complete disseisin and ouster of possession of those claiming title under the patent to Friedland as to that tract, and that such disseisin continued down to the time of the committing of the trespass here complained of, and of the bringing of this suit, by reason of which the appellee had, at best, at the time of suit brought, but a mere right of entry, which will not support an action of trespass. Injury to the possession is the gist of the action of trespass, and to support such action the plaintiff must show possession of the locus in quo; but this does not mean that he must be in actual occupancy thereof. A valid title to the locus in quo draws to it the possession, and upon the possession which the law so implies the action will lie, though the locus of the trespass be in a wild and unoccupied state. *Gent. v. Lynch*, 23 Md. 58-63, 87 Am. Dec. 558; *Hoye v. Swan's Lessee*, 5 Md. 237, and cases there cited. In this case those claiming title under the patent of 1840 show a clear paper and record title, by their prima facie proof, to Friedland. There is no dispute or question about this. Down to

1874, when John W. Fike obtained the patent for Fike's Venture, they had by intendment of law the possession of all the land covered by the patent of 1840. How far those holding title to Friedland were affected in their possession of that tract, if they were affected at all, by the certificate of survey of 1871 to Christian Fike, and what was done under it and in connection therewith, is not a material inquiry in this case, as will appear from the expression of views which follows.

The propositions involved in the contention of the appellant find their strongest support in the claim made that, by virtue of the patent of 1874, his grantor, having had possession of a part of the land described therein, and making claim to the whole, had color of title thereto, and, as a consequence, by intendment of law, possession of the whole; and that for like reasons, under the deed of January 3, 1878, he had, at the time of the trespass committed, possession of all that part of Friedland which is embraced within the boundaries of his deed, and of the locus of the trespass, to the exclusion of the rightful owners therefrom. It is settled law, with some qualifications that the facts of this case do not require us to have reference to, that if a party makes entry upon and goes into possession of a part of a tract of land with color of title to the whole, claiming title to the whole, he is, in law, in possession, constructively, to the extent of the bounds of his title. *Hoye v. Swan's Lessee*, 5 Md. 237; *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703. Now, giving the appellant the benefit of the principle of law just adverted to, and assuming that he went into possession of the land, embracing the locus in quo, under his deed of 1878, as set out in the prayers under consideration, the question recurs, did such possession continue to the time of the trespass committed? When, in 1884, the grantors of the appellee entered peaceably upon the land in controversy in assertion of their title thereto, and made the leases to Geiss and Harden, who, in acknowledgment of the right of the said grantors to the possession, executed to them the leases, the possession of the parts of the land so leased undoubtedly reverted to these rightful owners. At this time limitations was no bar to their entry, and possession of the parts in question was peaceably delivered to them. That they did come into rightful possession of the parts of the land so leased is admitted by the appellant. This is a part of the hypothesis of one of his prayers. With, then, the rightful owners of the land in rightful and peaceable possession of a part thereof, it would seem that in reason the law would, by its intendment, put the possession of the whole in these rightful owners, rather than in one in possession of a part and claiming title to the whole by a mere color of title. The reasoning of the court in the case of *Hall v. Powel*, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722, may be applied here. The court there

said: "There would appear to be no clearer principle of reason and justice than this: that if the rightful owner is in the actual occupancy of a part of a tract, by himself or a tenant, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong would be more favored than the rightful possessor. Here are two, each in actual possession and occupation of part of a surveyed tract, the owner and an intruder. Who is in possession of the part not occupied by inclosure by either—the man who has no right but by disseisin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed constructive possession the legal seisin is according to the title. Title draws possession to the owner." More pointed still in its application here is the following from 3 Wash. on Real Property, § 1986: "The seisin of an owner of an unbroken tract, who is in the actual occupation thereof, cannot be taken from him further than the actual adverse possession extends. Consequently, as against the owner in occupation, adverse possession under color of title is of no avail as a foundation of title. This is true even if the owner go into occupation of a part of his land after the disseisin has commenced. The running of the statute will thereby be stopped as to so much of the land as was constructively possessed, and will be restricted to that in actual possession." In support of the text, the author refers to case of *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113, which sustains the doctrine laid down, and in its facts, as bearing upon the point under consideration, is closely analogous to the case at bar. See, also, case of *Lessee of Clarke et al. v. Courtney et al.*, 5 Pet. 319, 8 L. Ed. 140. Again, in *Cooley on Torts*, marg. p. 323, it is said: "But if one lawfully entitled to possession can make peaceable entry even while another is in occupation, the entry, in contemplation of law, restores to him complete possession; and it is not unlawful for him to resort to such means, short of the employment of force, as will render further occupation by the other impracticable." Upon authority, therefore, as well as in reason, it seems to be clear that the entry, in 1884, of the appellee's grantors upon the land in controversy, and making the leases to Geiss and Harden by which these latter were put into possession as tenants of the former under the circumstances already indicated, arrested the running of limitations, and restored the possession of Friedland, containing the locus in quo, to the rightful owners thereof. In the case of *Henderson and wife v. Griffin*, 5 Pet. 151–158, 8 L. Ed. 79, it is said: "It is settled law that an entry on the land by one having the right has the same effect in arresting the progress of the limitation as a suit." So far we have left out of consider-

ation, as to its effect upon the propositions of the appellant's prayers, the lease to Henry Kold of May, 1895. Applying to the facts in connection with that the principles of law already adverted to, these propositions become manifestly unsound. It will be observed that the appellant's prayers start his adverse possession with the date of his deed—January, 1878—and claim that, as 20 years intervened between that date and the bringing of this suit in 1899, the bar of limitations applies. Kolb was in possession and occupancy, by inclosures, of a part of Friedland at the date of the appellant's deed. His occupancy took in a part of the land within the lines of this deed, and also part of the outlying strip of Fike's Venture, as it was of Friedland, not included in the deed. He did not hold under Fike, appellant's grantor, nor under the appellant. He did not hold adversely to the legal owners, but in recognition of their title; and in May, 1895, before expiration of 20 years—counting from the date of appellant's deed—he accepted a lease from the grantors of the appellee of the land in his occupancy, and was put into possession thereof as their tenant. This, under the law as we have found it to be, put these grantors into possession of all that part of the land included in the deed of the appellant to which they had the paper title. Thus, at the date of the deed of 1896 to the appellee, his grantors had and transferred to him both the title to and the possession of the locus in quo.

Finding no error in the ruling of the trial court in its rejection of the prayers set out in the appellant's exception, the judgment of that court will be affirmed.

Judgment affirmed, with costs to the appellee.

COTTRELL v. KENNEY.

(Supreme Court of Rhode Island. April 15, 1903.)

LIMITATION OF ACTIONS—COMPUTATION OF TIME—ABSENCE FROM STATE—EFFECT.

1. Pub. St. 1882, c. 205, § 5 (Gen. Laws 1896, c. 234, § 5), which provides that, if any person against whom there shall be a cause of action in favor of a resident of the state shall go out of the state before the action is barred, the person entitled to the action "may commence the same within the time before limited after such person shall return into the state," construed in connection with the prior legislation on the subject of limitations, fixes a new time for the "prescribed period" of limitation to begin, and does not merely require that in reckoning up the time of limitations the period of the defendant's absence be excluded.

Action by John S. Cottrell, as trustee, against Patrick Kenney. Verdict for plaintiff, and defendant petitions for a new trial. Petition denied.

Argued before STINESS, C. J., and TIL-
LINGHAUST and DOUGLAS, JJ.

Harrison A. McKenney, for plaintiff. Til-
linghaast & Murdock, for defendant.

DOUGLAS, J. This is an action of assumpsit brought February 23, 1897, upon a promissory note which became due March 3, 1884. The only defense set up was the statute of limitations. At the trial in the common pleas division the evidence introduced by the plaintiff showed that the defendant left the state about April, 1886, and that he returned in the summer of 1894. The defendant offered to prove that he did not leave the state until 1889, and returned again in 1893, and had resided in the state ever since; which would have established a residence in the state, between the time of the accruing of the action and the date of the writ, of more than six years altogether, though divided into two periods of less than six years each. The presiding justice ruled this evidence to be immaterial, and, there being no dispute that the claim was a valid one unless barred by the statute, directed a verdict for the plaintiff. The defendant duly excepted to the ruling, and alleges it as a ground for a new trial.

The only question involved is upon the construction of section 5 of chapter 205 of the Public Statutes of 1882, which now appears in substantially the same words as section 5 of chapter 234 of the General Laws of 1896, as follows: "If any person against whom there is or shall be cause for any action, hereinbefore enumerated, in favor of a resident therein, shall at the time such cause accrue be without the limits of the state, (or) being within the state at the time such cause accrue, shall go out of the state before said action shall be barred by the provisions of this chapter, and shall not have or leave property or estate therein that can by (common and ordinary) process of law be attached, then the person entitled to such action may commence the same, within the time before limited, after such person shall return into the state in such manner that an action may with reasonable diligence be commenced against him by the person entitled to the same."

The defendant's contention is that the effect of the law is to require of the defendant in an action of the case six years' residence in the state before he can plead the statute, but that these six years may be made up at different times; or, in other words, that, in reckoning the time of limitation after a cause of action accrues, periods when the defendant is absent from the state shall be excluded. He advances some considerations, based upon supposed expediency, for this view; but he fails to point out any language in the statute that is capable of that construction. In other states which have enacted provisions on the subject, the words of the statute aptly express the mode of computing the period of limitation. In these statutes such expressions as the following occur: "The time of absence shall not be taken as any part of the time limited for the commencement of the action," or "shall

not be computed as a part of the period within which the action must be brought," or "shall be excluded in computing," or similar words equally specific. Such words were equally at the service of our General Assembly if they had desired to express the same idea.

In our statute there is only one word which is capable of misleading, and this liability was corrected by the court many years ago. In *Crocker v. Arey*, 3 R. L. 178, it was contended that the word "return" implied a previous residence in the state, but the court held that as here used it applied equally to a first entry as to a second one. This is very clearly shown by the history of this provision on our own statute book, which the plaintiff's counsel has industriously traced, as follows: Laws 1798, p. 472, § 2: "And be it further enacted. That if any person or persons against whom there is or shall be any cause of suit for every and any of the species of actions hereinbefore enumerated, who at the time the same accrued was without the limits of this state, and did not leave property or estate therein that could be attached, that then, and in such case, the person who is entitled to bring such suit or action shall be at liberty to commence the same within the respective periods before limited, after such person's return into the state." May 1, 1801, an act fixed November 5, 1798, as the time the foregoing act should be considered as having taken effect. Sess. Laws, p. 51. October, 1804, the act was suspended. Sess. Laws, p. 115. October, 1805, the act was further suspended. Sess. Laws, p. 125. March 1, 1806, former suspensions modified so that the act should be considered as having taken effect February 1, 1801. Sess. Laws, p. 130. Rev. Laws 1822, p. 365, § 2: "And be it further enacted. That if any person or persons against whom there is or shall be any cause of suit for every and any of the species of actions hereinbefore enumerated, who at the time the same accrued was within the limits of this state and should go out of the state before said cause of action should be barred by this act, and did not leave property or estate therein that could, by the common and ordinary process of law, be attached; that then, and in such case, the person who is entitled to bring such suit or action shall be at liberty to commence the same within the respective periods before limited after such person's return into this state." In this revision the provision of 1798 was accidentally omitted, which omission was corrected by act of May 2, 1822, re-enacting it in identical language. Pub. Laws 1822, p. 535. The Revision of 1844, p. 221, § 2, reads: "If any person against whom there is or shall be cause for any action, hereinbefore enumerated, shall at the time such cause accrue, be without the limits of this state, (or) being within said state at the time such cause ac-

crue, shall go out of said state before said action shall be barred by this act, and shall not have or leave property or estate therein that can, by the common and ordinary process of law, be attached, then, and in such case, the person entitled to such action may commence the same, within the time before limited, after such person's return into this state." Rev. St. 1857, c. 177, § 5, p. 429, reads: "If any person, a resident of this state, against whom there is or shall be cause for any action hereinbefore enumerated, *in favor of a resident therein*, shall, at the time such cause accrue, be without the limits of this state, or, being within said state at the time such cause accrue, shall go out of the state before said action shall be barred by the provision of this chapter, and shall not have or leave property or estate therein that can, by the common and ordinary process of law, be attached, then the person entitled to such action may commence the same, within the time before limited after such person shall return into this state *in such manner that an action may, with reasonable diligence, be commenced against him by the person entitled to the same.*" The italicized words are additions to the act of 1844. August 10, 1861, c. 390, the restrictions to residents of this state was stricken out as to defendants. Gen. St. 1872, c. 194, § 5, p. 447, reads the same as 1857, with the words "a resident of this state" stricken out. Pub. St. 1882, c. 205, § 5, p. 356, reads the same as 1872. Gen. Laws 1896, c. 234, § 5, p. 810, reads same as 1882, with the words "common and ordinary" before "process of law" dropped out.

It will be observed that the provisions with respect to the two classes of defendants referred to, those who are out of the state when the action accrues, and those who are in the state when the action accrues, but go out of it before the period of limitation has expired, were enacted at different times, and, until the revision of 1844, were contained in separate paragraphs; but in both cases, from the first, the time of return into the state was made the beginning of a new period of limitation. In 1857 the benefit of the provision was restricted to defendants who were residents of this state, and this restriction was repealed in 1861. In 1857 the words, "in such a manner that an action may with reasonable diligence be commenced against him," etc., qualifying the return, were first added. The object of this clause is apparent. After the "return" the statute begins to run, and no subsequent absence affects it. Hence, a surreptitious or furtive visit to the state, or one made on a day when no civil process could be served, is excluded from the meaning of the word as here used.

The true meaning of the statute is expressed in very plain language. The first four sections of the chapter prescribe the periods within which various common-law actions

may be brought after the several causes of action accrue. This section provides for a different computation of the period of limitation in two specified cases: First, when the cause of action accrues when the defendant is out of the state; secondly, when the defendant goes out of the state after the cause of action has accrued, and before the limited time for bringing the action has expired. In both cases a new time is fixed at which the statute begins to run, i. e., when the defendant comes or returns into the state in such manner that the plaintiff can begin his action against him. Under this section the coming or return into the state is analogous to a new promise in an action of assumpsit. It does not add a certain increment to so much of the prescribed period of limitation as has already passed, but it fixes a new time for the prescribed period of limitation to begin. It follows from the words of the statute that the plaintiff's claim was not barred, and the verdict in his favor was properly directed.

Petition for new trial denied.

FLETCHER v. WAKEFIELD.

(Supreme Court of Vermont. Caledonia. May 6, 1903.)

MARRIED WOMAN—SEPARATE PROPERTY—GIFT FROM HUSBAND—DELIVERY—EVIDENCE—APPEAL—PRESUMPTIONS.

1. Acts 1884, p. 119, No. 140, giving a married woman the right to hold separate personal estate acquired before or during coverture, except that acquired by her personal industry or by gift from her husband, does not by implication prohibit a married woman from holding personal property which comes to her by gift from her husband, but leaves her rights respecting such property as they were under the common law.

2. At common law, a married woman may hold personal property which comes to her by gift from her husband, as against creditors of the husband who become such after the gift is made.

3. On an issue whether there had been a sufficient delivery of property alleged to have been given to a married woman by her husband, there was evidence of an agreement between the husband and wife whereby she was to receive from him a certain sum every week to dispose of as she pleased, and that payments were made under this arrangement until the wife had a certain sum of money, which she loaned to the husband, and that he paid for the property in question under an arrangement that he should do so in discharge of the loan, and that the property should be hers. The property was delivered at the house occupied by the husband and wife, when the wife was present but the husband was not. *Held* sufficient to justify a finding that the husband had never been in possession of the property.

4. The court refused to charge that there had been no delivery to a wife of property given her by her husband. The record did not show that it contained all the evidence on the issue. *Held*, that it could not be presumed in the Supreme Court that the evidence did not warrant refusal of the charge.

5. On an issue as to whether a husband or wife owned a certain piano, evidence that the piano was insured in her name, with the knowledge and acquiescence of the husband, was admissible.

6. The admission of evidence which is merely immaterial, and not prejudicial, is not reversible error.

Exceptions from Caledonia County Court; Munson, Judge.

Action of replevin by Carlotta E. Fletcher against A. E. Wakefield. Judgment for plaintiff. Defendant brings exceptions. *Affirmed*.

Argued before ROWELL, C. J., and TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

B. E. Bullard, for plaintiff. Taylor & Dutton, for defendant.

START, J. The defendant's motion for a verdict raises the question of whether a husband can make a valid gift of personal property to his wife, as against creditors of the husband who became such after the gift. By No. 21 of the Acts of 1867, p. 29, a married woman was authorized to hold to her sole and separate use all personal property and rights of personal action acquired by her during coverture, by inheritance or distribution. This right to hold separate personal estate was, by No. 140 of the Acts of 1884, p. 119, enlarged so that she could hold all personal property and rights of action acquired before or during coverture, except those acquired by her personal industry or by gift from her husband; and by No. 84 of the Acts of 1888, p. 98, the exception of property acquired by her personal industry was removed. V. S. 2647. The words, "except by gift from her husband," found in this statute, do not, by implication, have the force of an enactment prohibiting a married woman from holding personal property which comes to her by gift from her husband, but leave her rights respecting such property as they were under the common law, before the enactment of any statute relating to the separate estate of a married woman. Dewey v. St. Albans Trust Co., 57 Vt. 332; State v. Shaw, 73 Vt. 149, 50 Atl. 863; Yatter v. Smille, 72 Vt. 349, 47 Atl. 1070; State v. Martin, 68 Vt. 93, 34 Atl. 40.

This brings us to the consideration of the question of whether a married woman can hold personal property given to her by her husband, under the common law as interpreted by our courts, when the rights of creditors of the husband at the time of the gift are not involved. In Cardell v. Ryder, 35 Vt. 47, the court, in giving effect to an agreement between husband and wife respecting property, said: "An agreement made during coverture may be enforced in equity even in case of a gift from the husband to the wife, if it is so far carried into effect as to separate the property from the residue of the husband's estate and place it in the name or exclusive control of the wife." In Fisher v. Williams, 56 Vt. 586, the court, in an action at law,

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 245; *Husband and Wife*, vol. 26, Cent. Dig. §§ 249, 252, 417.

held that a husband could give his wife a demand for boarding a teacher, and, in doing so, said: "The husband had the right to make a gift of any of his personal property to his wife to any amount except as against his then existing creditors." In *Bent v. Bent*, 44 Vt. 555, the court, in holding that a husband could make a valid gift of a gold chain to his wife, said: "The law is well settled in this state that the husband may surrender to the wife the right to her personal property which the law gives him by reason of the marriage; that he may do this by antenuptial contract to that effect, by allowing her to claim and control for a long time property given her during the coverture as her separate property, and refraining to exercise the right which the law gives him to take from her such property and use it as his own, and by making gifts himself to the wife." In *Child v. Pearl*, 43 Vt. 224, the court, in holding, in an action at law, that the plaintiff could recover for a mare and colt given to her by her first husband, and sold to the defendant by her second husband, said: "It is conceded, as it may well be, in view of the doctrine and rule established in many decided cases, that the husband may during coverture make a valid gift to the wife by which she will become the owner, in her own separate right, of personal property." In *Richardson v. Estate of Merrill*, 82 Vt. 27, the court, in holding that a wife could hold property which was the result of gift, inheritance, or her personal earnings, said: "In every such case she will hold against the husband and his heirs, and generally against his creditors, so long as the husband allows the wife to keep the property separate from the general mass of his own estate, although his own name may be used in the formal conduct of the business, unless in the case of creditors this may lead to a false credit on the part of the husband." In view of these holdings it is considered that in this jurisdiction the law is settled that a married woman may hold personal property which comes to her by gift from her husband, as against creditors of the husband who become such subsequent to the gift.

The defendant also moved for a verdict on the ground that there was no such change of possession of the piano from the husband to the wife as to put it beyond the reach of the attaching creditor. It was in evidence that the husband and wife made an arrangement whereby she was to receive from him \$4 per week for one year, to dispose of as she pleased. Payments were made under this arrangement until the wife had \$162 in money. This sum she loaned to her husband. The wife inspected, tried, and selected the piano, and had negotiations with the salesman which resulted in the purchase of the piano for \$225, the husband paying therefor under an arrangement that he should do so in discharge of the loan so made by his wife to him, and of the amount unpaid un-

der the first arrangement, and that the piano should be her property. Before the piano was paid for, it was delivered at the house occupied by the husband and wife, and there set up to her satisfaction, she being there at the time, and her husband at his office. This evidence tended to show that the husband never owned the piano, and the issue presented by it was for the jury; and, if found in favor of the plaintiff, it followed that the husband, as owner, never had possession of the piano. Such being the tendency of the evidence, and the effect of a finding therefrom being that the husband never became the owner of the piano, the motion was rightfully denied. *Ridout v. Burton*, 27 Vt. 383; *Paris v. Vail*, 18 Vt. 277; *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624.

The defendant requested an instruction that, if the jury found that the husband intended to give the piano to his wife, then there had been no such delivery of it to the wife as put it beyond the reach of the attaching creditors. The exceptions show that certain evidence was introduced by the plaintiff, but there is nothing in the record from which it appears that there was not other evidence upon this subject; therefore we cannot say that, if there was a gift of the piano, it was not followed by a delivery. The evidence, so far as it is recited in the exceptions, is not inconsistent with such a delivery. For aught that appears, the piano may have been taken to the house by the procurement of the wife and the gift preceded such taking. We cannot, for the purpose of finding error, assume that such fact did not appear. *Brooks v. Guyer*, 67 Vt. 668, 82 Atl. 722.

Subject to the defendant's exception, the plaintiff was allowed to testify that the piano was insured in her name. Upon the issues of possession and ownership, the manner in which the piano was treated by the husband and wife, and, their acts respecting it, were relevant. *Stanley v. Robbins*, 86 Vt. 422; *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624. If there was evidence tending to show that the piano was thus insured with the knowledge and acquiescence of the husband, the evidence was admissible. We cannot assume that such evidence was not before the court; therefore error does not appear. *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659.

The plaintiff was allowed to testify, subject to the defendant's exception, that before going to Woodbury she kept a house girl, but thereafter had none. The defendant does not claim that he was in any way prejudiced by the evidence. His only claim is that it was immaterial. Immateriality alone, of testimony, is not a ground for reversing a judgment. To warrant a reversal, the evidence must be of a character likely to prejudice the excepting party in the decision of a material issue involved in the trial. *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666. We think it clear that the trifling information communicated by the evidence

respecting the plaintiff's domestic affairs could not have prejudiced the defendant, and for this reason the exception is not sustained. Judgment affirmed.

SMITH v. SMITH et al.

(Supreme Court of New Hampshire. Grafton. May 5, 1903.)

WILLS — CONSTRUCTION — CHILDREN — REFERENCE—RIGHTS AS DISTRIBUTEES.

1. Where at the date of testatrix's will she had one child living and was expecting the birth of another, which was born two weeks thereafter, provisions of the will that in case she died leaving no child she bequeathed a certain legacy to her mother, and that if one or more children born to her should be living at her death she bequeathed the income of such legacy only to her mother, the fund to go to her husband and heirs, sufficiently referred to her children to preclude them from sharing in the estate under Pub. St. c. 186, § 10, providing that every child of the deceased not referred to in the will, and who was not a devisee or legatee, should be entitled to the same portion of the estate as he would be if the deceased had died intestate.

Transferred from Superior Court; Pike, Judge.

Bill by William T. Smith, as executor of the estate of Susan K. Smith, deceased, for the construction of a will. Case transferred from superior court.

The plaintiff is executor of the will of Susan K. Smith, dated October 26, 1890. She died March 27, 1902. At the date of the will the testatrix had one child living, Morris K. Smith, and was expecting the birth of another, who was born about two weeks thereafter, and was named Thayer A. Smith. Both children survived the testatrix, and are now living. The material part of the will is as follows:

"1. In case I die leaving no child, I give and bequeath to my mother, Susan J. Kellog, the sum of twenty-three hundred dollars.

"2. If there are one or more children born to me who are living at the time of my death, I give and bequeath to my mother, Susan J. Kellog, the income of twenty-three hundred dollars during her life, the said twenty-three hundred dollars to go to my husband and his heirs.

"3. I give and bequeath to my husband, William T. Smith, all the remainder of my estate."

The executor, who is residuary legatee, raises the question whether the two children of the testatrix are sufficiently referred to in the will to preclude them from claiming a share in their mother's estate under the statute of distributions. A guardian ad litem was appointed for the children, and ordered to answer. No answer having been filed, the bill was taken pro confesso. Case discharged.

William H. Cotton, for plaintiff. James F. Colby, guardian ad litem, for defendants.

PARSONS, C. J. If it was the intention of the testatrix that no child surviving her should share in her estate, she could lawfully so provide. The law imposed no restrictions upon her power to so dispose of her estate by will. The executor inquires whether Mrs. Smith's two children are sufficiently referred to in her will to preclude them from sharing in her estate under the statute of distributions. As the testatrix had the power to exclude them from such share by the provisions of her will, if such was her intention, the inquiry is whether the case discloses evidence legally sufficient to establish such intention. The omission to make them beneficiaries is not of itself sufficient evidence of such intent. It must also appear that the omission was intentional. "Every child * * * of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate." Pub. St. c. 186, § 10. The children are not mentioned by name in the will. Neither are they devisees or legatees. But they are referred to expressly. The testatrix had distinctly in mind the possibility that she might leave surviving her a child or children, for she makes one disposition of a considerable portion of her estate in that contingency, and another in the event that no children survived her. It cannot reasonably be said that the child living at the date of the will, or the one whose birth was imminent, were "out of the mind of the testator at the time of making the will" (Laws 1822, p. 11, c. 28, § 3), or that the omission to make them the direct objects of her bounty was not intentional. *Smith v. Sheehan*, 67 N. H. 344, 347, 348, 39 Atl. 332; *Gage v. Gage*, 29 N. H. 533. The executor is accordingly advised that the two children of the testatrix are sufficiently referred to in the will to preclude them from sharing in the estate, under section 10, c. 186. Pub. St.

Case discharged. All concurred.

GALVIN v. PIERCE.

(Supreme Court of New Hampshire. Rockingham. April 7, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—NATURE OF RELATION.

1. Whether employes of a common master are fellow servants, so as to relieve the master from liability for injuries to one by the negligence of another, is to be determined by the nature of the act which caused the injury, and not by a difference in the rank or grade of service between the particular servants.

2. Plaintiff was engaged to dig around rocks in a quarry, and to attach chains thereto, so

¶ 1. See Descent and Distribution, vol. 16, Cent. Dig. §§ 124, 127.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 450.

that they could be hoisted by a steam crane. R. had charge of the work, as boss, which included the operation of the crane. Plaintiff having attached a chain to a stone, it was lifted up, and then lowered to stop its swinging, when plaintiff notified R. that the chain was not right on the stone, and asked him to wait until he fixed it. Plaintiff took hold of the chain, but R. immediately ordered the engineer to raise the stone, in which operation the chain caught plaintiff's hand. *Held*, that the operation of the crane was the act of a servant, and a duty which the master was authorized to delegate, and the negligence of R. in prematurely ordering the engineer to hoist the stone was the act of a fellow servant, for which the master was not liable.

Remick, J., dissenting.

Transferred from Superior Court; Pike, Judge.

Action by Jeremiah Galvin against John Pierce. From an order directing a nonsuit at the close of plaintiff's case, plaintiff brings exceptions. Exceptions overruled.

The plaintiff's evidence tended to prove the following facts: The plaintiff, a man 29 years of age, was in the service of the defendant at the time of the injury complained of, and had been employed in the same labor between seven and eight months. His work was excavating earth and stones. His duty was to dig around rocks that were to be taken out, and attach chains thereto, so that they could be hoisted by a steam crane to a car upon which they were removed from the place. The defendant was a contractor, and one Rombeau had charge of the work as boss, which included the control of the men and the operation of the crane. He also had charge of the tools and of everything connected with the work, and had the general direction of the men as to the places of their work. March 14, 1901, the plaintiff, having dug the earth from about a stone, said to Rombeau that the chain he had was too large and awkward, and that he could not get it around the stone very well, and asked Rombeau to get him a smaller and handier chain with which to do the work. Rombeau attempted to find such a chain, but was unable to do so, and told the plaintiff he must get along with the one he had. The plaintiff then adjusted the chain. The stone being a long one and the chain a little slack, the load began to swing when it was hoisted by the crane. Rombeau gave instructions to the engineer to lower the stone in order to stop the swinging. The plaintiff then told Rombeau that the chain was not right on the stone, and that it was not safe, and asked Rombeau to wait until he fixed it. The plaintiff took hold of the chain, but Rombeau remarked to the engineer: "Go ahead. The chain is all right." The engineer raised the stone, and, in so doing, the chain caught the plaintiff's hand and injured it.

Simon P. Emery and Ernest L. Guptill, for plaintiff. John Kivel and George T. Hughes, for defendant.

PARSONS, C. J. The plaintiff's duty was "to dig around rocks that were to be taken out, and to attach chains thereto, so that they could be hoisted by a steam crane." Rombeau had charge of the defendant's work as boss, "which included . . . the operation of the crane." At the time of the accident the plaintiff's duty had been performed. He had attached the chain. Rombeau was in the execution of his—the operation of the crane. The stone had been pulled out, and lowered to stop its swinging. The next operation in Rombeau's work was the raising of the stone. "The plaintiff then told Rombeau that the chain was not right on the stone—that it was not safe—and asked Rombeau to wait until he fixed it. The plaintiff took hold of the chain, but Rombeau immediately remarked to the engineer: 'Go ahead. The chain is all right.' The engineer hoisted on the stone, and the chain caught the plaintiff's hand and injured it."

If the defendant is liable for Rombeau's negligent operation of the crane, the plaintiff cannot recover without establishing Rombeau's negligence as the cause of the injury, and his own freedom from fault. Whether the case contains evidence upon which these propositions could reasonably be found in favor of the plaintiff may be open to doubt. But assuming that there was competent evidence for the jury upon these issues, a verdict might be found against Rombeau, or against the defendant if the defendant had personally performed the acts charged as negligence in Rombeau. The right of action in such case would not be affected by the fact that the plaintiff was a workman under Rombeau, or an employé of the defendant, but the action would be based upon the general duty resting upon every individual in the conduct of his lawful business to abstain from the careless injury of others. *Nashua Iron & Steel Co. v. Railroad*, 62 N. H. 159, 161. If the plaintiff were a stranger—an innocent third party injured by the negligent operation of the machine—it would be immaterial whether the actual operation was in the charge of the defendant in person, or in that of his employé or agent. The rule respondeat superior would apply. As to third persons, the act of Rombeau would be the act of the defendant. "*Qui facit per alium, facit per se.*" But it appears from the plaintiff's case that both he and Rombeau were the defendant's servants. The plaintiff's action, therefore, is not founded upon the maxim respondeat superior, but upon an alleged breach of duty owed by the defendant, as master, to the plaintiff as his servant. The mutual rights and duties of the master and servant are usually regarded as flowing from the contract for service. Whether the reciprocal rights and duties of the relationship depend upon the stipulations of a contract, or upon rules of law adopted as matter of public policy upon grounds of reasonableness, is not material. The general principles

governing the relationship are well settled. The master is bound to reasonable care to provide the servant with suitable instrumentalities for the work. This includes place, machinery, associates in the work, and, where necessary, suitable rules and regulations for its conduct. *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462.

Being guilty of no want of care in furnishing or maintaining these instrumentalities, the master is not liable if injury otherwise results to the servant. If to render the place safe it is reasonable a mechanical notice of intermittently recurring danger to the employé should be provided, it is the duty of the master to exercise care to provide and maintain some device for that purpose, as the bridge guard upon railways. If such care has been exercised, the master is not liable if for some other cause in a particular case the device fails to effect its purpose. *Hardy v. Railroad*, 68 N. H. 523, 41 Atl. 179. So if for the servant's safety it is reasonable that some person should be provided to give a warning from time to time, the master, having exercised care to provide a suitable person, is not liable if in a particular instance the warning is not given. *McLaine v. Head & Dowst Co.*, supra. In short, the master is not an insurer of the servant's safety. One obligation of the master is to exercise care to provide reasonably competent persons to engage in the work. If this duty has been performed, he is not liable if one servant is injured by the negligence of another servant engaged in the common work. Either because such a rule has been considered reasonable as governing the relationship of the parties, or because, in the absence of an express contract, the parties must be understood to have made a reasonable one, including the reasonable stipulation that the servant will assume the risk of injury from the negligence of his fellows engaged in the common work, such assumption of risk is now a settled rule of the law of master and servant. As the master, as the law is now settled, is not liable for an injury resulting to one servant from the negligence of a fellow servant in the course of their common employment, the question now arising for controversy in particular cases is whether the negligent person is to be regarded as a fellow servant of the one injured. In this jurisdiction "the responsibility of the master is determined by the nature of the act in question, and not by a difference in rank or grade of service between particular servants." *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 295, 52 Atl. 545, 58 L. R. A. 462. Accordingly it has been held that the master is liable where the negligent act in question was one which it was his duty to perform, although in fact performed by inferior servants (*Jaques v. Company*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Story v. Railroad*, 70 N. H. 364, 368, 48 Atl. 288; *Olney v. Railroad*, 71 N. H. 427, 430, 52 Atl. 1097),

while in *McLaine v. Head & Dowst Co.*, supra, the master was held not liable for the negligent performance of a duty properly that of a servant, although the negligence in fact was the negligence of the foreman in charge of the work.

At the time of the injury, Rombeau was directing the operation of the crane. The operation of the crane was a part of his employment. The sole question presented by this branch of the case, therefore, is whether the operation of the crane was work which might be committed to a servant, or whether its safe operation was a nondelegable duty of the master, owed by him to the plaintiff, of which he could not divest himself by employing another to perform it for him. There is no claim of any defect in the machine itself, or of incompetency in the engineer or Rombeau. The claim is as to manner of operation by competent persons of a suitable machine, used for the purpose for which it was designed. It is elementary that the master's duty does not extend to the operation of suitable machinery furnished by him to his servants. *Fournier v. Company*, 70 N. H. 629, 44 Atl. 104. "In working with a derrick, the foreman and his assistants are fellow servants, and the master is not responsible to any one of them for the negligence of any other in the use of the materials and implements which the master has supplied." *McKinnon v. Norcross*, 148 Mass. 533, 537, 20 N. E. 183, 3 L. R. A. 320. In this case the loading of the stone into the car by means of the derrick was the common employment in which the parties were engaged. If Rombeau had himself handled the levers of the engine, it probably would not be suggested that the parties were not fellow-servants. But it is claimed that because Rombeau did not himself control the valves of the engine, but orally directed the engineer when to raise and lower by the crane, such directions constituted a part of the master's duty, because they were orders. If it is held that the servant acts as the representative of the master in giving the order in question, upon the ground of his rank and the extent of his control over others (the class of cases considered in the note to *O'Neil v. Railway Co.* [Minn.] 51 L. R. A. 513, to which attention has been called at page 590), it necessarily follows that the negligent order in question is the act of the master. Similarly, under the doctrine of the cases by which the character of the act in question, as representative or otherwise, is determined by the nature of the act itself (*Bridge Co. v. Olsen* [C. C. A.] note, 54 L. R. A. 1), if the order is given in the execution of any nondelegable duty devolved by law upon the master, such order is the act of the master, while, if the order is merely part of the performance of a delegable duty, the order is the act of a servant, for which the master is not liable. As the latter rule is the law here, decisions in jurisdictions where the former point of view

(called the "superior servant rule") prevails, as in Illinois and Missouri (51 L. R. A. 539, 540, 608, 614, and cases there cited), are not of value here, but are liable to mislead. "None of the courts, apart from those which apply the superior servant doctrine, predicate nonassignability of the duty of giving orders" (note, 51 L. R. A. 593)—a result which naturally follows from the reason upon which the opposite doctrine is founded. It is doubtless true, as said in *Hankins v. Railroad*, 142 N. Y. 416, 420, 37 N. E. 466, 467, 25 L. R. A. 398, 40 Am. St. Rep. 616, that "It frequently becomes very difficult to determine whether the particular act in any case is that of the master, as such, or only that of a mere fellow servant." But there is no difference in principle between a verbal act, an order, and any other act. The question is the same in either case—whether the act pertains to the duty of the master, or the work of a servant. As the court continues in the case referred to (*Hankins v. Railroad*): "It is not a question as to the rank of the individual who gives the order or performs the act. The question is one as to the character of the order or act—whether it is one which is given or performed as an order or act of the master in his character as such, or only as an order or act delegated by the master to another, and performed by such other as an employé." Hence it is generally held that negligence of a superior servant, even in giving orders whereby injury results, is not of itself sufficient to charge the master. *Moody v. Company*, 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. *Griffin v. Company*, 67 N. H. 287, 30 Atl. 344, was a suit for injury resulting from the operation of a steam crane or derrick. In that case it appeared that, when the load was ready to be raised, the men arranging the load gave the signal to the engineer to hoist. At the time of the accident the plaintiff himself gave the signal. At this moment the defendants' superintendent called out to the engineer, in a loud voice, to hoist, whereupon the engineer started the engine quickly, and injured the plaintiff. Whether the case disclosed evidence in the sudden interference and direction of the superintendent, tending to establish that the order so given was an exercise of the controlling authority of the master, and, if so, was the performance of a duty of the master, was not decided, because the fact that the injury was caused, not by negligence in the order, but by negligence in obeying it, rendered immaterial the question whether the order given was the master's act. Neither are the questions suggested now presented for decision. The order in question was not an interference with the conduct of the work of servants, by virtue of a general power of superintendence and control conferred upon Rombeau by the master. Neither was it given in the performance of any of the master's duties. It

was a part of the work of operating a machine—a work which, upon all the authorities, may be delegated to a servant, and which in this case was specially imposed upon Rombeau. It is obvious that the operation of a steam crane or derrick will often, if not generally, require that some person in a position to observe the work should direct by signals or verbal orders the engineer in the control of the engine. Such person operates the machine as truly as the workman operates the ax or shovel in his hand. There is no logical ground which would require the master personally to operate the machine which would not impose the same duty as to the tool. The legal principle by which the master's liability is determined in this case is the same as if the parties were loading stone upon a drag with crowbars. *Fiffeld v. Railroad*, 42 N. H. 225, 228. If the careless handling of the bar raised the stone, to the injury of one of the workmen, it would not be claimed that a right of action accrued against the common employer, even if the one handling the bar were in general charge of the work. In this case Rombeau raised the stone by a steam crane which was controlled by the engineer under Rombeau's directions. The raising of the stone through Rombeau's directions to the engineer was as much Rombeau's act as if it had been done by a bar in his hand. The movement injurious to the plaintiff was not made the act of the master because it resulted from the oral instruction of Rombeau to the engineer, and took effect through the engineer's intelligent obedience, rather than from the unintelligent obedience of the crowbar following his will silently exerted by the pressure of his arm and weight. The giving of such direction was a necessary part of the removal of each stone; and there is nothing tending to show that such operation of the crane was not the work of a servant, imposed upon Rombeau as a servant, whatever relation he might occupy as to duties imposed on the master by law. For the negligence of one in general charge of the work while performing the duty of a servant, the master is not liable to other servants engaged in the common employment. The test is, as before stated, whether the act complained of is an act which may be performed by a servant, or is one which the master is personally bound to perform, and therefore cannot delegate. It is obvious that hoisting the stone was no more the personal act of the master than the attachment of the chain. *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, is decisive of the questions raised in this case. Exceptions overruled.

CHASE, WALKER, and BINGHAM, JJ., concurred.

REMICK, J. (dissenting). The plaintiff was the defendant's servant, and his duty

was "to dig around rocks that were to be taken out, and attach chains thereto, so that they could be hoisted by a steam crane." The crane was "operated" by an engineer, a fellow servant with the plaintiff. The defendant was represented by one Rombeau, who had general direction of the men—"charge" of the operation of the crane and of everything connected with the work. The plaintiff complained to Rombeau that the chain furnished him was too large and awkward, and that he could not get it around the stone very well, and asked Rombeau to get him a smaller and handier one. Rombeau attempted to find such a chain, but was unable to do so, and told the plaintiff he must get along with the one he had. The plaintiff then adjusted the chain; but, the chain being a little slack, the stone began to swing when it was hoisted by the crane, and Rombeau gave instruction to the engineer to lower the stone in order to stop the swinging. The plaintiff then told Rombeau that the chain was not right on the stone, and that it was not safe, and asked Rombeau to wait until he fixed it. The plaintiff took hold of the chain, but Rombeau immediately remarked to the engineer: "Go ahead. The chain is all right." The engineer raised the stone, and in doing this the chain caught the plaintiff's hand and injured it. Upon these facts, I think the plaintiff was entitled to go to the jury, and that the nonsuit was improperly ordered. The plaintiff was making the best of an unsuitable chain, which he had complained of to Rombeau, and which Rombeau, after seeking for another, had told him he must get along with. Proceeding accordingly, and discovering that he had not got the chain right on the stone, and that it was not safe, the plaintiff did what it was his duty to do—warned Rombeau of the danger, asked him to wait until he fixed the chain, and proceeded to fix it. Regardless of the plaintiff's notice that the chain was not safely adjusted, and regardless of the fact that the plaintiff was proceeding to fix it, and had taken hold of the chain for that purpose, Rombeau, speaking with the master's authority, ordered the engineer to go ahead, and the plaintiff was injured in consequence.

I will take no time in considering the question of the defendant's liability growing out of the character of the chain furnished, because it does not satisfactorily appear, as the record shows, that any defect in the chain contributed to the injury.

As to the defendant's liability as affected by the negligence of Rombeau, it has been suggested that the record discloses no evidence that Rombeau knew or ought to have known that his order to hoist the crane would be attended with danger to the plaintiff. But it appears that he had just been told by the plaintiff that the chain was not safely adjusted, and asked to wait until the plaintiff could fix it. It being the plaintiff's duty to make proper adjustment of the chain, he had

a right to assume, after notifying Rombeau that it was not safe, and asking him to wait until he fixed it, that Rombeau would wait. And Rombeau, in the exercise of ordinary care, might have anticipated, after such notice and warning, that the plaintiff would proceed to fix the chain according to his duty, and that he would be imperiled if the chain was hoisted in disregard of his warning and request. That there was evidence for the jury of due care on the part of the plaintiff, and of negligence on the part of Rombeau, in this connection, seems too clear for discussion.

As the case presents itself to my mind, the only question worthy of serious consideration is whether, assuming due care on the part of the plaintiff, and negligence causing the injury on the part of Rombeau, the defendant is liable. The majority are of the opinion that the defendant is not liable, and upon the theory that the negligence of Rombeau was the negligence of a fellow servant. From this conclusion I am constrained to dissent.

The plaintiff's injury resulted immediately and solely from Rombeau's order to the engineer to hoist the stone in defiance of the plaintiff's warning that it was not then safe to do so, and while the plaintiff, as Rombeau knew or ought to have known, was endeavoring to make it safe. The order, under the circumstances, was obviously improper and negligent. As the plaintiff was injured in consequence, I see no reason in law, morals, or philosophy why the defendant master should not be held responsible. I do not contend, because the master had committed the superintendence of the men and works to Rombeau, that he became responsible for Rombeau's negligent performance of acts of common labor or fellow service; but to say that an order, by one authorized by the master to give it, to others required by the master to obey, is an act of fellow service, is to say what is manifestly not so, in disregard of elementary principles of agency and the dictates of reason and justice. This court turned away from such a proposition in *Griffin v. Company*, 67 N. H. 287, 289, 30 Atl. 344, and it cannot be reconciled with views expressed in *Jaques v. Company*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Littott v. Company*, 69 N. H. 628, 632, 44 Atl. 98; and *Lapelle v. Company*, 71 N. H. 346, 349, 51 Atl. 1068. If it finds any countenance in *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, I have only to say that the doctrine in that case did not have my approval, and I cannot assent to its application to the new and different situation presented here. In *McLaine v. Head & Dowst Co.* the injury was caused by negligent omission on the part of the foreman to warn in accordance with his duty, assurance, and custom, and as required in order to make the working place safe. In the present case the injury was caused by a negligent order,

given by the defendant's representative in charge, in defiance of the plaintiff's warning that the situation was not safe, and that the order should be deferred. In *McLaine v. Head & Dowst Co.* I was unable to see how the duty of the master to warn, when established, as it admittedly was in that case, could be discharged by delegation, any more than any other duty incumbent upon the master (*Jaques v. Company*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Olney v. Railroad*, 71 N. H. 427, 430, 52 Atl. 1097); any more, for instance, than the duty to warn in *Simonie v. Kirk* (N. Y.) 65 N. E. 739, *Wheeler v. Company*, 135 Mass. 294, and *Bjbjlan v. Company*, 164 Mass. 214, 220, 41 N. E. 265, or the duty to instruct in *Lapelle v. Company*, 71 N. H. 346, 349, and *Tedford v. Company*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85 (and note), 96, 97, 98. So in the present case I am unable to see why an authorized order, given by one servant of the master to another, directing the latter to work in a particular place, is the act of the master (*Lapelle v. Company*, 71 N. H. 346, 349, 51 Atl. 1068; *Lintott v. Company*, 69 N. E. 628, 632, 44 Atl. 98), any more than an authorized order by the same servant directing the progress of the work in that place.

It may be a question, under some circumstances, whether an alleged order was an order, or simply an act of fellow service. But when the circumstances show that the alleged order was an act of authority, and that obedience thereto was a duty, then the order, whatever the grade of the giver or the nature of the order, must, if the reason and consistency of the law are to be preserved, be regarded as the order of the master. *Rombeau* was the defendant's representative in command. The men and works were all subject to his direction. He did not operate, but had charge of the operation of, the crane. The order in question was not a signal given by *Rombeau* in the ordinary course of the work, and involving no exercise of authority. The circumstances were special. The plaintiff had told him that the chain was not safe, and had asked him to wait until he fixed it. Under these circumstances, *Rombeau's* order to the engineer to go ahead can be regarded in no other reasonable light than as an act of authority. It ignored the plaintiff's warning, and left the engineer no alternative but disobedience. But for its official character, it might have spent itself in impotency. As it was, it set in operation the forces which caused the plaintiff's injury. If not an order, in the sense of being an exercise of authority, it would be difficult to conceive when an order would be of that character. To say that it was a mere act of fellow service would, under the circumstances, be a manifest misnomer. However other situations might be viewed, the proper classification of the present case would seem clear. It is the case of a negligent order by one speaking with the authority of the master; nothing more, nothing

less. That the master is liable under such circumstances is a proposition sound in principle and abundantly supported by authority.

In *Crispin v. Babbitt*, 81 N. Y. 516, 530, 37 Am. Rep. 521—the leading case to the proposition, now so generally accepted, that the nature of the act, not the rank of the actor, is the test of the master's liability—it appears from the dissenting opinion to have been generally assumed that an order by one authorized by the master to direct would be the master's act. And it was recently declared, upon a careful review of the authorities, that, "under any consistent application of the New York rule, * * * the master is represented, as by a vice principal, by any one to whom he deposes the power of giving orders which must be obeyed without or before appeal, and he is responsible for those orders as much as if they were his own." *Shearn & Red. Neg.* (5th Ed.) § 233. In *Dayharsh v. Railroad*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900, cited by this court in *Jaques v. Company*, 66 N. H. 482, 485, 22 Atl. 552, 13 L. R. A. 824, to the proposition that "those doing the work of a servant are fellow servants, whatever their grade of service, and a servant, of whatever rank, charged with the performance of the master's duty toward his servants, is, as to the discharge of that duty, a vice principal, for whose acts and neglects the master is responsible," it was said: "It was undoubtedly within the scope of Mr. Stephens' authority as * * * 'boss' to direct where the engine and tender that struck plaintiff should be placed, and how and when they should be moved over the tracks. In giving directions to that end, and seeing to their execution, we think he was performing the master's part, and, as such, was the representative of the latter, and not a mere fellow servant of the plaintiff." See, also, *Foster v. Railway*, 115 Mo. 165, 179, 180, 21 S. W. 916. In *Chicago, etc., R. R. v. May*, 108 Ill. 283, 15 Am. & Eng. R. R. Cas. 320, 323, 324, the true principle is well enunciated as follows: "The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend on its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which

relates to his duties as a collaborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railway company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of or is the direct result of the exercise of the authority conferred upon him by the master over his collaborators, the master will be liable. In such case he is not the fellow servant of those under his charge, with respect to the exercise of such power; for no one but himself, in the case supposed, is clothed with authority to command the others. When a railway company confers authority upon one of its employes to take charge and control of a gang of men in carrying on some particular branch of its business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself; and all commands given by him within the scope of his authority are, in law, the commands of the company. * * * In exercising this power, he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations; and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." This rule was recently applied in the same jurisdiction in Illinois, etc., *R. R. v. Atwell*, 188 Ill. 200, 64 N. E. 1095, where the court said: "It is insisted that the negligence charged is the negligence of a fellow servant, and therefore plaintiff could not recover. While the foreman and Atwell may have been in many respects fellow servants, they were not in that relation as to the exercise of authority by one over the other. The injury resulted from the improper exercise of the foreman's power to command, and in respect to the exercise of such power they were not fellow servants." In *Taylor v. Railroad*, 121 Ind. 124, 22 N. E. 876, 6 L. R. A. 584, 16 Am. St. Rep. 374, 376, it is said: "It is not easy to conceive how it can justly be asserted that one who commands an act to be done, and who possesses the authority to command * * * by virtue of the power delegated to him by the master, is no more than a fellow servant. * * * The duty of the master mechanic, as it appears from the complaint, was to order what should be done; and this, it has been well decided, is intrinsically the master's act, and not that of a mere fellow servant." In *Carlson v. Company*, 63 Minn. 428, 65 N. W. 914, it was said: "The doc-

trine of 'fellow servant,' and particularly that phase of it presented by this case, to wit, when a superior employe bears to inferior employes under him the relation of vice principal, and when that of fellow servant, is one of the most difficult questions in the law. The principle which this court has always announced as the test is that it is not the mere rank or grade of the superior employe, but the nature of the duty or service which he was performing, which determines the question; that whenever a master delegates to another the performance of a duty which he owes absolutely to his servants, or which would fall within the line of his duty as master if personally present, then, in the performance of such acts, such other person would be, as to other servants, a vice principal, and not a fellow servant. * * * For example, in hiring and discharging workmen the foreman in the present case would represent the master, and his negligence in the premises would be chargeable to the master. So, also, in the matter of selecting or inspecting implements and other instrumentalities for the performance of the work, assuming that this duty had been delegated to him. And where, as in this case, he had been given entire control of the work and all the workmen engaged in it, with * * * authority to give them orders how to do the work and where to work, I think that, on exactly the same principle, in giving these orders, which the workmen were bound to obey, he represented the master, and was performing a duty which would have devolved upon the master if personally present."

The subject was recently considered and the authorities reviewed in an exhaustive note in 51 L. R. A. 513, 590, and the conclusion arrived at is thus stated on page 590: "There is an overwhelming weight of authority to sustain the doctrine that the liability to which the master is declared to be subject, whenever the negligent act is a direct result of the exercise of power conferred by the master in the performance of a duty devolving by law upon him, is predicable in the case of orders issued in respect to the work, whatever may be the precise object to which those orders may have relation. It is, in fact, difficult to see what more indisputable example there can be of an 'exercise of authority' than the giving of such orders; and, for the purposes of the master's liability in this instance, it is obviously quite immaterial whether the delinquent employe be a mere 'superior servant' or a general or departmental manager. According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position." See, also, *Shearm. & Red. Neg.* (5th Ed.) § 233; *Galveston, etc., Ry. v. Fuente* (Tex. Civ. App.) 70 S. W. 362.

Decisions of the Supreme Court of the United States have been cited in behalf of the defendant, but the latest judicial utterance from a federal source is quite in harmony with the principle for which I am contending. See *Chicago, etc., Co. v. Birney*, 54 C. C. A. 458, 117 Fed. 72, where it is said by the Court of Appeals, Eighth Circuit: "It is * * * noteworthy that in the present instance the plaintiff was not injured by the negligent act of Bennett after he had descended to the plane of an ordinary laborer, and while he was assisting the plaintiff in doing the ordinary work of a laborer. He was injured in consequence of a negligent order given by Bennett, in the giving of which Bennett was obviously exercising the functions of the master." See, also, *Northern, etc., R. R. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82.

It will be observed that the authorities to which attention has been called do not proceed upon the "superior servant" idea, but upon the theory adopted in this jurisdiction—that the character of the act, and not the rank of the actor, is the test. They hold the master liable for the consequences of a negligent order given by his authorized representative, not because of the rank of the person from whom it emanates, but because of the intrinsic character of the act; because it is an order as distinguished from common labor—an act of authority as distinguished from fellow service. The suggestion of the majority that decisions proceeding upon the superior servant theory are without value and misleading is therefore pointless as applied to the present discussion.

The fact that, in jurisdictions where judicial opinion has gone the extreme length of the opinion of the court in the present case, legislative action has been found necessary to restore the law to a basis in better accord with the principles of agency governing other relations, and more in harmony with abstract justice (42 & 43 Vict. c. 42; Acts & Resolves Mass. 1887, p. 899, c. 270; *Feltham v. England*, L. R. 2 Q. B. 33; *Moody v. Company*, 159 Mass. 70, 72, 73, 34 N. E. 185, 38 Am. St. Rep. 396; *Roche v. Bleachery*, 181 Mass. 480, 63 N. E. 943), does not weaken our conclusions. On the contrary, the revulsion, thus indicated, from the doctrine against which we are contending, is additional proof of its injustice. In matters where the courts are free to apply the law of reason, they should not await legislative action.

BLODGETT v. JOHNSON.

(Supreme Court of New Hampshire. Merrimack. April 7, 1903.)

SALE-CONTRACT FOR OUTPUT OF MILL—RIGHT TO RENEW—DESTRUCTION OF MILL—EFFECT—BUILDING OF SECOND MILL—RIGHT TO PURCHASE OUTPUT.

1. A contract whereby the lessee of a sawmill sells its output for one year, with the right in

the purchaser to renew the contract for so long as the lessee retains the property, is terminated by the destruction of the mill, though the lessee rebuilds.

2. The lessee of a mill sold all slabs, etc., "to be produced at the Hall Mill, in L." for one year, with right in the purchaser to renew the contract so long as the lessee should retain the property. The mill was destroyed, and the lessee purchased the site and built a new mill, double the capacity of the former, called the "Johnson Mill." Before building, he borrowed a certain sum to aid him therein, on agreement with the lender that the latter should be the selling agent of the mill, at a certain commission. *Held*, that the original contract for the sale of slabs, etc., did not apply to the new property.

Transferred from Superior Court, Merrimack County; Wallace, Judge.

Assumpsit by Frank E. Blodgett against George L. Johnson. Verdict for plaintiff, and case transferred from superior court on defendant's exceptions. Case discharged.

The plaintiff contended that he had seasonably renewed the contract described in the opinion, and claimed damages for a breach thereof because the defendant refused to deliver to him the output of the Johnson Mill. The defendant's motion that a verdict be directed in his favor was denied, subject to exception. The question whether the plaintiff seasonably exercised the right of renewal was submitted to the jury, with an instruction that after the fire the plaintiff had the right to renew his contract; and to this instruction the defendant excepted.

Albin & Shurtleff, for plaintiff. Burleigh & Adams and Mitchell & Foster, for defendant.

REMICK, J. The defendant sold the plaintiff all the merchantable slabs and edgings to be produced at the Hall Mill, in Lincoln, N. H., for the space of one year, and the plaintiff was to have the right to renew the contract for the length of time the defendant should run the mill. The contract was entered into November 2, 1898. The plaintiff had the output of the mill for the first season, and the mill was destroyed by fire May 10, 1899. In the summer and fall of 1899 the defendant built a new mill on substantially the same site as the old one. The plaintiff claims that he is entitled, under the renewal clause in the agreement, to the slabs and edgings produced at the new mill. The defendant contends that the destruction of the Hall Mill by fire terminated the existence of the contract.

The contract contained no stipulation on the part of the defendant to rebuild the mill in case it was destroyed by fire; and it is conceded that, if the defendant had not rebuilt, the contract, as to future product, would have been dead, to all intents and purposes. So far as the plaintiff was concerned, the defendant was not only at liberty to rebuild, or not, as he saw fit, but he was at liberty to build a shoeshop, or any other kind of manufactory, in place of the sawmill.

And whatever he built, he was at liberty to incumber it and its entire product in order to provide for its construction. It is impossible to reconcile the plaintiff's contention with these unquestionable propositions. Attempt to do so would lead to the illogical conclusion that the defendant was free and bound at the same time.

Moreover, the stipulation was for product of the Hall Mill—a mill then owned by the Lincoln Lumber Company, and leased by the defendant. The new mill was built and owned by the defendant, and called the "Johnson Mill." The capacity of the Johnson Mill was almost twice the capacity of the Hall Mill. Before building it, the defendant purchased the land upon which to build it, made contracts with other parties to supply the mill, and received \$6,000 from one Stebbins to aid him in building, upon an agreement with Stebbins that he should have 6 per cent. for the use of the money, and should be the selling agent of the mill; receiving 5 per cent. commission therefor. It cannot be reasonably held that the parties intended the stipulation for product of the Hall Mill to apply to such new and changed conditions.

The exception to the instruction is sustained, and the result is that there should be judgment for the defendant for \$15. Case discharged. All concurred.

LENOIX v. DOVER, S. & R. ST. RY. et al.
(Supreme Court of New Hampshire. Strafford.
Feb. 5, 1903.)

STREET RAILWAYS—ROUTES—ESTABLISHMENT—RIGHTS IN STREET—OBSTRUCTION—SPECIAL CHARTER PROVISIONS—REPEAL.

1. A street railway company's charter required that its route over the streets of the city should be determined by the selectmen thereof in like manner as highways are laid out. Pub. St. 1901, c. 45, providing for the establishment of highways, section 4, requires that the selectmen shall make their decisions in writing, and cause the petition and their decision to be filed in the town clerk's office and recorded at length on the town records, and declares that their decision shall be of no effect until such section is complied with. *Held*, that where the selectmen voted a general location to such street railway company in accordance with a plan, but the hearing of the petition for the laying out of the railway was continued from time to time while the road was being built, such general location, without record thereof, conferred no authority on the company to occupy the streets.

2. Laws 1889, p. 161, c. 178, § 2, granting a special charter to a street railway company, and requiring that its route should be laid out and selected by the selectmen of a town in like manner as highways are laid out, was not repealed by Laws 1895, p. 307, c. 27, providing for the organization of street railway corporations by general law, and declaring that previous charters granted were altered or amended so far as they were inconsistent with such general law.

Transferred from Superior Court.

Action by Thomas Lenox, as administrator, etc., against the Dover, Somersworth & Roch-

ester Street Railway and others. A nonsuit was entered, subject to exceptions, and the case was transferred from the superior court. Nonsuit stricken off.

June 22, 1901, as the plaintiff's intestate was driving along a highway in Rochester, the horse became frightened at a reel of wire which had been left beside and within the highway by one Kendall, who had the contract for constructing certain overhead work which the Massachusetts Construction Company was building for the defendant street railway. Kendall and the construction company were made parties defendant.

The street railway was incorporated by the Legislature (Laws 1889, p. 160, c. 178) and duly organized. The records of the city of Rochester show that the following steps were taken toward the laying out of the road: A petition asking that the tracks, poles, lines, wires, etc., of the railway "be located, and the grade of said tracks be determined and fixed, as required by the charter of said company and the statutes of said state," was presented to the mayor and city council. The required notice was given, and on the return day of the petition the mayor and city council took a view of the proposed route. The hearing was continued until February 11, 1901, when action was taken, as appears by the following record of the council meeting: "The hearing on the petition of the Rochester Street Railway Company being in order, L. P. Snow, in behalf of the company, made a brief statement as to the proposed route and side of the street to be occupied, and called Engineer Springfield and President Lovell, who were sworn and testified as to the proposed route, material to be used, etc. On motion of Councilman Wallace, voted a general location, as shown by engineer's plan, be granted the street railway company. On motion of Councilman Meader, voted the committee on roads, bridges, and drains have general supervision of the layout of the road, and report to the council at the regular meeting in March." The hearing on the petition for the layout of the railway was continued from time to time while the road was being built, until December 10, 1901, when a layout, giving a detailed description of the tracks and poles of the company as they then existed on the ground, was duly drawn, signed, filed, and recorded in the city records. Subject to exception, the court ordered a nonsuit as to the street railway and the Massachusetts Construction Company. If the location of the street railway was sufficient against the plaintiff to authorize the work to be done in the highway, including the erection of poles and the stringing of wires, as Kendall was doing, there is to be judgment for those defendants; otherwise the nonsuit is to be stricken off.

Felker & Gunnison and George E. Cochran, for plaintiff. Leslie P. Snow, for defendants.

REMICK, J. Before the defendant railway company could rightfully occupy the street with their works, they were bound to secure a determination by the proper authority of the following questions: (1) Whether the public good required the construction of the proposed railway; (2) whether the public good required its construction over this particular street; and (3) where, upon the street, the public good required the track, poles, wires, and other appliances to be located. Laws 1889, p. 161, c. 178, § 2; Laws 1893, p. 368, c. 27, §§ 3, 5; Petition of Nashua Street Railway, 69 N. H. 275, 278, 278, 41 Atl. 858.

That the public good required the construction of the railway "was decided by the Legislature when the corporation's charter was granted." Petition of Nashua Street Railway, 69 N. H. 275, 278, 41 Atl. 858, 860. Whether the public good required the construction of the railway upon the street in question, rather than over some other route, and, if so, where, upon the street, were questions which the charter of the defendant railway company in express terms referred to the selectmen of Rochester, to be by them inquired of and determined, "in like manner as highways are laid out." Laws 1889, p. 161, c. 178, § 2; Petition of Nashua Street Railway, 69 N. H. 275, 41 Atl. 858.

Had the selectmen or corresponding municipal authority of Rochester, at the time of the plaintiff's injury, determined, "in like manner as highways are laid out," that the public good required the construction of the railway upon the street in question, and where therein it should be located? Section 1, c. 45, Pub. St. 1901, provides: "On petition to the selectmen for the laying out or altering of highways, or for laying out lands for any public use, and generally for the purpose of deciding any question affecting the conflicting rights or claims of different persons, their proceedings shall be governed by the following rules." Sections 2 and 3 relate to notice, and, as the notice in the present case is not questioned, they are immaterial. Section 4 provides: "They [the selectmen] shall make their decision in writing, and cause the petition, order of notice, evidence of service, and their decision to be filed in the town clerk's office and recorded at length upon the town records; and their decision shall be of no force or effect until the same is done." At the time of the plaintiff's injury the foregoing provision had not been complied with. If it could be said, upon the findings, that the vote of February 11, 1901, was a "decision in writing" that the public good required the construction of the railroad over the street in question, and that the minutes of the meeting of the city council were a record thereof sufficient to answer the requirements of the statute, by no stretch could it be said that the vote of that date was a determination of the question of particular location. The vote in terms grants nothing more than a "general location," while the subsequent votes

and conduct of the city council show conclusively that there was no location or record thereof, within the meaning of the statute, until December 10, 1901, long after the plaintiff was injured. The action of February 11, 1901, did not, therefore, authorize occupation of the street by the defendants for the purpose alleged.

It is urged that the charter provision requiring that the "railroad shall be laid out by the selectmen of said Rochester in like manner as highways are laid out" was repealed by chapter 27, p. 367, Laws 1895. By the express terms of that act, charters theretofore granted were altered and amended only so far as inconsistent therewith. Petition of Nashua Street Railway, 69 N. H. 275, 41 Atl. 858; Petition of Keene Electric Railway, 68 N. H. 434, 41 Atl. 775. Whatever inconsistency there may be between the provisions of that chapter and other provisions relating to the laying out of highways, we discover no inconsistency between anything in that chapter and the particular provision of the highway law—that until a decision and record, in accordance with section 4, c. 45, Pub. St. 1901, all steps in the laying out of a highway are without force or effect. If there had been nothing in the charter making the proceedings for location subject to that provision, and the proceedings had been under section 5, c. 27, p. 368, Laws 1895, exclusively, still they would have been subject to that provision by virtue of section 1, c. 45, Pub. St. 1901.

The sweeping terms of the statute leave the court no liberty to regard the general considerations urged by the defendants. The statute compels the conclusion that at the time of the plaintiff's injury the defendants' occupation of the street for the purpose alleged was unauthorized.

Nonsuit stricken off.

CHASE, J., was absent. The others concurred.

LAMOREUX v. MORIN et al.

(Supreme Court of New Hampshire. Coos.
March 3, 1903.)

MUNICIPAL CORPORATION — LABORER IN STREET DEPARTMENT — ASSIGNMENT OF WAGES—ACCEPTANCE BY STREET COMMISSIONER—AUTHORITY—SUFFICIENCY.

1. A finding that a city has constituted its street commissioner its agent to make acceptances of assignments of future earnings by employes in his department is sustained by a statement of agreed facts showing that for several years the commissioner had been accustomed to accept such assignments, and that the wages afterwards earned were paid to the assignees by the city treasurer, though it is also agreed that the city council never authorized the commissioner to accept assignments.

2. The acceptance by a street commissioner of an assignment of future earnings by an employe in his department, in the following words, "Accepted. J. B. N., Street Commissioner," is sufficient.

Transferred from Superior Court, Coos County; Young, Judge.

Foreign attachment by M. Lamoreux against Cleophas Morin, principal defendant, and the city of Berlin, trustee, in which Joseph Lambert appears as claimant. Facts agreed, and case transferred from the superior court on plaintiff's exceptions. Exceptions overruled.

The defendant was employed by the city of Berlin as a laborer in the street department. He was hired by and worked under John B. Noyes, highway commissioner of the city. May 17, 1902, the defendant, for a valuable consideration, assigned to Joseph Lambert all wages to be earned while in the employ of the city. The assignment was presented to Noyes, who wrote upon its face, "Accepted. John B. Noyes, Street Commissioner." The assignment and alleged acceptance were duly recorded with the city clerk. Subsequently this action was begun, and the plaintiff attached the goods, effects, and credits of the defendant in the hands of the city. The city disclosed \$28.88 due on account of the defendant's labor, set up the assignment, and denied its liability. The city council never authorized the highway commissioner or any other person to accept assignments drawn upon it. For several years the highway commissioner had been accustomed to accept assignments of wages made by men working under him, and the wages afterwards earned by the assignors had been paid to the assignees by the city treasurer. The court ordered judgment for the claimant, and the plaintiff excepted.

John E. Benton, for plaintiff. J. Howard Wight, for claimants.

REMICK, J. It is agreed that "the city council never authorized the highway commissioner or any other person to accept assignments"; but, viewed in the light of the record as a whole, and the briefs of counsel on both sides, this is understood to mean only that there had been no formal authorization. It is further agreed that "for several years the highway commissioner had been accustomed to accept assignments of wages made by men working under him, and the wages afterwards earned by the assignors had been paid to the assignees by the city treasurer." From this course of dealing, the superior court was warranted in finding that the city had constituted the highway commissioner its agent to make acceptances of assignments of future earnings by those employed in his department. Dill. Mun. Corp. (4th Ed.) 203; O'Neil v. Dunn, 63 N. H. 393; Smith v. Bank (N. H.) 54 Atl. 385. In this view, it is unnecessary to consider whether acceptance by the highway commissioner, by virtue of his office alone, would have answered the requirements of the statute.

The objection to the form of the accept-

ance is without merit. *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185; *Dow v. Moore*, 47 N. H. 419; *Despatch Line v. Bellamy Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Underhill v. Gibson*, 2 N. H. 352, 355, 9 Am. Dec. 82.

Exceptions overruled. All concurred.

HORNE et al. v. HUTCHINS.

(Supreme Court of New Hampshire. Carroll.

March 10, 1903.)

WATERS AND WATER COURSES—ESTABLISHMENT OF RIGHTS—EVIDENCE—QUESTIONS OF LAW—REPORT TO SUPREME COURT.

1. Where, in a prior action to establish priority in a water right, it was determined that a deed from a common grantor, in conveying the water rights, adopted the physical state of the property as it existed at the date when the property was conveyed to him as the standard for measuring the rights and privilege conveyed by him, in a subsequent proceeding to determine the extent of such rights, deeds and leases showing the extent of use of the water rights prior to the deed to such common grantor were inadmissible.

2. In a suit for the determination of certain water rights, evidence relating to the character of water wheels used, and the power consumed to operate the same, presented no question of law, and it was therefore not error for the court to refuse to report the same at defendant's request.

Exceptions from Superior Court, Carroll County; Young, Judge.

Bill by Lorenzo Horne and another against Frank Hutchins to determine the extent and the manner of preference of water rights under a previous decision of the Supreme Court in the case of *Horne v. Hutchins*, 71 N. H. 128, 137, 51 Atl. 651.

The defendant excepted to the exclusion of certain deeds and leases of the box factory, offered for the purpose of showing what rights were actually attached to the box factory on the date in question. The defendant requested the court to report the evidence tending to show that originally there were two 5-foot, center-vent wheels in the Hutchins penstock; that one of them was changed in 1870 for a 38-inch Cook wheel, which was rated to use 33 cubic feet of water per second under a 14-foot head; and that the 5-foot, center-vent wheel used considerably less water than the Cook wheel. The court refused to report these facts, on the ground that they were merely evidentiary, and the defendant excepted. Exceptions overruled.

Leslie P. Snow and Sewall W. Abbott, for plaintiffs. James A. Edgerly and Arthur L. Foote, for defendant.

REMICK, J. In *Horne v. Hutchins*, 71 N. H. 128, 51 Atl. 651, it was settled that in the deed of Cate to Hodge & Remick, Cate "adopted the physical state of the property at the date of the Hersey, Thompson & Co. deed [October 26, 1872], and the extent and manner of the use made of the water

at that time in connection with the box factory, as the standard for measuring the rights and privilege conveyed by him." By this construction, it became immaterial what rights Cate or his grantors had previously assumed to convey or lease, or what rights they might have conveyed or leased had they seen fit to do so. Having adopted the physical state of the property and the actual use made of the water as the standard for measuring the rights conveyed by the deed, it only remained for the superior court to ascertain what the physical situation was. The deeds and leases offered by the defendant disclose nothing bearing upon that inquiry, and were properly excluded.

It does not appear that the evidence as to the water wheels, which the superior court refused to report at the request of the defendant, if reported, would have presented any question of law. The defendant's request was therefore properly refused.

Exceptions overruled. All concurred.

SMART et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 20, 1903.)

MUNICIPAL CORPORATIONS—CONTRACTS—ACCEPTANCE OF BIDS.

1. The charter of the city of Philadelphia, art. 14 (P. L. 1885, p. 51), providing that all contracts as to city affairs shall be in writing, signed and executed in the name of the city, is mandatory.

2. Where a bid submitted to the city of Philadelphia is accepted, but the city subsequently refuses to enter into a written contract in the matter, it is not liable to the contractor for a breach of the contract.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Terence P. Smart and George W. Kelley against the city of Philadelphia. Judgment of compulsory nonsuit, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John M. Ridings and William Kelley, for appellant. Chester N. Farr, Jr., Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

MESTREZAT, J. The department of public works of Philadelphia was authorized by ordinance to enter into contracts for the repaving of certain streets of the city. In answer to an advertisement by the department for proposals for the work, the plaintiffs submitted a bid at which they agreed to repave a part of Wharton street. The contract was awarded to them, and they were notified of the fact by a letter from the chief of bureau of highways. They were also advised that the city solicitor would be notified to prepare the contract to be executed by the parties. This not having been done, the plaintiffs

wrote the director of public works, reminding him of the fact, and requesting him to have the contract prepared, so that they might proceed with the work. In a reply to this letter, a few days thereafter, the plaintiffs were advised that a passenger railway company would occupy Wharton street with its tracks, and that, under its charter, the company would be liable for repaving the street. The city therefore declined to enter into a written contract with the plaintiffs for the performance of the work, and refused to permit them to do the work. By reason of this action by the city, the plaintiffs instituted the present suit to recover damages. The court below entered a compulsory nonsuit, and we have this appeal.

Article 14 of the charter of Philadelphia declares that "all contracts relating to city affairs shall be in writing, signed and executed in the name of the city." P. L. 1885, p. 51. This court has held that this requirement of the charter is not merely directory, but mandatory, and that, unless it is strictly complied with, there can be no liability imposed upon the city. *Hepburn v. Philadelphia*, 149 Pa. 335, 24 Atl. 279; *McManus v. Philadelphia*, 201 Pa. 619, 51 Atl. 320. It is therefore settled that a strict adherence to this provision of the city charter will be enforced, and that he who asserts and attempts to enforce any agreement or liability against the city must produce a duly executed contract in writing, signed by an officer authorized to make the same. The reason for exacting a strict compliance with this most salutary requirement of the city's organic law is thus stated by the late Chief Justice Sterrett in *Hepburn v. Philadelphia*, supra: "To hold otherwise would defeat the very object that the Legislature had in view in thus specifically prescribing the manner in which all contracts relating to city affairs shall be executed, and expose the public funds to raids of every conceivable form."

In this case, however, the plaintiffs are not seeking to enforce a contract with the city, but to recover damages because the city "neglected and refused to enter into or execute a written contract with the plaintiffs for the doing of the said work, or to allow the plaintiffs to do or perform said work." It is therefore contended by the learned counsel of the appellants that the cases above quoted have no application to the present action, and that the right to recover here is not controlled or affected by the fourteenth article of the city charter. The distinction thus suggested by the counsel is not well taken, and the views entertained as to the rights of the plaintiffs are clearly erroneous. If this contention be allowed to prevail, the effect would be to deprive the city of the protection of the charter requirement, and to compel it to comply with any parol contract made by one of its officers, or submit to the alternative of responding in damages for a breach of such contract. Should the

alleged liability here be enforced, it would not be because the city had assumed it, but because it had refused to carry into effect the negotiations preparatory to the execution of the contract. This would be in conflict with the very spirit and purpose of the rigid requirement of the fourteenth article of the charter, which prohibits the city from incurring a liability, except by a contract in writing. Until a written contract is duly executed in such cases, there can be no claim or responsibility enforceable against the city. Prior to that time there has been no action by the city, and consequently no liability incurred. The ordinance and awarding of the contract are all preliminary to, and not the contract, which alone, as already observed, imposes the liability on the city. As said in *Hepburn v. Philadelphia*, supra: "The papers referred to, the advertisement, the bid, and the letter of acceptance, set forth the terms upon which the city was willing to enter into a contract with him, but neither singly nor altogether do they constitute a valid contract, nor in fact any contract. They are merely negotiations preparatory thereto."

The plaintiffs having failed to establish any claim for damages against the city, the nonsuit was properly entered by the court below. Judgment affirmed.

QUINLAN v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. April 20, 1903.)

MUNICIPAL CORPORATION—DEFECTIVE STREETS.

1. Plaintiff's horse was frightened by stepping into a hole in an asphalt pavement, and ran away and collided with a wagon, overturning the carriage. Plaintiff testified that she was about to cross a street and pass in front of a market house, when the horse stepped into the hole, and that she was driving carefully, and could not see the hole because of the wagons in front of her. *Held*, that it was error to direct a nonsuit on the ground of contributory negligence.

2. It was error to direct a nonsuit on the ground that the defect in the street which caused the fright of the horse was not the proximate cause of plaintiff's injury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Quinlan against the city of Philadelphia. From an order refusing to strike off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Howard A. Davis and Horn R. Kneass, for appellant. Chester N. Farr, Jr., Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. The plaintiff's horse was frightened by stepping into a hole in the asphalt surface of the street, and ran away. Within

a square the plaintiff had got the horse partly under control, when the carriage collided with a wagon which was in the street, breaking a wheel of the carriage and overturning it. The nonsuit was entered on two grounds—the contributory negligence of the plaintiff in not seeing and avoiding the hole, and that the defect in the street which caused the fright of the horse was not the proximate cause of the plaintiff's injury. It can be sustained on neither ground.

When the horse stepped into the hole, the plaintiff was about to cross a street and pass in front of a market house, where the passageway for vehicles was narrowed by wagons backed against the curb. She testified that she was driving carefully, looking ahead to avoid vehicles, and did not see the hole, and could not see it because of the wagons in front of her; that she looked where she was driving, but could not watch both the surface of the street and the wagons ahead. The situation was one of peculiar difficulty, because the street was obstructed by vehicles on one side, and the passageway narrowed perhaps one-third, and because she was obliged to look ahead constantly to avoid vehicles passing in both directions, and to avoid the travel on the cross-street. A more skillful driver might have avoided both dangers by observing the surface of the street and the course of travel ahead, but the plaintiff cannot be held to the exercise of the highest degree of skill and care. In a case in which this question was carefully considered (*Graham v. Philadelphia*, 19 Pa. Super. Ct. 292), it was said by the learned president of that court: "It is to be borne in mind that, in streets of a large city traversed by trolley cars, there are other perils to be guarded against, and much more likely to be encountered, and therefore to be expected, than such a pitfall in a traveled way as is described in the testimony in this case. The driver of the vehicle must be on the lookout for them, and cannot under all circumstances and in every case give his sole and undivided attention to the roadbed. It is impossible, therefore, to lay it down as an inflexible and unvarying rule of law that he must keep his eyes constantly fixed on the roadbed, and is affected with notice of every defect therein which can be detected by so doing." Whether, under all the circumstances, the plaintiff was negligent, was a question for the jury, and not for the court.

On the question of proximate cause the case is clearly with the plaintiff. The negligence of the city in allowing the hole to be in the street caused the plaintiff's horse to run away, and in running he collided with a wagon, breaking and overturning the plaintiff's carriage. There was no break in the natural sequence of events. If the carriage had been overturned by striking the curb or a lamp-post, or any other fixed object at the side of or in the street, it would scarcely be contended that there was a break in the

natural course of events, which made the neglect of the city the remote cause of the accident. The presence of a wagon in the street was not the intervention of an independent and efficient agency, which in itself produced the injury. It was a condition only upon or through which the first negligent act operated. It added to the danger in which the plaintiff was placed, but this was something that should have been foreseen; and the fact that no injury might have occurred, but for its presence, will not relieve the defendant. "The test of proximate cause is whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause." *Thomas v. Central Railroad Co. of N. J.*, 194 Pa. 511, 45 Atl. 344.

The judgment is reversed, with a *procedendo*.

RACHMEL v. CLARK et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

TRIAL — RECEPTION OF EVIDENCE — NEGLIGENCE — DANGEROUS PREMISES.

1. It is error to allow witnesses in an action for personal injuries to indicate the position of the parties by reference to objects in the courtroom, without any evidence in the record as to the distances, to aid the appellate court in reviewing the case.

2. Where the owner of a slate factory allowed slabs of slate to remain on the sidewalk, leaning against the factory, and a boy 7 years old leaned against the slabs, which fell over upon him, the owner of the factory is liable for the injuries received, though the slabs stood within the building line.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Albert Rachmel, by his next friend, against Jefferson H. Clark and Howard L. McDonnell. From a judgment of nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. S. L. Shields, for appellant. Franklin L. Lyle and E. Clinton Rhoads, for appellees.

MESTREZAT, J. The testimony as given in the paper book does not disclose the facts of the case as fully and clearly as it should. On the trial the witnesses were permitted to give distances, and to indicate the position of the child by reference to objects in the courtroom, and consequently we are not in possession of some important data necessary to a full understanding of the facts. This practice is not commendable, especially in cases of sufficient importance to be reviewed by an appellate court, as such testimony discloses no facts to those who read it. There

is a total absence of any measurements before us showing the width of the pavement proper, or the pavement as enlarged by the space between the factory and the building line. This is an important feature of the case, and exact data should have been produced at the trial and printed with the record. From these suggestions and the indefinite character of some other parts of the testimony, it is not singular that the parties disagreed as to whether the accident occurred on the pavement proper or in the rear of the building line. On the facts as they were disclosed on the trial below, we think the learned trial judge erred in withdrawing the case from the jury.

The defendants were engaged in the business of manufacturing articles from slate, at their factory at 122 Eutaw street, in the city of Philadelphia. For several years they had been accustomed to stand large slabs of granite and slate in front of and against their factory building, on both sides of a door which leads into the cellar of the building. These slabs were from three to five feet in length, and, in the language of one of the witnesses, "were all piled up in front of the building, and pretty nearly half of the pavement was taken." The cellar door was partly in the pavement, from which it inclined upward to the wall of the building. About 4 o'clock in the afternoon of June 26, 1896, the plaintiff, a boy of about 7½ years, having returned from school to his home in that section of the city, was on the cellar door in front of the defendant's manufactory. While there, he placed his left foot on the frame of the door, steadied himself by his left hand on a slab of the slate, and was making figures on the slab with his right hand. In leaving this position he jumped to the ground, a distance of about one foot, in front of the slab, which fell on him and inflicted very serious injuries. The evidence does not directly disclose what caused the slab to fall, but the plaintiff claims that it was so negligently and insecurely placed that the slightest touch of the child's hand would cause it to fall.

The defendants had no right to use the pavement of the street as a storage ground for the material used in their factory. They could use it temporarily in conveying the material to the factory and in taking the manufactured articles from it. But even under those circumstances they were required to observe proper care and precaution so as not to endanger those who were using the pavement for transit. Notwithstanding the argument of the defendants to the contrary, the evidence would have justified the jury in finding that the place in front of their building, including a part of the pavement, had been occupied continuously for four or five years by the material used in the factory. Of course, the same slabs were not there for that length of time, but, when any slabs were removed, others replaced them. The

slab that fell on the boy had stood in its place for at least one month. The act of the defendants in obstructing the pavement was a nuisance, and hence was unlawful. They were therefore responsible for injuries occasioned by their conduct to any person lawfully using the street and who was himself without fault. The streets of a city are for the purpose of transit, and, except for temporary use by abutting property owners, recognized as lawful, it is illegal to obstruct them.

If the plaintiff was within the building line at the time he fell, the defendants are not necessarily relieved of liability for his injuries. The evidence tended to show that the space between the building line and the factory had been paved, and was used as a part of the sidewalk of the street. If that be true, the defendants were required to exercise due care to keep it in a reasonably safe condition, and, if they placed and kept upon it a dangerous obstruction resulting in injury, an action would lie to the injured person. *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22. In paving the space in front of the building and permitting its use as a sidewalk, there was an implied invitation to the public to use it, and that imposed upon the defendants the duty of exercising reasonable care to protect those using it from danger. "This [paving and use by the public] would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared," says Allen, J., in *Holmes v. Drew*, supra, "and the plaintiff so using it would have gone upon the defendant's land by her implied invitation, and she would owe to him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented."

If it be conceded, however, that the ground between the factory and the building line was not paved, yet it was open, and practically a part of the footwalk of the street. The defendants, therefore, having regard to these circumstances, owed a duty to the public to exercise reasonable care to keep it safe, so that those using the adjacent highway would not be exposed to danger. As said by Chief Justice Agnew, in *Hydraulic Works Co. v. Orr*, 83 Pa. 332: "Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence." The owners of the premises are required in such cases to anticipate that children as well as adults may use the highway, and thereby be exposed to any unsafe objects placed upon the premises. In this case the person injured was a child of very tender years. His child-

ish instincts led him to the place. He saw the slate, and, just from school, he had a desire to write on it. His conduct was perfectly natural, and what might have been expected of any schoolboy of his age, and especially of any child of the evident precocity of this boy. Pertinent and applicable to the facts of this case is the language of Cooley, C. J., in *Powers v. Harlow* (Mich.) 19 N. W. 257, 51 Am. Rep. 154: "Children, wherever they go, must be expected to act upon childish instincts and impulses; others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." In throwing open, and permitting the use of, this space adjacent to a public street in a thickly populated community, the defendants, therefore, were required to make the place reasonably safe, not only for adults using the highway, but for children, recognizing their childish instincts, and the probability that they might be attracted to and enter upon the premises. Hence, if they disregard their duty in this respect, they are liable to any person, adult or infant, who, while exercising the care required of him, was injured by their default.

It is strenuously urged that the child was a trespasser, and that therefore, in the use of their premises, the defendants owed him no duty of protection against the injuries he sustained. Several cases decided by this court are cited in support of the proposition, and as sustaining the contention of the defendants, that by reason of the trespass there can be no recovery here. But those cases were ruled on a different state of facts, and do not control the present case. Similar or analogous facts alone make a case a precedent for subsequent decisions, and dicta in the opinion, not necessary to a decision on the facts presented, are not to be regarded as an authoritative enunciation of a principle. While in some of the cases it is said that a child may be a trespasser and subject to the consequences of his trespass, yet it will be found in many, if not all, of the cases, that under the facts disclosed the law imposed no duty upon the defendant, and that the injuries were not the result of his negligence. The mere fact that a child was injured without his fault is not sufficient to impose a liability on the defendant, unless he is convicted of negligence. The defendant's negligence and the child's lack or want of it must both be found before there can be any liability on the part of the defendant. Here, as we have seen, the peculiar location of the ground where the accident occurred imposed the duty of reasonable care in the use of it on the defendants, and it is averred as the cause

of action that the plaintiff's injuries were due to a negligent performance of that duty. This was a question for the jury. So, also, was the alleged negligence of the plaintiff if he were of sufficient age to appreciate and avoid danger. Where the extreme youth of a child forbids any imputation of negligence, it is not a question for consideration; but beyond that age, his conduct affects his right to recover damages for his injuries, and is for the jury. He is required to exercise ordinary care and caution reasonable for one of his age and discretion. Such prudence only is exacted of him, and, when he observes it, his duty is performed. The rule as to the responsibility of an infant for his acts is thus stated in *Kehler v. Schwenk*, 144 Pa. 848, 22 Atl. 910, 18 L. R. A. 374, 27 Am. St. Rep. 633: "All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of 14. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same, to wit, the average capacity of others in his condition."

The case as presented on the trial in the court below should have been submitted to the jury, with instructions as to the rights of the plaintiff, and the duty of the defendants, at the place of the accident. The nonsuit was therefore improperly granted.

The judgment is reversed, with a procedendo.

COMMONWEALTH v. GEARHARDT.

(Supreme Court of Pennsylvania. April 20, 1903.)

HOMICIDE—INSTRUCTIONS—INSANITY—EVIDENCE—SEPARATION OF JURY.

1. On trial for murder the evidence showed that the killing was deliberate. The defense was that accused was suffering from delirium accompanying typhoid fever. *Held*, that he had no right to complain of an instruction that, if the prisoner was laboring under such form of insanity as to blind him to the natural consequences of his moral duty and destroy his perceptions of right and wrong, he was unaccountable.

2. Where, on an indictment for murder, the defense was insanity, nonexpert witnesses, after stating their opportunities of knowledge, may testify that they saw nothing in the conduct of the accused indicating insanity.

3. A verdict of guilty of murder in the first degree will not be set aside because jurors were allowed, pending the trial, to go to a barber shop under charge of an officer.

Appeal from Court of Oyer and Terminer, Northumberland County.

Jacob Gearhardt was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James Scarlet and A. G. Marr, for appellant. H. W. Cummings, Dist. Atty., and D. W. Shipman, for the Commonwealth.

DEAN, J. More than one year ago—February 8, 1902—the defendant was convicted in the court below of murder of the first degree. Then, after a motion for a new trial and full argument, on January 26, 1903, he was sentenced to death. Of whatever defendant may complain, he certainly cannot have any ground to allege that there was undue haste in entering judgment against him. The court below fully heard him by counsel on motion for a new trial after affording him ample time and every opportunity to be heard. He now brings this appeal, alleging 15 errors in the trial proceedings, which prejudiced him, and tended to produce a conviction. Before particularly discussing the alleged errors, it is proper to briefly notice the undisputed facts.

The defendant, Jacob Gearhardt, and his wife, Maggie, had been married for many years. They lived in Shamokin. Had a family of four sons, aged, respectively, 10, 12, 14, and 16 years. Defendant was aged about 40 years, and was a carpenter and builder by occupation. In the spring of 1901 he had been working at a coal tipple in West Virginia. About the middle of July of that year he returned to his home in Shamokin. At that time he had an attack of typhoid fever, which kept him to his bed until the following August. He was then able to get up and go about town as usual. For years before this time there had been bickerings and quarrels between him and his wife. There was more than suspicion on his part of her marital infidelity. About this time she notified him of her intention to leave him. He remonstrated, and tried to persuade her to abandon her intention, but she persisted in her determination, and fixed the date of her going as Tuesday morning, August 13th. On Monday, the 12th—the day before—he went to a hardware store, and bought a revolver. On Tuesday morning he went to a bar in the town, and took two drinks of liquor, then returned to his house; met his wife, and asked her if she was going to move. She replied, "Yes." He immediately shot her twice with the revolver, and she fell mortally wounded. He then turned the revolver on himself, firing two more shots, one of which took effect in his head, but neither proved fatal, and in due time he recovered, and was put on trial for the murder of his wife. On the Saturday before the killing he had been seen by one of his sons busy writing, and then putting something in his trunk. On ex-

aming the trunk after the homicide, an envelope was found, addressed to the "Citizens of Shamokin." Inside was a letter in pencil, part English and part German, in his handwriting, and signed with his initials, J. G., in which he gives the year of his marriage, 1885, and narrates, in part at least, his marital troubles, accuses his wife of infidelity, and closes with this language: "She wants to move, and I think the best moving is us both to the cemetery. That is all, so good-by children."

The facts, as we have stated them, are indisputable. The evidence shows beyond reasonable doubt that he wrote the letter on the Saturday before the killing, and put it in his trunk. Clearly, he intended to kill his wife and himself, and gave this explanation of his motive. The killing, then, was premeditated and deliberate, with fully formed intent to kill. It was, therefore, malicious. This the law pronounces murder of the first degree. The defense was insanity, or rather temporary dementia or delirium of that form which often results from disease, such as fever. If this delirium existed when the shots were fired, the burden was on the prisoner to prove it. The presumption is, he was sane, and it was on him to show by the weight of the evidence that at the time he fired the shots he was not. Counsel for appellant properly argues that, if the aberration was from fever, and but temporary in its nature, yet, if it existed at the time of the commission of the act, it is a defense, even though soon after he returned to his right mind. The exact cause of the dementia and its duration are not material. The question is, did it exist at the time the pistol was fired, so as to destroy his judgment, and render him incapable of distinguishing between right and wrong? The court plainly so instructed the jury thus: "It is contended by the defense, not denied by the commonwealth, known to the medical profession, known to many people—perhaps most people—that a person in a delirious state of mind, which often follows an attack of fever, especially typhoid fever, is wholly unaccountable for his conduct and actions." And he further very fully elaborated the same thought; and instructed the jury that, if the defendant, when he committed the act, was laboring under such form of insanity, he was wholly unaccountable. He further instructed them that such "delirium must have existed to so great a degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perceptions of right and wrong." Then, further, he instructs them: "If he had sufficient power of memory to recollect the relation in which he stood to others and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty, he would be responsible." It must be borne in mind that the whole of the instruction is based on

the evidence before the court. The defendant had adduced evidence tending to show that for five weeks immediately preceding the act he had occasional fits of delirium such as usually follow fevers. This was denied by the commonwealth. Therefore whether delirium had existed at all was a question for the jury. It is argued that it was the duty of the court to explain to the jury the distinction between mania and such delirium; but this also was a fact to be ascertained by the jury from the evidence, so far as such distinction was material. The court heard the evidence of experts, listened to the citations from reputable medical authorities which undertook to point out the distinction, but even they did not fully agree. After all, we doubt whether the court or any lawyer was more capable of defining the exact distinction than an intelligent layman.

The court could have pointed out and defined when the use of the words "heirs of the body" are words of purchase and when they are words of limitation, but we doubt if 12 learned physicians, who had given the subject no particular thought, would have clearly understood him. So we doubt if the learned court below, in the conflict of evidence and technical medical authority, could have clearly defined and explained the distinction between mania and delirium so as to make that distinction clear to the jury. From his learned argument here and in his paper book the distinction is probably clear to appellant's counsel. But he has given the subject much thought. The citations in the paper book evince much study and research. But the court below, to reach the same conclusions, would have had to adjourn for weeks of study. The court did, however, what was far more important; that is, instructed the jury that, if defendant's mind was so benumbed or perverted by delirium or mania that he was incapable of distinguishing between right and wrong, he was not responsible, and his defense was sustained. According to the evidence, counsel for appellant argues that, if defendant was affected with delirium, then his faculties were completely beyond his control. This may be, although we do not think the evidence settles it as a fact. Then, under the instructions on the question of insanity, it was the plain duty of the jury to acquit, and they must have so understood, as is evident from this excerpt from the charge: "The jury must be satisfied by fairly preponderating evidence, and the questions of reasonable doubt do not apply to this phase of the case—to this defense of insanity, or abnormal condition of the mind, delirium. * * * Defendant must show by fairly preponderating evidence, in order to excuse an unlawful killing, that the condition of defendant was such at the time that he could not reason, and could not understand right from wrong. In other words, he was out of his mind, to use the most common phrase." This was in effect saying to the jury that, whether from

delirium or any form of dementia he was out of his mind, he was irresponsible. Taking the charge as a whole, it is clear from any error of which defendant can justly complain. This disposes of appellant's first to eleventh assignments of error, inclusive. They are all overruled.

The twelfth and thirteenth assignments relate to the competency of two experts, physicians, called to testify that soon after the shooting the defendant feigned unconsciousness. On an examination of their testimony and the facts stated by them, the physicians were competent to give their opinions. The value of their opinions was for the jury, but they were admissible.

The fourteenth assignment avers that the court erred in not sustaining objections to the competency of a number of laymen called as witnesses. They were not called to give their opinions. After stating their opportunities of knowledge, they said they saw nothing in the conduct of defendant which indicated to them unsoundness of mind. This was competent evidence, although the witnesses were not experts. *Commonwealth v. Wireback*, 190 Pa. 188, 42 Atl. 542, 70 Am. St. Rep. 625.

The fifteenth assignment is that the court erred in admitting in evidence the letter written the Saturday before the shooting and certain other writings as standards for comparison of handwriting. This evidence was clearly admissible, and the assignment is overruled.

Another complaint is that the jury separated during the trial. It seems part of them went into a barber shop and were shaved, and that this not seldom occurs in the trial of capital cases in that county. If so, it is a practice which ought to cease. There is a necessity for the services of a barber during a prolonged trial, but this is a necessity which can be met by the barber serving them in their room in the presence of an officer having the jury in charge. To permit them to separate, and some of them to go to a public room, where they might be brought in contact and communication with others, was a palpable violation of the unbroken practice of the courts of oyer and terminer, especially in capital cases, and meets with our condemnation. If there had been any evidence at all of communication on the part of outsiders with the separated jurymen by reason of this separation, we would set aside the verdict. But the testimony of the jurors who went to the shop is that no one spoke to them during the time they were there, and that one of the tipstaves who attended them was present with them all the time of their separation. While we unhesitatingly condemn such indifference to their oath on the part of the officers, and such heedlessness of duty on the part of the jurors, for they doubtless heard the oath administered to the tipstaves, we will not conclusively presume that the mere

fact of separation prejudiced the defendant. The most we can say is that it might have done so, but the testimony shows it did not.

We can detect no error which would warrant us in setting aside this verdict. All the assignments are overruled, and the judgment is affirmed. It is further directed that the record be remitted to the court below, that the judgment may be carried into execution according to law.

BEATTY et al. v. HARRIS et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

APPEAL IN EQUITY—NECESSITY OF EXCEPTIONS.

1. Where no exceptions to a decree on a bill in equity were filed in the court of common pleas, an appeal therefrom must be quashed, there being nothing in the record to support the assignments of error.

Appeal from Court of Common Pleas, Schuylkill County.

Bill by J. M. Beatty and others against J. M. Harris and others. Decree for plaintiffs, and defendants appeal. Appeal quashed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

C. E. Breckons, Robert Snodgrass, and John F. Whalen, for appellants. George M. Roads and E. D. Smith, for appellees.

FELL, J. The motion to quash the appeal must be granted, for the reason that no exceptions were filed in the common pleas to the decree entered, and there is nothing on the record to support the assignments of error. The rules of equity practice provide for the entering of a decree nisi, the filing of exceptions thereto by either party, the entering of a formal decree by the prothonotary, as of course, if no exceptions are filed, and, if exceptions are filed, for the hearing of them on the argument list as upon a rule for a new trial. They expressly direct that the exceptions filed shall cover all objections to rulings on evidence, findings of fact or law, and to the decree of the court; the power is given the judge or the court in banc to sustain or dismiss exceptions, and to confirm, modify, or change the decree entered. Rule 67 is as follows: "Upon appeal to the supreme or superior court such matters only as have been so excepted to and finally passed upon by the court, shall be assignable for error." The object of these rules is to afford an opportunity for a careful review of the rulings made at the trial and of the findings of the court. The rules are mandatory, and their violation cannot be overlooked.

The appeal is quashed, at the cost of the appellants.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1469.

**TRUSTEES OF STATE HOSPITAL FOR
INSANE v. PHILADELPHIA COUNTY.**

(Supreme Court of Pennsylvania. April 20,
1903.)

**LIMITATIONS — SET-OFF — PAYMENT BY MIS-
TAKE—SUPPORT OF PAUPER INSANE—
LIABILITY OF COUNTY.**

1. The statute of limitations is available against a claim sought to be used as a set-off when it could be successfully urged against the claim in assumpsit thereon.

2. Where a county pays money to a state hospital for the insane, and it is applied to the use of the hospital, it cannot, after six years, sue to recover the same on the ground that the payment was made by mistake on its part, and by fraudulent concealment of the facts by the trustees of the hospital.

3. Between the years 1885 and 1889 the officers of a state hospital for the insane submitted to a county bills for the maintenance of indigent insane, based on a construction of the act of June 13, 1883 (P. L. 92), imposing the cost of insane in state hospitals equally on the state and county. The bills were paid by the county. After the passage of Act May 21, 1889 (P. L. 258), the bills from the state hospital against the county were made out in accordance with such latter act, and were rendered quarterly. An affidavit was attached to each bill, stating that no part of the amount due for the quarter named had been paid, and that there was no deduction or set-off against it. More than six years after 1889 the hospital sued the county, which set up overpayments made by reason of a wrongful construction of the act of 1883, and claimed that the certificate and affidavit attached to the bills rendered after 1889 and before limitations had run were false in stating that the county was not entitled to any set-off. The bills rendered between 1885 and 1889 and the reports of the hospital made no concealment of the rate charged to the county. *Held*, that the claim was barred by limitations.

Appeal from Court of Common Pleas, Philadelphia County; Sulzberger, Judge.

Action by the trustees of the State Hospital for the Insane for the Southeastern District of Pennsylvania against Philadelphia county. Judgment for plaintiff, and defendant appeals. *Affirmed*.

The court charged as follows: "The amount sought to be recovered by the city, claimed in its notice of special matter, was paid by it to the plaintiff more than six years before the bringing of the present action, and, even though paid by the city erroneously, is barred by the statute of limitations, unless you find that subsequently to the payment, and within six years of the bringing of the present action, the plaintiff made affirmative efforts to divert or mislead the defendant from discovering that the payment had been improperly exacted. As supplemental to the point which the plaintiff has thus asked me to charge, and which I have charged, I now say to you that there is not in the whole body of evidence presented to the court and jury any evidence that can be submitted to the jury tending to show that the plaintiff made affirmative efforts to divert

or mislead the defendant from discovering that the original payments at any time between 1885 and 1889 had been improperly exacted, and that, as a necessary consequence of the statement of these propositions of law and fact, your verdict must be for the plaintiff. The amount will be settled between counsel, and submitted to you." Verdict and judgment for plaintiff for \$67,508.28.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

J. W. Catharine, Asst. City Sol., and John L. Kinsey, City Sol., for appellant. John G. Johnson and Montgomery Evans, for appellee.

MESTREZAT, J. The learned trial judge directed the jury to return a verdict for the plaintiffs on the ground that the counterclaim interposed as a defense to the action was barred by the statute of limitations. The correctness of this ruling is the only question raised by this appeal.

The State Hospital for the Insane for the Southeastern District of Pennsylvania at Norristown was erected pursuant to the provisions of the act of May 5, 1876 (P. L. 121). The hospital was built for the care and maintenance of the insane of the city and county of Philadelphia and certain other counties in the southeastern part of the state. The act provided for the selection of a site and the erection and management of the hospital. The expenses of the care and maintenance of the indigent insane were chargeable to the counties, respectively, from which they were committed. The act of June 13, 1883 (P. L. 92), imposed the cost of the care and treatment of the indigent insane in the state hospitals for the insane equally on the state and the county, and provided that the maximum charge to the county should not exceed, including all charges, the sum of \$2 a week for each person. It also enacted that the cost per capita should not exceed \$3.50 a week, except for clothing, for which an additional charge not exceeding 50 cents per week was allowed. By the act of May 21, 1889 (P. L. 258), the expenses for the maintenance of the insane in the state hospitals was fixed at the uniform rate of \$1.75 per week for each person, including clothing, "chargeable to the respective counties or poor districts from which such insane shall come, and the excess over \$1.75 shall be paid by the state; but in no case shall the said excess exceed \$2 per week for each indigent insane person." The hospital at Norristown was opened for the reception of patients on July 12, 1880, and since that date the indigent insane of the respective counties for which it was erected have been maintained there. This action was brought to recover the sum of \$52,651.72, the balance due the plaintiffs for the care and treatment of the indigent insane of Philadelphia county for the quarters ending August 31 and Novem-

¶ 1. See Limitation of Actions, vol. 23, Cent. Dig. § 214.

ber 30, 1896, and February 28 and May 31, 1897. The defense is that the plaintiffs during the years 1885 to 1889, inclusive, had illegally and fraudulently charged and collected from the county for the maintenance of its insane an amount equal to the claim in suit in excess of the amount properly chargeable against the county under the act of 1883. This defense was met by a plea of the statute of limitations. The county replied to the plea that the statute was not a bar to this claim, because (1) it does not apply to claims of this character; (2) the moneys constituting the alleged overcharge are held by the plaintiffs for public purposes; and (3) the statute did not begin to run against the claim until within six years of the bringing of the suit by reason of the active concealment of the alleged original fraud.

1. The reasons assigned by the county why the statute of limitations is not a bar to its claim are wholly untenable, and cannot avail to defeat a recovery in this action. Its claim, as we have seen, is for moneys alleged to have been paid to the plaintiffs in excess of the amount due for the care and treatment of its indigent insane. Regarding the overpayments as having been made either under a mistake of fact or by reason of the fraud of the plaintiffs, and conceding that the county had a right to the return of the money, the proper action would unquestionably have been *assumpsit*, in which it is settled the statute may be pleaded in bar of the claim. If, therefore, instead of attempting to enforce this claim by way of set-off or having it applied to its indebtedness to the plaintiffs, the county had brought an action against the trustees to recover the amount of the overpayments, the statute could have been successfully pleaded. The same right to invoke the application of the statute exists here. *Hinkley v. Walters*, 8 Watts, 260.

2. The learned counsel for the defendant further contend that the statute cannot be successfully pleaded here because the money received by the plaintiffs as overcharges is held by them for public purposes. Neither of the two Illinois cases cited in support of the position sustains the contention. In the first case it was held that the statute does not apply in an action brought by a city against a county to recover trust funds held by the latter for the city. The other case was an action on an official bond by a school treasurer for failure to pay over to his successor in office the money received by him. Here no express trust was created by the parties, nor could the money be held by the trustees for any public purpose. If, as claimed by the defendant, it was paid to the plaintiffs by mistake on the part of the county and by reason of the fraudulent concealment of the facts by the plaintiffs, the money continued to belong to the county, and was not held for the use of the hospital. The act of illegally charging and receiving it under the

circumstances and refusing to repay it gave a cause of action against the plaintiffs irrespective of the fact that they received it as trustees and applied it to the maintenance of the indigent insane.

3. It is strenuously urged by the defendant that subsequently to the date of the alleged overpayments, and within six years of the bringing of this suit, the plaintiffs, through the action of their officers, diverted and misled the county officials from discovering that the payments had been improperly exacted, and that, therefore, the statute of limitations does not bar the claim. Each of the quarterly bills presented by the plaintiffs to the defendant subsequently to 1889 was authenticated by the certificate of the executive committee of the board of trustees and by the affidavit of the superintendent. This is the action complained of by the county as tending "to divert and mislead the county officials." It is difficult to see how such action by the hospital authorities could mislead the county officials as to charges made against the county for the years 1885 to 1889. It will be observed that the act of 1889 changed the rate fixed by the act of 1883 at which the indigent insane were maintained, and imposed a uniform rate of \$1.75 on the county. Thereafter the quarterly bills were made out and presented to the county at that rate. Each of these bills included only an account for the quarter for which it was rendered, and did not purport to charge or credit the county with any item of a prior date. The bills rendered subsequently to 1889 were correct in every detail as to the expenses incurred for the quarter. This we understand to be conceded. But it is claimed that the certificate and affidavit attached to the bill were misleading in stating that no part of amount due for the quarter named in the bill had been paid, and that there was no deduction or set-off against it to which the county was entitled to a credit. This alleged false statement is predicated upon the theory that the hospital authorities had no right to charge the maximum rate for the maintenance of the insane under the act of 1883, and that the county was entitled to a credit on subsequent bills for any sum charged in excess of the actual cost of maintenance. This is the construction now put upon the act of 1883 by the present county officials, but the trustees of the hospital interpreted the act as authorizing them to charge \$2 per week for each person, the maximum rate fixed by the act of 1883, and the sum claimed in the bills presented to and paid by the county. That this was the construction put upon the act by the trustees, and that they rendered the quarterly bills in good faith, conclusively appears by the statement in each of their annual reports for the years 1885 to 1889, as follows: "When the law putting in operation the act of June 13, 1883, was passed, the trustees availed themselves of the terms of its provisions to charge the maxi-

mum price for board and clothing, namely, \$3.50 for board and fifty cents for clothing." But, if the present county officials properly interpret the act of 1883, and the plaintiffs were authorized to charge only the actual expenses of maintenance, excluding the cost of permanent improvements, the trustees during the years from 1885 to 1889 concealed neither the rate per patient charged the county nor the items that constituted the basis upon which the charge was made. This is established by the uncontradicted evidence in the case. The superintendent of the hospital was called as a witness by the county, and he testified that in ascertaining the rate of maintenance for the years 1885 to 1889 the entire expenses for each year, including permanent improvements, were considered, and that the maintenance account kept by the hospital showed these items in detail. He further stated that during those years the institution made and published yearly reports setting forth the various items that were included in the cost of maintenance. It also appears that the accounts of the institution disclosed every item that was counted in making up the expenses of maintenance, and that a report containing these accounts and the notice above referred to showing the rate charged by the trustees and the reason therefor was sent annually to the officials of the county and to each of the city councilmen. The accuracy of these accounts is now attested by the present county officials, as appears from the fact that they rely solely upon them in ascertaining the alleged overpayments. There is, therefore, no ground for a legitimate inference that the trustees acted fraudulently in making the charges against the county originally, or that they then attempted to conceal from the county or city officials the items of expenditure from which they fixed the rate charged for the maintenance of the insane. The books of the institution made the fullest disclosure of all the facts necessary to an intelligent understanding of the price charged to and paid by the county of Philadelphia for the maintenance of its indigent insane from 1885 to 1889, and this information was given the county and city officials annually by the reports sent them. There was no concealment of the facts from either the county or the public at large. The reports made by the trustees were available to all who were in any way interested in the management of the hospital. If the officials of the county and city of Philadelphia did not avail themselves of the ample opportunity thus given them to ascertain the correctness of the accounts for maintenance charged against the county, it may be a dereliction of duty on their part for which they may be censurable, but it affords no ground whatever for an allegation of fraudulent action on the part of the trustees of the hospital.

Subsequently to the act of 1889, as we have seen, the accounts were rendered under that act, and the bills included simply the

charges for the quarters for which they were respectively rendered. They very properly contained no reference to the accounts for the years 1885 to 1889, which, as claimed by the trustees, had been closed and paid. If it be conceded, however, that the trustees misinterpreted the act of 1883, and that these accounts were erroneous in not allowing a credit for the alleged overpayments, there is not a particle of evidence tending to show that the plaintiffs knew or believed the fact, or that they intentionally or fraudulently concealed it in rendering subsequent accounts. The learned trial judge was, therefore, clearly right in charging as follows: "I now say to you that there is not in the whole body of evidence presented to the court and jury any evidence that can be submitted to the jury tending to show that the plaintiffs made affirmative efforts to divert or mislead the defendant from discovering that the original payments at any time between 1885 and 1889 had been improperly exacted."

The judgment is affirmed.

COMMONWEALTH, to Use of MONTGOMERY COUNTY, v. AMERICAN BONDING & TRUST CO. et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

COUNTIES—AUTHORITY OF TREASURER—MISREPRESENTATIONS.

1. A county treasurer is not required to examine the account of a tax collector, and report thereon to a party intending to become surety for such collector; and if he does so he acts as the agent of the surety, and if he makes false answers the county is not responsible therefor.

Appeal from Court of Common Pleas, Montgomery County; Weand, Judge.

Action by the commonwealth, to the use of Montgomery county, against the American Bonding & Trust Company and Jacob L. Loper. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

J. P. Hale Jenkins and Irvin P. Knipe, for appellant. F. B. Bracken and N. H. Lazzere, for appellees.

DEAN, J. Jacob L. Loper, having made application to the county treasurer of Montgomery for the appointment of tax collector of Cheltenham township for the year 1898, then applied to the American Bonding & Trust Company to become his surety. Before executing the bond, the surety company applied by letter to A. C. Godechall, county treasurer, for information as to Loper, and addressed to him a written schedule of questions, with answers blank for him to fill out. The treasurer did not live in Norristown, the county seat, where he had his office. So he handed the blank to Mr. Place, his private counsel, to answer the questions, who wrote

the following answers to certain of the interrogatories: "(15) Is there now, to your knowledge, any shortage due you by the applicant? Answer. No. He owes part of '96 and '97 duplicates of taxes uncollected by him. (b) Has he ever been short with you? Answer. No. He has been slow in collecting his taxes, but pays as fast as he collects." This schedule of interrogatories was addressed to Mr. Abram C. Godschall, with no addition of his official title. It was signed, "A. R. Place, Solicitor for County Treasurer," and was by him returned to the surety company at Baltimore. Thereupon it executed the bond as surety for Loper, the collector, and it was duly accepted by the county treasurer. Loper became a defaulter for the year 1898. The county commissioners brought this suit on the bond. The surety made defense on the ground that the answers to its questions by the treasurer were false, and consequently the bond was void. The court below instructed the jury that the evidence offered sustained the defense, and that they must find for the defendant surety. We now have this appeal by the county, assigning for error the instruction of the court.

We will not waste time over the quibbling as to whether Place had authority to answer for the treasurer the interrogatories. We think, with the court below, that the only fair inference from the evidence is that he had full authority from the treasurer, and that his act must be taken as that of Godschall, who was the treasurer. The answers quoted, although not altogether false, were certainly not the whole truth in response to the questions. The treasurer was not bound to answer the questions at all. When Godschall did undertake to answer them, he was bound, as a man of veracity, to tell the truth. A public officer may not be bound to give information or answer questions, but when, as a man, he voluntarily does so, the moral obligation on him, as a man, to tell the truth, remains in full force. In his answers to the questions, he did not tell the truth. Loper was a defaulter for every year he had been collector.

It is not improbable that the surety company was misled by Godschall's falsehood. But the question still remains, must the county suffer by his untruthfulness? There is a clear distinction running through all the cases as to how far the conduct of public officers will affect the public, and to what extent declarations by an agent of an individual or a private corporation will affect his principal. An illustration of the former will be found clearly defined in *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; of the latter, in *Lauer Brewing Co. v. Riley*, 195 Pa. 449, 46 Atl. 71. The laxity of a public officer in the performance of his duty—his conduct not in the line of his official duty—cannot be permitted, on grounds of public policy, to prejudice the public. Assume, for the sake

of the argument, that the county treasurer was the representative of the county, though that is at least doubtful; then comes the question, in what particular does he represent it? Clearly, only in those which pertain to his office. His morals outside of his official acts may be reprehensible and be the indirect cause of loss to others, but the public who elected or appointed him are not responsible. So, here, the public is not responsible for the untruthfulness of their officer in a matter where the public imposed upon him the performance of no duty. In this state, under the act of 1834 (Laws 1833-34, p. 542, § 33) the county treasurer is to faithfully perform the duties of his office, is to keep a just account of all county moneys that may come into his hands, deliver to his successor all books, documents, and papers belonging to the office, and pay over to him any balance of county funds in his hands. There is no express or implied direction that he shall answer truthfully all questions put to him by third persons. He must keep correctly all official books and accounts. They will then, necessarily, show the exact financial relation to the county of those subordinates and others who have official transactions with the county treasurer. These accounts are public accounts, open to the public and accessible to all. Any third person desiring information can examine the accounts himself, or employ an agent or attorney to do so, and report to him. There is no official duty on the treasurer to examine and make such report. If he do so at the request of a third person, he becomes the mere agent of that person, to do what he is not officially obliged to do; and, whether he performs the act well or ill, it is something with which the public has no concern and is in no way responsible. In his official acts he must tell the truth, or the public suffers. For instance, it is his duty to receive the unpaid taxes on unseated lands, and receipt therefor. If a taxpayer request a statement of the amount of such taxes, and pays according to the statement, although the amount be less than the real amount assessed, no valid sale of the land can be made in default of payment for the excess above the statement. But this is an official act, and the public suffers because of the untruthfulness of its officer. But by appointing Godschall treasurer the public did not constitute him a "bureau of information" for the accommodation of all persons who chose to ask questions of him. We are of opinion the surety company had no legal right to ask these questions, and, when it did, there was no official duty on the part of the officer to answer them. When he chose to do so, he was the mere agent of the company, just as any other person would have been of whom it might have made the same request.

Our opinion on this question is in accord with the principle of all the authorities, from *United States v. Kirkpatrick*, decided in 1824,

down to this time. Justice Story, who rendered the opinion in that case, in which it was argued that the gross laches of a public officer relieved the surety on an official bond, says the general principle is that laches, on the ground of public policy, is not imputable to the government; that the utmost vigilance of the government would not save it from losses if the doctrine of laches can be applied to the financial transactions of its officers. The principle in that case has been followed and cited with approval in a large number of our own cases. *Bower and others v. Washington County*, 25 Pa. 69, in its principal features, was much like the case before us. One Kinnan had been appointed by the county commissioners tax collector of Peters township for the year 1848. He was then reappointed for the year 1849, and Bower and others became sureties on his official bond. There was on the statute book at the time an act which prohibited the reappointment of a collector who was in default on a duplicate for the preceding year. In the annual publication of the receipts and expenditures of the county made by the commissioners, it was stated that Kinnan had paid up in full on his first duplicate, when in fact he was a defaulter to a considerable amount. It was shown that the sureties had seen the statement of the commissioners that Kinnan had paid in full, before they went upon his bond, and there was a strong inference that they had been thereby induced to become sureties. He became a defaulter on the second duplicate, and the commissioners attempted to collect from the sureties. The sureties sought relief because of the false statement of the commissioners. This court held that the false statement by the officers did not bind the county, remarking, "Usually those who suffer by the mistakes and misconduct of public officers must look to them for compensation, and not to the public." We are not sure that we would, on the facts, carry the decision so far as the court more than intimates in these last remarks. What we mean is this: If the surety company had called upon the treasurer for a certificate from the official accounts, which he was bound to correctly keep, of the balances against Loper for the years 1894, 1895, 1896, and 1897, and he had, as a treasurer, furnished a false statement, it might be the county would be answerable for the misstatement, because it would have had many of the marks of an official act, which perhaps it would have been his duty, as an officer, to perform. But such question does not here arise, and we do not decide it. What we do decide is that the inquiry here, in these questions, was neither in form nor in fact inquiry as to the condition of Loper's official accounts with the county, and the public is in no way answerable for their truthfulness.

Therefore we sustain appellant's fourth assignment of error, and reverse the judgment, with a v. f. d. n.

COMMONWEALTH, to Use of MONTGOMERY COUNTY, v. JIMISON et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

TAX COLLECTOR—LIABILITY ON BOND—APPOINTMENT.

1. That a county treasurer knew at the time he appointed a collector of delinquent taxes that the latter was a defaulter for previous years, and did not reveal this fact to the surety on the collector's bond, does not relieve the surety from liability on a subsequent breach of the bond.

2. The county treasurer in Montgomery county has the right to appoint collectors of state and county taxes in townships, and to approve their bonds.

Appeal from Court of Common Pleas, Montgomery County; Weand, Judge.

Action by the commonwealth, for the use of Montgomery county, against Edward J. Jimison and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The defendant filed the following demurrer to the statement: "(1) The plaintiff's statement fails to show that Jacob L. Loper, the alleged tax collector, was elected to said office according to law, or ever became such collector *de jure*. (2) The statement shows that the alleged bond signed by demurrants was not approved according to law, and therefore never became effectual. (3) Upon the face of the bond, it was not given in accordance with the act of Assembly in such case made and provided."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

N. H. Larzelere, Gilbert Rodman Fox, and N. H. Gibson, for appellants. J. P. Hale Jenkins, for appellee.

DEAN, J. On September 30, 1897, Jacob L. Loper was appointed collector of delinquent taxes of the township of Cheltenham for the year 1897, and the duplicate delivered. The appointment was made by the county treasurer, upon whom the law conferred that authority. The taxes on the duplicate which it was the duty of Loper to collect amounted to about \$4,500. He tendered a bond in the sum of \$9,000, with appellants as sureties, which was accepted and approved by the county treasurer. The bond, after reciting the appointment of Loper, and the delivery to him of the duplicate, has but the single condition that Loper shall collect the taxes charged upon the duplicate and pay them over to the county treasurer within three months after the delivery of the warrant, with the schedule of taxes therein contained, less exonerations. It appears that Loper had been appointed and served as collector of delinquent taxes of the same township for the years 1894, 1895, and 1896. There was a balance due on the county treasurer's books of the duplicate of 1897, at the date of this suit, August, 1901, of \$3,618.63. There also remained charged against him on

the other three duplicates, according to the treasurer's books, an aggregate amount of \$9,811.12. The collector had made one payment to the county treasurer of \$600 on the 1897 duplicate, leaving him in default on that duplicate the balance already noted. The county commissioners brought this suit in the name of the commonwealth against the sureties on the 1897 bond to recover that balance, and, after hearing, the court peremptorily directed the jury to find for plaintiff, and entered judgment accordingly. From that judgment the sureties bring this appeal, assigning four errors.

The first assignment practically includes all the complaints made by appellants, and we will discuss them all, so far as they demand discussion, under that head. The sureties requested the court to charge "that, under the undisputed evidence in the case, the verdict must be for the defendants." The undisputed evidence was that Loper, at the time the sureties executed the bond, was a defaulter on the three older duplicates, for the years 1894, 1895, and 1896. This fact was necessarily known to the county treasurer when, in face of the law, he again appointed him collector for the year 1897. The sureties were not informed by the county treasurer of Loper's previous default when they executed the bond. So far as appears, they were ignorant of it. The books of the county treasurer showing the accounts between the county and its collectors for those years were public accounts which the law directed the county treasurer to keep, and were open and accessible to all who had sufficient interest to examine them. While the treasurer did not notify the sureties that Loper was behind in his payments for those years, there is no evidence that he practiced any intentional concealment from, or made any willful misrepresentations to, the sureties. The single question, then, is, does the failure of the county treasurer to notify the sureties of a material fact well known to him relieve the sureties of their obligation on the bond? It may be assumed, as the settled law, sustained for many years by a large number of authorities, that there is a clear distinction between the liabilities of sureties on an obligation to an individual or private corporation and to a public municipal corporation. Since *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199, this distinction has been asserted and maintained determinedly. It is not based on any difference of moral obligations of the state or municipality and those of the individual, but wholly on the ground of public policy. The public demands from its officers strict performance of their official duties, and, in large degree, must suffer from their nonperformance, but it is not answerable to third parties for their neglect to perform only moral duties. Any other rule would bring disaster to the public. Here it was the official duty of the county treasurer to receive the public mon-

ey, to keep correct accounts, and to pay over to his successor any balance in his hands at the end of his term. Perhaps, morally, it was his duty to say to Loper's sureties when they were about to go on his bond that he had not yet paid over the amounts on his three previous duplicates, but his official duty as county treasurer did not require him to do so; that is, to act as neighbor or guardian to third persons.

The case of *Bower v. Washington County*, 25 Pa. 69, is very nearly this one. There Bower was one of the sureties for Kinnan, who had been appointed collector of state and county taxes for the year 1848 by the county commissioners. He had been appointed for the previous year 1847, and at the second appointment was a defaulter for that year. At that time the act of Assembly forbade the appointment the second time of any person who had not paid over the whole amount of his first duplicate. The surety sought to be relieved from his obligation, because he was not informed that Kinnan was a defaulter for 1847, and because his appointment in the face of the prohibition of the act of Assembly was illegal. This court held the surety liable, saying the act of Assembly was for the protection of the public, and not of the sureties; that, while the second appointment was a breach of duty to the public, that act was only intended as security to the public additional to the bond. Here the surety was not informed of the previous default. In fact, he might well assume that there was none, for, if there had been, the commissioners were forbidden by law to reappoint the collector. But the mere silence of the county treasurer as to the previous default is relied on in this case. To the same effect are *Harrisburg v. Gulles*, 192 Pa. 191, 44 Atl. 48, *Wayne v. Commercial Nat. Bank*, 52 Pa. 343, and *Boreland v. Washington County*, 20 Pa. 150. In this last case there was actual publication by the county commissioner that the delinquent tax collector had paid up in full on his previous duplicate. The surety on the second bond sought to be relieved because of the actual misrepresentation. The very reverse of this is the law as to sureties on bonds to individuals and private corporations. In such cases a material misrepresentation by the servant or official whose duty it is to accept the bond is a fraud upon the surety, and avoids it. *Lauer Brewing Co. v. Riley*, 195 Pa. 449, 46 Atl. 71. Therefore we are clearly of the opinion—this being a bond to protect the public—that, whatever inference the sureties may reasonably have drawn from the silence of the officer who accepted and approved it, their liability is fixed by the terms of the bond alone.

As to the third assignment, that the court below did not assume absolutely, as a fact, that Loper, on his former duplicates, was a criminal embezzler of public money, but was merely a defaulter, we think it wholly im-

material which he was. The controlling fact was that he had not paid up as it was his duty to do, and it was the failure to disclose this fact by the treasurer of which the surety complains.

The fourth assignment alleges the court erred in overruling defendants' demurrer to plaintiff's statement. A careful comparison of the statement with the acts of Assembly and the conditions of the bond with the statutory duties of the collector leads to the conclusion that the court properly overruled the demurrer.

Therefore all the assignments of error are overruled, and the judgment is affirmed.

LANCASTER COUNTY v. HERSHEY et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

COUNTY TREASURER—ACTION ON BOND.

1. Where a county treasurer fails to pay over to his successor a balance shown by his books to be due to the county, it may maintain a common-law action against the sureties on his bond, though the county auditors may not, as yet, have settled and adjusted the treasurer's accounts.

Mestrezat and Potter, JJ., dissenting.

Appeal from Court of Common Pleas, Lancaster County; Landis, Judge.

Action by Lancaster county against E. H. Hershey and others. From a judgment making absolute a rule for judgment for want of a sufficient affidavit of defense, defendants C. H. Hershey and Amos Hershey appeal. Affirmed.

The following is substantially the opinion below:

"Emanuel H. Hershey, having been elected treasurer of Lancaster county, before entering upon the duties of his office gave two bonds—one to the county of Lancaster, in the sum of \$100,000, conditioned to 'faithfully perform all the duties of the said office,' to 'keep safe and render just and true accounts of all moneys that shall come into his hands on behalf of the said county,' and to 'deliver to his successor all books, papers, documents and all other things held by him in right of said office,' and to 'pay to his successor in office any balance of money belonging to the said county'; and the other to the commonwealth of Pennsylvania, in the sum of \$60,000, conditioned to 'keep safe and account, as directed by law, for all moneys received by him for the use of the said commonwealth,' and to 'faithfully discharge all duties enjoined on him by law in behalf of the said commonwealth of Pennsylvania.' His term of office expired on the first Monday in January, 1900, and his successor, Jacob Stoner, then assumed the duties of the office. He proved to be a defaulter, the amount of his deficiency being \$65,037.94. From this the plaintiff, in its amended statement, admits there should be deducted certain com-

missions and allowances. It is not assumed that any moneys came into his hands which were not covered by one of these bonds, and the present proceeding is to ascertain the liability on the county bond.

"In Commonwealth, to the Use of the County of Lancaster, v. Hershey et al., 200 Pa. 306, 49 Atl. 882, the liability on the state bond was fixed at \$10,686.43, and judgment was entered for that amount. That case conclusively settles the law as to the liability of the state bondsmen, and it would be futile for us to again enter into a discussion of that question. It would therefore seem to follow, as a corollary, that, if the whole default was \$65,037.94, and the state funds included in that amount, and which the state bondsmen were compelled to pay, were \$10,686.43, the difference, less the deductions above referred to, would be the amount of county moneys not paid over, and therefore that would be the liability for which the sureties on the county bond are now responsible. It must, of course, be conceded that the judgment in the case against the state bondsmen cannot absolutely determine the rights of the sureties on the county bond; but the principles decided in that case must necessarily be effective against these defendants, if the facts as here presented are similar to those coming before the court in that proceeding. If, therefore, no new legal difficulties would intervene, we would be bound to render a judgment based upon the conclusion there laid by the Supreme Court, and it only then remains for us to investigate what additional objections have been here interposed to prevent the entry of such a judgment which were not presented at the hearing of the other case. * * *

"It has, however, been strenuously urged that no suit could be commenced upon the bond until the county auditors had first settled the treasurer's accounts. We have carefully examined the numerous cases which, through the industry of the learned counsel for the defendants, have been cited upon this point, but among them we fail to find a single one which supports the proposition in its entirety. It is true that it has been held that a settlement, when once made by the auditors, is conclusive between the officer and the county, unless appealed from in accordance with the statute, and, where the auditors have thus adjusted the account, the officer could neither maintain an action against the county for items not included in the settlement, nor the county against the officer. *Siggins v. Commonwealth*, 85 Pa. 278; *Blackmore v. County of Allegheny*, 51 Pa. 160; *County of Schuylkill v. Boyer*, 125 Pa. 226 17 Atl. 339; *Westmoreland County v. Fisher*, 172 Pa. 317, 33 Atl. 571; *Northampton County v. Herman*, 119 Pa. 373, 13 Atl. 277. These, however, are not the real questions, as we understand them, which are now presented for decision.

"Suit here is really brought against the

sureties alone; there being no personal service upon the principal, who, prior to the issuing of the writ, had left the jurisdiction, although technically he has been served by leaving a copy of the writ at his residence. It is asserted, and not denied, that, subsequently to the bringing of the suit, the county auditors audited his accounts, and found the balance due as is claimed by the plaintiff. At best, then, if no judgment could have been recovered until after the holding of such an audit, what was there in either the acts of assembly, or the decisions of the court, to prevent the bringing of the suit, and then awaiting such an adjudication before entry of judgment? Some inconvenience and great danger of loss might attend any other construction of the law. If, as in this case, one of the sureties was dead, leaving real estate, and the period of two years was approaching since his decease, after which time his debts would cease to be a lien upon the same, the neglect or inability of the auditors to settle finally the account before that period had elapsed would bring about the loss of the security, and perhaps wholly take away the protection of the public, were there not others upon the bond, of equal responsibility, against whom it could be enforced. If, too, as has been forcibly said, an appeal was taken from the settlement, years might elapse before a final disposition of it, and in the meantime all the county's money, whether in dispute or not, could be retained by the outgoing officer, to the great prejudice and injury of the county, and perhaps to an impairment of its credit. It is true that in *Branch Township v. Yount*, 23 Pa. 182, it was held that, where one of the supervisors of a township was appointed to collect the road taxes, and gave bond, with sureties, no action would lie against the sureties, without a previous settlement of the account of the collector by the township auditors. This proceeding was, however, under a special act of Assembly, and the same principle does not, as we think, apply to a case such as that now under consideration. But even if it does, we strongly doubt whether it is well considered.

"The acts of Assembly which direct that official bonds of public officers shall be sued for in the name of the commonwealth would seem to refer to those bonds such as are given by the prothonotary, register, recorder, and the like, in which the individual citizen has an interest for which he can maintain an action upon the bond for his use. Even this direction is not, however, compulsory, for in *Clarke v. Potter County*, 1 Pa. 159, Gibson, C. J., says: 'Nor is it an available objection that the bond is not payable to the commonwealth instead of the county. Though the sixth section of the act of 1836 directs how an official bond to the commonwealth shall be sued, it prescribes not what bonds shall be given to the commonwealth as a trustee; and the thirty-third and thirty-fourth sec-

tions of the act of 1834, which require the treasurer to give one bond for his duties to the county, and another for his duties to the commonwealth, are silent as to the person of the obligee. But it seems to be most natural and proper to give them, respectively, to the agents of the interests to be secured by them; in other words, to the county or the commonwealth, as the case may require.' In like manner, the act of June 14, 1836 (P. L. 637), would seem to have no application to cases like this. That act provides for the assignment of specific breaches of the bond, and the purposes intended to be subserved are those which refer to such public officers, executors, and administrators, and the like, whose bonds are given for the benefit of individual interests, and may thus be sued.

"The bond of the county treasurer is, however, somewhat different from other bonds. It is for the protection of the county alone, and is therefore given by virtue of the thirty-third section of the act of April 15, 1834 (P. L. 537, 542), to the satisfaction of the commissioners, conditioned 'for the faithful performance of the duties of his office; for a just account of all moneys that may come into his hands on behalf of the county; for the delivery to his successor in office, of all books, papers, documents and other things, held in right of his office, and for the payment to [by] him of any balance of money, belonging to the county, remaining in his hands.' No individual can reap any benefit from it, nor can a default entail any individual loss, except that which may fall upon the sureties upon being compelled to pay. It is true that by the forty-eighth section of the same act it is provided that 'the auditors of each county, any two of whom, when duly convened, shall be a quorum, shall audit, settle and adjust the accounts of the commissioners, treasurer and sheriff and coroner of the county, and make report thereof to the court of common pleas of such county, together with a statement of the balance due from or to such commissioners, treasurer, sheriff or coroner'; and section 55 says, 'The report of the auditors shall be filed among the records of the court of common pleas of the respective county, and from the time of being so filed shall have the effect of a judgment against the real estate of the officer, who shall thereby appear to be indebted either to the commonwealth or to the county'; and in the next section, 'An appeal may be made from such report to the court of common pleas of the same county, either by the commonwealth, the county or the officer.' But the sureties in the bond have no standing before the auditors, and the adjudication is simply between the officer and the county or the commonwealth. No judgment can be entered, by reason of the settlement, against the sureties, nor can they appeal from the finding. Of course, the conclusion arrived at by the auditors may be binding upon the sureties in a subsequent

suit upon the bond, but, outside of the mere ascertainment of the balance in the hands of the officer, their rights are not prejudiced, and any other defenses which they may have are open to them in the subsequent action. We therefore hold that the suit was not prematurely brought, and the fact that no prior auditors' report was filed before its commencement does not make this proceeding void.

"It is also alleged that the defendants are not liable for the loss occasioned by the default, because it occurred through the laches and negligence of the county commissioners. This objection may be very summarily disposed of. In *Commonwealth v. Wolbert*, 6 Bin. 292, 6 Am. Dec. 452, it was held, even in case of a voluntary bond, there being no act of Assembly which compelled one to be given, that 'an omission on the part of the accounting officers of the commonwealth for a year and upwards to compel the prothonotary of the common pleas to settle his account of fees does not discharge the sureties on the official bond of the prothonotary, although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution.' And in *Commonwealth v. Porter*, 21 Pa. 385, it was said: 'It is no answer to this that the Auditor General for a long time neglected to decide upon the account, for it is settled by numerous decisions, beginning with our own case of *Commonwealth v. Wolbert*, 6 Bin. 292, 6 Am. Dec. 452, that the state is not chargeable with the negligence of its officers in such cases, even as against sureties.' The court then proceeds to say: 'On the principle of common justice, how can it be otherwise? There is no duty more plainly implied and written than that of a county treasurer to pay, and how can he excuse his neglect by pleading that of his superior officer to call on him? His is the first fault, and it is not forgiven because of a similar neglect of another. The Auditor General did not settle the account, and what of that? It was no less the duty of the county treasurer to pay, and, if he kept his accounts as he ought to have done, he knew exactly what to pay.' See, also, *Commonwealth v. Brice*, 22 Pa. 211, 60 Am. Dec. 79; *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Shaeffer*, 59 Pa. 350; *Throop on Public Officers*, § 283, p. 289; and *Supervisors v. Otis*, 62 N. Y. 88. The doctrine that the sureties of a public officer are not discharged by the laches or omissions of another officer, or board of officers, to take proceedings against the principal or to settle his accounts as required by law, although such laches has been gross and unreasonable, and the principal has meanwhile become insolvent, has been established in numerous cases. *Throop on Public Officers*, § 283, p. 290.

"The mere denials contained in the affidavit are of no effect, where it plainly appears on the face of the affidavit that the general

words are a mere evasion of the real facts. Assertions on the part of a defendant that he has paid a debt, without setting forth when and the manner in which he has paid it, are of no account; and, in a similar way, an allegation that he does not owe the claim will not be considered. The general allegations contained in the affidavit of defense are based upon the assumption that some of the moneys for which this suit is brought were state moneys, and not county moneys. A calculation based upon the figures presented will show this to be the case. That question has, however, already been settled. They allege that the sum of \$42,730.61 was all of the funds of the county of Lancaster in the hands of the treasurer on January 1, 1900. The difference between that amount and \$126,661.44, which was claimed to be the total of the indebtedness before any payments were made, is \$83,930.83, the exact amount of the state tax. There, then, having been paid by the treasurer to his successor, by checks and cash, \$61,623.50, the defendants hold that the amount due upon this bond was settled, because so much should be appropriated for this purpose from the treasurer's payment. They ignore, however, their admissions that no separate accounts were kept of the state and the county moneys in the bank, and that the same were deposited under one account, and they do not even allege that the treasurer himself made such an appropriation for their benefit.

"It is now too late to insist that the money collected from the state tax was all state money. The Supreme Court, in *Commonwealth v. Hershey*, supra, and *Commonwealth v. Philadelphia County*, 157 Pa. 531, 27 Atl. 546, have decided that they will consider as paid that which ought to have been paid. Three-fourths of the state tax being returnable to the county upon the payment of the whole state tax to the state, that court has also determined that this amount was to be considered as county money, although the interchange had not been really made; and therefore the actual amount of state money in the hands of the treasurer at the expiration of his term of office was not \$83,930.83, but only \$21,612.18, and, the cash payment of the amount deposited being apportioned between the state and the county money, the state bond was answerable for its proportionate share, after deducting the credit ascertained upon this basis.

"It must be recollected that there is no distinction between the liability of a surety and that of a principal in the bond, and that the same act of neglect which will charge the principal will also charge the surety. Where the statute expressly requires an officer to pay to his successor all moneys in his hands, his bond is also conditioned to the same effect. An active duty is thereby imposed upon the officer, and a failure to perform it constitutes a breach of the conditions of the bond. *Throop on Public Officers*, §

295, p. 300. Whenever the condition of the bond is broken, an action lies thereon, without notice to or demand upon the principal; and, therefore, as in this case, there being an admitted breach of the bond by the facts as here presented, we are of opinion that the defendants are liable, and that judgment should be entered in favor of the plaintiff against them for the sum of \$61,104.62. Judgment for plaintiff."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, M. G. Shaeffer, and Coyle & Keller, for appellants. A. B. Hassler and N. F. Hall, for appellee.

DEAN, J. Emanuel H. Hershey was duly elected county treasurer of Lancaster county. To qualify, he gave two bonds—one to the commonwealth, and one to the county of Lancaster; the latter in sum of \$100,000. Among the conditions of this bond were these: That he would keep full accounts, and that on expiration of his term he would deliver to his successor all books, papers, documents, and all other things held by him in right of said office, and pay to his successor any balance of money belonging to said county. The other bond was to the commonwealth, in the sum of \$60,000, conditioned to keep safe and account as directed by law for all moneys received by him for use of the commonwealth. The treasurer's term of office expired the first Monday of January, 1900, when his successor was duly qualified and assumed the duties of the office. Hershey turned out to be a defaulter, altogether, to the amount of over \$65,000. The amount due the commonwealth was ascertained to be \$10,666.43. See *Commonwealth v. Hershey*, 200 Pa. 306, 49 Atl. 882. For this amount the commonwealth obtained judgment, and the sureties paid it. This amount, with some commissions added, deducted from the whole amount of the default, left the balance due the county \$61,104.62, the amount for which the court below entered judgment against the treasurer and his sureties on the county bond in this case. The judgment was entered for want of a sufficient affidavit of defense. The two sureties, C. H. Hershey and Amos Hershey, bring this appeal.

There are 13 assignments of error, most of them to the correctness of the court's method of ascertaining the balance due the county, and the soundness of its conclusions of law based on the admissions expressed or implied in the affidavit of defense; also on the proper effect to be given the judicial determination in *Commonwealth v. Hershey et al.*, *supra*. A careful scrutiny of the very clear opinion of the court below, and an examination of the authorities cited in it, lead us to the firm conclusion that all of the assignments of error, except the fifth, are without real merit, and should be overruled. The fifth raises some doubt and demands special notice. It

is as follows: "The court erred in holding that the suit was not prematurely brought, and the fact that no prior auditors' report was filed before its commencement does not make this proceeding void." Although the county auditors did settle and adjust the accounts of the county treasurer before the judgment was entered, they had not yet acted in the matter at the time the suit was brought. Therefore, it is argued, the suit was premature, and must fail.

Section 48 of the act of 1834 (P. L. 545) says: "The auditors of each county, any two of whom when duly convened shall be a quorum, shall audit, settle and adjust the accounts of the commissioners, treasurer and sheriff and coroner of the county, and make report thereof to the court of common pleas of such county, together with a statement of the balance due from or to such commissioners, treasurer, sheriff or coroner." This section was not for the protection of the officer or his sureties. Its purpose was the protection of the public. The accounts of the officer must not be left solely to his determination. They must undergo the scrutiny of a board of officers elected by the people entirely independent of him, and having no interest in common with him. This is apparent from the proviso to the act of February 18, 1871 (P. L. 79). A vicious custom had grown up in some of the counties of electing as one of the auditors the county treasurer. That proviso expressly prohibits it. The finding of the auditors may or may not change the accounts of the officer so as to affect his or his sureties' liability. Their finding might, if not appealed from, absolutely determine a breach of the bond, when by the officer's own account no such breach was shown. This suit was brought February 9, 1900. There was no auditors' report until August 21st of that year, and, if the question as to whether there is a breach of the condition of the bond is determinable solely by the adjudication of the auditors, of course the suit was premature; but, as we have intimated, that board does not alone determine that fact. We must go back of it, and take notice of the law defining the officer's duties and the obligation of his sureties. Section 33 of the act of April 15, 1834 (P. L. 542), says: "Each county treasurer shall give bond with sureties, * * * conditioned for the faithful performance of the duties of his office; for a just account of all moneys that may come into his hands on behalf of the county; for the delivery to his successor in office, of all books, papers, and documents and other things, held in right of his office, and for the payment to him of any balance of money, belonging to the county, remaining in his hands." It will be noticed that, in addition to the general duty of faithful performance, he is to do three specific things: (1) Keep a just account of all moneys that come into his hands; (2) deliver to his successor all books, papers, and documents held

in right of his office; (3) pay over to his successor any balance of county money remaining in his hands. And such were the conditions of the bond, which conditions his sureties undertook he would perform. It is not material that the written obligation in the bond does not exactly follow the words of the statute. It was a statutory bond, given under and by the provisions of the statute, and the liability assumed by the sureties was the one fixed by the statute. No breach of the first and second specific duties is alleged. The officer did keep accounts. He did deliver to his successor the books and papers held in right of his office. But he failed to perform the third specific duty—pay over to his successor the balance of the county money in his hands. How do we know this? We answer, from the public account books which the law enjoined upon him as a duty to keep, and which he handed over to his successor. They were not his individual books. They belonged to the public, and were kept for a public purpose. They showed a large balance in his hands belonging to the county. He did not pay this to his successor. Why was not this a breach of duty for which the sureties were at once answerable? It is answered that the auditors had not yet settled and adjusted his accounts. But this did not postpone the performance of a plain statutory duty on the part of the officer. The accounts which the law directed him to keep, and which he did keep, and handed to his successor, showed a large balance in his hands. This public account kept by an officer was just as much an account authorized by law as the report of the county auditors. True, that report might increase the balance, or, on evidence of some mistake shown by the officer, lessen it, but *prima facie* his account showed the balance of money in his hands belonging to the county. The county so assumed, and brought suit. Afterwards the county auditors made adjustment, but made no change in the balance. Even if they had changed it, that fact would not have affected the *prima facie* proof of the breach growing out of the distinct, unequivocal admission of the officer in the lawful account kept by him. It is conceivable that the county auditors might not have met for a year or more. Is the outgoing officer to retain a large balance of the public money to the possible great prejudice of the public during that interval? That is, would the neglect or inability of one set of officers to perform their duty suspend the obligation to perform a plain duty on the part of another? The bond of the sureties, by the express terms of the act, was that the officer should pay over to his successor immediately the balance on hand, not such sum as in the indefinite future the county auditors might find to be in his hands when his term ended. This, from the plain account kept by himself, he failed to do, and the suit might at once be brought.

We do not undertake to decide in this case

what would have been the proper course of the county, had the treasurer failed to perform any one of the three special provisions of the bond; that is, had not kept accounts, had not handed them to his successor, and had not paid over the balance. Such default raises a different question, and one not before us. The authorities cited by appellant are not in point. They are all under other statutes, with other provisions as to other officers with other duties. We decide the case on our statute prescribing specifically the duties of the officer, the conditions in his bond, and the undisputed fact of his default from the official account kept by him.

The opinion of the learned court below fully demonstrates the soundness of the judgment, and it is affirmed.

MESTREZAT, J. (dissenting). I would reverse the judgment entered in the court below for two reasons: (1) The sureties on an official bond given by a county treasurer to the county are not liable thereon for his failure to account for moneys collected by him for the state, and payable to the state treasurer. (2) If there is a liability on the bond, no action will lie against the treasurer or his surety until the auditors of the county have settled the accounts of the treasurer, and ascertained the amount due from him to the county. If, however, neither of these positions be tenable, the judgment should be reduced by at least \$30,000, as it is clearly excessive to that amount, as shown by the appellee's own figures.

1. This action was brought February 9, 1900, by the county of Lancaster against the treasurer of the county and his sureties on the bond given by the officer to the county. The record discloses the fact that service of the writ was made on the treasurer and the administrator of one of the other sureties, and was accepted by counsel of the other surety. All parties, therefore, were in court, subject to its orders and judgment. The plaintiff filed a statement in which it is averred that the treasurer failed to pay to his successor in office the sum of \$65,037.94. But of that sum, \$10,666.43 had since been collected in a suit on the state bond, leaving \$54,371.51 as a claim in this suit. The sureties filed an affidavit of defense, denying the right of the plaintiff to recover any sum in the action, because, among other reasons, the amount, if any, due from the treasurer, had not been determined by the county auditors at the time of bringing the action; and the said amount is the tax on personal property collected for, and due, the commonwealth. This is a rule for judgment for want of a sufficient affidavit of defense, and these averments must therefore be taken to be true. The act of April 15, 1834 (Purd. Dig. 462, pl. 8), requires the county treasurer to give two bonds—one, "conditioned for the faithful performance of the duties of his office, for a just account of all moneys that may

come into his hands on behalf of the county, * * * and for the payment to him [his successor] of any balance of money belonging to the county remaining in his hands"; the other, "conditioned for the faithful discharge of all duties enjoined upon him by law in behalf of the commonwealth, and for the payment, according to law, of all moneys received by him for the use of the commonwealth." The act of April 29, 1844 (P. L. 501, § 40; *Purd. Dig.* 1867, pl. 20), provides that "it shall be the duty of the commissioners of the several counties, to cause to be collected the tax as aforesaid adjusted and assessed; and the respective county treasurers shall pay over the same, as fast as collected to the state treasurer; and if the quota of any county be not paid before the second Tuesday in January in each year, to the state treasurer, then, and in such case, the amount remaining unpaid, after deducting such commissions as are or shall be allowed by law for the collection of the same, shall be charged against said county, on the books of the state treasurer." In *Commonwealth v. Philadelphia County*, 157 Pa. 531, 27 Atl. 546, it is said that the act of April 29, 1844, is substantially the same in its provisions as the act of 1889. The cases of this court construing the prior legislation on this subject may therefore be regarded as controlling the question under consideration here.

It will be observed that the county treasurer has duties to perform not only for the county, but also for the commonwealth. He must collect the tax levied by the county, and certain taxes levied by and payable to the commonwealth. For this reason, he is required by law to give a bond to each—the one, to the county, that he will account for and pay over all moneys that may come into his hands, belonging to the county; the other, to the commonwealth, that he will make payment, according to law, of all moneys received by him for the use of the commonwealth. It is therefore apparent that the two bonds are given for different purposes, to secure the payment of different funds, and that the sureties on the one are not liable for a default and failure of their principal to account for moneys secured by the other. If this be not true, and the sureties on the county bond are liable for moneys collected by the treasurer for the state, why take two bonds? The additional or state bond is taken for some purpose, and that purpose is found and disclosed in the bond itself, to wit, to secure payment of moneys collected for the commonwealth.

The foregoing view of the liability imposed by the respective bonds is sustained by the adjudicated cases. In *Hughes v. Commonwealth*, 48 Pa. 66—an action on a state bond by the commonwealth against a surety on the bond to recover for "state taxes on real and personal estate"—it was held that "a surety on the state bond of a county treasurer is liable for taxes on real and personal

property received by him for the use of the commonwealth, and not paid over; and though the county is the debtor of the state for interest accrued and accruing on, and possibly for the principal of, such taxes, the surety cannot require the state to look to the county, and it to the surety on the county bond." *Elder v. Commonwealth*, 55 Pa. 485, was an action on a state bond by the commonwealth, for the use of Juniata county, against the sureties on the bond of a county treasurer. The county auditors settled the accounts of the treasurer, and found a balance due from him to the commonwealth for state taxes, which the county paid. It was held that the county, having paid the commonwealth the balance due by her for state taxes for which the treasurer was in default, might recover against the sureties on the state bond. The doctrine of subrogation was applied, and the county was reimbursed by an action for its use on the bond. It was not even suggested that there was any liability imposed by the county bond for the state taxes collected by the treasurer. The county's responsibility arose under the act of 1844, and when the auditors had determined the amount due from the treasurer to the commonwealth, and he had failed to pay, the act required it to be "charged against such county on the books of the state treasurer." The liability of the county in such cases is not put on the ground that it is responsible for the treasurer, but on the positive words of the act of Assembly, which holds the county responsible for the taxes until paid into the state treasury. *County of Schuylkill v. Commonwealth*, 36 Pa. 524. Neither the act of June 1, 1889 (P. L. 420), nor the act of June 8, 1891 (P. L. 229), has changed the mode of collecting state taxes, nor the liability imposed by the respective bonds required by the treasurer under the act of 1834, nor the manner of keeping accounts as required by that act. Under the late legislation a four-mill tax is imposed on personal property for state purposes, and it is provided that "three-fourths of the net amount of taxes based on the return of property subject to taxation for state purposes * * * that is collected and paid into the state treasury, by a county * * * shall be returned by the state treasurer to such county * * * for its own use in payment of the expenses incurred by it in the assessment and collection of said taxes." *Laws* 1891, p. 233, § 16. It is therefore clear from this statutory provision that the whole sum, and not the one-fourth thereof, required to be collected for state purposes, is a tax imposed by law, and is collected for the use of the commonwealth. Hence nothing relieves the county from liability to the state for the tax but actual payment of the entire sum to the state treasurer. *Commonwealth v. Philadelphia County*, supra. It is a fund entirely distinct from that produced by county taxation, and is due and must be paid to the

commonwealth, for whose use it was levied and collected. It is not subject to the control of, nor can it be applied by, the commissioners for any county use; and, until the whole sum is collected and paid to the state treasurer, the county is not entitled to three-fourths of the fund with which to reimburse itself for the collection of the tax. *Commonwealth v. Philadelphia County, supra.*

2. Almost a century ago the Legislature of this state declared that in all cases where a remedy was provided or duty enjoined, or anything directed to be done, by any act or acts of Assembly of this commonwealth, the directions of the said acts should be strictly pursued; and no penalty should be inflicted or anything done agreeably to the provisions of the common law, in such cases, further than should be necessary for carrying such act or acts into effect. In the many years which have intervened since this statute became a law of the commonwealth, no court has heretofore failed or refused to enforce its positive mandate, or hesitated to give due effect to its provisions. Notwithstanding the uniformity of action by the courts, and the settled construction of the act, the judgment of the court below in the present case was entered in direct violation of its terms.

The act of April 15, 1834 (P. L. 545, § 48; *Purd. Dig.* 447, pl. 10), provides that "the auditors of each county * * * shall audit, settle and adjust the accounts * * * of the treasurer * * * of the county, and make report thereof to the court of common pleas of such county, together with a statement of the balance due from or to such * * * treasurer." The forty-ninth section of the act makes it the duty of the auditors to audit the accounts of the county treasurer with the state treasurer, and to make a separate report to the court, with a statement of the balance due from or to the county treasurer. The auditors are invested with ample powers to enable them to perform the duties imposed upon them by the statute. In discharge of these duties, the auditors are authorized to compel the appearance of witnesses and the production of papers, to administer oaths, and to commit persons for refusing to testify. The act further provides that their report shall be filed in the court, and shall thereupon have the effect of a judgment against the officer if he is indebted to the commonwealth or county. An appeal lies to the common pleas, in favor of any party interested, within the time and on the terms provided by the statute. If an appeal results in a judgment, or there is no appeal taken, execution may issue against the defaulting officer.

It will thus be seen that the Legislature has created a special tribunal, with ample powers to settle and adjust the accounts of the county treasurer with the commonwealth and the county, and thereby to ascertain and determine what, if anything, is due from the

officer. The statute, it will be observed, is imperative, and provides that the auditors "shall audit, settle and adjust the accounts of the * * * treasurer." The details of the subsequent procedure are provided for, until final adjudication by the appellate court. Here, then, is a complete and effective remedy or course of procedure directed by statute, by which the accounts of the treasurer shall be adjusted, and the balance, if any, due by him to the county or commonwealth, ascertained. This, under the act of 1806, is the exclusive and only method by which the treasurer of a county can be determined to be in default. Such has been the uniform interpretation put upon the statute by all the courts of the commonwealth before which the question has been raised, and there is not a single solitary decision to the contrary. Sixty years ago this court held, in *Northumberland County v. Bloom*, 3 Watts & S. 542, that a settlement of the account of a county treasurer by the auditors, unappealed from, was conclusive against both the county and the officer. In *Blackmore v. Allegheny County*, 51 Pa. 160, Justice Agnew, delivering the opinion, after referring to the act of 1834, by authority of which the accounts of the county officers are to be audited, says: "Thus a special tribunal has been created, with all necessary judicial powers to determine the indebtedness from or to the officer, and enforce collection in due course of law; and this, under the provisions of the thirteenth section of the act of March 21, 1806 (4 Smith's Laws, p. 332), precludes a resort to an action at common law. The decision of this tribunal is also conclusive, and cannot be inquired into, either by the same tribunal at another time, or by a court of law, except in the manner provided, upon an appeal by the county or the officer. A long line of decisions has set this point at rest." In *Siggins v. The Commonwealth*, 85 Pa. 278—an action on a treasurer's official bond to recover a "balance in his hands not shown by the auditors' settlement"—Justice Woodward says: "*Blackmore v. Allegheny County*, 51 Pa. 160, and the array of precedents there collected, abundantly prove that the decision of the auditors on the accounts of the treasurer is controlling, and cannot be inquired into either by the same tribunal at another time, or by a court of law, except upon appeal. When the accounts of *Siggins*, as treasurer of the county of Forest, were adjusted in January, 1871, by a report from which there was no appeal, the settlement was final and binding on all parties and for all time." In *Godshalk v. Northampton County*, 71 Pa. 324, Justice Williams, speaking for the court, says: "It is manifest from all the provisions of the statute that it is the duty of the auditors to ascertain and settle the amount of public money received by any of the officers whose accounts they are required to audit, whether they have settled or refused to produce their accounts.

The power of the auditors to settle and adjust the accounts of such officers is not suspended or held in abeyance by their neglect or refusal to settle or produce their accounts." In *Northampton County v. Herman*, 119 Pa. 373, 13 Atl. 277, Justice Sterrett, delivering the opinion, after stating it to be the duty of the county auditors under the act of 1834 to audit the accounts of the county officers, says: "A special tribunal is thus erected, with all necessary powers to bring before it the parties, witnesses, etc., determine the indebtedness by or to the officer, and enforce its collection. This, under the provisions of the act of 1806, necessarily excludes every other remedy except the appeal provided for; and, if that is not taken within the sixty days limited by the act, the decision of the auditors becomes final and conclusive, and cannot afterwards be inquired into either by the auditors themselves or by a court of law." To the same effect is *Schuykill County v. Boyer*, 125 Pa. 226, 17 Atl. 339, where the present Chief Justice says: "It has been repeatedly held by this court that the act of April 15, 1834, which defines the powers and duties of the county auditors, constitutes a special tribunal for the settlement of the accounts of the officers named in it, with necessary authority to compel the attendance of witnesses and the production of papers, and to determine the indebtedness by or to the officer, and to enforce its collection." And in the recent case of *Westmoreland County v. Fisher*, 172 Pa. 317, 33 Atl. 571, our Brother Fell, citing some of the numerous authorities on the subject found in our Reports, says: "Since the passage of the act [of 1834], it has been uniformly held that the special tribunal created by it for the settlement of the accounts of the county officers named is exclusive of all others, and that its decision, if not appealed from, is final and conclusive, and cannot be opened for the correction of errors, or again inquired into by the auditors or by the court." *Branch Township v. Yount*, 23 Pa. 182, was an action against a collector of road taxes and his sureties on his official bond, given in pursuance of a special act of Assembly. The trial court held that, until settlement of the account of the collector by the township auditors, no action would lie upon his bond. Knox, J., in affirming the judgment, said: "This was correct. The liability of the sureties is contingent, and no resort can be had against them until the default of the principal is fixed. The township auditors have unquestioned jurisdiction to settle the account of the supervisor and collector, and their settlement, unappealed from, would be conclusive in an action upon the bond. If the supervisor neglected to appear upon notice and exhibit the state of his accounts, the auditors should have passed upon them in his absence; and, unless evidence of payment were before them, they would have been justified in reporting a balance against

him equal to the entire amount of the duplicate, which they could have ascertained without difficulty, as it was recited in the bond. The Legislature has provided a local tribunal to determine primarily the amount of the receipts and expenditures by the officers whose duty it is to collect and disburse the township revenues, and public policy coincides with the rules of law in requiring the remedy plainly pointed out to be pursued."

These are but a few of the many cases by which it is conclusively established that a common-law action will not lie against a county officer for an alleged shortage in his accounts with the county, and that an adjustment of his accounts by the county auditors, is a prerequisite to an action on his official bond. They show, if anything can be settled by the repeated decisions of this court, that the act of 1834 provides a complete and exclusive way in which the accounts of a county officer with the county and the commonwealth must be settled, and the amount, if any, be ascertained to be due to or from the officer. It necessarily follows that, until this tribunal has determined an amount to be due from an officer, he is not in default, and no action will lie against him or his sureties on his official bond. This evidently was the view of the appellee, as its substitute statement avers what the original statement omitted—that the accounts of the treasurer had been audited by the county auditors. This, as appears by the affidavit of defense and is conceded, had not been done when this suit was brought, and, even if done subsequently, cannot avail the plaintiff here, as was correctly ruled by the superior court in *Commonwealth v. Piroth*, 17 Pa. Super. Ct. 586.

The learned trial judge supports his position that a suit will lie on the bond without the prior action of the county auditors in determining the sum due from the officer by saying, *arguendo*, that to await the action of the tribunal created by law to establish the officer's default might result in loss to the county by the death or insolvency of the sureties on the bond. With equal relevancy and force it may be suggested that both these events might occur and like consequences might result before the expiration of the officer's term, prior to which time no action will lie on the bond. It is further said in support of the position of the court below that the county might be prejudiced by the delay attending the audit and final settlement of the officer's accounts. This proposition is sufficiently answered by the suggestion that no delay in the audit of the officers' accounts can occur unless the auditors fail to perform their duties, which we will not presume the court below, from which this appeal was taken, would permit. It is further contended by the appellee that, the action being on the bond, the default consists in the officer's failure to pay the "bal-

ance of money belonging to the county remaining in his hands," as required by the condition of the bond, and that it is a breach in the officer not to pay the money immediately on the expiration of his term, which imposes a liability on the sureties. For this reason, it is asserted that no prior settlement by the auditors is required. The fallacy of this argument lies in the fact that at that time the amount due has not been ascertained, and hence is not known. Suppose the officer would pay the amount he and the county then thought was due, and the subsequent audit of his accounts should show a sum far in excess or much less than was paid was really due the county; the mistake could not be corrected, and one of the parties must suffer an injustice. Is it not, therefore, apparent that the proper interpretation of the condition of the bond did not require the officer to pay the balance to the county until it had been ascertained in the mode provided by law, and that consequently no action would lie until the county auditors had determined the sum due?

But if the county may bring suit on the bond without awaiting the action of the auditors, how is it to establish its claim before the court and jury? This requires, in the present case, a settlement of the accounts of the treasurer during at least one year of his term. The appellee contends that the amount due from the officer shall be ascertained from the "true and correct accounts" required by the act of Assembly to be kept by him. I cannot imagine that the county or the sureties on the bond would want to accept as verity an account stated by a defaulting officer. The law requires him to keep an account with the county as well as with the state, but it concludes no party, except possibly the officer himself, and not him if a mistake should be made to appear in the settlement of his accounts by the auditors. To sustain this action, however, the county is driven to the position of accepting his accounts, and has attached copies of it to the statement to show the amount due from the sureties on the bond. Should the case reach a jury, that body—wholly unfitted for the purpose—must pass upon and determine the correctness of a long and intricate account. The case would be similar to *Mothland v. Wireman*, 3 Pen. & W. 185, 33 Am. Dec. 71, in which Chief Justice Gibson says, "In the trial of the issue the jury were burdened with accounts which were proper for adjustment by no one but an auditor."

From the plaintiff's statement it appears that on January 1, 1900, there was due from the treasurer \$126,661.44, which the affidavit of defense shows, and it is conceded, represents two funds, viz., \$88,930.88, state taxes on personal property for 1899, and \$42,730.61, county taxes for the year 1899. Of this

amount, the statement avers that there was paid to the county \$61,628.50, leaving yet due \$65,037.94. This is the total shortage, according to the contention of the appellee. As conceded by all parties, and on the theory adopted by this court in *Commonwealth v. Hershey*, 200 Pa. 306, 49 Atl. 882 (an action on the same treasurer's state bond), this sum represents two funds (\$43,096.64, state taxes, and \$21,941.30, county taxes). The default of the treasurer to the county is, therefore, by the appellee's own figures, only \$21,941.30, instead of \$54,371.51, the amount declared by the court below to be due from the sureties on the bond, and for which the court entered a judgment against them. *Commonwealth v. Hershey*, supra, was an action brought for the use of Lancaster county against this same treasurer and his sureties on the state bond to recover that part of the deficit of \$65,037.94 due the state, and which the county had to pay. The same trial judge tried both cases, and in *Commonwealth v. Hershey* gave judgment in the action on the state bond for \$44,072.94, the amount shown above as the state's share of the total deficiency. This court held that, as three-fourths of the \$88,930.88 was required to be returned to the county by the state treasurer, there was but one-fourth of that sum, \$21,812.18, lost to the state by the defaulting of the officer, and the proportionate share of that sum, to wit, \$10,666.48, could be recovered from the sureties on the state bond. In this case the trial judge erroneously concluded that as the total shortage was \$65,037.94, and this court had held that but \$10,666.48 belonged to the state, the residue of the total deficiency was due the county from the treasurer, and that therefore the sureties on the county bond were liable for that sum. The trial judge misapplied *Commonwealth v. Hershey*, and consequently brought about an erroneous conclusion. That case did not determine the rights or liabilities of the sureties on the respective bonds, as is distinctly stated in the opinion where it is said: "We are not adjusting the equities between the sureties on the county bond and those on the state bond, but dealing only with the strict rights of the parties to this action."

Believing that the position taken by the majority of the court is in direct conflict with all prior rulings of this court, and that the decision will unsettle the well-established practice of more than half a century in the audit and adjustment of the accounts of state and county officers by the controllers and auditors of the state, I have felt justified in citing the authorities bearing on the question raised on the appeal, and in stating at some lengths the reasons why the judgment of the court below should be reversed.

I am authorized to say that Justice POTTER joins in this opinion and dissent.

AMERICAN PIG IRON STORAGE WARRANT CO. v. SINNEMAHOING IRON & COAL CO. et al.

(Supreme Court of Pennsylvania. April 20, 1903.)

LANDLORD AND TENANT—DISTRESS FOR RENT—PROPERTY SUBJECT—WAREHOUSE RECEIPTS.

1. A furnace company manufactured pig iron in large quantities from iron and coal on the demised premises, and stored it near the furnace on the premises. Thereafter a warehouse company leased from the furnace company the small piece of land on which the pig iron was stored, and fenced it in, and issued warehouse warrants against the iron. There was no authority given to sublet in the lease, and no notice was given to the landlord. *Held*, that his right of distress for rent on the pig iron was good against the holders of the warrants.

2. One who takes warehouse receipts assumes the risk of the warehouseman issuing receipts for goods on which a landlord had a prior lien.

Appeal from Court of Common Pleas, Cameron County.

Action by the American Pig Iron Storage Warrant Company against the Sinnemahoning Iron & Coal Company and others. Judgment for defendants, and plaintiff appeals. *Affirmed*.

Mayer, P. J., filed the following opinion below:

"Findings of Fact.

"We find the following facts:

"(1) On April 19, 1899, the Sinnemahoning Iron & Coal Company leased its coal and iron property, consisting of about 10,000 acres of land, on which were coal mines, coke ovens, and a blast furnace, to Frank B. Baird for a period of three years, at a minimum annual rental of \$14,000, payable quarterly on October 20th, January 20th, April 20th, and July 20th, including all rents earned on the 1st days of these months, respectively, and the lessee took possession of the premises under the lease.

"(2) On December 21, 1899, Frank B. Baird assigned the lease to Chester R. Baird.

"(3) Chester R. Baird assigned the lease or sublet the demised premises to a New Jersey corporation, called the Emporium Furnace Company, and a large amount of pig iron was made under the management of this company on the demised premises, and placed in its yard near its cast house and furnace from day to day as it was made; said yard being part of the demised premises.

"(4) On July 25, 1900, and August 24, 1900, the Emporium Furnace Company entered into three leases with the American Pig Iron Storage Warrant Company, a New Jersey corporation, subleasing to it three contiguous pieces of the demised premises lying near the cast house, and embracing that part of the yard where it had piled pig iron. There were then on the ground so sublet upwards of 7,000 tons of pig iron.

"(5) The Emporium Furnace Company continued to manufacture pig iron after this subletting, and substantially all they made was carried from the cast house to the land sublet to the storage warrant company and there piled.

"(6) On October 29, 1899, when the first landlord's warrant was issued, there were about 11,000 tons of pig iron altogether on this storage lot.

"(7) The storage company issued warrants for all this iron to C. R. Baird, who claimed to have bought it from the Emporium Furnace Company; and the warrants so issued were pledged by C. R. Baird to banks as collateral for his notes prior to the issuing of the landlord's warrant, October 29, 1900.

"(8) On October 29, 1900, there was due to the Sinnemahoning Iron & Coal Company from Frank B. Baird, as rent on the lease, \$7,536.36, and on that day a landlord's warrant was issued, and 1,500 tons of pig iron in the storage company's yard were distrained for rent. The iron so distrained was on the premises leased by the Sinnemahoning Iron & Coal Company to Frank B. Baird, and the warrant was issued against Frank B. Baird as tenant.

"(9) After distraint, and before sale on the landlord's warrant, the American Pig Iron Storage Warrant Company brought replevin for the iron so distrained.

"(10) It appears that C. R. Baird is a brother of Frank B. Baird; that C. R. Baird & Co. is C. R. Baird; that the Emporium Furnace Company is Frank B. Baird, C. R. Baird, and a clerk of C. R. Baird & Co. It further appears that C. R. Baird furnished the capital and management of the Emporium Furnace Company; that he arranged with the storage company to lease the ground and accept the iron; that he directed the iron to be put in the storage yard, and also directed when it was to be taken out.

"(11) Possession was taken by the lessee, Frank B. Baird, of the entire demised property, the blast furnace put into operation, and upwards of 11,000 tons of pig iron made and piled on the leased premises prior to the distraint.

"(12) The rent for the month of October, 1900, was distrained for, and an agreement made, by which the iron seized was released, and, the same questions being raised under that distress as are in this case, the result of that distress is to depend upon the result of this case, and, if a recovery is had by the landlord, the amount of the rent due on the second distraint, which is \$1,732.94, shall be included in the recovery in this case.

"(13) There was due and unpaid on the demised premises seated taxes in Lumber township for the year 1900, amounting to \$190.56, and in Emporium borough seated taxes on the demised premises, amounting to \$367.29, and the unseated taxes for Lumber township for the year 1900, amounting to \$336.54, and for Shippen township the unseated taxes for

1900, amounting to \$229.73, which the lessee obligated himself to pay.

"(14) The leases to the American Pig Iron Storage Warrant Company by the Emporium Furnace Company were never recorded, nor were they assented to by the Sinnemahoning Iron & Coal Company, nor ratified by them in any way.

Conclusions of Law.

"(1) The evident intent and purpose of the lease between the Sinnemahoning Iron & Coal Company and Frank B. Baird, dated April 19, 1899, was to enable the lessee to take possession and assume control of the entire demised premises, and utilize the same for the purpose of making pig iron. It was not within the contemplation of the parties that the said lessee would sublet a portion of the demised premises to another corporation for the purpose of carrying on an independent business in no way necessarily connected with the business contemplated by said lease.

"(2) The general rule is that whatever goods and chattels the landlord finds upon the demised premises, whether they belong to the tenant, undertenant, or a stranger, are distrainable by him for rent. *Kessler v. McConachy*, 1 Rawle, 435; *Price v. McCallister*, 3 Grant, Cas. 248; *Karns v. McKinney*, 74 Pa. 387; *Kleber v. Ward*, 88 Pa. 93; *Whiting v. Lake*, 91 Pa. 349; *Murphy v. Borland*, 92 Pa. 90; *Page v. Middleton*, 118 Pa. 546, 12 Atl. 415. To this general rule are exceptions: First, fixtures which are annexed to the freehold, and become part of it; second, chattels placed on the premises 'to be wrought, worked up, or managed in the way of the tenant's trade or employment,' as in the case of a tailor, warehouse keeper, boarding house keeper, and livery stable, etc. In *Brown v. Sims*, 17 Serg. & R. 138, it was held that 'the goods of a third person, placed, in the way of trade, on storage in the warehouse of one who used the trade and business of a merchant, and received goods and merchandise from merchants and traders on storage, are not liable to distress for rent for such warehouse, though found on the premises.' In this case Justice Gibson said: 'Where the course of the business must necessarily put the tenant in possession of the property of his customers, it would be against the plainest dictates of honesty and conscience to permit the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent. * * * To take goods on storage, though not the appropriate business of our merchants, is of such common occurrence as to furnish an intendment that it enters into the consideration of the parties to every lease of a warehouse. The landlord knows that it is to be used for the general purposes of trade, and, as this sort of bailment usually forms a part of the business of commerce, we are bound to say the parties had regard

to it as one of the usages of trade, and the landlord must, therefore, be considered as having waived his privilege in this particular instance.' In the present case it is not pretended or claimed that when the lease was made between the parties they had in view the subletting of these premises to the storage company for the purpose of storing iron made at said furnace.

"(3) 'The goods of a subtenant are liable to be distrained for rent of the original tenant, under whom he claims, and who has surrendered his lease in the middle of the term.' *Hessel v. Johnson*, 45 Leg. Int. 474. 'A subtenant cannot compel the lessor to sell the goods of the original lessee, in satisfaction of the rent in arrears, before having recourse to his own.' *Jimison v. Reifsnider*, 97 Pa. 136. 'The goods of one who entered under the lessee are liable to be distrained for the rent reserved, though he hold over after the determination of the lease.' *Whiting v. Lake*, 91 Pa. 349. 'The goods of a stranger in the possession of the tenant as a matter of favor and without hire are not exempt from distress for rent.' *Page v. Middleton*, 118 Pa. 546, 12 Atl. 415. Under the authority of these cases our conclusion is that the pig iron piled in the storage yard of the American Pig Iron Storage Warrant Company does not come within any of the exceptions to the general rule that property found on the demised premises is distrainable for rent."

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

B. Gordon Bromley, C. H. McCauley, and Thomas De Witt Cuyler, for appellant. Johnson & McNarney and W. W. Webb, for appellees.

DEAN, J. In April, 1899, Frank B. Baird leased from the Sinnemahoning Iron & Coal Company, a corporation, its furnace property in Cameron county, consisting of about 10,000 acres of land, with blast furnace, coal washers, mines, coke ovens, railroad sidings, and like improvements, for three years from date of lease. The lessee covenanted to pay a minimum annual rental of \$14,000 quarterly, and on the execution of the lease at once took possession. The lease was to be binding upon both parties, their heirs, executors, administrators, and assigns. There was no express provision as to subletting or restriction as to terms of sublease; so it may be assumed that there was plainly an implication of a right to sublet. In December, 1899, the tenant assigned his lease to Chester R. Baird, and he assigned it to the Emporium Furnace Company, a corporation promoted by Baird, and this company continued to manufacture pig iron in large quantities, piling it up on the property near the casting house from day to day as it was manufactured. By this method of conducting its business the furnace company had accumu-

lated on the premises about 7,200 tons of pig iron when it leased this small part of the land to the Philadelphia Warehouse Company for warehouse purposes. Then, on July 25, 1900, the warehouse company leased that part of the land to the American Pig Iron Storage Warrant Company, a New Jersey corporation, having, under our statutes, full authority to do business in Pennsylvania, such as to receive iron on storage, and to issue its negotiable warrants therefor. It had a large quantity of this pig iron near the furnace in its storage yard, a few feet from the furnace, which had been manufactured at the furnace, and on which it had issued warrants, many of them to the furnace company and to C. R. Baird & Co., the first lessees from the owner. The lessees fell in arrears for rent to the amount of \$7,536.36. A landlord's warrant was issued to Constable Yentzer, who, by virtue of it, seized the pig iron in the alleged storage yard of the American Pig Iron Storage Warrant Company, this appellant. This latter company then replevied the iron seized by the constable, alleging the iron was not lawfully subject to distraint for rent, it being the property of the storage warrant company. When the case came on for trial, the parties by agreement submitted the issue, both fact and law, to the decision of the court under the act of 1874 (P. L. 109).

The court, in opinion filed, gave judgment for the Sinnemahoning Iron Company and the constable, thus, in effect, holding that the iron was subject to distress for rent. From that judgment comes this appeal by the storage warrant company with 21 assignments of error. The subject of all of them is so fully discussed in the opinion of the learned judge of the court below that but little further need be here said. The only question raised in our minds as to the correctness of the legal conclusion of the court has its source in the act of the 24th of September, 1866 (P. L. 1867, 1863). That act, after authorizing the issuing of warrants by warehousing companies, and making such warrants negotiable, goes on to say: "And any person to whom the said receipt or bill of lading may be so transferred shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon." This act was obviously framed for the protection of the warrant holders, and it is the duty of the courts to give full effect to its intent, but they cannot go further, and by construction disregard or subvert the law which long settled the rights of a landlord to distrain for rent the goods on the demised premises. But for this act, there could be no question raised as to the right of the landlord to seize this iron made in the leased furnace from ore and coal mined on the leased land. It had been taken from the casting house and

piled about the same distance from the furnace as it would have been had there been no transfer to the storage company. The warrant itself does not determine and fix that the iron has been warehoused. There must have been an actual change of possession. Any other ruling would suggest a most fruitful method of fraud, which is not warranted by any reasonable interpretation of the act.

Notice the character of warehousing done here: The lessee was in arrears for more than a quarter's rent. The iron manufactured before and during that quarter had been piled up just where it lay when seized. At the end of the quarter the storage company leased from the tenant the small piece of land on which the iron was piled, ran a wire fence around it, and claims that it was stored by the storage company on its premises; therefore, under the act of 1866, it is not subject to distress for rent. Notice of this subletting was not given the landlord. It was answered he was not entitled to notice. This may be, if the subletting was for the same purpose as the original lease—the manufacture of iron. But this sublease was for warehouse and storage purposes. It may well be doubted whether the implied right of the first lessee to assign a right to manufacture iron embraced the right to assign a part of the demised premises for other and distinct purposes. But the finding of fact by the court below clearly vindicates the judgment on another ground. Appellant argues that the rule as announced by Gibson, C. J., in *Brown v. Sims*, 17 Serg. & R. 138, must control the case before us. It may be said that *Brown v. Sims* was no modification of or departure from the common-law rule that the goods on the demised premises are liable to distress for rent. It is merely an exceptional case on its facts, as appears from the language of the opinion thus: "Where the course of the business must necessarily put the tenant in possession of the property of his customers, it would be against the plainest dictates of honesty and conscience to permit the landlord to use as a decoy and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent." From that follows a long line of exceptional cases on similar facts down to *Karns v. McKinney*, 74 Pa. 387, where, after an elaborate discussion of most of them, the exceptions to the rule are all embraced in these few words: "When the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals or those who employ him, such property, although upon the demised premises, is not liable to distress for rent due thereon from the tenant." This pig iron did not come upon the demised premises from the possession of a third person. It was manufactured and piled there by the ten-

ant. It was not, necessarily, there for any purpose. Appellant ran a wire fence around it, and left it there for its own convenience, and then assumed it was in its storage yard or warehouse, without even notice to the landlord that there had been a constructive change of ownership. These findings of fact by the court below bring the iron under the operation of the general rule that the goods on the demised premises are distrainable for rent, and which does not encourage what Blackstone calls "a dangerous combination between strangers and tenants to defraud the landlord of his rent," or, as the court below puts it, "all that would be necessary, as was done in this case, would be to deposit the entire output in this storage yard, and, when there deposited, claim that it was exempt from distress for rent." On the facts as found, this question is not affected by the act of 1866. If the landlord had hauled his iron to appellant's storage yard, and placed it in their custody and control, and they had issued warrants upon it, the holder of the warrant would have been protected by that act. Nevertheless, while the act hedges around the owner of the warrant with almost every possible protection, he must run the risk of the warehouseman issuing a warrant upon goods that never were legally put in his possession by a landlord who has a prior right of lien.

All the assignments of error are overruled, and the judgment is affirmed.

MINERSVILLE BOROUGH v. SCHUYLKILL ELECTRIC RY. CO. et al.

(No. 1.)

(Supreme Court of Pennsylvania. April 20, 1903.)

STREET RAILROADS — USE OF STREETS — BREACH OF CONDITIONS — FORFEITURE OF RIGHT — LACHES.

1. Where a street railway company has been granted by a borough the right to use a street on the condition that such right shall be forfeited if it does not within a year build a certain extension, the borough can remove the track from the street if the extension is not constructed within a year.

2. Where a street railroad has failed to build an extension, which was the condition of its obtaining the use of the streets, indulgence by the borough in commencing proceedings to compel removal of the tracks, where the delay leads to no change in the situation, is not laches on the part of the borough.

Appeal from Court of Common Pleas, Schuylkill County.

Action by Minersville Borough against Schuylkill Electric Railway Company and another. Decree for plaintiff, and defendants appeal. Affirmed.

The following are the findings of fact of the court below:

"The People's Railway Company was in-

corporated under an act of the General Assembly approved April 4, 1865 (P. L. 815), which provides, *inter alia*, as follows: It gives to the People's Railway Company 'the right to lay out and construct a railway, with one or more tracks, with turnouts and sidings, from and in the borough of Pottsville, to any point or points, in any direction, in the county of Schuylkill, not exceeding six miles in length, as the directors may select, and through any street or boroughs or roads, or by any routes they may deem advisable and to cross at grade, or connect with any other railway now constructed or that may be hereafter constructed, and to carry passengers or freight along such route or streets as may be used by said railway to equip said road. Provided, that the road constructed under the provisions of this act shall not be worked by steam; and provided, further, that it shall not cross at grade any of the tracks of the Philadelphia & Reading Railroad. That the company may commence and complete said railway at any time within three years from the passage of this act, the completion of any one mile thereof perpetuating all the rights hereby conferred. That the said company shall be subject to all provisions of any act regulating railroad companies, approved February 19, 1849, so far as the same are not altered or supplied by this act.' A supplement to this act was passed on April 28, 1871 (P. L. 503), which provides, *inter alia*: "That the time provided in the act of the General Assembly of the commonwealth, approved April 4, 1865, entitled, 'An act to incorporate the People's Railway Company,' be and the same is hereby extended until the expiration of three years from and after this date. That it shall be lawful to use the dummy steam engines upon the railways of said company, and to cross at grade the track or railway of any other railway company.' A second supplement was approved March 14, 1873 (P. L. 287), which provides that section 4 to the supplement to the act entitled 'A supplement to an act, entitled 'An act to incorporate the People's Railway Company,' approved April 4, 1865, be so amended as to allow to said company the use of any kind of locomotive engines upon the railways of said company, and that said company shall not be restricted to the use of the dummy steam engine as provided in said section to said supplement.

"About 1872 or 1873 (the exact date does not appear from the evidence) the said company constructed its lines, which commenced in the borough of Mt. Carbon, and ran through Center street, in the borough of Pottsville, out into Fishbach, a suburb of Pottsville. At Center and Market streets in Pottsville the line branched off and ran out Market street to Twelfth street, down Twelfth street for several blocks, and then turned off to a depot erected by said company. All this part of the line of the People's Railway was operated by horse cars. From the depot on

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1491.

Twelfth street the line continued on private right of way to the borough of Minersville, and ran on South Delaware avenue, in said borough of Minersville, to the south side of Sunbury street, a distance of about 1,200 feet. This part of the line was operated by locomotive and passenger cars. They also carried freight and coal over this part of the road. The road was operated continuously, so far as appears from the evidence before us, by the People's Railway Company, until about the year 1890, when the portion of the tracks lying east of their depot in the borough of Pottsville—the portion operated by horse power—was leased to the Schuylkill Electric Railway Company, was electrically installed, and electric cars run over that portion of the road. On February 1, 1895, another agreement was entered into between the Schuylkill Electric Railway Company and the People's Railway Company, by which the former were granted the rights of running their cars over that portion of the road running from the depot in Pottsville to the south side of Sunbury street, in Minersville, or, in other words, that portion over which locomotives then ran. This line was electrically installed, and electric cars started to run on March 10, 1895, and have run continuously since that date. The People's Railway Company retain possession of the said line, repair the roadbed, make the schedules, and employ some of the station agents, as appears from the evidence, all under supervision of its own superintendent. They also have agreement with the Lehigh Valley and the Philadelphia & Reading Railroad Company, by which these latter companies run trains over a portion of this road between the boroughs of Pottsville and Minersville. On October 21, 1896, the borough of Minersville passed an ordinance granting the Schuylkill Electric Railway Company the right of way set forth in the bill, and all the conditions of this ordinance were accepted by the said company in writing. The road on Sunbury street in the borough of Minersville, the right to lay which was granted by the above ordinance, was built prior to the passage of the ordinance, but cars were not run on Sunbury street until after the passage thereof. The Schuylkill Electric Railway Company entered into an agreement with the Philadelphia Construction Company on December 29, 1894, for the construction of branches, furnishing of rails, erection of a power house, etc., among which were the branches enumerated in the above ordinance. Ties and rails were distributed along part of the route into the Heckschersville Valley, but were afterwards removed, the date of which does not appear. The defendants, in their answer, admit that they failed to carry out the provisions of the above ordinance by building the road into the Heckschersville Valley, but aver that they contracted with the Philadelphia Construction Company for the construction of the same, but said company became insol-

vent, and the rails and ties above referred to were sold under execution and carried away; and they allege in the answer that after that the Schuylkill Electric Railway Company could not get the necessary rights of way. In the evidence of Hon. R. H. Koch, who was then president of the Schuylkill Electric Railway Company, he gives as their reasons for their failure to carry out this condition of the ordinance the want of funds. We cannot find as a fact that either of these reasons was the cause of the failure to construct the Heckschersville Branch. Judge Koch, in his testimony, admits that he knew at the time he obtained the passage of this ordinance from the borough of Minersville that numerous judgments were entered against the construction company, and that was his reason for asking for one year's time to complete the road. From the evidence of both Koch and King, it does not appear to us that such efforts were used as would justify us in concluding the necessary rights of way could not be procured. The next step in point of time was the lease entered into between the Schuylkill Electric Railway Company and the Pottsville Union Traction Company, dated August 6, 1899, whereby the railway company leased to the traction company all its lines and franchises. It is admitted in defendants' answer that this lease was without the consent of the complainant or its local authorities. It is further shown by the evidence that the schedule of running cars every forty-five minutes, as set forth in the ordinance, was not carried out continuously during the day, but that at one period in the morning and one in the afternoon a longer time elapsed between the running of cars, and also that on two of the trips the cars only ran to the depot on South Delaware avenue, instead of to the end of Sunbury street, as the conditions of the ordinance provide.

"The bill of plaintiff was filed on September 3, 1900. Between the passage of the ordinance and the filing of the bill, numerous resolutions were passed by council of the borough of Minersville, among which the following are in evidence:

"Resolution March 5, 1898. Schuylkill Electric Railway Company be notified to pave at Delaware avenue and Sunbury street according to the ordinance.

"July 7, 1898. Railway committee were instructed to meet Schuylkill Electric Railway Company and ask for the privilege of taking up the stone along the track on Sunbury street for use at other places in the borough, and, if the privilege is granted, if the Schuylkill Electric Railway Company will fix up the street where the stone were taken from, and keep that portion of the street in repair.

"August 4, 1898. Chairman Shindal, of the Schuylkill Electric Railway committee, reported some action soon to be taken by the Schuylkill Electric Railway Company regarding the stone along the car tracks on Sunbury street.

"September 1, 1898. Electric railway committee reported that the council were at liberty to take up the stones on Sunbury street, but the borough must fix up the holes, and hereafter keep the eighteen inches of the street in repair. They also reported that the Schuylkill Electric Railway Company will put the street in good repair at Rothermel's Hotel.

"May 4, 1899. Chief burgess be instructed to notify electric railway company to have defects in road and crossings fixed, giving them limited time to do it, and, if not complied with, have street committee do it, and charge company for same.

"June 29, 1899. Chief burgess notify electric railway company to fix rut on East Sunbury street, also crossing from Pottsville and Sunbury streets, and that they will be held responsible for any damages that may occur through neglect to comply.

"July 2, 1900. Motion that solicitor be instructed to proceed at once by all legal measures to compel electric railway company to carry out their contract, or stop them from coming into town at all.

"July 18, 1900. Solicitor was instructed to proceed against company.

"August 2, 1900. 'Whereas, the Schuylkill Electric Railway Company has failed to carry out the conditions of an ordinance or contract made with the borough of Minersville October 21, 1896,' etc., 'resolved, that the borough of Minersville, by their council, hereby again declare the rights, privileges and franchises granted under said agreement or ordinance null and void.'

"From the resolutions of council above set forth, and from the evidence before us, we find that the council from time to time endeavored to have the railway company keep the streets along the line of its tracks in good condition, and also that they made attempt to have this company carry out its agreements, and that finally they instructed their solicitor to bring suit."

Upon the facts as found above, the court entered a decree declaring the defendant's right to use the street was forfeited, and that the company should be enjoined from running its cars upon the street, and should be compelled to remove its tracks and restore the street to its original condition.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Guy E. Farquhar and R. H. Koch, for appellants. David A. Jones and C. N. Brumm, for appellee.

FELL, J. The right of the Schuylkill Electric Railway Company, or its successor, the Pottsville Union Traction Company, to occupy Sunbury street, in the borough of Minersville, rests entirely upon the ordinance of October 21, 1896. The grant of this right to the Schuylkill Electric Railway Company was on the condition that within one year

the company should construct and operate a railway from Sunbury street, through Heckschersville Valley, to Glen Carbon. The ordinance contained the following provisions: "The right above granted to the said company to construct and lay a track on Sunbury street or maintain the same where already constructed shall be forfeited by said company and its successors unless a track is constructed, maintained and operated into and along Heckschersville Valley to Scott's Store, in Glen Carbon, within one year of the acceptance of this ordinance by the Schuylkill Electric Railway Company." "All rights and franchises heretofore and hereby granted on any of the streets of said borough to said railway company shall be void unless the said company shall construct, maintain and operate a railway on Sunbury street and a branch into Heckschersville Valley to Glen Carbon under the rights and franchises granted by the said borough." The condition imposed by the ordinance was a reasonable one. The inhabitants of Minersville, many of whom were employed in mining operations in the Heckschersville Valley, were interested in the extension of the branch road which had been projected by the railway company. This condition was expressly accepted by the railway company, and it became a contract between the parties, by which the right to occupy the street was regulated, and it was binding upon the defendants. The power of the borough to give or refuse consent to the occupation of its streets was unqualified, and the power to impose reasonable conditions was necessarily implied. *Allegheny City v. Millville, etc., Street Railway Co.*, 159 Pa. 411, 28 Atl. 202; *Plymouth Township v. Chestnut Hill, etc., Railway Co.*, 168 Pa. 181, 32 Atl. 19. Ties and rails for the proposed extension of the branch road were distributed along the route before the passage of the ordinance. These were removed after the ordinance granting permission to occupy the street had been passed. The court found that the work was abandoned by the railway company, and that it made no reasonable effort to complete the road. This finding appears to be fully sustained by the testimony, and it established as a fact the failure of the company, without adequate reason, to perform a condition on which the grant was made.

There was nothing in the conduct of the borough to give rise to an estoppel. Its officers notified the railway companies that they would insist upon the building of the branch road, and the delay in commencing proceedings against them was indulgence, only, which led to no change in the situation to their prejudice. As this conclusion fully sustains the decree entered, it is unnecessary to consider the other grounds upon which it is based.

The decree is affirmed, at the cost of the appellants, with leave to the court of common pleas to fix such a time for the removal of

the tracks of the railway company, and the restoration of the street to the condition it was in before they were laid, as, under the circumstances, may be deemed reasonable and just.

MINERSVILLE BOROUGH v. SCHUYLKILL ELECTRIC RY. CO. et al.
(No. 2.)

(Supreme Court of Pennsylvania. April 20, 1903.)

STREET RAILROAD—LEASE OF TRACKS—OBJECTION BY BOROUGH.

1. A borough cannot object that a street railroad company incorporated under a special act of the Legislature, giving it a right to lay its tracks in the borough without municipal consent, has exceeded its powers in entering into an agreement for the lease of its tracks; such question being for the commonwealth only.

Appeal from Court of Common Pleas, Schuylkill County.

Bill by Minersville Borough against Schuylkill Electric Railway Company and another. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

C. N. Brumm and David A. Jones, for appellant. Guy E. Farquhar and R. H. Koch, for appellees.

FELL, J. This is an appeal by the appellee in the preceding case from the refusal of the court to enjoin the use by the railway companies of 1,200 feet of tracks on South Delaware avenue in Minersville, which are a part of the line of the defendants' road that extends to Pottsville. These tracks were laid in 1873 by the People's Railway Company, a corporation chartered by Act of Assembly of April 4, 1865 (P. L. 815), and since 1895 have been used by agreement by the Schuylkill Electric Railway Company. The People's Railway Company had the right to lay its tracks in the borough without municipal consent, and the fundamental question at the hearing was whether the defendants had exceeded their powers in entering into an agreement for the use or lease of the tracks. This question could be raised only by the commonwealth. It was properly held by the learned judge that "whether any of the above companies exceeded their lawful authority by becoming a party to the contracts entered into is a question of excessive exercise of power by a corporation, for which it is amenable to the commonwealth, but not to a private suitor or another corporation, unless such suitor has sustained a private injury, or such corporation has had its rights and franchises invaded. We hold that this plaintiff has not sustained such injury, and, as to that part of the road now under discussion, have no standing to maintain their bill."

Western Pennsylvania Railroad Co.'s Appeal, 104 Pa. 399.

The appeal is dismissed at the cost of the appellant.

MEIGS v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Pennsylvania. April 20, 1903.)

INSURANCE—PRORATING—CONSTRUCTION OF POLICIES—PROPERTY COVERED.

1. Where insured takes out two policies insuring the same property, but one of them covers other property also, without stating how much insurance applies to each property, it is not a case of double insurance, and the policies do not prorate.

2. An owner of a building placed insurance on building and contents, with the privilege to make an addition, "and this policy to cover on and in same." He made an addition, placing specific insurance on the addition and contents. The latter policies provided that the insurer should not be liable for a greater proportion of any loss than the amount "hereby insured" should bear to the whole insurance. The old building was slightly damaged, but the damage to the addition was less than the amount of specific insurance on it. The contents of the addition were damaged to a greater amount than the specific insurance, and the insurance on the old building and contents was much greater than the damage. *Held*, that the loss on the addition and the contents must be borne by the specific insurance taken out after the addition was constructed, and that the other policies did not prorate with such specific policies in bearing the loss upon the addition and contents.

Mitchell, J., dissenting.

Appeal from Court of Common Pleas, Montgomery County.

Action by John Meigs against the Insurance Company of North America. Judgment for plaintiff, and defendant appeals. Affirmed.

From the adjudication it appeared that plaintiff had placed fire insurance aggregating \$135,000 upon a building, and \$55,000 upon its contents. These policies each contained the provision: "Privilege granted to make additions, alterations and repairs, and this policy to cover on and in same," and were referred to by the court as Class A. Subsequently plaintiff built an addition, and placed in 13 companies specific insurance, aggregating \$60,000, upon the wing or addition, and \$7,500 upon its contents. These policies were referred to by the court as Class B, and each contained the following clause: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by any expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property. * * *" A fire occurred, which caused loss, adjusted as follows: Loss on east wing building, \$28,668.50; loss on contents in east wing, \$13,250 (this item includes students' wearing apparel, \$4,500); loss on

buildings other than east wing, \$1,815.65; loss on contents in buildings other than east wing, \$2,382.30. The defendant had issued one of Class B policies, and contended that their pro rata share was to be determined by considering not only the other Class B policies, but also the Class A policies. It paid to plaintiff the amount due according to this view (\$1,573.25), without prejudice. On August 18, 1902, Swartz, P. J., filed separate findings of fact and conclusions of law adverse to the defendant's contention, and entered judgment for plaintiff for \$2,504.94, the amount due in addition to the amount already paid.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

G. W. Pepper and Montgomery Evans, for appellant. N. H. Larzelere, Muscoe M. Gibson, and Gilbert R. Fox, for appellee.

MESTREZAT, J. In *Sloat v. Royal Insurance Co.*, 49 Pa. 14, 88 Am. Dec. 477, decided by this court in 1865, the definition of "double insurance" is stated by Read, J., as follows: "Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk, and the same interest. If there be double insurance, either simultaneously or by successive policies, in which priority of insurance is not provided for, all are insurers, and liable pro rata. All the policies are considered as making but one policy, and therefore any one insurer who pays more than his proportion may claim a contribution from others who are liable. Fire policies usually contain express and exact provisions on this subject." It was there held (following the rule adopted in *Howard Insurance Co. v. Scribner*, 5 Hill, 298) that where one policy of insurance in a company covers the building of the party insured, and a subsequent policy in another company covers the building, machinery, tools, etc., it was not a case of a double insurance. In that case there was a \$2,000 policy on the building, and a \$2,500 policy on the building, machinery, tools, etc. In a suit on the former policy, the plaintiff was allowed to recover the entire amount of the policy, and the defendant was not permitted to prorate with the \$2,500 policy. This case has been followed and approved in subsequent decisions of this court, the most recent of which, containing a full discussion of the subject, is *Clarke v. Western Assurance Co.*, 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821. The pro rata clause in that case was identical with the one in the case at bar. There Chief Justice Paxson, delivering the opinion, reviewed the former cases of this court on the subject, and held that the case of *Sloat v. Insurance Co.* was well decided, and has since been followed in all our decisions. The opinion says: "*Sloat v. Insurance Co.* has been the law of this state for over a quarter of a century, and we would not dis-

turb it now, unless for grave reasons. It has been accepted and acted upon in the adjustment of losses. Moreover, it has been expressly recognized as law by later cases. * * * We are now asked to overrule it, because *Howard Insurance Co. v. Scribner*, cited by Justice Read, has been overruled in New York by *Ogden v. East River Insurance Co.*, 50 N. Y. 388 [10 Am. Rep. 492]. With the highest regard for the able and learned judges who decided that case, we are not disposed to follow them in this instance. We can only do so by overturning our own cases, and we have not been convinced that they are erroneous. Our own rule is a safe one, and easily understood." It was accordingly held to be the settled law of the state that when two policies insure the same property, but one of them covers other property, also, without specifying how much of the insurance applies to each property, a case of double insurance is not presented, and the policies do not prorate.

The result reached by the trial judge in this case is sustained by the rule enunciated in all our decisions, and, unless we overrule them, the judgment of the court below must be affirmed. This we have no intention of doing. For 38 years the losses covered by insurance policies in this state have been adjusted in conformity with the doctrine of *Sloat v. Insurance Co.* The rule announced in that case is recognized and well understood as the law of the state by both the insurer and the policy holder, and to modify or change it now, with the vast interests depending upon its enforcement, would require stronger and more convincing reasons than have yet been presented. As said by Chief Justice Paxson, the rule is a safe one and easily understood. It works manifest justice by giving the policy holder the full value of his policy, and in requiring from the insurer only the consideration which the amount of the premium exacts.

The contract of fire insurance is one of indemnity. The intention of Dr. Meigs was to indemnify himself against loss on his property to the full amount of both classes of policies. We must presume that the insurance company intended that he should have protection to that extent. He paid a premium that entitled him, in the event of a total loss, to the payment of the full sum named in the policies. Unless, therefore, there is something in the contract that would prevent, it should be construed so as to give effect to the intention of the parties. It is contended by the defendant company that the pro rata clause requires the two classes of policies in case of a partial loss to contribute ratably to the loss on the east wing and its contents. Clearly, the application of that doctrine would not give full effect to both classes of policies and protection to the insured to the amount of the policies. It must be conceded that that rule has no application where there is a total loss of the whole

property, and, as we have seen, it has been so decided by the court. It therefore might be sufficient to say that the rule cannot have a dual application; that it must be applied alike in case of a total and a partial loss. In a case of partial loss, it is apparent that it would deny to the insured the full value of his policy. If a pro rata contribution is to be enforced here against Class A policies on the loss to the east wing and its contents, then the full amount of those policies will not hereafter be available in case of a loss on the main building and its contents. To the extent of the sum taken from Class A policies and applied to the loss on the east wing and its contents, the protection of those policies is withdrawn from the main building. This interpretation of the contracts evidenced by the two classes of policies not only does manifest injustice to the plaintiff as regards his indemnity on the A policies, but also effects a result that deprives him of the full value of his B policies. These policies contract to pay him \$60,000 in case of a total loss of the east wing of the building. If, however, the A policies, \$135,000, on the main building, prorate with the B policies, the latter will contribute about one-third of their value to the loss on the east wing. The residue of the B policies, which insure no other part of the plaintiff's buildings, is retained by the companies, and the plaintiff loses it. Such a construction of the policies is not a reasonable one, is against the obvious intention of the parties, and should not be applied.

It is contended by the defendants that, unless both classes of policies contribute ratably to the loss on the east wing and its contents, the plaintiff will not be indemnified to the full extent of his loss on the contents of the wing; and that is urged in support of the defendant's construction of the policy. But we do not regard the fact as sustaining the contention. If the B policies pay the entire loss on the east wing and its contents, the plaintiff gets the full value of his policy, and that is all he has a right to demand. If that is not sufficient to meet his loss, the fault lies with him, in not taking adequate insurance, and not with the interpretation which is here placed on his contracts.

We regard the question raised on this record as settled by the principles announced in the decisions of this court in which the reasons for the rule are fully given, and hence we need not prolong this opinion. In the view we take of the case, the admission of the parol testimony and the action of the court thereon become immaterial, and hence the assignments relating thereto need not be considered.

The judgment is affirmed.

MITCHELL, J. (dissenting). Double insurance is, or ought to be, wherever there are two separate insurers liable for the same loss. The fact that one policy covers more

property or wider risks than the other does not prevent the insurance being double on subjects covered by both. If there had been no Class B in the present case, and the wing had burned, Class A would have been liable to the extent of its policies; but, there being a Class B, both were liable for the same loss, and that is double insurance. If Class B policies were not sufficient to cover the entire loss on the contents of the wing—which was the case here—the insured would be deprived of the full indemnity for which he paid. It is understood that Class A have agreed to indemnify the plaintiff, but the case is none the less dangerous in its effect on the rights of insurers.

There is no difficulty about the ratio. Class A covered risks on \$190,000, and Class B on \$60,000, and that should be the ratio of their liabilities.

It is said that the insured's right to cover additions to the building by the same policies in Class A was a privilege. But that is not a correct statement. The rights of the parties were fixed by the first contract, not by any intention or choice subsequently. To build the addition was a privilege, but to have it covered by the policy when built was a right, and involved the reciprocal right of Class B to hold Class A for contribution on a loss covered by the policies of both. This is not only clear on principle, but I have not seen in any case an adequate answer to it. It must be admitted frankly that there is some difficulty in the language of the authorities in this state. The cases, whether decided rightly or wrongly, are settled, and I would adhere to them. But the principle of law was expressed in some of them much more broadly than the case called for, and I would narrow the expression to what was really necessary in each case. The rule laid down is not properly, logically, or equitably applicable to a case like the present.

HEAVALOW et al. v. CONNER.

(Superior Court of Delaware. Sussex. Oct. 18, 1901.)

JUSTICES OF THE PEACE—JUDGMENT—PROCESS—RECORD.

1. Where the record showed that the summons was issued August 21st, returnable forthwith, and that the return was made on the 21st, and that judgment was rendered by the justice, by default, August 22d, but the summons itself, which was a part of the record, showed that the return was on the 22d, the judgment was sustained.

Certiorari to Justice of the Peace, Sussex County.

Action brought in justice court by Charles A. Conner against James E. Heavalow and another. Judgment for plaintiff by default. Defendants bring certiorari. Affirmed.

The record showed that the summons was issued by a justice on the 21st of August, 1901, made returnable forthwith; that the

return was made on the 21st of August, 1901; and that judgment was rendered by the said justice, by default, on the 22d of August, 1901.

The following exceptions were filed: "First. For that it does not appear from the said record that the said justice rendered said judgment on the day upon which the summons was returnable. Second. For that the said defendants were summoned on the 21st day of August, 1901, to appear before said justice forthwith, and judgment by default was rendered on another and a different day from the one upon which the said defendants were required to appear."

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Charles F. Richards, for plaintiffs in error. Andrew J. Lynch and Charles W. Cullen, for defendant in error.

LORE, C. J. The record shows that the summons was issued returnable on the 21st, but the summons itself, which is a part of the record, shows that the return was on the 22d.

The judgment below is affirmed.

STATE v. McDANIEL et al.

(Court of General Sessions of Delaware. New Castle. Sept. 22, 1902.)

FALSE PRETENSES — INDICTMENT — SUFFICIENCY—MOTION TO QUASH—BILL OF PARTICULARS—CONTINUANCE.

1. The application for a bill of particulars ought to be in writing, and ought to point out fully all the particulars desired.

2. A general motion to quash an indictment need not set out the reasons relied on.

3. An indictment against a sheriff and other officials for conspiracy to obtain money from the receiver of taxes and county treasurer by false pretenses, consisting of a padded bill of the sheriff for vagrants and prisoners lodged in the county jail, sustained.

4. A bill of particulars setting forth the number and names of the alleged vagrants and prisoners in the jail, and the number and names of said vagrants and prisoners alleged to have been falsely reported, etc., was unnecessary.

5. The state, in seeking the continuance of a criminal prosecution, at the second term after the indictment, on the ground of the absence of a material witness, should give the name of the witness and state what it expects to prove by him, and the probability of procuring his attendance at the next term of court.

6. Rev. Code 1852, as amended in 1893, p. 858, c. 115, § 17, provides that, if any person shall be committed for treason or felony, and shall not be indicted and tried at the second term after his commitment, he shall be discharged from prison. A sheriff and other officials were indicted for conspiring to obtain money from the receiver of taxes and county treasurer by false pretenses. At the second term after the indictment the state moved for a second continuance for an absent witness. Held, that the motion should be denied.

Samuel A. McDaniel and others were indicted for crime. Nolle prosequi entered.

The defendants were indicted at the May term, 1902, for obtaining money by false pretense. The indictment contained two counts. The first count was as follows:

"The grand inquest of the state of Delaware and the body of New Castle county on their oath and affirmation, respectively, do present:

"That Samuel A. McDaniel of the hundred of New Castle, Evan G. Boyd of the hundred of New Castle, Harvey B. Wigglesworth of the hundred of Wilmington, and Walter Rash of the hundred of Wilmington, all in the county of New Castle and the state of Delaware, on the 31st of March in the year of our Lord one thousand nine hundred and one, at New Castle hundred, in the county of New Castle aforesaid, he, the said Samuel A. McDaniel then and there being the sheriff of said county of New Castle, and he, the said Harvey B. Wigglesworth then and there being a warden in the county jail for said county and a deputy under him, the said Samuel A. McDaniel, sheriff, as aforesaid, and the said Walter Rash then and there being a warden in the said county jail and a deputy under him, the said Samuel A. McDaniel, sheriff as aforesaid, and he, the said Evan G. Boyd, then and there being mayor of the city of New Castle in said county, and being persons of evil minds and dispositions, with force and arms unlawfully and wickedly did conspire, combine, confederate, and agree together by certain false pretenses unlawfully to obtain for the use and benefit of the said Samuel A. McDaniel, from a certain Horace G. Rettew, the said Horace G. Rettew then and there being the receiver of taxes and county treasurer of the county of New Castle aforesaid, a large sum of money, to wit, the sum of two thousand five hundred dollars, lawful money of the United States of America, the kind and denomination of which money is to the jurors aforesaid unknown, of the money, goods, and chattels then and there the property of and in the ownership, possession, and control of him, the said Horace G. Rettew, receiver of taxes and county treasurer for said New Castle county as aforesaid; the which said false pretenses in pursuance of and according to the said conspiracy, combination, confederacy, and agreement of the said Samuel A. McDaniel, Harvey B. Wigglesworth, Walter Rash, and Evan G. Boyd so had as aforesaid were thereafter, on and about the 30th of June, 1901, at the county aforesaid, embodied in a certain false, deceitful, fraudulent, and padded bill of the said Samuel A. McDaniel, as sheriff as aforesaid, for the three months ending on the said 30th day of June, A. D. 1901, which said false, deceitful, fraudulent, and padded bill was in due course then and there presented by the said Samuel A. McDaniel, as sheriff as aforesaid, to George D. Kelley, county comptroller for the county of New Castle aforesaid, and to the levy court commissioners of New Castle county aforesaid, for the purpose of then

† 2. See Indictment and Information. vol. 27. Cent. Dig. § 472.

and there obtaining the approval thereon by the said comptroller for said county and by the said levy court commissioners for said county, and the consequent payment thereof then and there out of the funds and moneys which were then and there of the property of and in the possession, ownership, and control of him, the said Horace G. Rettew, receiver of taxes and county treasurer for said county, and by which said false, deceitful, fraudulent, and padded bill was then and there falsely, untruly, fraudulently, and knowingly stated and set forth the pretended and therein alleged number of vagrants lodging and prisoners being and remaining in the jail of New Castle county from day to day in and during the three months ending on the said 30th day of June, A. D. 1901; with intent then and there by means of the said false pretenses to cheat and defraud the said Horace G. Rettew, receiver of taxes and county treasurer of said county as aforesaid, of the said sum of money, to the evil example of all others in like case offending, and against the form of an act of the General Assembly in case made and provided, and against the peace and dignity of the state."

The second count differed from the first only in that it set forth after the charge that the defendants "did conspire, combine, confederate, and agree together" the words "and with other evilly disposed persons whose names are to the jurors aforesaid unknown."

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State. Anthony Higgins, Alexander B. Cooper, and William S. Hilles, for defendants.

Counsel for defendants gave notice that they would move to quash the indictment, and, if that was refused, they would move the court to order the Attorney General to file a bill of particulars.

The Attorney General asked that both the motion to quash the indictment and the motion for the bill of particulars be reduced to writing, and that the counsel for the defendants furnish the state with a copy of the same.

LORE, C. J. We think that the application for a bill of particulars ought to be in writing, and ought to point out fully all the particulars you desire. And it should be filed in the court of general sessions.

Mr. Higgins: Has the court ruled whether we should set out the reasons in our motion to quash?

LORE, C. J. While it would be a good practice, and would probably shorten the matter, to specify to what particular defect you object in the indictment, yet I know of no rule requiring the reasons to be set out in a general motion to quash. Such motion goes simply to the face of the indictment,

which discloses whatever defects there may be, and of what the framer is bound to take notice.

Motion to Quash Indictment.

Counsel for defendants moved to quash the indictment as insufficient:

First. Because it failed to allege the facts more particularly set forth, and asked for in defendants' motion for a bill of particulars filed in this cause, and which need not be repeated here.

PER OURIAM. The indictment is sustained

Motion for Bill of Particulars.

The defendants, by their attorney, move the court for an order on the Attorney General to file or furnish the defendants with a bill of particulars showing the particular acts relied upon, and more particularly:

(1) The number and names of the alleged "vagrants, lodgers, and prisoners" in the jail of New Castle county during the quarter ending June 30, 1901.

(2) The number and names of said vagrants and prisoners alleged to have been falsely reported to have been in the said jail for the period aforesaid.

(3) The days and dates upon which said vagrants and prisoners alleged falsely to have been in said jail, and the number being and remaining there each day.

(4) In what specific way the said bill of said sheriff as presented to the county comptroller and levy court was false or padded as to numbers, dates, and names.

(5) That he set forth with accuracy the number and names of said falsely pretended vagrants and prisoners for each day during said quarter ending June 30, 1901, giving therein their names and the dates of alleged commitments.

(6) That he set forth accurately and specifically the overt acts upon which he relies.

(7) That he shall with sufficient detail set forth the overt acts, and the names, number, and dates of all commitments of the vagrants lodging and prisoners in said jail, which are alleged to have been falsely presented by the said Samuel A. McDaniel as "being and remaining in said jail from day to day in and during the three months ending on the said 30th day of June, A. D. 1901."

(8) That he supply the defendants with the facts on which the prosecution seeks to establish the offense.

All of which is moved by reason of the charges of the Attorney General in the indictment, and also that the defendants may not be taken by surprise at the trial, and that the judgment, should it be rendered against them, may be pleaded in bar to any further prosecution, etc.

LORE, C. J. The court have considered the arguments upon the motion for a bill of particulars in the case of State v. McDaniel

et al., and have reached the conclusion that this case does not present itself to us in such a way as to warrant the court in making an order for a bill of particulars. We therefore refuse to make such order.

Defendants excepted.

LORE, C. J. We understand that it is conceded by counsel for the defendants that this matter rests largely in the discretion of the court. We do not think this is a matter to which an exception can be properly taken, but with that statement by the court we will note that you asked leave to except.

Defendants thereupon moved for a continuance to the September term upon affidavits by defendants, alleging absence from the state of a material witness and setting out what they proposed to prove by said witness.

Continuance granted.

At the September term the Attorney General moved for a continuance to the next term on a like ground.

Mr. Hilles, of counsel for defendants, stated that he would waive the affidavit by the Attorney General, but insisted that, if the court held that there was ground for continuance, the defendants would insist upon the Attorney General stating the name of the absent witness, and what he expected to prove by him.

Mr. Cooper, of counsel for defendants, made a motion that the state either proceed with the prosecution at this term, or that the defendants be discharged—this being the second term after their indictment—under chapter 115, p. 858, § 17, Rev. Code, 1852, amended in 1893.

LORE, C. J. We think that the state in a case of this kind should give the name of the absent witness, what it proposed to prove by him, and the probability of getting him here at the next term of court.

The Attorney General thereupon stated that the name of the absent witness was Montylao A. Cole, and detailed what the state expected to prove by said witness.

LORE, C. J. The court are unanimously of the opinion, under the circumstances of this case and in view of the statute cited by Mr. Cooper—and by that parity of reasoning applying it to this case—that we ought not to continue this case to the next term.

The Attorney General thereupon entered a nolle prosequi.

MATTESON v. MOONE.

(Supreme Court of Rhode Island. April 17, 1903.)

STATUTE OF FRAUDS—COLLATERAL UNDERTAKING.

1. Where credit for goods delivered to R. was given to R. as well as to defendant, de-

fendant's promise to pay is collateral, and therefore required by the statute of frauds to be in writing.

Assumpsit by Arthur J. Matteson against Benjamin Moone. Defendant petitions for a new trial. Granted.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Matteson & Healy, for plaintiff. George A. Littlefield, for defendant.

PER CURIAM. The plaintiff in this case sues to recover the price of groceries delivered to one William B. Riddle. The claim that defendant's son was authorized to contract for these goods in his father's name is based upon quite unsatisfactory evidence; but the books and letters of the plaintiff prove that credit was given to Riddle as well as to the defendant. In such case the promise of the defendant, if any were made, must be held to be collateral, and not binding upon him, because not made in writing. The case is governed by the decision in *Wood v. Patch*, 11 R. I. 445.

The case will be remanded to the common pleas division, with direction to enter judgment for the defendant.

STATE v. GRUNER.

(Supreme Court of Rhode Island. April 17, 1903.)

INTOXICATING LIQUORS—ILLEGALLY KEEP- ING FOR SALE—TITLE—DE- FENSES—EVIDENCE.

1. A person may be guilty of illegally keeping liquor for sale, even though the title to the liquors sold was in another.

2. Where the testimony of defendant showed that she owned the property, had the key to the place where the liquors were stored, and owned the furniture, and she testified that her husband owned the liquors, a ruling as to presumption of ownership by her husband was immaterial.

3. In a proceeding for illegally keeping liquors for sale, where defendant testified that her husband owned the liquors, the fact that he had been summoned in a proceeding to forfeit the liquors, but did not appear as claimant, would furnish no implication or ground for defense.

Jennie M. Gruner was convicted of illegally keeping liquors for sale, and petitions for a new trial. Petition denied.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLASS, JJ.

William B. Greenough, Asst. Atty. Gen. for the State. John C. Burke, for defendant.

PER CURIAM. The court is of opinion that there was evidence sufficient to sustain the verdict from defendant's ownership, occupancy, and apparent control of the property; evidence tending to show selling in the absence of her husband, and her own admissions.

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 26.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 158.

There was no error in refusing to charge as requested. The defendant may be guilty of illegally keeping liquor for sale, even though the title to the liquors sold was in another.

The testimony of the defendant shows that she owned the property; that she had the key to the place where the liquors were stored; that the furniture was hers; and she testified that her husband owned the liquors. A ruling, therefore, as to presumption of ownership by her husband was immaterial.

The fact that in a proceeding for forfeiture of the liquors the husband had been summoned, but did not appear as claimant, would furnish no implication or ground of defense in this case.

The only exception to evidence as shown in the record was to a question apparently calling for a conversation with the defendant. The witness stated what he said to her, but no reply was given. If this was error, which we cannot determine from the record, it was harmless, and is no ground for a new trial.

Petition for new trial denied.

BUCCI v. WATERMAN.

(Supreme Court of Rhode Island. April 17, 1903.)

NEGLIGENCE—DRIVERS OF VEHICLES—TRESPASSERS—INJURIES TO CHILD—SUFFICIENCY OF PETITION—QUESTION FOR JURY.

1. A petition alleged in its first count that plaintiff, a child six years old, attempted to get on a low-gear vehicle driven by defendant's servant, and that the servant so carelessly and negligently ejected plaintiff as to cause him to fall in front of one of the wheels, which ran over him. *Held* defective in not setting out with sufficient definiteness the servant's negligence.

2. It is the duty of the driver of a vehicle ejecting therefrom an intruder six years old to use reasonable care, in so doing, to avoid injury to the child, and to give it an opportunity to get off without injury.

3. A petition alleged in its second count that plaintiff, six years old, attempted to get on a vehicle driven by defendant's servant, who, by an order to get off, given in a threatening manner, while the vehicle was in motion, frightened plaintiff so as to disconcert him, and cause him to fall while trying to get off. *Held* sufficiently definite.

4. Whether a servant, in ejecting a child six years old from a moving vehicle, was negligent or not was a question for the jury.

Trespass on the case for negligence by Dominica Bucci, pro ami, against Thomas W. Waterman. Heard on demurrer to declaration. Demurrer to first count sustained, and demurrer to second count overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Doran & Flanagan, for plaintiff. Van
Slyck & Mumford, for defendant.

DOUGLAS, J. The declaration is in two counts, to each of which the defendant demurs on the grounds that the count does not

set forth any duty from the defendant to the plaintiff which has been violated, that it does not appear by the count that the defendant has been guilty of negligence, that the count does not specify any acts of negligence sufficient to entitle plaintiff to recover.

The substantial allegations of the first count are that the plaintiff, a child six years of age, got upon a low gear which was being driven by defendant's servant upon a public highway; that the servant, in the course of his employment, undertook to eject the plaintiff from the low gear, but so carelessly and negligently ejected him as to cause him, while exercising due care, to fall in front of one of the wheels of the vehicle, whereupon said wheel passed over his body, and severely and permanently injured him. The second count, in addition to these allegations, alleges: "That, in view of the extreme youth of plaintiff, it was the duty of the defendant and of his said agent, in the event that they or either of them desired to remove the plaintiff from said low gear, to use reasonable care, in so doing, to avoid causing injury to plaintiff; and to give plaintiff an opportunity to get off without injury; but said driver, while his team continued traveling, and without stopping, in a threatening manner ordered plaintiff to get off, thereby frightening and disconcerting plaintiff; and plaintiff, in fear, and using due care in the premises, tried to comply with said order, but by reason of the motion of the low gear and his fear, caused as aforesaid, and the negligence of the driver in ordering him off in the manner aforesaid, was caused to fall to the ground," etc., as in the first count.

We think the first count is defective in not setting out with sufficient definiteness the negligence of the defendant's servant by which the plaintiff was injured. "Ordinarily, unless the particular duty and its breach are set forth in the declaration, no negligence appears." *Parker v. Prov. & Stonington S. Co.*, 17 R. I. 379, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 83 Am. St. Rep. 899. In this case it was the right of the driver to eject the plaintiff, and no cause of action is stated until it is averred how he overstepped his right.

The second count, we think, corrects this deficiency. It is the duty of the driver of such a vehicle, as the second count alleges, when he wishes to eject from his wagon an intruder six years old, to use reasonable care, in so doing, to avoid injury to the child, and to give the child an opportunity to get off without injury; and the count states in general terms that the driver neglected that duty, in that by an order to get off, given in a threatening manner, while the low gear was in motion, he frightened the child so as to disconcert him and cause him to fall while trying to get off. If this is true, we think it is at least a question for the jury whether the driver was negligent or not. The manner of the driver, his tone of voice, the rate

of speed of the low gear, the position of the child upon it, and other circumstances which may be learned from witnesses cannot practically be set forth in a declaration, and hence are not necessary to its validity. The principles on which the defendant's liability rests in cases of this character are well established. They appear in many cases where persons of various ages, while stealing rides upon steam cars, have been ordered off, and in obeying the orders have suffered injury. In *Enright v. Pittsburgh Junction R. R. Co.*, 198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 795, it is held that a child of 10 years, who, while trespassing on a freight train, is frightened by the shouts and threatening action of a brakeman while in the discharge of his duties, so that he jumps from the train while it is in rapid motion and is injured, may recover damages from the railroad company for the injuries sustained. The court say (page 170, 198 Pa., page 939, 47 Atl., 53 L. R. A. 330, 82 Am. St. Rep. 795): "The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employé in frightening him so that he attempted to quit the train in the face of an imminent danger." In *Arnold v. Penna. R. R. Co.*, 115 Pa. 140, 8 Atl. 215, 2 Am. St. Rep. 542, it is said: "Even a trespasser cannot be ejected from a train without a reasonable regard for his safety." The same doctrine is held in *Sioux City & Pacific R. R. Co. v. Stout*, 84 U. S. 657, 21 L. Ed. 745. In *Benton v. C. & P. R. R. Co.*, 55 Iowa, 496, 8 N. W. 330, a boy 11 years old entered an empty freight car to steal a ride. After the car started, he was ordered out by the conductor, and in attempting to obey the order fell on the track, and was killed. It was held that the order given to a child of that age might have amounted to compulsion, and that it was for the jury to say whether it was so in fact. In *Bogges v. Ches. & Ohio Ry. Co.*, 37 W. Va. 297, 18 S. E. 525, 23 L. R. A. 777, the plaintiff jumped from a moving train after being ordered by the conductor to get off. It was held that the order, in the circumstances, amounted to force. In *Kansas City, etc., R. R. Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596, it was held that, where a boy 15 years old gets upon a freight train wrongfully and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion in the nighttime, and in obedience to that command and in fear of being thrown off jumps off the train and is run over and injured, the company is liable. To the same effect are *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Clark v. N. Y., L. E. & W. R. R. Co.*, 40 Hun

(47 N. Y. Supp. Ct.) 605. *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 39 N. E. 708, 45 Am. St. Rep. 607, applies the same principles to the case of a boy 10 years old who was frightened from the front step of a street car by an exclamation of the conductor. It may be said that there is little similarity between a steam car, moving at ordinary speed, and a low gear as usually driven upon the street; but the injury alleged to have been suffered by the plaintiff by falling from the low gear is as great as might be caused by jumping from a railway train, and the same legal responsibilities attach to one who caused the injury in one case as in the other. It might be clearly negligence in the eye of the law to cause a person to jump from a train, and the question might be more doubtful in respect to the less dangerous agency; but this consideration only shifts the decision from the court to the jury, and we cannot say, as matter of law, that the facts set out in this count do not constitute negligence.

Demurrer to the first count sustained. Demurrer to the second count overruled.

GLADDING v. UNION R. CO.

(Supreme Court of Rhode Island. April 17, 1903.)

NEW TRIAL—WITHDRAWAL OF PETITION—EFFECT—AMENDMENTS—MISFORTUNE, ACCIDENT, OR MISTAKE—NOTICE AT TIME OF FILING PETITION.

1. After verdict for plaintiff in the common pleas division defendant filed its petition for a new trial under Gen. Laws, p. 862, c. 251, having taken all requisite preliminary steps. On the same day plaintiff, without taking any previous steps in that direction, also filed a petition for a new trial; and the papers were certified to the appellate division, where plaintiff filed a motion to amend his petition, together with an amended petition in conformity therewith. Thereupon defendant filed a withdrawal of its petition. Held that, as the withdrawal of defendant's petition did not withdraw the other papers in the cause from the jurisdiction of the court, defendant might abandon its petition, as no injury to plaintiff would be caused thereby.

2. Plaintiff was entitled to a hearing on his petition on reimbursing defendant for the amount expended by it for the transcript of testimony and rulings filed in the case.

3. Plaintiff's proposed amendment to his petition for a new trial related to certain matters occurring in open court, and there was no claim made that they were omitted from the petition by reason of any accident or mistake. Held, that the amendment should be refused in accordance with the general rule that a petition for a new trial cannot be amended by adding new and additional assignments of error, of which the party had notice at the time of filing the petition.

Action by Charles F. Gladding against the Union Railroad Company. Heard on defendant's withdrawal of its petition for a new trial, on its motion to dismiss plaintiff's petition for a new trial, and on plaintiff's motion to amend his said petition. Defendant's petition for a new trial ordered withdrawn, its motion to dismiss plaintiff's petition for a

new trial denied, provided plaintiff take and pay for the transcript of the testimony and rulings filed in the case, and plaintiff's motion to amend his petition for a new trial denied.

Argued before STINESS, C. J., and TIL-
LINGHAST and DUBOIS, JJ.

Irving Champlin, for plaintiff. David S. Baker and Lewis A. Waterman, for defendant.

DUBOIS, J. This is an action of trespass on the case for negligence, originally brought in the common pleas division of this court. After a verdict for the plaintiff, the defendant, taking all of the requisite preliminary steps, filed its petition for a new trial. On the same day the plaintiff, without having taken any previous steps in that direction, filed his petition for a new trial, and the clerk of that division certified to this all the papers in the cause. The plaintiff here filed a motion to amend his petition for a new trial and an amended petition in conformity therewith, whereupon the defendant filed its withdrawal of its said petition for a new trial and motion to dismiss the plaintiff's petition for a new trial. The petitions for a new trial were filed under Gen. Laws, p. 862, c. 251, "Of New Trials." Section 5 of said chapter defines the rights of petitioners for a new trial. Section 6 thereof prescribes the course of procedure to be complied with by such petitioners. The effect of a compliance with the first three clauses of said section 6 is to stay judgment in said division, and to cause its clerk to certify all the papers in the cause to the appellate division. Section 10 of said chapter provides for a further stay of judgment until the matter has been decided by the appellate division and until its decision has been certified to the common pleas division. Jurisdiction of the cause and of all of its papers being thus conferred upon the appellate division, it may, in its discretion, entertain the plaintiff's petition for a new trial. The objections against such an exercise of judicial discretion are that the plaintiff slumbered upon his rights, and allowed the defendant to perform all of the work and assume all of the expense attendant upon the presentation and prosecution of a petition for a new trial, and ought not now to be permitted to take advantage of such diligence. It would be mere idle ceremony to require the filing of duplicate notices and transcripts of testimony entailing needless expense. The defendant paved the way by which its and the plaintiff's petitions reached their destination, and it is entitled to the presumption that it acted in good faith. It now desires to withdraw its petition. In fact, subject to the approval of the court, it has withdrawn it. If the defendant does not desire to proceed with its petition, there is no reason why it may not abandon the same, so long as the plaintiff is not injured thereby. Withdraw-

ing the petition does not withdraw the other papers from the jurisdiction of the court. The petition of the plaintiff is before the court, and he is entitled to a hearing upon it if the court is satisfied that substantial justice can be reached in that way. It would be manifestly unfair, however, to allow the plaintiff to avail himself of the steps taken by the defendant until he has repaid to it the cost of the transcript of testimony and rulings filed in the case.

The plaintiff's motion to amend his petition must be denied. The proposed amendment relates to acts of the servants and agents of the defendant during the trial of the case, whereby the plaintiff claims that the jury were prejudiced against him. The acts alluded to were brought to the attention of the plaintiff and his counsel in open court in a most conspicuous manner, and could hardly have been forgotten or overlooked during the preparation of the petition for a new trial. There is no claim made that they were omitted from the petition for a new trial by reason of any misfortune, accident, or mistake. No cause being shown to the contrary, the motion is governed by the general rule. A petition for a new trial may be amended by making the assignments of error more specific, but not by adding new and additional assignments of error, of which the party had notice at the time of filing his petition. Ency. Pl. & Pr. 14, p. 894, and cases cited.

Defendant's petition for a new trial may be withdrawn. Defendant's motion to dismiss plaintiff's petition for a new trial denied, provided that the plaintiff shall take and pay for the transcript of the testimony and rulings filed in the case. Plaintiff's motion to amend his petition for a new trial denied.

BROWN v. PROVIDENCE TELEGRAM PUB. CO.

(Supreme Court of Rhode Island. April 15,
1903.)

LIBEL — COURT PROCEEDINGS — PRIVILEGED PUBLICATIONS—INNUENCES—SURPLUS- AGE—EXCESSIVE VERDICT.

1. While newspaper reports of proceedings in court are privileged, provided they are founded on truthful statements and proceed from good motives, this does not permit a newspaper to prejudge a case, or to misstate it, or to hold up to scorn or ridicule, either directly or by implication, a litigant.

2. While most of the facts categorically stated in defendant's newspaper as to the case in which plaintiff was involved and the litigation which led up to an execution on his house were true, they were accompanied with insinuations against plaintiff's character, and statements to the effect that whether plaintiff could save his house from the auctioneer would depend on the result of the case, and that it was said that he would now have to produce money or lose property credited to him. The whole article with reference to plaintiff's connection with a competing newspaper showed the motive of the publication was to do personal injury to plaintiff. Held, that the article was clearly libelous.

3. Where the statements in a newspaper article on which a libel suit is based are libelous per se, innuendoes in the declaration, not justified by the language of the article, must be treated as surplusage.

4. Where it appears in a libel suit against a newspaper that the article complained of was submitted to the scrutiny of at least two of defendant's officials before publication, it must be considered to be the deliberate utterance of defendant, and the expression of its well-considered attitude towards plaintiff.

5. Where, in a libel suit, it was shown that, in consequence of the newspaper article complained of, plaintiff had to furnish his bank a statement as to his financial standing, though he had been in business 30 years, that he had lost considerable trade in a neighboring city, in which defendant's paper was read, and that the paper had a circulation of 32,000 copies per diem, \$1,500 was not excessive damages.

Trespass on the case for libel by D. Russell Brown against the Providence Telegram Publishing Company. Decision for plaintiff, and defendant petitions for a new trial. Petition denied.

Argued before STINNESS, C. J., and TILLINGHAST and DUBOIS, JJ.

Edward D. Bassett and Dexter B. Potter, for plaintiff. Charles A. Wilson and William J. Brown, for defendant.

PER CURIAM. The defendant's petition for a new trial is denied, and judgment will be rendered upon the decision of Mr. Justice DOUGLAS, which is approved and adopted as the opinion of the court:

Decision.

DOUGLAS, J. This is an action of libel, complaining of the publication of an article which appeared in the defendant's newspaper October 18, 1899, purporting, under displayed headings, to give an account of "Gov. Brown's Legal Troubles," with the subtitles, also displayed, "Creditor in Form of New England Butt Company After Him Red Hot for Settlement. Other Peculiar Matters Journalistic Stock Transfer to Former Governor's Son to be Probed in Action Brought."

The legal principles applicable to a case of this kind have been recently announced by this court in *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 78 Am. St. Rep. 900. It may be further observed, as applicable to the present case, that, if any class of people have the right to invoke the protection of the law against malicious intermeddling with their reputations, litigants in the courts should be so guarded.

1. The orderly system of our social life, which excludes the private redress of wrongs, provides these tribunals, and compels the citizen to resort to them to enforce his rights or to defend against unjust claims. When he is in court, therefore, as a party or as a witness, any publication unjustly commenting upon his case or his behavior calls for severe condemnation. The conduct of the judge and

jury and the decisions of the court are proper subjects of fair and temperate criticism. These are public officers performing their work in the face of public opinion, and they are responsible to the people, from whom they derive their powers, for the honest and intelligent exercise of their official functions. A newspaper, or an individual who writes for a newspaper, may argue against the conclusions of law announced by the court, or may criticise its methods of procedure with a view to promote the correction of errors or abuses, and great latitude is allowable in such articles, provided they are founded on truthful statements and proceed from good motives. It is conceded that the proceedings of the courts in a general way constitute legitimate items for the newsgatherer to publish. The results of a majority of cases tried as a matter of fact concern no one but the parties to them, but incidentally propositions of law are considered which interest the community generally, and it would be contracting the right of free speech into a narrow channel to require a selection of only those cases for report which concern public questions. To a fair and true publication of his case a litigant must submit. It is only an extension of the publicity of the courtroom itself. But this principle gives neither to a newspaper nor to an individual the right to prejudice a case, or to misstate it, or to hold up to scorn or ridicule, either directly or by natural implication from his language, a party who is pursuing his legal remedies in court.

2. If one avails himself of the privilege, which is given for public reasons, to publish a report of court proceedings, he must make such report full, true, and fair, at his peril. Tried by these principles, the article complained of in this case is plainly libelous. It relates truthfully enough certain things that took place in court. It reproduces with substantial accuracy the tenor of the pleadings, and states the history of the litigation which terminated in the issue of an execution and the levy of it upon the plaintiff's residence. Most of the facts, categorically stated, are substantially true; and, if this were all, while the reference to cases long ago terminated might be considered a stretch of the newsgatherer's net not required by any public necessity, the article could not be seriously condemned. But every statement of fact is accompanied with comment, and inference, and insinuation directly tending to excite ridicule and depreciation of the plaintiff's character. More than this: there are direct statements which assert or clearly imply the plaintiff's inability to meet his pecuniary obligations. In one part of the article the assertion is made that "whether or not he can keep" his residence "out of the auctioneer's hands depends upon the result of a hearing which will take place to-morrow in the appellate division," and this statement might well happen to be read by persons who would not read the whole article and

¶ 3 See Libel and Slander, vol. 32, Cent. Dig. § 208.

come upon the statement below, which changes the alternative prophesied by saying, "It is said that Mr. Brown now has reached the point where he will have to produce money or suffer the amputation of property possessions credited to him," which is itself an insinuation that he was carrying property in his name which did not belong to him, and thus obtaining false credit. The frequent references throughout the article to the plaintiff's connection with an evening paper published in competition with the defendant's journal, as well as the whole tone of the article and its reference to the plaintiff, show that the motive of the publication was to do personal injury to the plaintiff from dislike and ill will, and not the giving to the public a fair and truthful report of the litigation which is made the occasion of it.

3. Some of the innuendoes in the declaration may not be justified by the language; but these must be treated as surplusage, since there is enough in the article which is libelous without explanation. *Porter v. Post Publishing Co.*, 20 R. I. 88, 37 Atl. 535. The case in that respect is like the one considered in *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 515, 48 N. E. 275, where it is said by Holmes, J.: "It is not necessary to state these innuendoes in detail, or to consider whether they are all borne out by the words; for, if they are not, they may be rejected as surplusage, when, as here, the words, read as ordinary persons would understand them, are libelous per se. It is settled in England, and so far as the question has arisen in this country, in accordance with good sense, that to that extent the plaintiff was not debarred from relying on the wrong alleged and complained of merely because he interpreted it as going farther than it did in fact"—citing numerous cases. It appears in evidence that this report, after being written, was submitted to the scrutiny of at least two of the defendant's officials before publication; hence we must take the article to be the deliberate utterance of the defendant, and the expression of its well-considered temper and attitude towards the plaintiff. In consequence of this publication, the defendant, who had been engaged in business in this community for 30 years, was required by the bank with which he was accustomed to deal to furnish a statement of assets and liabilities, and he was compelled to submit to this humiliation as if he had been suspected of insolvency. He further testifies to a considerable loss of trade in a neighboring city where this paper was circulated. These elements of actual damage are necessarily indefinite as data for computation in money of the injury done, but the case is one which forbids the assessment of merely nominal damages. Taking into account the circulation of the paper, which was admitted at the trial to be 32,000 copies per diem, and all the other circumstances of the case, I do not consider the sum of \$1,500 as an excessive remuneration

to the plaintiff for what he must have suffered from this libel, and I assess the damages at that amount.

Decision for the plaintiff for \$1,500 and costs.

STATE v. NAGLE.

(Supreme Court of Rhode Island. April 15, 1903.)

HOMICIDE—CONFESSIONS—CIRCUMSTANTIAL EVIDENCE—REVERSIBLE ERROR.

1. In determining whether it was reversible error for a trial court to admit a confession of one accused of a crime, it is immaterial how far the confession tended to prove the guilt of the accused.

2. While defendant, who was tried for murder on circumstantial evidence, was in the custody on the way to jail charged with the crime, she stoutly protested her innocence, whereupon the officer told her that she could plead either guilty or not guilty, but that the truth, whatever that might be, ought to be told, and that, even if it would mean conviction, he should prefer it if it were his case. She then said that she had not bought the revolver found near the deceased, and had never been in H.'s store, whereupon the officer told her that there was ample proof that she had bought the revolver, and that, having mentioned the place, she might as well tell whether she bought it, and asked her what she paid for it, to which she replied that she paid \$2. *Held*, that defendant's confession was not voluntary.

3. In order to determine, from the nature of the powder burn around the wound of a victim of a homicide, the position in which the 32-caliber revolver was held with which the victim was shot, an expert on gunshot wounds testified to experiments he had made with 32-caliber revolvers to determine the nature of the powder burn produced by them, and then to experiments with the particular revolver alleged to have been used by defendant. *Held*, that the testimony as to experiments with the particular revolver in question was admissible in connection with the expert evidence.

Rose Nagle was convicted of murder, and she petitions for a new trial. Petition granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Charles F. Stearns, Atty. Gen., for the State. George R. Macleod, for defendant.

TILLINGHAST, J. The defendant, who has been convicted of the crime of murder, now petitions for a new trial on various grounds, amongst which are certain alleged erroneous rulings of the trial court in the admission of testimony.

The defendant's husband, James Nagle, came to his death on the 14th day of November, 1901, at about 5 o'clock in the morning, from the effect of a pistol shot which was fired into his head while he was in bed, or on the bed, in his own house in East Providence. Shortly after the fatal shot was fired, the defendant called in some of her neighbors, and told them that her husband had shot himself, which statement was then accepted by them, as it also was by the medi-

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 554.

cal examiner, who appeared a few moments later, as being true. The day following, however, in view of certain circumstantial evidence which had been discovered in relation to the taking off of the deceased, and particularly in relation to the alleged purchase by the defendant, a short time before, of a pistol at the store of Halliday Bros. in East Providence, she was arrested upon a criminal complaint charging her with the murder of her husband. Upon being arraigned in the district court of the Seventh Judicial District she pleaded not guilty to said charge, and was ordered committed to jail to await a preliminary examination in said court. She was committed to jail by Samuel S. Barney, town sergeant and mittimus officer of the town of East Providence, and while on the way to jail in his custody certain statements or admissions were made by her, according to his testimony, to which he was allowed to testify against the defendant's objection in the trial of the indictment now before us. Before testifying to such statements or admissions, the witness was inquired of by the attorney general as to whether any inducement was offered to defendant to talk about the affair; also whether the witness tried to get her to talk with him about it, or whether he made any threat to her in the premises. His answer was that he had no inducement to hold out to her, and actually held out none; whereupon he was permitted, against the defendant's objection, to testify to the conversation which took place between them. He testified as follows: "She insisted on her innocence. She said: 'They have found me guilty, and bound me over to the grand jury—guilty of killing Jimmy. I am innocent. I did not kill him.' I said to her: 'You have an undoubted right to plead guilty or not guilty. That is your privilege. There is no reason why you should plead guilty. You have that privilege. The court allows you that either way.' There was nothing further said about the matter of killing directly. She said something about the pistol. She says: 'I didn't buy a pistol. In fact,' she says, 'I was never in Halliday's store in my life.' I reminded her that nothing had been said about Halliday's store; that I hadn't mentioned it. She talked rather incoherently about some other matters, and I asked her a question. I said, 'What did you pay for the pistol?' She said '\$2.' She didn't say where she bought it directly. 'Well,' I said, 'did you pay for the cartridges?' She said, 'They gave me the cartridges in the store.' Q. Was there anything said in that conversation about insurance on James Nagle's life? A. There was. She said that she had two insurance policies, if I remember correctly, \$200 each, or something to that effect. 'If I am proven and found guilty I shall lose that; I would not get a cent of it.'" In cross-examination the court said to defendant's counsel, "You can ascertain now about those threats and the in-

ducements held out." The witness then stated that he told defendant that the truth, whatever that might be, ought to be told, but that she had an undoubted right to plead guilty or not guilty in regard to any part of the case which was coming before the court; that he also told her: "The truth is always the best, except where it would be a means of conviction; and even then I should prefer, if it was my case, to tell the truth. Q. And you told her that before she said these things? A. Yes, sir; I told her so always."

In view of these admissions on the part of the witness Barney, the defendant's counsel then requested that the jury be instructed not to consider said testimony, on the ground that witness had no right to give her advice at all, or hold out any inducements. This request was denied, and the defendant duly excepted thereto. In further cross-examination witness testified that he said to defendant: "'It is thought that you bought this revolver,' but she said, 'No, sir; I did not buy it.' I said to her, 'There is no question but what you bought the revolver, and if you did you will gain nothing by denying it.' Also: 'It would be better for you to tell the truth. We have ample proof that you purchased this revolver.' That she said: 'I did not, and I never was in Halliday's store in my life.' I remarked that I did not mention Halliday's store in the matter at all. 'Now,' I said, 'having mentioned the place where you bought it, you might just as well say whether or not you bought it. What did you pay them for that revolver?' She said 'I paid them \$2.00 for it, and they gave me the cartridges.'" Defendant then told witness where she had put the revolver, but she persistently denied ever having used it upon her husband.

The question raised by the defendant's exception, broadly considered, is whether the court erred in not granting defendant's request to instruct the jury not to consider any part of said Barney's testimony which related to statements or admissions made by defendant concerning the purchase of the pistol and the procuring of the cartridges therefor. Although the statements or admissions in question did not amount to a confession within the strict legal import of that term—a confession being a voluntary acknowledgment of guilt, or, as well and concisely defined in Stephen's Digest of the Law of Evidence, p. 52, "A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime"—yet, as said admissions had a vital bearing upon a highly important link in the chain of circumstantial evidence relied on by the prosecution, we must regard them as in the nature of a confession. Indeed, we think it is manifest from the record that the sole ground upon which the proof of the conversation above set out was tendered by the prosecution was that it was in the nature of a

confession. And, this being so, it follows that in determining whether the proper foundation for its admission was laid, or, rather, whether the trial court erred in not ruling it out, as requested by defendant, it is immaterial how far the confession tended to prove guilt. "Having been offered as a confession," as said by the court in the recent and noted case of *Bram v. United States*, 163 U. S. p. 541, 18 Sup. Ct. 183, 42 L. Ed. 568, "and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which, by the very offer, is vouched for as tending to that end, and, on the other hand, for the purpose of avoiding the consequences of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt." This quotation is pertinent to the case at bar. The admissions made by the defendant were offered by the prosecution as tending to prove guilt. If they did not have that tendency, then they were inadmissible in evidence. But that they clearly did tend to prove guilt, and that they were only admissible as being in the nature of a confession, or as amounting to a partial confession, is evident.

Treating the statements of the defendant in question, then, as in the nature of a confession, we are next to inquire whether, in view of the manner in which they were obtained by the committing officer, they were obnoxious to the rule which obtains in such cases. This rule is well stated in 3 *Russell on Crimes* (6th Ed.) 478, as follows: "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence; not obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise, for the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." See, also, 1 *Greenl. Ev.* (16th Ed.) §§ 219, 220; *Taylor on Ev.* (9th Ed.) § 872 et seq.; 1 *Bishop, Crim. Pro.* (3d Ed.) § 1217 et seq.; *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Reg. v. Baldy*, 2 Den. & P. Crown Cases, 428.

We have come to the conclusion, after much consideration, that the statements or admissions made by the defendant were not freely and voluntarily made within the rule as thus stated, and hence were improperly allowed to go to the jury. It appears, from the cross-examination of the committing officer, Barney, that, previous to the making of

most of said statements by the defendant, he had told her that the truth, whatever that might be, ought to be told; that it was always the best, except where it would be the means of conviction; and that even then he should prefer it if it were his case. He had also told her, during the latter part of the conversation, that it was thought she bought the revolver; that there was ample proof that she bought it; and that, having mentioned the place where she bought it, she might just as well say whether or not she bought it. At the time when the statements in question were obtained from the defendant she was in the custody of this officer, and on the way to jail, charged with the crime of murder. That she must have been in a high state of nervous excitement and mental distress, whether guilty or not guilty, and hence ready to catch at any gleam of hope whereby her situation might be bettered, goes without saying. The familiar saying that "drowning men catch at straws" aptly illustrates the mental condition of one in her situation at that time. And we think it is not only possible, but probable, that, having stoutly and persistently asserted her innocence to the officer of the terrible crime charged against her, she was led to believe, by his persuasive and continued questioning, that it would not only do no harm, but would in some way be better for her to admit the purchase of the pistol and the obtaining of the cartridges in question. In other words, the language used by the officer, taken as a whole (and taken in connection with the contradictory statements made by the defendant about the purchase of the pistol), was such as to very naturally convey to the mind of the defendant the idea that she would gain some advantage by admitting that she bought the pistol and obtained the cartridges therefor. And hence it cannot be said that her admission relating thereto was voluntary.

We do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence, for the strong current of authorities, as well as the better reason, is to the contrary. *Am. & Eng. Ency. of L.* (2d Ed.) vol. 6, p. 531, and cases cited; *State v. Habib*, 18 R. I. 558, 30 Atl. 462. Those decisions which have gone to the extent of so holding have certainly gone "to the verge of good sense, at least." *Com. v. Chance*, 174 Mass. 249, 54 N. E. 551, 75 Am. St. Rep. 306. But where the request or admonition is given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession, the confession induced thereby will be inadmissible in evidence. Nor do we wish to be understood as agreeing with counsel for the defendant in his contention that a confession made by a prisoner to the officer in whose custody he is is not admissible in evidence, for such is not

the law. On the contrary, a confession to the officer in charge of a prisoner, if voluntarily made, is just as admissible as if made to any other person, as ruled by the trial court in this case. See cases collected in *Am. & Eng. Ency. of L.*, vol. 6, *supra*, pp. 536, 539; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.

The next exception relied on by defendant is that which was taken to the admission of the testimony of Dr. Jay Perkins as to the results of certain experiments made by him in firing the revolver with which the deceased came to his death. Dr. Perkins was the medical examiner for Providence at the time, and had been such for six years previous. He had had large experience with gunshot wounds which were self-inflicted, and also with those which were not self-inflicted, and had made a special study of the nature and effects of such wounds, and of the manner in which they were produced. In short, he was shown to be an expert in such matters. The theory of the defense in this case was that the deceased committed suicide. The testimony of Dr. Allison was that the bullet wound was on the right temple, about 1¼ inches above the right ear; that the hair was singed above the bullet wound about 1½ inches, also back of the ear a little; and that the beard of the deceased was singed to a point down below the angle of the mouth. The autopsy showed that the course of the wound was downward and backward, and that the bullet lodged in the cerebellum. The proof shows that there was much greater burning of the hair beneath the wound, in the direction of the mouth, than above the wound; and it was claimed on the part of the prosecution that this was a material fact in determining the position in which the revolver was held when it was fired, the contention being that it was practically impossible for the deceased to have so held the revolver himself as to have caused the wound and the burning or singeing referred to. Dr. Perkins testified first, without objection, that he had made experiments with 32-caliber revolvers to ascertain the amount and character of burning which would be made by the discharge thereof. He then testified that he had made experiments with the particular 32-caliber revolver in question. To this testimony the defendant's counsel objected, on the ground that the experiments were *ex parte*, and hence should not be admitted, as the witness was not shown to have been an expert regularly appointed by the court. This objection was overruled, subject to exception. The doctor then testified that if a pistol is held at any distance from the target the perforation made by the ball is not in the center of the burn, and that a greater part of the burn is on the side corresponding to the hammer of the revolver. He also testified that this is always so; that his own personal observation of gunshot wounds, and all the best authorities, showed it to be the

invariable rule that the greater part of the burn is always in the direction of the side in which the hammer of the revolver is held.

The contention of the prosecution in support of the admissibility of this evidence is that, having shown the existence of such a fact, it was competent to show that experiments made with the revolver in question produced similar results; while the contention of the defendant is that such evidence is in the nature of manufactured evidence, and hence inadmissible. We do not think the court erred in admitting the testimony in question. Had the experiments been made by a person not an expert in such matters, and had they been limited to the particular pistol which caused the injury, a very different question would arise. For, in such a case, the entire value of the testimony would depend upon the accuracy, skill, and honesty of a particular person regarding a particular and isolated transaction, with no opportunity on the part of the defendant to contradict it. But such is not the case here. The *ex parte* experiments, if such they may be called, which were made by Dr. Perkins, were not necessary in the establishment of the fact sought to be shown by the prosecution, as that existed independently thereof, as was fully shown in evidence. There was no occasion, therefore, to introduce the particular testimony objected to. But still we see no good reason why it was not admissible, as it tended to corroborate the position taken by the expert. And it is a well-settled rule that, whenever the opinion of a person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant. *Stephens' Digest of Ev. supra*, 112; *Hawkins v. Fall River*, 119 Mass. 94; *Com. v. Webster*, 5 Oush. 295, 52 Am. Dec. 711. See *State v. Justus*, 50 Am. Rep. 470, as to experiments made by nonprofessional witnesses. If a chemist were called as a witness in a criminal case, and were asked the question whether a certain chemical always produces a certain result under given conditions, could it be properly objected that, because he had confirmed the result reached by him by experiments conducted alone in his laboratory with the particular chemical in question, such evidence should be excluded, because the defendant was not present when the experiments were made? We think not. In such a case the witness would be testifying as an expert, and it would be competent for the defendant to contradict his conclusions if they were unscientific or incorrect; so that no harm could come to the defendant simply because he was not present or represented when the particular investigation in question was made. In *State v. Asbell*, 57 Kan. 398, 46 Pac. 770, it was held that a witness experienced in the use of firearms might properly testify as to experiments like those here in question. The case of *Tesney v. The State*, 77 Ala. 33, cited by defendant's counsel in support of his objec-

tion to the testimony in question, is very different from the one before us. There the witness did not show that he had had any experience in respect to the requisite proximity of a pistol, when discharged, to leave signs or indications of burnt powder on the clothing. And the court said: "A person may be skillful and experienced in the use of firearms and have no observation or experience in respect to the particular matter inquired about. But the court erred in permitting evidence of the result of a solitary experiment of firing at a coat similar to the one worn by defendant, and the exhibition of the coat to the jury. Such evidence superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments, with results as variant as the manner of loading the pistols and the modes of making the experiments, dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury, and withdraw their minds from the consideration of the main issue. The witness, if an expert, may give his opinion, and detail generally the facts on which it is based, whereby the value of the opinion, and of the evidence on which it is founded, is submitted to the jury. *McCreary v. Turk*, 29 Ala. 244."

The cases of *Forehand v. State*, 51 Ark. 553, 11 S. W. 766, and *Yates v. The People*, 38 Ill. 527, relied on by counsel for defendant, are not in point. The experiment in the former case was made by the jury, after they had retired to their room to consider upon their verdict, for the purpose of testing the truth of the defendant's statement. And it was held, and very properly, that this was taking evidence out of court, and in the defendant's absence, and was such misconduct on the part of the jury as entitled the defendant to a new trial. In the latter case the defense was that the deceased had come to his death by his own hand by shooting with a pistol, which was found near his person. On the trial a pistol was shown to the jury, and identified as one which had been sold to the prisoner. But it was not proved to be the one that was found near the deceased, and by the agency of which he undoubtedly came to his death. After the retirement of the jury, the pistol which had been shown to them on the trial was sent to them without the knowledge of the prisoner, his counsel, or the court, and they experimented with it for the purpose of judging whether, under the circumstances proven, the deceased could have shot himself with that weapon. The trial resulted in a verdict of guilty; and it was held that, because the pistol, which had not been properly identified as the one by means of which the deceased was killed, was allowed to go to the jury without the prisoner's consent, a new trial should be granted.

Boyd v. The State, 82 Tenn. 161, cited by defendant, not only fails to sustain the position taken by her, but, on the contrary, is a

strong authority in support of the admissibility of the evidence in question. It was there held, in a very well reasoned opinion, that experts may testify as to the results of experiments made before and during the trial, based upon facts established by the evidence. The theory of the defense in that case was that the deceased came to her death by her own hand, and there was evidence pro and con as to whether there were any powder stains on her clothing. The deceased was shot through the chest, the ball entering under the third rib on the left side, two and a half inches from the center of the breast bone, coming out at the eighth rib, and breaking that rib where it joins the back bone. The court said: "As stated, the experts derived their knowledge, to some extent, from experiments made shortly before, or perhaps in part during, the progress of the trial. A great deal of our knowledge is thus acquired, and it is recognized in everyday life as a legitimate source of knowledge. And it is upon this ground of experience or experiment that persons who have devoted their attention to particular branches of science or art may give their opinions, founded upon such experience and observation. So a surgeon was allowed to testify that a pistol must have been fired close to the body of the deceased, because there distinctly appeared marks of powder and burning on the wrist. *Wharton on Hom.* § 667. * * * The fact that the witnesses detailed the nature of experiments does not diminish the force of the opinions founded upon them. If the experiments are such as to throw light upon the subject of inquiry, testimony as to them is not only admissible, but very material. In most matters the opinion of the witness derives its value from the facts upon which it is founded, whether it be from observation, knowledge or experiment."

While we have no reported case in this state bearing upon the admissibility of testimony as to *ex parte* experiments like those brought in question in the case at bar, such testimony was admitted in the somewhat noted local case of *State v. Congdon*, a murder case, which was tried at great length at East Greenwich in 1883. The weapon used by the defendant was a pistol, and an important question at the trial was as to the nearness of the pistol to the deceased when the fatal shot was fired. Dr. William H. Palmer, of Providence, a well-known expert on gunshot wounds, was permitted to testify as to many experiments made by him, both before and after the homicide then in question, in order to determine at what distance from the muzzle of a pistol like the one used in that case powder burns or powder marks could be caused. Whether this testimony was objected to does not appear from the record of the case which has been preserved. But, in view of the fact that the defendant was represented by such eminent counsel as Hon. Willard Sayles, for many years the

able attorney general of this state, and Adoniram J. Cushing, Esq., and that no point was taken by them in the defendant's petition for a new trial (State v. Congdon, 14 R. I. 458) that the testimony referred to was improperly admitted, it is fair to assume that such testimony had not theretofore been regarded as objectionable by the bar. We therefore decide that the trial court did not err in admitting the testimony now in question.

We have carefully examined the other exceptions taken by defendant's counsel, but do not consider them to be tenable, or of sufficient importance to require special attention. As a new trial must be granted because of the error of the court in refusing to rule out the testimony first hereinbefore considered, after it appeared that the admissions in question were improperly obtained, there is no occasion for us to determine whether the verdict was against the evidence.

Petition for new trial granted.

BRADBURY v. JACKSON et al.

(Supreme Judicial Court of Maine. April 20, 1903.)

WILL—DEVISE AND LEGACY—LIFE ESTATE—TRUST FUND—POWERS—RESIDUE.

1. When a testator's intention is clearly expressed in the will, and violates no rule of public policy, it overrides technical rules of construction, and must be given effect.

2. That intention is to be gathered from the whole will, and not from isolated words and phrases. A will is not to be expounded by a word here and another there, but by what, on the whole, was the testator's scheme for the rational disposition of his estate.

3. The language of the will should be viewed in the light of the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised, with the testator, and with the will itself.

4. By the ninth item of his will a testator divided the residue of his estate, consisting largely of stocks and bonds, into two equal parts, one-half to the trustees of his granddaughter, and one-half to the trustees of his only surviving son; further directing that the certificates of stock so received should show for whom they held them, as well as the names of the trustees.

By the tenth item he appointed the trustees of his granddaughter, and after investing them with necessary powers for the preservation of the property, and fixing the time when she should come into the full possession and absolute control of her part of the estate, he made her his residuary legatee, including lapsed bequests, and the reversionary or other interests in the property, in trust for his son, but subject to the provision that should she marry and die before she was 27 years old, leaving issue, then with the right of disposal of one-fourth, etc.; and the residue was to be divided among certain persons, or their issue, named in the will.

The eleventh item, after appointing trustees for his son and giving them half of his property, provides as follows: "As the property is mostly in stocks paying dividends, and a few bonds that will not soon mature, I direct that the trustees shall keep an annual income account and balance the same annually. and pay

the net income thereof (deducting all charges and expenses) to the said Charles during his life. The account will thus be closed at the end of every year, and should be settled in the probate court every third year. I wish that he should be paid in quarterly payments, and if convenient, monthly. He is my son, and I should prefer to give him the property directly free from the trust, were I not satisfied that it is best for him that I should do as I propose. I am led to fear, from the unfortunate disposition of the property he has had control of, that what I leave for him would also be lost, if left for his unrestricted control, and old age might find him in need. Should he lose his present wife and marry again, and have issue by such wife, such issue, if alive, shall have the property left for him, as aforesaid. Should such wife survive him without issue, he has the right to the disposition of one-half of the block of brick stores in Augusta, and can make provision for her. Should he be very unfortunate and there should be any pressing necessity, said trustees, upon so finding and certifying, may advance to him from time to time, not exceeding five thousand dollars in all. Upon the decease of my sons, James W. and Thomas W. S., I gave their half of the block of brick stores on Water Street (that fell to me as their heir) to my surviving sons, Henry and Charles, placing the latter in trust for him with the right to dispose of it by will. As he has often complained in regard to the disposition of his mother's property, I wish to say here, that after the payment of specific bequests, her property was divided equally between Henry and Charles, and no more of Charles' half was put in trust than she was bound by her promise to her brother, Henry R. Smith, to so place it in order to receive anything from him."

Upon a bill of interpleader filed by the son, the plaintiff, to obtain the construction of the will, he claimed that under item 11 he took at once an absolute equitable fee in the corpus of the estate therein devised in trust, restricted to the enjoyment during his lifetime of the income, only subject to the limitation over to his issue, if any, and, if no issue, then that the trust would terminate at his death, and both the legal and equitable fee would vest in his heirs, subject to any intermediate disposition of it by him.

Reading the will in this case in the light of the facts which the testator had in his mind and recited in the will itself, *held*, that the plaintiff takes a life estate in the income only of the trust fund named in the eleventh item of the will, with a right to have paid to him not exceeding \$5,000 of the principal, contingent upon the trustees finding and certifying that there is a pressing necessity for it.

(Official.)

Report from Supreme Judicial Court, Kennebec County.

This was a bill in equity brought by Charles Bradbury, the only surviving son of James W. Bradbury, late of Augusta, for the construction of his father's will, and especially under items ninth, tenth, and eleventh. The case came before the law court upon report. Decree rendered.

The questions raised under these items of the will were: (1) Whether under the provisions of the will the plaintiff takes an absolute estate at law or in equity in one undivided half of the residue, both principal and income, subject only to a trust as to the income during his lifetime; or whether he takes a life estate only in the income; or, if neither, what estate he takes in the principal

and income. (2) In the event of the death of the plaintiff without will and without issue by his present wife, to whom should the trustees deliver the principal in final disposition under the terms of the will?

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

O. D. Baker, for plaintiff. L. C. Cornish, N. L. Bassett, and J. O. Bradbury, for defendants.

POWERS, J. This bill is brought to obtain a construction of a part of the will of James W. Bradbury. The testator left an estate of about \$217,000, all in personal property. By the first eight items of his will he gave about \$37,000 in various public or private bequests, including a legacy of \$8,000 to his son Charles. The balance of his estate he disposed of by the ninth, tenth, and eleventh items of his will, which are as follows:

"Ninth. The residue of my property that remains after the payment of the bequests, gifts, debts and expenses provided for in the eight preceding sections, is to be divided into two equal parts by my executors, as soon as the last bequest is paid, and by them transferred and delivered to the trustees herein-after named, one-half to the trustees for Eliza Louisa Bradbury, and one-half for the trustees of Charles Bradbury. They shall see that the certificates of the stock they deliver shall show for whom the trustees are holding the property, as well as the name of the trustees.

"Tenth. I name Henry O. Jackson, my nephew, and Louisa H. Bradbury, as trustees for Louisa H. Bradbury, and give to them to hold in trust for Eliza Louisa Bradbury the half of the property transferred to them by my executors. It is mostly in stocks, with a few bonds, and will give little trouble, so that Mr. Jackson can find time to look after the business. The trustees shall have all necessary powers in regard to the preservation of the property, and the investment of the interest until their ward is to have it. When the said Eliza Louisa shall reach the age of twenty-one, she is from that time to have annually the net income of her property, to be paid to her by her trustees in quarterly payments, unless she shall prefer to leave it with the trustees to invest for her.

"On the arrival of my dear granddaughter to that age, I wish to make her a birthday present, and for that purpose I direct the trustees to transfer to her and deliver the certificate of fifty-two or fifty-three shares of the stock of the Dexter and Newport Railroad, which they will have in trust for her.

"As she will have from her father's estate as much property as she, with her inexperience, can be likely to manage, I deem it for her interest and hereby direct that the trustees continue their trust of the principal un-

til she shall reach the age of twenty-seven, when they shall transfer to her one-half, and when she reaches the age of thirty-three, the whole of the property, after deducting all proper charges.

"I make her, the said Eliza Louisa, my residuary legatee; including lapsed bequests and the reversionary or other interests in the property in trust for my son Charles. All of her share of the property shall vest in her when she reaches the age of twenty-seven, although a part shall remain in trust. Should she marry and decease before that age, leaving issue, she shall have the right, after she is twenty-one, to dispose of one-fourth of all her property, and her mother shall have one-fourth. The residue shall be divided into shares, and paid by the trustees to the following persons in the proportions according to the shares, and to the issue of any who may die, viz.: To my son Charles four shares, and for his wife, Eva, one share: To James Otis Bradbury, four shares, and one for his wife, and one for each of his two children; his mother, brother, and sister, and the husband of his sister are each to have a share: To Cotton M. Bradbury, one share for himself, one for his daughter Jennie, and one for his two minor children: To Mrs. Margaret H. Gregorie, Miss Esther H. Gregorie, Mrs. Alice G. Hayward, Mrs. Julia M. Claghorn, Mrs. Margaret H. Carter, Miss May Martin, one share for each.

"Eleventh. I name James Otis Bradbury, Oscar Holway, and Henry O. Jackson of Boston, as trustees for my son Charles Bradbury, and I give to them, in trust for him, the half of my property, to be transferred to them by my executors.

"As the property is mostly in stocks paying dividends, and a few bonds that will not soon mature, I direct that the trustees shall keep an annual income account and balance the same annually, and pay the net income thereof (deducting all charges and expenses) to the said Charles during his life. The account will [thus?] be closed at the end of every year, and should be settled in the probate court every third year.

"I wish that he should be paid in quarterly payments, and if convenient, monthly. He is my son, and I should prefer to give him the property directly free from the trust, were I not satisfied that it is best for him that I should do as I propose. I am led to fear, from the unfortunate disposition of the property he has had control of, that what I leave for him would also be lost, if left for his unrestricted control, and old age might find him in need. Should he lose his present wife and marry again, and have issue by such wife, such issue, if alive, shall have the property left for him, as aforesaid.

"Should such wife survive him without issue, he has the right to the disposition of one-half of the block of brick stores in Augusta, and can make provision for her.

"Should he be very unfortunate and there should be any pressing necessity, said trustees, upon so finding and certifying, may advance to him from time to time, not exceeding five thousand dollars in all.

"Upon the decease of my sons, James W. and Thomas W. S., I gave their half of the block of brick stores on Water Street (that fell to me as their heir) to my surviving sons, Henry and Charles, placing the latter in trust for him with the right to dispose of it by will.

"As he has often complained in regard to the disposition of his mother's property, I wish to say here, that after the payment of specific bequests, her property was divided equally between Henry and Charles, and no more of Charles' half was put in trust than she was bound by her promise to her brother, Henry R. Smith, to so place it in order to receive anything from him."

The plaintiff claims that under item 11 he took at once an absolute equitable fee in the corpus of the estate therein devised in trust, restricted to the enjoyment during his lifetime of the income only, subject to the limitation over to his issue, if any, and, if no issue, then that the trust would terminate at his death, and both the legal and equitable fee would vest in his heirs, subject to any intermediate disposition of it by him.

Great research and learning have been displayed and a vast array of authorities cited by counsel in support of the successive steps by which it is sought to establish the above proposition. It would be unprofitable to here undertake to distinguish or analyze the cases cited. Precedents and rules of testamentary instruction may afford valuable aid when the testator's intention is in doubt, but when that intention is clearly expressed in the will, and violates no rule of public policy, it must be given effect. It overrides precedents and technical rules of construction. This "pole star," as it is sometimes termed, of testamentary construction, "leads into various courses, since every will must be steered by its own luminary. Yet uniform justice is better than strict consistency." Schouler's *Ex'rs & Adm'rs*, § 474. "It may well be doubted," said Mr. Justice Miller in *Clarke v. Boorman's Ex'rs*, 18 Wall. 493, 21 L. Ed. 904, "if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself." No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.

Coming now to the instrument before us, we find that the testator had two natural

heirs, his granddaughter Eliza and his son Charles. The former had been a member of his household, and he had conveyed to her and her mother his homestead in Augusta. He calls her in the will his "dear granddaughter," and it is evident that the ties of association had strengthened those of natural affection. He had made advances to his son for him to go into business. He had bought of him his one-fourth interest in the homestead. The testator knew that his wife had devised property to Charles, placing it in trust, as she was bound to do by her promise to her brother, in order to receive anything from him. Charles had often complained of the disposition which was made of his mother's property. The testator had himself conveyed property to Charles, placing it in trust, with a right of disposition by will. He had seen his son make an unfortunate disposition of the property he had had the control of, and he feared that what he should leave him would also be lost if left to his unrestricted control, and that old age might find him in need. He anticipated that, notwithstanding the property Charles had already had from both the testator and his wife, and the \$8,000 bequeathed him by the will, he might in the future be very unfortunate, and there might arise a pressing necessity for his relief. It is evident that he did not have confidence in his son's business capacity, in his ability to successfully manage or long retain any property over which he had the power of alienation, and that, judging the future by the past, he feared an "unfortunate disposition" of such means as Charles might control. That these facts were present in the testator's mind at the time he made the will cannot be questioned, for they are all recited in the will itself.

The ninth item of the will directs that the residue of the property, after paying bequests, gifts, debts, and expenses, be divided into two equal parts by his executors, and transferred, one-half to the trustees for his grandchild, and one-half for the trustees of his son. In item 10 he gives to the trustees for his grandchild the one-half of the property conveyed to them by his executors, and declares the purposes of the trust, and the nature and extent of the beneficial interest of the cestui que trust. He makes her his residuary legatee, including lapsed bequests, "and the reversionary or other interests in the property in trust for my son Charles." In the next item of the will he gives to the trustees in trust for Charles the half of the property to be transferred to them by his executors, and proceeds to declare the purposes of the trust, and to define the nature and extent of the son's beneficial interest. The trustees are directed to pay the net income to Charles during his life, in quarterly payments, and, if convenient, monthly. Should he marry again, as he did during the testator's lifetime, and have issue, such issue are to have the prop-

erty. Should the wife survive him without issue, the testator states that Charles has the right to dispose of one-half of the block of brick stores in Augusta, and can make provision for her. If Charles is unfortunate, and there is pressing necessity for it, the trustees may advance him not exceeding \$5,000 in all.

Such are the terms of the will. Reading it in the light of the facts which the testator had present in his mind at the time he made it, we think it clear that he intended to give to his son a life interest in the income only of the trust fund named in item 11 of his will, with a right in case of misfortune and pressing necessity, upon the trustees so finding and certifying, to receive not exceeding \$5,000 from the principal. Indubitable evidence is afforded that he believed he had done this and nothing more by the statements that his granddaughter is his residuary legatee in the reversionary and other interests in the property in trust for his son, and that the son can provide for his wife, in case he marries again, out of the property over which he already had the power of disposition by will. It is incredible that Mr. Bradbury would have incorporated this last statement into the same clause of a will by which he intended to give Charles the right to dispose by will of \$80,000 of property. Mr. Bradbury was a lawyer of long experience and large practice. The matter of the son's right to dispose of property by will was present in his mind, brought sharply home to his attention at the time he was writing the very item of the will under which the plaintiff claims, and yet plainly the testator regarded the block of brick stores as the only property from which Charles could make a future testamentary provision for his wife. No thought could have been further from his mind when he penned that statement than that Charles had the entire beneficial interest in and the power of disposal by will of the \$80,000 which he had just given to trustees, with directions to pay the net income to Charles during his life.

It is strongly urged that certain parts of the will manifest a contrary intention. Stress is laid upon the direction that the executors shall see that the certificates of stock they deliver shall show for whom the trustees are holding the property. This may require a few more words, but it can be done as well under one construction of the will as the other. In the residuary clause the testator speaks of the reversionary or other interests "in the property in trust for my son Charles." In a sense it was in trust for Charles, as he was to have the income from it for life, and possibly \$5,000 of the principal. The context wherein he speaks of reversionary or other interests in this fund passing to the residuary legatee is strong evidence that when he used the words he did not intend that Charles should have the en-

tire beneficial interest in the property. It is hardly probable, in view of all the provisions and recitals in the will, and in view of the advanced age of the testator when he made it, that when he spoke of reversionary or other interests he had nothing more in his mind than the remote possibility of his surviving his son.

When the testator explains his reasons for making the disposition of his property which he did, it is contended that the statement that he would prefer to give Charles the property directly, free from the trust, is inconsistent with an intention that he should not take the entire beneficial interest, and that the same is true of the further statement in the same connection, that he fears what he leaves for him would be lost if left for the son's unrestricted control, and old age might find him in need. That might be true if the words stood alone, but these words were used to express the testator's reason, as well as his regret that he felt compelled not to give Charles a larger interest than he did. He feared that whatever the son had the control of would be "lost." The words must be read in connection with the other parts of the will, which plainly show an intention to give but a life interest in the income. It is not probable that the testator would give an unlimited power of disposition over a large estate to one whom experience had taught him was incapable of wise and prudent business management.

Lastly, the use of the word "advance" is said to indicate that the testator understood the corpus of the fund to be vested in his son. The use of the word is undoubtedly consistent with that view, but the intention of the testator is to be gathered from the whole will, and not from isolated words and phrases. The most exact of men do not always express themselves with equal care and precision. This is as true of wills as of other human transactions. The testator's predominant idea was to care for his granddaughter and his son, and that the bulk of the estate which he left should be preserved and applied for this purpose, and not "lost" or made the subject of "unfortunate disposition." Sad experience had taught him that what the son controlled he might well fear would be lost. His intention extended beyond the preservation of the income of the trust fund for the life of his son, and he provided that after Charles' death without issue it should vest in the "dear granddaughter." A will is not to be expounded by a word here and another there, but by what on the whole was the testator's scheme for the rational disposition of his estate.

Such being Mr. Bradbury's intention as expressed in his will, and construing the will in the light of that intention, has he used appropriate language, according to the rules of law, to carry that intention into effect? The plaintiff invokes the familiar rule of

testamentary construction that where an estate in fee simple is devised, or an absolute gift of personal property made, a devise or gift over is void, and the estate first given cannot afterwards be cut down except by the use of clear and appropriate language. *Wallace v. Hawes*, 79 Me. 177, 8 Atl. 885; *Loring v. Hayes*, 86 Me. 351, 29 Atl. 1093; *Mitchell v. Morse*, 77 Me. 423, 1 Atl. 141, 52 Am. Rep. 781. The answer is that that is not this case. The trust fund is not given to the trustees "in trust for Charles" and nothing more. If it were, he would take both the legal and equitable estate in the corpus of the fund. The purposes of the trust are declared. They are to pay the net income to Charles during his life. If he has issue they are to have the property left for him "as aforesaid"; that is, left in trust for the purpose of paying to him the net income. There is no absolute gift of this property. It is given in trust for Charles, to pay the net income to him during life. The words which give to the trustees, and all the words which declare the purposes for which the trust is created, are to be read and construed together. A gift of the income of personal property is a gift of a life estate. *Sampson v. Randall*, 72 Me. 109. If there is nothing in a will to show an intention that anything should be paid to a legatee except the income of a fund during life, the fund upon his death falls into the residue. *Wynn v. Bartlett*, 167 Mass. 292, 45 N. E. 752. Here there is ample evidence that the testator intended to give no more than the income, and that intention must be given effect. In *Re Morgan* (1893) L. R. 3 Ch. 222, *Lindley, C. J.*, says: "I should have thought that upon the will the matter was reasonably plain, but we are pressed with authorities. Now, I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases, or decisions in other cases. Of course there are principles of law which are to be applied to all wills, but if you once get at a man's intention, and there is no law to prevent you giving it effect, effect ought to be given to it."

The plaintiff takes a life estate in the income only of the trust fund named in the eleventh item of the will, with a right to have paid to him not exceeding \$5,000 of the principal contingent upon the trustees finding and certifying that there is a pressing necessity for it. The remainder in said trust fund, by the tenth item of the will, vested in *Eliza Louisa Bradbury*, subject to be divested by surviving issue of the plaintiff, and at his death without issue is to be paid over by the trustees to her, if living, or if deceased to such person or persons as are entitled to her estate.

Costs and reasonable counsel fees are to be allowed out of the estate. Decree accordingly.

TOWLE v. DOE et al.

(Supreme Judicial Court of Maine. April 9, 1903.)

WILLS — PERPETUITIES — GIFT — REMAINDER — TRUST — CHILDREN — TIME OF VESTING — FUND NOT SEPARABLE.

1. Where by will a gift is made of a remainder in fee, and in the same will there follows language showing a clear intent to charge such remainder with a trust invalid under the rule against perpetuities, the donee takes such remainder in fee.

2. A trust attempted to be created by will for the use of a man and his children is invalid as contravening the rule against perpetuities, unless it appears from the context that only those children actually in esse at death of the testator are intended to share in the benefit.

3. The mere fact that events as they finally transpire restrict a trust in such manner that, had the will in apt terms in fact so limited the trust, it would have been valid, does not alter the rule that the tests of validity must be applied to the language actually used by the testator in the will itself.

4. That construction of a will should be adopted which does not contravene the rule against perpetuities, whenever by so doing the intention of the testator will not be wholly disappointed.

5. A trust fund created by a clause in a will providing for the payment of "the interest, deducting expenses, to W. M. T. and his children, so long as they live," is not separable, and might vest too remotely to be valid.

6. In such a clause the word "children" is not to be construed as meaning alone those in esse at the death of the testator, unless such meaning is evident from the context.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Bill by Josiah C. Towle against Alice H. Doe and others. Case reported. Decree rendered.

Bill in equity to obtain the construction of the residuary clause of the last will and testament of Josiah Towle, late of Bangor, deceased.

The will showed evidence of being holographic, and the complete residuary clause was as follows:

"To my wife Lucinda L. Towle I give & bequeath all the remainder of my property of every description both real personal & mixed to have & to hold occupy & enjoy & receive all the income rents & interest during her life time & at her decease I give & bequeath all the aforesaid property which I have devised to her during her life time & which shall remain at her decease, to my four children viz: Wm. M. Towle & his heirs one-fourth part to be invested by my executor in U. S. bonds or State bonds & the interest deducting expenses paid over to said Wm. M. Towle and his children so long as they live & then the principal divided to his or their heirs.

"Mary I. Taylor and her heirs one-fourth part said fourth part to be invested by my executor in U. S. or State bonds & the in-

¶ 2. See *Perpetuities*, vol. 28, Cont. Dig. § 16.

terest deducting expenses paid over to said Mary so long as she shall live & after her decease the principal divided to her heirs & invested in bonds as aforesaid for them by my executor & the accruing interest deducting expenses shall be so invested & added to the principal & as fast as they shall attain the age of twenty-five years provided they shall be of sound mind and steady habits & shall have accumulated not less than three hundred dollars of property if a male or fifty dollars if a female by their own industry then their several portions shall be paid over to them & such of them as shall not be of sound mind & good habits & have accumulated as aforesaid shall receive only the interest (deducting expenses) of their said share yearly during their life time & at their decease the principal shall be paid to their heirs.

"To my son John A. Towle & his heirs one-fourth part to be paid over to him by my executor.

"To my son Josiah C. Towle & his heirs one-fourth part to be paid over to him by my executor.

"Provided however if my estate shall not prove sufficient (after deducting the four thousand dollars herein before set aside) to leave a sufficient sum for my wife Lucinda L. Towle so that she shall receive therefrom a net income of Ten hundred dollars per annum after deducting taxes & expenses & house rent then sufficient of the interest of the aforesaid four thousand dollars shall be paid over to her yearly—instead of being paid over or reserved for said needy ones as afore herein stipulated to make up her income to the sum of \$1000 per annum & if the whole of the interest of the said four thousand is not sufficient to make up the yearly net income to ten hundred dollars then a portion of the principal of said four thousand dollars may be taken each year until the whole is used up if needed to make up said sum of \$1000 net yearly income instead of being reserved as before devised to my children aforesaid & whatever may remain of it shall be divided to them as above devised.

"And for the furtherance of the aforesaid object and for the safety & protection of the property & to establish a legal mode for the sale & transfer of all my property I hereby devise & bequeath to my trustee hereinafter named all my estate real personal & mixed to have & to hold the same upon the terms trust & conditions hereinafter specified herein fully authorizing and empowering said Trustee to sell & dispose of any & all said estate real personal & mixed except that my dwelling house on State Street & my store if (I shall own any at my decease) shall not be sold until after the decease of my wife but all the other property may be sold & conveyed by my said Trustee when & in such manner as to said Trustee may seem most advantageous hereby directing my said Trustee to invest the whole proceeds of sales in U. S.

or State bonds & to keep the same so invested & pay over the income & interest deducting taxes & expenses to meet the aforesaid devises as herein before specified."

The only child of William M. Towle at the testator's death, at the termination of the intervening life, and also at his death, was Alice H. Doe.

There was also a codicil, which, however, had no bearing on the case.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

F. H. Appleton and H. R. Chaplin, for plaintiff. J. R. Mason, for defendants. C. H. Bartlett, guardian ad litem, for minor defendants. Matthew Laughlin, administrator of the estate of William M. Towle, pro se.

PEABODY, J. This cause comes before the law court on report. It is an equity suit brought for the purpose of obtaining a legal construction of certain provisions of the will of Josiah Towle, late of Bangor, Me., deceased.

The case shows that the testator made and executed his will on the 17th day of August, A. D. 1866, and a codicil thereto on the 9th day of March, A. D. 1876. The provisions of the codicil are immaterial in the case. The portions of the will which the parties desire construed, being part of the residuary clause, are as follows:

"To my wife Lucinda L. Towle I give & bequeath all the remainder of my property of every description both real personal & mixed to have & to hold occupy & enjoy & receive all the income rents & profits & interest during her lifetime & at her decease I give & bequeath all the aforesaid property which I have devised to her during her life time & which shall remain at her decease, to my four children viz: Wm. M. Towle & his heirs one-fourth part to be invested by my executor in U. S. bonds or State bonds & the interest deducting expenses paid over to said Wm. M. Towle and his children so long as they live & then the principal divided to his or their heirs."

The remaining parts of the residuary clause relate to the bequests to the other three children of the testator, and do not affect the question submitted, except as indicating the intention of the testator.

The testator died January 26, 1883, and his widow, Lucinda L. Towle, died April 8, 1886. His son William M. Towle died January 23, 1896, leaving a widow, now living; and his granddaughter Alice H. Doe, the surviving child of William M. Towle, has died since the filing of the bill in equity, leaving a husband and children, who are now living.

The validity of the will and codicil is not questioned, and their terms clearly indicate that the testator thereby intended to dispose of his entire estate. The will is not arti-

ficially drawn, as is evident both from the words used and the structure of its testamentary provisions.

In the portion of the will quoted the words used in the first section of the clause imply an absolute bequest to his son William M. Towle, but they are followed by words showing that the testator intended that the legal estate in this fourth part of the residuum should vest in a trustee, to be disposed of in accordance with the terms of the trust.

In determining the general intent of the testator, the words defining the bequest to William M. Towle and his heirs cannot be dissociated from those which immediately follow; and the language of the whole clause shows that the bequest was not intended by the testator to be a remainder in fee to William M. Towle, but an executory bequest to be held by the executor in trust for the lives of William M. Towle and his children, and at the decease of the survivor of them to vest in their heirs. The doubt which has arisen as to the legal effect of this bequest is whether it is in conflict with the rule against perpetuities.

The common-law rule is recognized by the courts of this state, as formulated in *Cadell v. Palmer*, 7 Bl. 202, quoted in 2 *Woerner on American Law of Adm.* § 427:

"The utmost period in which an executory bequest can take effect is a life or lives in being and twenty-one years thereafter, together with the period of gestation already existing."

The same rule applies to trusts as is applied to legal estates. 1 *Perry on Trusts*, § 382.

The actual events now show that the will in effect limited the trust to William M. Towle and his daughter Alice H. Doe as beneficiaries for life, and had it done so in terms the bequest would not have been void for remoteness, because this daughter was his only child at the death of the testator, at the termination of the intervening life, and at his own death. But the test of the validity of the gift must be applied to the language of the will itself. And the possibility that the executory limitation might be void for remoteness is clear from the fact that a child or children of the testator's son William M. Towle might be born after the death of the testator, the continuance of whose lives might postpone the vesting of the estate beyond the time limited by law. 1 *Jar. on Wills*, 266; 2 *Woerner, Am. Law Adm.* § 427; *Webber v. Jones*, 94 Me. 429, 47 Atl. 908; *Gray on Per.* § 214.

From the facts in the case and the language of the will several theories arise as to the construction of the portion quoted in the third clause of the bill.

1. That the entire bequest is void because the fatal defect of violating an inflexible rule of law applies to the whole.

This construction would do great violence to the manifest intention of the testator to

give his four children and their immediate families the benefit of equal shares in his estate at the death of his wife.

The general terms of the provision are: "At her decease I give & bequeath all the aforesaid property which I have devised to her during her life time & which shall remain at her decease, to my four children."

He then in specific terms defines the several bequests of one-fourth to each. To two of his sons he gives the shares in apt words to them and their heirs. To the daughter and her heirs he gives one-fourth part, and in words immediately following modifies the bequest by directing its investment by his executor, and creating a trust not free from complications similar to those in the provision under consideration.

If a construction may be given to the will which does not contravene the rule, and does not wholly disappoint the intention of the testator, it should be adopted. 3 *Jar. on Wills* (5th Am. Ed.) 709.

2. Another theory of construction is that the bequest in trust is limited to beneficiaries in esse at the date of the death of the testator, namely, William M. Towle and his child, Alice H. Doe, and vested at the death of the survivor, Alice H. Doe, in her heirs.

This construction is claimed on the ground that the word "children" used by the testator in his will may mean children living at the time of his decease, but we think that this can only apply to cases where this meaning is evident from the context. It cannot be forced against the plain language of the will so as to apply only to those of the same class who might legally take the equitable estate. *Gray on Per.* c. 10; *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88; *Leake v. Robinson*, 2 Mer. 363, 388; *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412.

3. Another construction sought is that the bequest was in trust during the life of William M. Towle, and that only the limitation over to his children for life and to his or their heirs in fee was void for remoteness. This construction can only rest upon the assumption that the beneficiaries mentioned in the trust would take the interest in succession. But the legal estate is not given to them for life, but to a trustee. The trust is an entirety, for the benefit of a parent and his children, and is *prima facie* concurrent. It would seem that the equitable interest belonged to William M. Towle and his children as a class, and consequently to the survivor. This is also indicated by the words "his or their heirs." *Schouler on Wills*, §§ 530, 537; *Gray on Per.* §§ 322, 323.

The equitable remainder could not vest until the death of these beneficiaries. *Spear v. Fogg*, 87 Me. 182, 32 Atl. 791; *Hunt v. Hall*, 37 Me. 363.

4. We think that the legal construction of the bequest in question depends upon whether it is a remainder to William M. Towle in fee, or whether the words in the first part of

the provision, which imply this, are so inseparably connected with the modifying clause attempting to create a trust as to render the whole provision void for remoteness.

The creation of a trust which cannot vest the object of the trust within the time limited by law will be nugatory. 1 Perry on Trusts, 383; Blgrave v. Hancock, 16 Sim. 371; Dodd v. Wake, 8 Sim. 615; Sears v. Russell, 8 Gray, 86; Brattle Square Church v. Grant, 3 Gray, 142, 63 Am. Dec. 725; Pulitzer v. Livingston, 89 Me. 359, 36 Atl. 635; Brooks v. Belfast, 90 Me. 318, 38 Atl. 222. See Slade v. Patten, 68 Me. 380.

The trust fund is not separable, and might vest too remotely in the heirs of a child of William M. Towle born after the death of the testator.

If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court. 1 Perry on Trusts, 381; Martelli v. Holloway, L. R. 5 H. L. 532.

It will be observed that the testator uses the words "and his heirs" technically in reference to other devises in this will, and he is presumed to employ them in their legal sense unless the context clearly indicates the contrary. 3 Jar. on Wills, 707.

It must be held that William M. Towle took a remainder in fee. This is the legitimate effect of the language used in the first section of the provision under consideration, and even the intent of the testator to restrict it by a trust must yield to the rule against perpetuities. 1 Jar. on Wills, 293, 295, 296; Gray on Per. §§ 233, 235, 240; Deford v. Deford, 36 Md. 168; Sears v. Putnam, 102 Mass. 5. The trust is therefore invalid.

We answer the prayer of the complainant, in behalf of all parties interested, that the proportion of the estate in which William M. Towle was interested, and which came at the death of Lucinda L. Towle into the hands of the complainant as executor, vested absolutely in William M. Towle and belongs to his estate.

The expenses of this suit should be paid out of the property involved in this decision. Decree accordingly.

MILLIKEN v. HOUGHTON.

(Supreme Judicial Court of Maine. April 14, 1903.)

TAX TITLE—SALE—RETURN BY TOWN TREASURER—INSOLVENCY—ASSIGNMENT—REAL ACTION.

1. In making return of his doings in selling land of a nonresident for nonpayment of town taxes, the town treasurer should state facts showing that no bid could be obtained for less than the whole land, and that it was necessary to sell the whole land in order to obtain the amount of the tax and costs,

2. A statement in such return that "it became necessary to sell the whole amount of the real estate," without any statement of facts showing such necessity, is a statement of the treasurer's opinion only, and is not sufficient to sustain a title under such sale.

3. An assignment under the insolvent law (Rev. St. c. 70, § 33) does not require a seal.

4. In a real action, where no rents or profits are sued for, no allowance can be made for taxes paid by the defendant.

(Official.)

Report from Supreme Judicial Court, Oxford County.

Action by Charles R. Milliken against John Houghton. Case reported. Judgment for plaintiff.

Real action to recover possession of Lot 8, range 12, in the town of Byron, Oxford county, known as the "Hiram Gilcrease Farm."

The defendant relied on a tax title.

The parties agreed that, if the court find the title to be in the plaintiff, the court may also determine whether the defendant had any right to be reimbursed for taxes paid by him and interest thereon.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

El. Foster and O. H. Hersey, for plaintiff. G. D. Bisbee and R. T. Parker, for defendant.

EMERY, J. The defendant's claim of title rests solely on a tax sale and deed by the treasurer of the town of Byron for nonpayment of a town tax assessed in 1885 to the then nonresident owner. The statutes (Rev. St. 1883, c. 6, §§ 188, 189) were then in force. It was explicitly declared by the court in construing that statute in Ladd v. Dickey, 84 Me. 190, 24 Atl. 813, at the bottom of page 194, 84 Me., page 814, 24 Atl., that to show a valid sale "it should appear that he exposed for sale and sought offers for a fractional part of said premises sufficient to pay the tax and legal charges, and that he could obtain no bid therefor. It is not sufficient for him to say that it was necessary to sell the whole amount so assessed and advertised, no person offering to pay the tax and legal charges for a smaller fractional part of said real estate. It must appear that he tried to obtain an offer for the payment of the tax and legal charges for a fractional part of the premises without success."

The treasurer sold the whole tract, but we nowhere find, either in the recitals in the tax deed, or in the treasurer's return of his doings, or anywhere else, the evidence that the treasurer "sought offers for a fractional part," or "tried to obtain an offer for the payment of the tax and legal charges for a fractional part of the premises without success." The most the treasurer says is that "it became necessary to sell the whole amount of the real estate so assessed and advertised, as no person would pay the tax-

es, interest, and legal charges for a less amount of said real estate." This is merely a statement of the treasurer's opinion, viz., that he thought no person would pay the taxes, etc., for a less amount, and that, therefore, he thought it was necessary to sell the whole amount. The fact might have been different. Had he "sought offers for a fractional part" or "tried to obtain an offer" therefor, as the court said in *Ladd v. Dickey*, supra, was his duty, he might perhaps have been successful. Had he done so, and without success, and so stated in his return, it would then have been apparent to the court that it was necessary to sell the whole tract. As it is, the necessity does not appear, and we must therefore hold the sale, being of the whole tract, to be invalid.

The plaintiff shows a *prima facie* title by a chain of deeds from a former acknowledged owner. The only objection seriously made to his *prima facie* title is that, where it passed through the insolvency court, neither the seal of the court nor of the judge was affixed to the instrument of assignment by which the judge assigned and conveyed the insolvent's property to the assignees in the case. The statute (Rev. St. 1883, c. 70, § 33) then in force did not require any seal. "An instrument under his hand" was all that was required. After considering all the objections suggested, we are satisfied the plaintiff has sufficient title to maintain this action.

By the terms of the report, if the court find the title is in the plaintiff, it is to determine whether the defendant has any right to be reimbursed for taxes paid and interest on same. This is an action at law, a real action, in which no rents and profits are claimed, and, as the case is now presented, no right of reimbursement is shown by the defendant. He is, and presumably has been, in possession, taking the rents and profits, if any. When he is asked to account for these, he may perhaps raise the question of allowance for taxes paid.

Judgment for the plaintiff for title and possession and for \$1 of damage.

PULSIFER v. HUSSEY et al.

(Supreme Judicial Court of Maine. April 11, 1903.)

LIFE INSURANCE—EXEMPTIONS—BANKRUPTCY—FRAUDULENT ASSIGNMENT—SURRENDER VALUE.

1. At the date of the filing of his petition, March 8, 1901, a bankrupt held a policy of insurance on his life payable to him or his assigns, if he survived 20 years, the date of the policy being March 1, 1893; but if he died before that time it was payable to his wife if she survived him; if not, to his representatives or assigns. In 1900 his wife was divorced from him, and she assigned her interest in the policy

to her husband. Shortly after that he assigned to his daughter all his right to the sum insured "in event of death," if she survived him, but did not assign the endowment if he survived 20 years. His trustee in bankruptcy sought by bill in equity against the bankrupt and the daughter to hold this policy, or its surrender value at the date of bankruptcy, March 8, 1901.

Held, that by the laws of Maine (Rev. St. c. 49, § 84; Id. c. 75, § 10) this insurance is exempt from the claims of creditors; also by the bankrupt act of 1898.

2. The bankrupt act of July 1, 1898, provides, in section 6, 30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424], that the "act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws." And section 70 of the bankrupt act, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides that the trustee of the bankrupt shall "be vested by operation of law with the title of the bankrupt, * * * except in so far as it is to property which is exempt," to various enumerated kinds of property, and to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." *Held*, that this clause must be construed in the light of the terms in the earlier part of the same section which excepts exempted property. Any other construction would annihilate all the exemptions specially provided for in the act.

3. By another subsequent provision in section 70 of the bankrupt act of July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], it is declared: "Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value, payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the policy, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." *Held*, that this proviso, instead of enlarging the rights to property in the trustee, qualifies and limits them. But for it, in states where life policies are not exempted, and no beneficiary is named, the entire interest in the insurance would pass to the trustee. The proviso limits the amount to go to the creditors to the "surrender value" only, reserving to the bankrupt an interest he would not otherwise retain. This construction gives effect to the manifest intent of Congress, harmonizes all sections of the act, and escapes an otherwise unavoidable conflict between sections 6 and 70, 30 Stat. 548, 565 [U. S. Comp. St. 1901, pp. 3424, 3451].

4. *Held*, that the assignment to the daughter "in the event of death" before the endowment period is not fraudulent as to creditors. The assignment to the daughter is not of the whole policy, as it might have been, but only of the right to the fund if the assured shall die before the endowment period of 20 years. The right thus assigned has no surrender value—that remains to the assured for the endowment period—it had no value as to creditors, for it was absolutely exempt from their claims under the bankrupt act and the state statute. Even as his heir the result to the daughter would be the same, or it could have been accomplished by a will of the father.

5. The policy contains this clause: "At the end of the fifth and every subsequent fifth year from date of issue the cash value specified in table of cash surrender values indorsed hereon will be paid for this policy, provided it shall

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 201, 664.

be in force under its original conditions, and is legally surrendered thereafter to the home office within thirty days from the close of such period." The date of the policy was March 1, 1893. The first surrender period was on March 1, 1898, but the policy was not then surrendered, and that right to surrender was lost. The next period will arrive March 1, 1903, but the bankruptcy occurred March 8, 1901. *Held*, that at that date the policy had no surrender value which the company was bound to recognize. The surrender value referred to in section 70 of the bankrupt act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], refers only to the contract right of surrender, and not to the result of a negotiation or act of grace.

6. Section 70 of the bankrupt act of July 1, 1898, 30 St. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], does not include policies payable to a wife or kindred of the assured, but only applies to policies payable to the assured or his personal representatives.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Bill by James A. Pulsifer against Charles E. Hussey and another. Heard on report of agreed statement, and dismissed.

Bill by the plaintiff trustee in bankruptcy against Charles E. Hussey, bankrupt, and his daughter, seeking to hold a policy of insurance on the life of the bankrupt, or its surrender value on March 8, 1901; date of policy, March 1, 1893.

The parties agreed to report the case to the law court upon bill, answer, and replication, and the following agreements and statement of facts.

On December 12, 1899, Lizzie L. Hussey, the beneficiary named in the policy and mentioned in the plaintiff's bill, assigned to the defendant, her husband, Charles E. Hussey, or his legal representatives or assigns, all her interest in said policy. A copy of said assignment was filed with the agent of the insurance company, and by him forwarded to the home office of the company, the Travelers' Insurance Company, where it was received as filed on December 19, 1899. A copy of said assignment was annexed to and made part of the statement of facts.

On July 10, 1900, Lizzie L. Hussey, having obtained a divorce from her husband, the said Charles E. Hussey, claiming that she had not assigned her interest December 12, 1899, executed another assignment of all her interest as beneficiary in said policy to the defendant Charles E. Hussey, and a copy of the same was forwarded by him to the home office of the insurance company, where it was received and filed August 7, 1900. A copy of said assignment was annexed to and made a part of the statement of facts.

On August 10, 1900, said Charles E. Hussey, without receiving any compensation or valuable consideration therefor, gave to his daughter, Edith G. Gove, a defendant in this case, the writing of that date by him signed, which was forwarded to the same

home office of the insurance company, where it was received and filed August 20, 1900.

The last-named assignment is as follows: "For One Dollar, in hand paid, and for other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby assign, transfer and set over unto Mrs. Edith G. Gove, daughter, of Biddeford, Maine, (provided said assignee be living at the time of the death of the insured), all the right, title, claim, interest, and benefit of the undersigned in and to the principal sum insured in event of death by the Policy of Insurance issued by the Travelers' Insurance Co., of Hartford, Conn., on the life of Charles E. Hussey and numbered 73148. In Testimony Whereof, I have hereunto set my hand and seal at Biddeford Me. this tenth day of August 1900.

"Charles E. Hussey. [L. S.]

"In presence of H. G. Hutchinson. Tc C. E. H."

On said August 10, A. D. 1900, the said Charles E. Hussey was owing a large part of the debts mentioned in his schedule of liabilities and filed in court with his petition in bankruptcy.

Said plaintiff demanded of said Charles E. Hussey, to wit, on June 6, 1901, said policy of insurance, and said Charles E. Hussey refused to deliver up the same. Said plaintiff thereupon demanded of said Charles E. Hussey the equivalent of the cash surrender value of said insurance policy, and the said Charles E. Hussey refused to pay the same, and has ever since refused and neglected to either deliver said policy of insurance to the plaintiff or to pay him the said cash surrender value.

By the written terms of said policy, its cash surrender value was, on March 1, 1898, \$287.50, and will be on March 1, 1903, \$712.50. But while said policy gives the right to the insured to surrender his policy only during the 30 days immediately succeeding each five-year period from its date, and only provides in terms as to what the cash surrender value shall be at those periods, it is, nevertheless, the custom of said insurance company to waive the strict and literal construction of the clause in its said policy relating to the cash surrender value of said policy, and allow said policy to be surrendered and canceled at any time, and to pay in consideration of such surrender an increased sum therefor with each full year's premium paid thereon. In other words, under said custom, the cash surrender value of said policy changes on the 1st day of March of each year during its life, and does not increase on account of anything less than a full year's premium.

Under said custom, the cash surrender value of said policy was on March 1, 1901, \$522.50, and on March 1, 1902, \$615.

Said policy had no cash surrender value to said Edith G. Gove, the full sum being pay-

able to said Charles E. Hussey at the expiration of 20 years, if he was living. And, in order to have a cash surrender value, said Hussey and said Gove (if said writing of August 10, 1900, be valid) must release each of their interests in said policy.

Said insurance policy was thereupon filed in court, and became a part of this agreed statement of fact, and together with said writing dated August 10, A. D. 1900, there remains, pending the final decision of the case, subject to the trial and final disposition of the court according to the rights of the parties as they should be determined.

The said Charles E. Hussey has paid the following sums at the time specified, as premiums upon said policy of insurance, since the date of his petition in bankruptcy:

Date Due.	Date Payment Reported by Agent.	Amount.
Mar. 1, 1901	Apr. 23, 1901	\$30 85
June 1, 1901	Aug. 28, 1901	30 85
Sept. 1, 1901	Nov. 27, 1901	30 85
Dec. 1, 1901	Jan. 21, 1902	30 85
Mar. 1, 1902	May 29, 1902	30 85
June 1, 1902	July 31, 1902	30 85

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for plaintiff. Geo. F. & Leroy Haley, for defendants.

STROUT, J. The defendant **Hussey** was decreed bankrupt on March 8, 1901. March 1, 1898, he obtained a policy of insurance upon his life, which was in force when he became bankrupt and is still in force. His wife, **Lizzie L. Hussey**, was the beneficiary named in it. By its terms the amount insured was to be paid to **Charles E. Hussey**, or his assigns if he survived 20 years, or, if he survived his wife, then to his legal representatives or assigns. But if he did not survive 20 years, and his wife survived him, then the amount was payable to her. It also contained provision for surrender at certain times according to the "cash surrender values" indorsed thereon. **Lizzie L. Hussey** was divorced from her husband, and afterwards, on July 10, 1900, executed an assignment of all her interest in the policy to her former husband, **Charles**. August 10, 1900, **Charles** assigned to his daughter, **Edith G. Gove**, one of the defendants, provided she be living at the time of his death, all his right to the sum insured "in event of death," but not assigning the endowment to her if he survived 20 years.

Plaintiff, as trustee in bankruptcy of **Charles**, claims to hold this policy, or its surrender value at the date of bankruptcy. Whether it is to be regarded as assets in the hands of the plaintiff is the question presented.

By Rev. St. Me. c. 75, § 10, "money received for insurance on his life, deducting the pre-

miums paid therefor within three years with interest, does not constitute a part of his estate for payment of debts * * * when the intestate leaves a widow or issue," but descends to the widow and issue, or, if no widow, to the issue. "It may be disposed of by will, even if the estate is insolvent." **Charles** has a daughter, **Mrs. Gove**.

By Rev. St. Me. c. 49, § 94, "life and accident policies, and the money due thereon are exempt from attachment, and from all claims of creditors during the life of the insured, when the annual cash premium paid does not exceed one hundred and fifty dollars," etc.

Under these statutes it is beyond question that if the policy is within them it could not be reached by creditors under the laws of this state.

By the bankrupt act of July 1, 1898, § 6, 30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424], it is provided that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherever they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." This provision pervades and qualifies the whole act, and is to be read into all its subsequent language. It is equivalent to saying that, whatever general expressions may appear in other parts of the statute, they must all be taken subject to this unqualified expression.

By section 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], of the same act, it is provided that the trustee of the bankrupt shall "be vested by operation of law with the title of the bankrupt * * * except in so far as it is to property which is exempt," to various enumerated kinds of property, and, fifth, to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." If this clause 5 should be given literal effect, it would destroy all exemptions specially provided for in section 6 of the act. It must be construed in the light of the term in the earlier part of the same section, which excepts exempted property, manifestly referring to the exemption in section 6.

This construction harmonizes section 6 and that part of section 70 with the evident legislative intention. There immediately follows in section 70 the language: "Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the policy, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankrupt-

cy proceeding, otherwise the policy shall pass to the trustee as assets."

The policy in this case had a surrender value to Charles at each successive five years after its date. The plaintiff claims under the recited proviso.

Arbitrary rules for the construction of statutes afford slender aid in their consideration, and not infrequently mislead. To so construe the different provisions of a statute so as to produce a harmonious whole, in accord with the apparent legislative intent, is the object aimed at, and to be accomplished, if it can be done consistently with its terms, although detached sentences or paragraphs may indicate a different view.

In this statute, in section 6, there is expressly exempted from the operation of the act the exemptions given by the state. Later in section 70, which defines the property passing to the trustee, it is prefaced with the statement, "except in so far as it is to property which is exempt," and then follows, in the same section, all subject to the exemption, the property which he might have conveyed, and the provisions as to life policies. On reading the section, the intention appears to be clear that all its terms apply only to property not exempt by the state laws.

Instead of enlarging the rights to property in the trustee, this proviso further qualifies and limits them. But for it, in states where life policies are not exempted, and no beneficiary is named, the entire interest in the insurance would pass to the trustee. But the proviso limits the amount to go to the creditors to the "surrender value," reserving to the bankrupt an interest he would not otherwise retain. The proviso is in the interest of the bankrupt, and not in that of his creditors; for whether payable to his estate at death, or as an endowment to the insured after a definite period of years, only its cash surrender value at the time of bankruptcy is secured to the creditors, and the ultimate fund, if an endowment policy, is retained by the bankrupt, and if an ordinary life policy to the beneficiary, if any; if not, to the heirs of the insured.

This construction of the statute will give effect to the apparent intention of Congress, and harmonize all sections of the act, and escape an otherwise unavoidable conflict between sections 6 and 70.

We do not find that this question has been passed upon by the Supreme Court of the United States, but there are several decisions of the District and Circuit Courts which are not in harmony. These decisions of learned judges are entitled to great respect, but are not conclusive upon this court.

In *Re Lange* (D. C.) 91 Fed. 301, where the insurance was by an endowment policy, which by the laws of Iowa was exempt, the District Court held that the surrender value went to the trustee, but in this case we think sufficient weight was not given to the lan-

guage of the first part of section 70, or the imperative language of section 6. Section 70, in defining the property passing to the trustee, says the title of the bankrupt passes to the trustee, "except so far as it is to property which is exempt" (which exemption is defined in section 6) to all the then following enumerated species of property. The opinion also treats the proviso as to insurance policies, as an independent, positive, and controlling enactment, unaffected by the exception which applies to all the after enumerated property. This case, and that of *Steele* (D. C.) 98 Fed. 78, were reversed by the Circuit Court in *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968. In *Re Boardman* (D. C.) 103 Fed. 783, the policy was an endowment one. The case arose on petition of the bankrupt for an order upon the trustee who had possession of the policy to deliver it to him. In denying the petition upon the ground that the trustee had some interest in the policy, the District Judge cited with approval *Diack's Case* (D. C.) 100 Fed. 770. In that case the policy was an endowment, payable to the assured if he survived 15 years, "or, should he die before, then to his wife, if living; if not, then to" the insured's personal representatives. For some years Mrs. Diack paid the premiums, and it was held that "as the trustee cannot require Mrs. Diack either to accept a paid-up policy, or to suffer the policy to lapse and thus obtain immediate payment of the surrender value, the bankrupt should be required, unless Mrs. Diack shall elect to surrender, to execute an assignment to the trustee of his interest in the surrender value of the policy, which "should be made payable out of the proceeds of the policy when it matures, or whenever sooner paid." The case does not discuss the construction of the bankrupt act which is presented to us.

In *Re Scheld*, 44 C. C. A. 233, 104 Fed. 870, 52 L. R. A. 188, in the Ninth Circuit, it was held that policies payable to the bankrupt or his personal representatives passed to the trustee under section 70, but that policies payable to wife or children did not pass.

In *Re Slingluff* (D. C.) 106 Fed. 154, a case in Maryland, in which state a policy like that before the court was not exempt by the state law, it was rightly held that it passed to the trustee.

In *Re Holden*, 51 C. C. A. 97, 113 Fed. 142, the court held to the doctrine of the *Scheld* Case.

In *Re Welling*, 51 C. C. A. 151, 113 Fed. 189, policies of insurance were not exempt by the laws of the state. The case, therefore, is not an authority upon the question under consideration.

In *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968, three Circuit Judges sitting, Caldwell, Circuit Judge, delivered an able and well-considered opinion, in which is adopted the same construction of the statute we have

given it. We do not see how any other construction can obtain, without doing violence to the language of the act and the evident intention of Congress.

Plaintiff claims that the assignment to Mrs. Gove is invalid, as a fraud against creditors. This contention cannot be sustained. The policy is a combination life and endowment. When issued the amount insured was payable to Hussey, the insured, if he survived 20 years; but if not, then it was payable to his then wife, Lizzie. When she assigned her interest to Mr. Hussey, the policy then became payable to him, if he survived the endowment period, otherwise to his personal representatives or assigns. The policy authorized an assignment, and the company's promise to pay was to the parties named or assigns. The assignment to Mrs. Gove is not of the whole policy, as it might have been, but only of the right to the fund, if the assured shall die before the endowment period of 20 years. If he survives that, he receives the money, and Mrs. Gove gets nothing. The right thus assigned had no surrender value—that remained to the assured for the endowment period; it had no value as to creditors, for it was absolutely exempt from their claims under the bankrupt act and the state statute. It was entirely competent for Mr. Hussey to make that assignment, practically a designation of a new beneficiary—his creditors are not harmed and cannot complain; but after the assignment to Mrs. Gove, and filing with the company a copy, as required by it, she became the rightful and legal owner of the insurance, if Mr. Hussey shall not survive the endowment period. If he does, she takes nothing. Even as heir the result would be the same, or it could have been accomplished by will of Mr. Hussey.

The contract of the insurance company was, "at the end of the fifth and every subsequent fifth year from date of issue, the cash value specified in table of cash surrender values indorsed hereon will be paid

for this policy, provided it shall be in force under its original conditions, and is legally surrendered thereafter to the home office within thirty days from the close of such period." The date of the policy was March 1, 1893. The first surrender period was on March 1, 1898, but the policy was not then surrendered, and that right to surrender was lost. The next period will arrive March 1, 1903, but the bankruptcy occurred March 8, 1901. At that date the policy had no surrender value which the company was bound to recognize. The parties have agreed that, notwithstanding this, it has been the custom of the company to allow a surrender at any time. The surrender value referred to in section 70 of the bankrupt act refers only to the contract right of surrender, and not to the result of a negotiation or act of grace. If the company has been in the habit of accepting a surrender at other than the contract periods, it is not bound to continue the practice. What it may have done as an act of grace it is under no obligation to continue. It may at any time fall back upon its contract. Under that the policy had no surrender value at the date of the bankruptcy. In *re* Welling, 51 C. C. A. 151, 113 Fed. 192.

But, if this were not so, the transfer to Mrs. Gove of the insurance, in the event of the death of the assured before the expiration of the endowment period, invested her with the right of an assignee, and entitled her, under the terms of the policy, to receive the amount insured, if the death of the assured occurred before the end of the endowment period. All the cases hold that section 70 does not include policies payable to a wife or kindred of the assured, but only applies to policies payable to the assured or his personal representatives. After the assignment to Mrs. Gove, the policy, in the event of death within the endowment period, was payable to her, the daughter. The bill must be dismissed.

So ordered.

STATE v. BISBEE.

(Supreme Court of Vermont. Addison. May 16, 1903.)

ADULTERY—INDICTMENT—SUFFICIENCY—MOTION IN ARREST.

1. An indictment for adultery which fails to aver that the particeps criminis was a married woman is insufficient, under V. S. 5056.

2. An indictment for adultery which does not aver that the particeps criminis is an unmarried woman is not sufficient, under V. S. 5056, which declares that a married man and an unmarried woman who commit an act which would be adultery if such woman was married shall be guilty of adultery.

3. In a prosecution for adultery, where the indictment failed to aver whether the particeps criminis was a married or unmarried woman, and it was not implied in nor inferable from the findings of the facts alleged which she was, the defect in the indictment was available on motion in arrest of judgment.

Exceptions from Addison County Court; Haselton, Judge.

Don A. Bisbee was convicted of adultery, and brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

F. L. Fish and W. H. Bliss, for plaintiff. James R. Donoway, State's Atty.

WATSON, J. The respondent was tried and convicted of the crime of adultery. After verdict and before judgment, he moved in arrest of judgment, for that, among other things, the indictment contains no allegations showing whether the particeps criminis was or was not an unmarried woman. Upon an exception to the overruling of this motion, the case is here.

To be guilty of the crime of adultery under the provisions of V. S. 5056, a man must have sexual connection with a married woman other than his wife; and, to constitute the crime under V. S. 5056, a married man must have sexual connection with an unmarried woman. The indictment is without any allegation that the particeps criminis was a married woman, hence it is insufficient under the former section; nor is it sufficient under the latter section, for it does not allege that she is an unmarried woman. This has been so held on demurrer to an indictment where the statutory provisions in these respects were the same as those contained in the sections above named. *State v. Searle*, 56 Vt. 516. The indictment omits to allege an essential and material fact to constitute a crime under either section of the statute, and it is not implied in nor inferable from the finding of the facts alleged whether the alleged particeps criminis was a married or an unmarried woman. Hence it cannot be said that the jury must have found that she was either, rather than the other. Therefore the defect

is not cured by the verdict. *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

Judgment reversed, judgment arrested, all the proceedings are set aside, and judgment that the respondent be acquitted.

STATE v. SHEDROL.

(Supreme Court of Vermont. Caledonia. May 16, 1903.)

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—UNLAWFUL DISCRIMINATION.

1. V. S. 4732, provides that a person who becomes a peddler without a license in force as provided in that chapter (198) shall be fined not more than \$300 and not less than \$50. By V. S. 4733, persons resident of the state who served as soldiers in the Civil War, and were honorably discharged, are exempt from the payment of a license tax under the provisions of that chapter. Held an unjust discrimination in favor of honorably discharged soldiers, and a violation of the fourteenth amendment, whereby no state can "deny to any person within its jurisdiction the equal protection of the laws."

Exceptions from Caledonia County Court; Watson, Judge.

Information against Albert Shedrol for peddling without a license. Demurrer overruled pro forma, and information adjudged sufficient. The respondent brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

M. G. Morse, State's Atty., for the State. G. C. Frye, for respondent.

WATSON, J. The respondent is informed against for becoming a peddler without a license in force, under the provisions of V. S. c. 198, as amended by No. 94, p. 66, Laws 1900, and the case is here upon demurrer to the information. It is contended that the law upon which this information is based is in conflict with the fourteenth amendment to the Constitution of the United States.

That the license fee required to be paid under the provisions of this chapter for the privilege of selling goods as a peddler is a tax upon the goods themselves was determined by this court in *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973. In that case the law was held to discriminate unjustly against goods manufactured in this state, and for that reason unconstitutional. Later the law was so amended as to avoid such discrimination. Laws 1900, p. 66, No. 94. V. S. 4732, provides that a person who becomes a peddler without a license in force as provided in that chapter (198) shall be fined not more than \$300 and not less than \$50. By V. S. 4733, persons resident of this state who served as soldiers in the war for the suppression of the Rebellion in the Southern States, and were honorably discharged, are exempt from the payment of a license tax under the provisions of that chapter. It is urged that herein the law unjustly discriminates in favor of such soldiers and against other persons, by reason of which

¶ 2. See *Adultery*, vol. 1, Cent. Dig. § 15.

it is in violation of the fourteenth amendment, whereby no state can "deny to any person within its jurisdiction the equal protection of the laws." Can such an exemption be made by the Legislature without affecting the validity of the general provisions of that chapter? is the question. In *Bell's Gap R. R. Co. v. Penn.*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, speaking through Mr. Justice Bradley, the court said: "The provision of the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions; it may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impossible and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think we are safe in saying that the fourteenth amendment was not intended to compel a state to adopt any iron rule of equal taxation." And in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, the court, speaking through Mr. Justice Field, said this amendment, "in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should

be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." And in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, it is said that the rule only prescribes that the "law have the attribute of equality of operation; and equality of operation does not mean indiscriminate operation on persons merely, as such, but on persons according to their relation." Such is the rule laid down by this court in *State v. Hoyt*, above cited. It was there held that the mere fact of classification is not enough to exempt the operation of the statute from the equality clause of the Constitution, but that it must also appear that the classification made is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.

By the law in question the Legislature has made a classification by placing persons resident of the state, who served as soldiers in the Civil War, and were honorably discharged, in one class, and all other citizens together in another class. All persons engaged in the business of peddling, whether they belong to the one class or the other, must have a license in force, or be subject to a penalty; but a license tax is required to be paid by persons in the latter class, while a license may be had by all in the former class without the payment of such tax. The classification, therefore, is one of taxation. From one class a tax on their goods authorized so to be sold is exacted for the privilege of doing business as a peddler, while the other class may carry on the same business in the same manner, sell the same kind and quality of goods in the same territory, without payment of such tax. Does this classification have the equality of indiscriminate operation on all persons licensed thus to do business according to their relations? Upon the answer to this question being in the affirmative or in the negative depends the validity or the invalidity of the law in question under the equality clause of the fourteenth amendment. Upon what basis does the attempted classification rest? There is no basis upon which it can rest except that persons in the one class served as soldiers in the Civil War, and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since past, and not on a present situation or condition, nor on a substantial distinction having reference to the subject matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army they returned to no particular class—they again became a part of the gen-

eral mass of mankind, with the same constitutional rights, privileges, immunities, burdens, and responsibilities as other citizens similarly circumstanced in law in the same jurisdiction. Assuming that thus to have served as a soldier and to have received an honorable discharge may well merit reasonable considerations at the hands of the state in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole; for equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and liabilities imposed." *Magoun v. Bank*, above cited. It cannot be said that service as a soldier in the Civil War and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration. There is no difference between the present conditions and circumstances of such veterans and those of other citizens regarding the relations to the law or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection, and based upon no reasonable grounds. In *State v. Hoyt*, referring to the equality clause, it is said that it is enough if there is no discrimination in favor of one against another of the same class; but that, when such discrimination exists, it impairs that equal right which all can claim in the enforcement of the laws. And the cases of *State v. Harrington*, 68 Vt. 623, 35 Atl. 515, 84 L. R. A. 100, and *State v. Cadigan*, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. Rep. 714, are much in point. In the former the respondent was charged with selling and exposing for sale goods, wares, and merchandise as an "itinerant vendor," without a license therefor. It was contended upon demurrer to the information that the law upon which the prosecution was based discriminated between itinerant vendors and resident vendors, and between classes of itinerant vendors, and therefore it was in conflict with both the state and federal Constitutions. It was held that the state might require a license fee from persons in one occupation, and not from those in another, provided no discrimination was made between those of the same class. In the latter case, the respondent was charged with acting as agent of a partnership organized under the laws of the state of New York in selling certain municipal bonds here without the partnership having procured a license from the inspector of finance, etc., as required by the laws of this state. It was held that to discriminate between residents of our own state by denying to one class the privilege of transacting business without complying with conditions and exactions not

required of others, when the ground of classification is wholly fanciful and arbitrary, is a denial of the equal protection of the laws.

The constitutional right of a state legislature to discriminate in favor of persons who served in the army or navy of the United States in the Civil War has been before the court of last resort in several of the sister states. In New York the Constitution provides that appointments and promotions in the civil service "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations which, so far as practicable, shall be competitive." In the matter of *Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447, it was held that a provision of the civil service law in effect that as to honorably discharged soldiers and sailors of the Civil War competitive examinations should not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed \$4 per day was in conflict with the Constitution. And a somewhat similar law in Massachusetts, purporting absolutely to give veterans particular and exclusive privileges different from those of the community in obtaining public office, was held to be not within the constitutional power of the Legislature. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357. In Iowa the Constitution provides that "all laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall equally belong to all citizens." A statute requiring peddlers to procure a license and to pay a license tax contained the provision that the section requiring the payment of the tax should not be held to apply "to persons who have served in the Union army or navy." In *State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524, it was contended that because of this immunity from the tax to peddlers who so served in the army or navy the law was void. In an extended opinion, reviewing many authorities, the court, saying that the attempted classification is based on no apparent necessity or difference in condition or circumstances that have any relation to the employment in which the veteran of the Civil War is authorized to engage without paying license, and that it savors more of philanthropy than of reasonable discrimination based upon real or apparent fitness for the work to be done, held the law unconstitutional.

We think it clear that the discrimination made in the law in question in favor of persons who served in the War of the Rebellion and were honorably discharged is without reasonable ground, and arbitrary, having no possible connection with the duties of the citizens as taxpayers, and their exemption from the payment of the tax therein re-

quired of others exercising the same calling is pure favoritism, and a denial of the equal protection of the laws. It follows that section 4732 of the Vermont Statutes is unconstitutional, and without force, and that section 4733 of the Vermont Statutes, so far as it relates to the payment of license required by said chapter 198, is unconstitutional, and without force.

Pro forma judgment reversed, demurrer sustained, information adjudged insufficient and quashed, the respondent discharged and let go without day.

DAVIS v. BOWERS GRANITE CO.

(Supreme Court of Vermont. Caledonia. May 16, 1903.)

CONTRACTS—EXCUSE FOR NONPERFORMANCE—MORTGAGE TO SECURE PERFORMANCE—FORECLOSURE—CONVERSION—DAMAGES—REMITTITUR—WRITTEN INSTRUMENT—CONSTRUCTION—QUESTIONS FOR COURT—BURDEN OF PROOF.

1. In assessing the damages caused by a conversion, it is proper to consider not only the value of the property at the time of the conversion, but also the time which has elapsed since it occurred.

2. The court can allow plaintiff to reduce his verdict to the sum declared for by a remittitur of any excess recovered, and then to enter judgment accordingly.

3. Whether or not the condition of a mortgage had been broken so as to warrant a sale of the property by the mortgagee depended on the terms of the condition and on the performance thereof by the mortgagor, and not on the facts surrounding the execution of the mortgage.

4. The construction of a written instrument is for the court, though it is drawn in language so plain as not to require the aid of extrinsic evidence.

5. Plaintiff mortgaged property to defendant to secure the performance of a contract to cut stones. The work was all completed by him except certain lettering, when defendant's manager inspected the stones, and refused to accept them. *Held*, that if the work, as far as completed, was in compliance with the contract, plaintiff was excused from further performance thereof, and his failure to do the lettering would not warrant foreclosure of the mortgage.

6. In trespass against a mortgagee for selling the property, the burden was on defendant to show that the condition of the mortgage had been breached so as to warrant the sale.

Exceptions from Caledonia County Court; Munson, Judge.

Action of trespass and trover by Chas. R. Davis against the Bowers Granite Company. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before TYLER, START, WATSON, and HASELTON, JJ.

Taylor & Dutton, for plaintiff. Senter & Senter, for defendant.

WATSON, J. This action is trespass *de bonis asportatis*, with a count in trover for a horse and wagon. The *ad damnum* is \$200.

The taking and conversion were on the 3d day of September, 1894. There was no evidence that the property was worth at the time of the conversion more than \$185, nor to show any damages in excess of that sum. The jury returned a verdict for the plaintiff to recover \$204.05. After verdict, and before judgment, the plaintiff was permitted to remit so much of the verdict as was in excess of \$200. The defendant moved that the verdict be set aside on the ground that it was not warranted by the evidence, and that it was in contradiction of it. After the plaintiff filed his remittitur, the defendant's motion was overruled, and judgment rendered for the plaintiff for \$200. To this the defendant excepted, and thereon he now contends that, as there was no evidence of any damages in excess of \$185, the remittitur, if allowed, should have been for all in excess of that sum.

In assessing the damages, it was legitimate for the jury to consider not only the value of the property at the time of the conversion, but also the time which had elapsed since the conversion, to determine the fair compensation to the plaintiff for his injury. *Clement v. Spear*, 56 Vt. 401. Under this rule it cannot be said that the damages found were not warranted by the evidence and circumstances of the case, but, this action being one sounding merely in damages, the plaintiff could recover no greater sum than he had declared for. It was within the province of the court to allow the plaintiff to reduce his verdict to that sum by a remittitur, and then to render judgment accordingly. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104; *Crampton v. The Valido Marble Co.*, 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120.

The mortgage upon which the property in question was sold by the defendant's officer, together with the order referred to in the condition of the mortgage, designated as No. 8,186, sent by the defendant to the plaintiff under date of December 13, 1893, were introduced in evidence. The consideration of the mortgage was not in question. If the condition of the mortgage had been broken, and 80 days had elapsed since the breach, the defendant had a right to sell the property upon the mortgage as he did. If the condition had not been broken, and such time elapsed, he had no right thus to sell it. Whether the condition had in fact been broken depended upon the terms of the condition and the performance thereof by the plaintiff, and not upon the facts and circumstances resulting in the giving of the mortgage. Therefore, in excluding the evidence offered of such facts: circumstances, there was no error.

The plaintiff's evidence tended to show that the stock used by the plaintiff in cutting the four stones described in the condition of the mortgage was of the quality and kind specified in the contract, and that said stones were completed by him according to the terms of said contract, except the lettering and certain links to be cut on the die;

¶ 2. See *Damages*, vol. 15, Cent. Dig. § 576.

and that as to these matters defendant had directed plaintiff not to proceed until the stones were completed in all other respects ready for inspection; that, when the stones were completed except in these particulars, plaintiff notified defendant, whereupon defendant's managers inspected the stones; that defendant refused to accept the stones, claiming certain defects, which the plaintiff's evidence tended to show did not exist; that by reason of this refusal plaintiff suspended work on the stones; that the stones still remain in plaintiff's yard; and that plaintiff has always stood and still stands ready to complete the work, and would have done so at that time but for the defendant's refusal to accept. Letters written by the parties, which had a bearing upon the question whether the plaintiff had satisfied the condition of the mortgage by performing his contract, were introduced in evidence. Of the letters so introduced there were two from the defendant to the plaintiff—one dated July 10, 1894, and the other July 14, 1894. The court charged the jury in part that the contract imposed in the condition of the mortgage was the entire contract, and the plaintiff could not satisfy the condition of the mortgage without fully completing the contract, unless he was excused from the full completion by some act of the defendant; but, if the stock furnished by the plaintiff was in accordance with the contract, and if the work to be done upon it was completed in accordance with the contract, except the cutting of the three links and the lettering, the positive declaration of the defendant in its letters of July 10th and July 14th, above referred to, that it would not accept the "base," would excuse the plaintiff from further cutting and lettering the stone; so his failure to do this would not justify the foreclosure of the mortgage, nor prevent the plaintiff's recovering in this suit. To this portion of the charge the defendant excepted, claiming that, as there was nothing ambiguous about the letters, it was for the jury, and not for the court, to say whether the plaintiff was warranted from those letters in neglecting to complete the job; that, as there was nothing ambiguous about them, it was a question of fact for the jury, and not one of law for the court, and that, inasmuch as it was an entire contract, the plaintiff must have completed it; that the evidence was conflicting, but it tended to show that the defendant only told the plaintiff that, if he proceeded, he must proceed at his own risk. The fact that these letters contained no ambiguity did not make them for the jury to construe. It is a general rule that the interpretation or construction of written instruments drawn in language so plain as not to require the aid of extrinsic evidence is a question for the court, and to submit such a question to the jury is error. 1 *Thomp. on Trials*, § 1065. See, also, *Smith Woolen Machine Co. v. Holden*, 73 Vt. 396, 51 Atl. 2;

Currier v. Robinson's Est., 61 Vt. 196, 18 Atl. 147; *Gove v. Downer*, 59 Vt. 139, 7 Atl. 463; *Wason v. Rowe*, 16 Vt. 525; *Mixer v. Williams*, 17 Vt. 457. These two letters expressly state that the defendant will positively not accept the "base"; hence in that regard they were properly construed by the court. If the stock was such as the plaintiff was required to furnish, and the work to be done upon it by him was completed according to contract, except the cutting of the three links and the lettering, when he received these letters, the plaintiff was justified in stopping work. The contract set forth in the conditions of the mortgage was an entire contract, and incapable of severance. When the plaintiff received notice from the defendant that it would not accept the base to the monument, a part of the entire contract, it was, in effect, a notice that the defendant would not accept the stones specified in the conditions of the mortgage according to contract. This shows that the noncompletion of the contract was not the fault of the plaintiff, and that he was disposed and able to complete it had not the act of the defendant prevented. In that part of the charge excepted to there was no error, for such fault by the defendant should be removed before he can charge the plaintiff with a failure to perform. *Cort v. The Ambergate, etc., Ry. Co.*, 17 Q. B. 127; *Raynay v. Alexander, Yelverton*, 76.

It is urged, however, that it was the plaintiff's duty to have fulfilled the contract by completing the job and tendering it to the defendant. But, if the defendant refused to accept the stones according to the contract, the law did not require of the plaintiff the useless ceremony of thus making a tender. *Hard v. Brown*, 18 Vt. 87; *Cobb v. Hall*, 33 Vt. 233.

The defendant requested the court to charge that the burden of proof was upon the plaintiff to show that the work was completed according to the terms of the contract. This request was not complied with, but instead thereof the court charged that the burden of proof was upon the defendant to show there was a breach of the conditions of the mortgage. An exception was taken to the neglect to charge as requested and to the charge as given in this behalf. To make out his case the plaintiff need show no more than that the defendant committed the act which, in the absence of excuse or justification, constituted in law a tort to him. If facts existed which would justify the defendant in his act, even though they would show that he had committed no tort, such facts would constitute an affirmative defense, and the burden was upon the defendant to allege and prove them. Hence in the refusal thus to charge and in the charge as given there was no error. *Bosworth v. Bancroft*, 74 Vt. 451, 52 Atl. 1060.

No other exceptions being relied on in the defendant's brief, judgment is affirmed.

MULLANEY v. MULLANEY et al.

(Court of Errors and Appeals of New Jersey.
March 11, 1903.)

ADMINISTRATION—WIFE'S RIGHT TO APPOINTMENT—MARRIAGE—RELEASE OF INTEREST—FRAUD IN PROCUREMENT—ORPHANS' COURT—ADMINISTRATION—RES JUDICATA—EVIDENCE—SUFFICIENCY.

1. Evidence on an issue of marriage *held* to show that the parties were actually married, and lived together as husband and wife, though no marriage ceremony was performed.

2. The orphans' court has no jurisdiction to determine whether a wife's release of her interest in her husband's estate was obtained by fraud, and its decision is not res judicata.

3. In a proceeding by a wife for appointment as her husband's administratrix, under a statute providing that administration shall be committed to the widow or next of kin, the issue whether her release of her interest in the estate was procured by fraud is only incidentally cognizable, and the decision thereon is therefore not res judicata.

4. Evidence in a suit by a widow to set aside, as procured by fraud, her release of all interest in her husband's estate, examined, and *held* to sustain complainant's contention, and to show that the person perpetrating the fraud, though previously her agent, was at the time acting for heirs adversely interested.

Appeal from Court of Chancery.

Suit by Pauline E. Mullaney against George W. Mullaney and others. Decree for complainant, and defendants appeal. Affirmed.

The following is the opinion of the court below (Stevens, V. C.):

"This is a suit to set aside a release given by the complainant, who claims to be the widow of Michael Mullaney, to defendants, who are his next of kin and heirs at law. That the case may be understood, it will be necessary to state the situation as it was prior to the giving of the release: Michael Mullaney died intestate at Bayonne December 2, 1899. He left personal property estimated at \$7,297.29, and real estate estimated at \$6,400. At the time of his death, Mrs. Mullaney was not living with him. She says that on July 4, 1862, it was agreed, in the city of New York, that they should become man and wife. There was no marriage ceremony, but the undisputed fact is that after that time they lived together for about twenty years, and most of the time in Bayonne. Then she left him, as she alleges, because of his cruel treatment, and she went to New-ark, where she has since resided. For nearly twenty years she has been supporting herself at domestic service, or by working out by the day. When Michael died she applied for letters of administration. This was resisted by Michael's next of kin on the ground that she was not in fact his widow. The case was heard by the Hudson county orphans' court. A large number of witnesses were sworn on both sides. On February 2, 1900, the last witnesses were called, and the case summed up. The court reserved its decision. Three days thereafter the release in controversy was procured. On February 9th

application was made to the orphans' court to open the case, in order that the release might be put in, for the purpose of showing that Mrs. Mullaney had no further interest in the estate, and that consequently she was not a proper person to administer. The paper did not, in terms, contain any waiver of her right to do so. It only released her right, title, and interest in and to the estate, real and personal, of her late husband. The application was resisted, but the court granted it, and then counsel for the widow asked to be permitted to show that the release was obtained by fraud. The court granted the request, and thereupon evidence was given on both sides on this new issue. The decision, as appears by the judge's opinion, but not by the order or decree, was that there was no fraud, and that, this being so, it was unnecessary to decide any other question. The order was that the prayer of the petitioner, asking for administration, be denied. Then Mrs. Mullaney filed this bill, and, the case coming on to be heard, it was stipulated that the evidence taken in the orphans' court should be used here. No additional evidence, either on the question of marriage or of fraud in procuring the release, was taken in this court.

"I shall deal with the first of these questions very briefly. It seems to me very plain that, while there was no ceremonial marriage, the connection was matrimonial, and not meretricious. In addition to the evidence of Mrs. Mullaney that there was a verbal agreement of marriage, the following facts appear: Michael Mullaney kept a grocery and liquor store in Bayonne. He was also for many years postmaster. During the twenty years that he and Mrs. Mullaney lived together, they regarded each other, and were treated by their customers and by their friends and relatives, as man and wife. In their correspondence, some of which is in evidence, they recognized each other as such. There was one child born to them—a son, who died when about eight years old. The inscription over his grave was as follows:

"Our Little Simey.

"Simon K. son of Michael & Pauline Mullaney died March 23, '73, age 8 years, 3 mos. & 10 days.

"Sleep on my Babe and take thy rest.

"God called thee home.

"He thought it best.

"Selected by his grandmother."

"After the separation he told the witness Frank Hovell that he could not sell the lots because he could not get his wife to sign off. The defendants' witnesses, in so far as they do not corroborate complainant's witnesses, apparently draw their conclusion that the cohabitation was illicit only from the admitted fact that there was no ceremonial marriage. The evidence shows that there was an interchange of consent, and that this was followed by cohabitation, accompanied with matrimonial habit and repute.

"The important question to be determined is whether this court should avoid the release for fraud. An objection was made in limine that this question, having been decided by the orphans' court, became res adjudicata, and not re-examinable here. I think there are two answers to this objection: First, the orphans' court had no jurisdiction to decide the question; second, if it had, its decision thereon was not conclusive, for the reason that the point decided was only incidentally cognizable.

"The jurisdiction of the orphans' court is limited to those matters which have by statute been confided to it. It has no inherent jurisdiction to decide whether a release of lands or personal property is voidable for fraud. The utmost that can be claimed is, that it may determine questions of law and equity, the decision of which is necessary to the decision of some other matter expressly committed to it (*Dunham v. Marsh*, 52 N. J. Eq. 281, 30 Atl. 473), just as this court may decide legal questions when they arise incidentally and collaterally in a suit rightly instituted for equitable relief (*Kean v. Union Water Co.*, 52 N. J. Eq. 813, 31 Atl. 282, 46 Am. St. Rep. 538). The orphans' court had power to decide the question whether Mrs. Mullaney was in fact the widow of Michael Mullaney, for letters of administration could only be granted to her on this foundation; and, if the question were in doubt, it would necessarily hear proof on the subject. But if that court could perform its statutory duty without trying questions properly cognizable by some other tribunal, it would be without jurisdiction to pass upon them. Thus it has been held in several cases that when an administrator makes application to sell lands to pay debts, the estate not being insolvent, the orphans' court has no power to determine the validity of the claims in respect of which the administrator bases his application. The determination, under our system, belongs to other courts. *Miller v. Pettit*, 16 N. J. Law, 421; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Smith v. Smith's Administrator*, 27 N. J. Eq. 445; *Middleton v. Middleton*, 35 N. J. Eq. 115. It has also been held, where the estate is not insolvent, the orphans' court has no power to adjudge that a creditor has, by inequitable conduct, discharged it from liability to him. *Partridge v. Partridge*, 46 N. J. Eq. 434, 19 Atl. 662; *Id.*, 47 N. J. Eq. 601, 22 Atl. 1075. Now, there is no more reason why the orphans' court should have assumed jurisdiction to try the validity of the release under consideration than there would be for a court of law, in an action of ejectment, to adjudge whether the deed under which grantee claimed was obtained by fraudulent misrepresentation. The law court would adjudge in accordance with the legal title, and would leave the grantor, in the case supposed, to his remedy in equity; and so, in like manner, the orphans' court should

have assumed that the release was valid, until it was decreed by this court to be fraudulent and void. It was proper for it to have received the release as a valid instrument, and to have given it such weight as it was entitled to, in determining the question of administration. The orphans' court had before it the evidence on which to decide whether Mrs. Mullaney was or was not Michael's widow. It had proof of who were next of kin. It had, too, Mrs. Mullaney's release. It was therefore in a position to decide to whom, under the then existing circumstances, administration should be committed. It is true that subsequent litigation in another tribunal might have varied the rights of the parties as they then appeared to be, but this was only a not uncommon instance of a right ascertained by one tribunal, acting within its sphere, being subsequently modified by the decision of another tribunal acting also within its sphere. In other words, the mischief, if mischief it was, arose out of the fact that—such is the complexity of human affairs—it has been found convenient, if not necessary, to apportion the judicial work of the state among the several courts, instead of giving to any one unlimited jurisdiction to deal with every phase of every subject that might come before it. The proceeding to determine the fraudulent character of the release was therefore *coram non jure*, and the determination worked no estoppel.

"If I had come to the conclusion that the court had jurisdiction to determine the question of fraud, I should still have thought that its determination would not have been conclusive. Lord Chief Justice De Grey thus expresses himself in the leading case of the *Duchess of Kingston*: 'From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, and, as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same question between the same parties coming incidentally in question in another court for a different purpose. But the judgment of a concurrent or exclusive jurisdiction is neither evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.'

"It seems to me that the question resolved by the orphans' court, if cognizable at all, was only incidentally cognizable, and only to be inferred by argument from the order actually made. The statute says the administration shall 'be committed to the wid-

ow or next of kin of the intestate.' Under ordinary circumstances, it is usually confided to the widow. *Wms. Ex'rs* *363. Had the question been only whether Mrs. Mullaney was the lawful wife of Michael Mullaney, its adjudication would, according to most of the cases, have bound this court. Lord Lyndhurst so held in *Barrs v. Jackson*, 1 Phill. 582, with respect to the analogous question of who was next of kin, revising the contrary decision of Vice Chancellor Knight Bruce, reported in 1 Y. & Coll. 587. The weight of English and American authority is said to be in favor of the view taken by Lord Lyndhurst. *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. (8th Am. Ed.) *681. The present case does not call for a decision on the point. The question whether Mrs. Mullaney was or was not Michael Mullaney's wife would under ordinary circumstances have gone to the very heart of the controversy. An issue could have been framed upon it. But the question of release or no release could never have become an issue, in the proper sense of that term. If her allegation was, 'I am widow,' and this was proved, then the allegation by way of confession and avoidance would be, not, 'You have executed a release,' but, 'You, though widow, are without interest,' and so not entitled to your statutory right. Want of interest would be the issue, and of this the release would be evidence. It would have been quite beyond the power of the orphans' court to have decreed that the release should be avoided for fraud. The judgment in the case at bar was only 'that the application of Pauline E. Mullaney for her appointment as administratrix * * * be, and the same is, denied, and her petition be dismissed, with costs.'

"It seems to me clear, therefore, that the question of fraud or no fraud, had the court been competent to try it, would have been collateral. It would be strange indeed if this court could be estopped by the inference of an adjudication which the court neither actually made, nor was competent to make. *Hibshman v. Dullehan*, 4 Watts, 183, is a case in point. It was there held that a decision by the Orphans' Court that a legatee was precluded from excepting to an account filed by an executor by a release of the legacy did not debar him from proving that the release was procured by fraud, in a suit for the legacy. A judgment is not conclusive and is no evidence as to facts not in issue in the action, but proof of which is given therein to establish facts in issue. *Belden v. State*, 103 N. Y. 1, 8 N. E. 363.

"Suppose Mrs. Mullaney, instead of assigning her interest to the heirs and next of kin, who happened to be parties to the orphans' court proceeding and to the present proceeding, had assigned to a stranger. Her lack of interest would be the same. Could the question of fraud have been tried by the orphans' court in the absence of the assignee? Certainly it would not be asserted that that

court could have brought him in by process, and made a decree which would have bound him.

"I now proceed to a consideration of the merits. On this branch of the case the material facts are these: On the day of Mr. Mullaney's funeral, at which his wife attended, she had a conversation with one Alexander Martin, who describes himself as a general auctioneer and collector. As the result of it, he took her to William Salter, an attorney practicing in Jersey City. Salter made application in her behalf for letters of administration, and conducted the proceedings on the caveat. Evidence was taken in open court on January 5, 1900, and on several days thereafter, up to and including February 2d. Great diligence in procuring witnesses seems to have been displayed on both sides, and during all this time Martin acted as a messenger and process server for Salter, and appears to have had, by arrangement with him, a contingent interest in the result. Salter himself, it is said, was to have had one-half the proceeds of the recovery. The case was argued and submitted to the court on the 2d of February. Mrs. Mullaney was present. Now, I think that all who heard the evidence must have been greatly impressed with the strength of Mrs. Mullaney's case. That Martin must have great confidence in it cannot be doubted, and in fact he himself admits it. Notwithstanding, what he did was this: The argument had taken place on Friday. On Sunday afternoon he started for Newark to see a man named Erwin, who wanted to buy a horse. I shall give his version of what took place in some detail, for I think its inherent improbability will be apparent from his own statements. After he reached Newark it occurred to him, as he testifies, that it was his duty to go and see Mrs. Mullaney. Somewhat incongruously, he adds, 'I went to see her for no purpose whatever.' As the trolley car had carried him one or two blocks from Erwin's place, he decided not to go there, although he had expected to make money by the trade he was contemplating, but to go direct to Mrs. Mullaney's. He went there and found her 'in a horrible condition.' She told him that the neighbors were shouting at her; that a Mrs. Brown was telling her that she was trying to be a white man's wife; that the Farrell people were round the streets nights, trying to get evidence; that she wanted to move; and that she said to him: 'Aleck, you have got me in all this trouble. Get me \$100, and you will never hear from me again.' He says that he told her he did not see how he could get any money for her, but that she kept at him all that afternoon so that he neglected to see Erwin about the horse. Then he says, 'I made up my mind before I left the house that I would settle the case, no matter what I got; and I told her I would go over to Bayonne, and ask a man named Smith, who is brother-in-law of

Mullaney's, for \$300.' She said, 'The d—entire Mullaney family has not \$300.' I said, 'I would just as leave ask them for \$300 as I would for \$100, and I'll do it.' And she says, 'If I get \$300, I will give you one.' He then told her that if he got the money he would telegraph for her to meet him at the corner of Broad and Market streets, Newark, and she said: 'I will not go to Market and Broad streets. I don't want to meet those Farrells.' She then suggested the Central R. R. Depot, in Elizabeth, and he said 'All right,' as to the place, and that he would telegraph her. On cross-examination he says that he thinks that it was he who mentioned the Central Railroad Depot, and not she. He then went to Smith's house, in Bayonne, reaching there after eight that same Sunday evening. On the way, it occurred to him that he might as well ask Smith for \$400. Accordingly he asked Smith for that amount, and said, 'I want the money early to-morrow morning.' Smith told him that they should go to George W. Mullaney, as he was an heir indirectly only, and Martin replied that he would not go to him. Then Martin said to Smith, 'I'll give you an hour and a half to let me know what you will do.' Smith thereupon proceeded to see Mullaney, and Mullaney at once agreed to the \$400. After that Smith went to a Dr. Forman, who agreed to go to Elizabeth the next morning with the money. After seeing these two gentlemen, Smith went to Martin's house, and told him that they would pay \$400. Less than two hours elapsed from the time Martin first saw Smith, to the time when the arrangement was completed. Next morning Martin went back to Mrs. Mullaney's without communicating with Mr. Salter, her solicitor, or Mr. Linn, her counsel. He reached her house between seven and eight o'clock, and took her from Newark to the Central Railroad Depot in Elizabeth. In the meantime Forman had received from Smith, at Bayonne, \$400, \$300 of which was made up of three \$100 bills, and reached the Elizabeth Depot between nine and ten o'clock. From there, Forman, Martin, and Mrs. Mullaney proceeded to the office of Frederick Marsh. Mr. Marsh had had nothing whatever to do with the case, but under Dr. Forman's instructions he prepared a release, expressed to be for the consideration of one dollar, which Mrs. Mullaney signed. It may be remarked, in passing, that this release is noticeable not only because it fails to express the true consideration, but because it contains no less than fourteen grantees, whose names, including their middle names, are given in full, with their respective places of residence, in New Jersey and in different towns in the state of New York. Dr. Forman's version of how he executed his errand is that he received the \$400 from Smith, who said that he was to go to Elizabeth and procure a good lawyer and get a release from the woman, and that he was to use the mon-

ey to get the job done. When asked to whom he was to give the \$400, his reply was, 'I suppose, to whom it belonged.' When asked, 'Who was that?' he says, 'I suppose, this woman, for she signed that release.' Notwithstanding this supposition, he says he gave her \$300, paid the fee of Mr. Marsh (\$10), and gave Martin the balance (\$90). 'I supposed, if the woman got that \$300, Martin was entitled to the balance.' It does not appear that from the beginning to the close of this transaction Mrs. Mullaney was directly informed of the precise amount of the settlement. The paper which Mr. Marsh read over and explained the effect of to Mrs. Mullaney was delivered to Dr. Forman. It is a complete release of all Mrs. Mullaney's right, title, and interest in all her husband's lands and personal property, said to be worth over \$13,000. One or two days afterwards Mr. Salter was notified that application would be made to reopen the case for the purpose of introducing it in evidence. This was the first notice that Mrs. Mullaney's counsel had of its execution.

"Mrs. Mullaney's account of her meetings with Martin differs essentially from his. She says: That he came to her house on Sunday afternoon, and told her that he had good news for her; that the case had been settled; and that her lawyer, Salter, had sent word to her that she should go to Elizabeth and sign a paper. That she asked him how much she was to get, and that he said, 'About \$300.' That her reply was that that was very little for her to get; that her lawyer had said that she would get ten times that. And that he answered that Salter had done the best he could, and she should be satisfied, that Mullaney had drunk up and used up his money with women; and that his relatives had robbed him to such an extent that the estate had all gone down. That he told her that the other heirs would only get \$98 apiece. Mrs. Mullaney is corroborated in this version of the interview by a colored man named Holmes, who lives in the same house with her, and was present at the conversation. It is, on its face, so much more probable than Martin's version, that I have no doubt of its substantial accuracy. To suppose that Martin, a horse dealer and auctioneer, was so moved by Mrs. Mullaney's tears and entreaties that he was compelled to take a course which he knew was contrary to her pecuniary interest and his own, in a case which he admits he believed to be a good one, and, to take this action so hastily that he did not find time to consult her own counsel, who lived in the same town with him, quite transcends belief. There must be another explanation of his conduct. That he is unscrupulous appears from his own evidence. That he is unworthy of belief appears from the testimony of his neighbors. I have no doubt that he went to Newark that Sunday afternoon because of some understanding with some one representing the in-

terests of the heirs. He had shortly before discovered that Salter, in the written agreement which he had made with his client in reference to his contingent fee, had not mentioned him; and he doubtless thought that, because he would not have hesitated to take an unfair advantage of Salter, as in fact he did, Salter might be willing to take an unfair advantage of him. He no doubt came to the conclusion that it would be more certainly profitable to him to go over to the other side. This, of course, is largely conjecture, but conjecture not only resting on its inherent probability, but also on evidence. He afterwards said to Salter's clerk, Spofford, in explanation of his conduct, he could not see any money on Salter's side, and so he went over to the other side; and he said to Salter, if Salter is to be believed: 'I guess I am the best heir now. You get your \$1,400 first [alluding to an offer of settlement which Salter had made to the heirs], and I will show you dollar for dollar.'

"I have said that it is probable that Martin went to Newark in consequence of some understanding between himself and some one representing the interest of the heirs. Smith and George Mullaney both deny that they had any such understanding. Their testimony may be, and very probably is, literally true, but they are only two of the fourteen persons interested. Martin's testimony is that, when he started to go to Newark on that Sunday afternoon, he intended to see Erwin about a horse, and did not intend to go to Mrs. Mullaney's. He is diverted from this purpose only because the trolley car had carried him a block or two beyond Erwin's house. He goes to Mrs. Mullaney's 'for no purpose whatever.' He finds her 'in a horrible condition,' notwithstanding the fact that the excitement of the trial was over, and the evidence appeared to be very favorable to her. He reaches Smith's house, in Bayonne, after eight o'clock in the evening. Between that and ten he not only concludes the bargain, but Smith sees George Mullaney and gets his consent to it, and Mullaney or Smith gets Dr. Forman's consent to go to Elizabeth early the next morning. There is no bargaining over terms. The four hundred dollars, three hundred of which were in hundred dollar bills, are in readiness for the consummation of the affair before the banks opened on Monday morning. Where this money came from, or how Smith happened to have so much money at hand, in such large notes, does not appear. The most singular fact of all is that no one on either side suggested that the transaction should be consummated with the assistance of the counsel engaged in the case. In this regard the only explanation that suggests itself is that the representatives of the heirs were unwilling to let the high-minded gentlemen who were conducting their case in court know what was going on. They doubtless

feared that if they were informed of it they would insist that the settlement should be made by Mrs. Mullaney under the advice of her own counsel, and that this would defeat their purpose; and so it was arranged that the settlement should be made in another town, in the office of a lawyer who was ignorant of all the important facts. If the transaction was an honest transaction, there was absolutely no reason why it should not and would not have been consummated in the office of Mr. Hughes or Judge Hudspeth. There was every reason why it should.

"Again, why all this haste? Was it not feared that, even if the consummation of the plan were delayed for a few hours, it might become impossible? Another significant circumstance indicative of collusion was the place of meeting, viz., the Central Railroad Depot in Elizabeth. Martin, in his direct evidence, swore that this place was suggested by Mrs. Mullaney, but on cross-examination this must have appeared to him so unlikely that he finally said that he had himself suggested it. Why he did so is obvious. It was accessible from Bayonne, and it was out of the way. That he would have fixed that place, and that early hour on the morning of the next day, unless there had been some previous understanding, is not probable.

"The rule of law applicable is clearly stated by Mr. Justice Magle in delivering the opinion of the Court of Appeals in *Dundee Chemical Works v. Connor*, 46 N. J. Eq. 582, 20 Atl. 51. He says: 'Courts will not weigh the relative skill of parties to contracts, and, merely from a disparity between them, avoid a contract obtained from the less skillful party. It is only when the contract is got from the illiterate, the weak-minded, or distressed party under circumstances which indicate that it was procured by artifice or deception, or by undue pressure and importunity, inducing action without advice or time for deliberation, or by advantage taken of distress, or for no or an inadequate consideration, or is otherwise inequitable, that it will come under condemnation. Therefore, when a disparity of capacity appears, courts should scrutinize the transaction with extreme care. But if, when so examined, there is disclosed no ground of objection except such disparity, the contract cannot be impeached.' Every element mentioned by Mr. Justice Magle as ground for avoidance seems to be present in this case. The artifice of Martin in representing himself as coming from Salter; the deception which he practiced when he told her that her case had been settled, that the estate had been found to be dissipated, and that it was Salter's advice to her to sign the release; his importunity, inducing action without advice or deliberation; and an inadequate consideration—are all obvious. It is said, however, that, conceding this to be so, Martin was Mrs. Mullaney's agent, and the heirs are not responsible for his misconduct. I do not so

read the facts. I think the evidence shows not only that the heirs are seeking to hold an advantage which Martin's fraud has given them, but that their representatives, or one or more of them, took some part in promoting the scheme. Martin, in this transaction, appears to have acted for himself and for them, and not for Mrs. Mullaney. She still has the money, and offers to return it.

"There is some evidence tending to show that since she left her husband she has been living with two colored men. This evidence is controverted, and the matter is left in doubt. As I view the case, it has little to do with the decision of the present controversy. It may become of consequence hereafter, when she sues for her dower."

Corbin & Corbin, for appellants. Wm. D. Salter, for respondent.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of Stevens, V. C., in the court below.

SAMUELS v. LUCKENBACH.

(Supreme Court of Pennsylvania. May 4, 1903.)

REAL ESTATE BROKER—RIGHT TO COMMISSIONS.

1. The fact that a broker had previously made a sale of property, and had been paid a commission therefor, is insufficient to entitle him to commissions on a subsequent sale made by him for the same vendor without request or employment.

2. Plaintiff was employed to sell one of two tugs specifically named, and brought a person who rejected them, but afterwards purchased from the defendant a third tug, in relation to which there was no contract with the broker. *Held*, that he was not entitled to recover commissions thereon.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William S. Samuels against Lewis Luckenbach. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward F. Pugh and Henry Flanders, for appellant. John F. Lewis and Francis C. Adler, for appellee.

MITCHELL, J. The dealings of the parties were altogether by telegrams and letters. The contract, therefore, having to be gathered from the writings, its terms and construction were for the court, and the defendant's point to this effect should have been affirmed. But as it does not appear that the construction of the contract was really left to the jury, except negatively by the failure to charge otherwise, the error would not be material if the case was in other respects properly submitted.

A much more important error, however, was contained in the instructions upon the

requisites of the plaintiff's cause of action. On this subject the judge charged: "The question in this case, as the court will leave it to you to be determined, is whether or not this plaintiff brought these parties together, and was the efficient means of effecting the sale of this boat. That is what you will have to consider and determine; and the court will charge you that, if he was the efficient means of producing the sale of this boat, he is entitled to his commission, but, if he was not the efficient means, he is not entitled to his commission." This was inadequate in overlooking the element of employment or authority. A mere volunteer is not entitled to commissions, though he brings the parties together, and is the efficient means of procuring the sale. Even a broker whose business it is to bring buyer and seller together "must establish his employment as such, either by previous authority, or by the acceptance of his agency, and the adoption of his acts." *Keys v. Johnson*, 68 Pa. 42. The fact that a broker had previously made a sale and been paid a commission will not entitle him to a commission on a subsequent sale made by him on behalf of the same vendor, but without request or employment. *Mayer v. Rhoads*, 135 Pa. 601, 20 Atl. 158. And, as a necessary corollary, the employment must be to sell the thing for the sale of which commissions are claimed.

The employment of the plaintiff, gathered, as it must be, from the writings, was to sell or find a purchaser for one of two tugs specifically named. The correspondence opened by a telegram from plaintiff to defendant inquiring as to tugboats for sale, and asking particulars and lowest cash prices. Defendant replied by a letter offering a large tugboat not named and the Ocean King. Plaintiff wrote again, asking "more complete information" about the Ocean King, and saying the price of the large tug was too high. Defendant again replied with further particulars about the Ocean King, and saying: "The other tug I don't think your party wishes to purchase on account of the price being too high. My price is \$30,000" (evidently a slip of the pen, as \$85,000 was the price named both previously and later). Plaintiff next wrote that the Ocean King might suit his clients, but the larger tug, which, though not previously named, he seems to have recognized as the Edwin Luckenbach, would suit them better, "but not at the price, \$85,000." Several letters, not now material, followed, in regard to prices and the payment of commissions, and then one from plaintiff saying: "My commission of five per cent. must be included in the prices named for boats, as follows: Ocean King, \$30,000; Edwin Luckenbach, \$85,000. Should I sell either boat, the commission to be based on the price they actually sell for." To a telegram a week later, asking a reply, defendant answered by letter, saying: "Your telegram duly received this a. m. asking for

me to accept your proposition for the five per cent. commission to be paid to you on the sale of either the Ocean King or Walter A. Luckenbach. You mentioned the tug Edward Luckenbach. These latter two tugs were built last year, and they are the same size and power, so kindly change your mind from the Edward to the Walter A. I will only sell one tug, either the Ocean King or the Walter A. Luckenbach, and you shall have your commission of five per cent. if you sell either one of the above-named boats for me." This closed the correspondence, so far as the contract is concerned.

It appeared at the trial that the customer with whom the plaintiff had been in communication went to New York, saw the defendant and the two boats mentioned, declined to buy either of them; but, after looking about, and negotiation, did buy from defendant another boat, the Lewis Luckenbach, for commissions on the sale of which this suit is brought. There was no question that the purchaser had gone to defendant in consequence of his previous communication with plaintiff, but the testimony was conflicting as to whether or not he informed defendant of that fact. It was not, however, material whether he did or not. The contract between plaintiff and defendant conveyed no general authority, even by implication. On the contrary, the agency was expressly limited to the specific boats named, at specified prices, and neither of them was sold. As to any other boat, even if his communications with the purchaser be considered as the efficient means of the sale, the plaintiff was only a volunteer, without precedent authority or subsequent acceptance of his services as an agent. That they gave him a claim in natural justice to a fair compensation is plain, as the jury no doubt felt; but on the clear and indisputable limits of the contract it was not a claim enforceable at law, and the jury should have been so instructed. If there were any grounds for claiming a fraudulent effort of the defendant to avoid payment of commissions by the sale of another boat, a different question would be presented, but the evidence shows that the boat sold was an independent selection by the purchaser after investigation of the vessels in the market at the time and place.

The case of *Holmes v. Neafie*, 151 Pa. 392, 24 Atl. 1096, cited by appellee, was very different. There, after the failure to make sale of the particular boat first considered, there were negotiations in which the broker took part, which resulted in the contract afterwards made. The point of that case was in the fact that, the vendors having to go into competition with other bidders, before finally getting the contract, did not destroy the broker's title to commissions for bringing the parties together.

Judgment reversed, and now judgment entered for defendant.

BROMMER v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

MASTER AND SERVANT—VICE PRINCIPAL—INJURY TO EMPLOYE—NEGLIGENCE.

1. A train dispatcher is a vice principal of the railroad company which employs him.

2. A brakeman sued for personal injuries received in a collision. The evidence showed that the train dispatcher directed an engineer to run on a certain track carefully, and stated that there were cars at a street named. The engineer collided with such cars some 1,200 feet nearer than the point named. *Held* error to direct a nonsuit.

3. Where a collision occurs, and plaintiff, a brakeman, is injured, an alleged defect in the sill of the tender cannot be treated as negligence contributing to the accident, as a requirement that such sill should be strong enough to resist the force of a collision would be impracticable.

Appeal from Court of Common Pleas, Philadelphia County; Willson, Judge.

Action by William H. Brommer against the Philadelphia & Reading Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richard P. White and Andrew C. Wylie, for appellant. Gavin W. Hart, for appellee.

MITCHELL, J. It is conceded that under the decisions the train dispatcher, within the limits of his employment, was a vice principal. *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631. The negligence charged in the plaintiff's statement includes, among other things, erroneous information, and a misleading direction by the yardmaster, which were averred as at least in part the cause of the accident. The direction complained of was as stated by the engineer: "My orders were to run the south-bound track carefully. That there were fifteen cars on the south-bound at Front street, and that an engine was coming from Richmond to move them to Richmond. That I should follow those cars down carefully, and, after they were shifted, the engine would go in the house." The engine and tender were accordingly run carefully, as alleged, but met the standing cars at Second street, instead of Front, as expected, with the result of a collision, in which the plaintiff was injured. The character of these orders on the question of negligence was for the jury. It may be that in railroading, where distances are so entirely a matter of time and speed, a direction to run carefully, and be on the lookout for an obstruction at a point named, is sufficiently accurate and specific, though the obstruction be met in fact 1,200 or 1,300 feet nearer. If the order was not negligent under the customs and common understanding in the business, then the defendant is not responsible,

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 495.

for that is the only negligence averred on which the plaintiff can recover. But, as that is not the only, or even the *prima facie*, deduction from the order, it must go to the jury on the evidence.

It is not perceptible how the alleged defect in the sill of the tender can be treated as negligence contributing to the accident. The sill being the place where the coupling is attached for pulling the train, it is required to have strength to resist the tension of that operation, but there is nothing in its purpose or use to require that it shall be strong enough to resist the force of a collision. Such a requirement would be impracticable. The inference that, if the sill here had been stronger, the injury to the plaintiff would have been less, or would not have happened at all, is a mere guess, which the jury should not be permitted to make.

It is strongly urged by the appellee that the only proximate cause of the collision was the disregard of the rules of the company by the crew of the standing train, and it may be so, but it is not sufficiently established in the plaintiff's presentation of the case to justify the court in taking it away from the jury.

Judgment reversed, and procedendo awarded.

IN RE MYERS' ESTATE.

(Supreme Court of Pennsylvania. April 27, 1903.)

TRUSTEE UNDER WILL—REMOVAL.

1. Under a will the beneficiary and another were appointed trustees and the beneficiary, an elderly woman, petitioned for the removal of her co-trustee showing the existence of an irreconcilable antagonism, resulting from the domineering behavior of the co-trustee. The evidence showed that he had notified the tenants to pay rent to him, and not to the agent of the beneficiary, a nephew, who lived with her, and had long collected the rents at her request. *Held*, that a decree removing the trustee would be sustained.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Simon S. Myers, deceased. Appeal by Mark Myers, trustee, from a decree removing him from his office. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Henry H. Rosenfelt, for appellant. Preston K. Erdman, for appellee.

PER CURIAM. The court below found that, owing to the hostile relations between the appellant and his co-trustee, the retention of the former would naturally work disadvantage, inconvenience, and great discomfort to the latter, and that the petition for appellant's removal was not the offspring of whim or caprice, but of irreconcilable antagonism, which "resulted largely from the dogmatic, domineering, and ungentle behavior of

the respondent [appellant] towards the petitioner." The court further found specifically that the facts as shown by the evidence brought the case clearly within the principles of *Marsden's Estate*, 166 Pa. 213, 31 Atl. 46, and *Neafie's Estate*, 199 Pa. 307, 49 Atl. 129. We have not been convinced that this view was erroneous. The appellee, besides being co-trustee, was tenant for life, and entitled to have her interests considered from a friendly and beneficial point of view in the management of the estate. The whole will is not before us, but, so far as appears, the principal use of a co-trustee is to protect the remainders. No doubt the testator also thought that his brother's business judgment, which is conceded to be good, would be serviceable to his widow. But this advantage is more than offset by the want of harmony in a relation in which harmony is essential to wise and profitable action. In the case of partnership, want of harmony and confidence may of themselves be sufficient to compel a dissolution, even in the face of positive agreement as to the term of continuance. Though not to the same extent, the same principles are applicable to the case of co-trustees and others required to act together for common benefit. How far mere manners and behavior, even though "dogmatic, domineering, and ungentle," as the court found here, may be sufficient cause to justify removal, depends so largely on the circumstances as shown in the evidence, that much room must be left for the discretion of the court. But one point in the present case is decisive. The petition charged that the appellant had notified tenants to pay the rents to him, and not to petitioner's agent. Appellant, in his answer, averred that what he did was to notify the tenants to pay rent either to petitioner or himself. The testimony shows that the two statements come to the same thing. The petitioner was a woman of about 60 years of age, and did not desire to collect the rents in person, but by the hands of her nephew, who lived with her, and had assisted her husband in the collection during his lifetime. Appellant appears to have supposed that he could compel her to collect in person or leave the collection to him, and his notice to the tenants, in whichever form it is regarded, was clearly intended to have that meaning. He had no such right. The collection of rents involves no delegation of discretion, but is a mere ministerial act, which a trustee may do by agent or attorney, as any other person. Appellant's notice to the tenants in its intention and effect was a plain effort to oust his co-tenant from the exercise of her unquestionable right of participation in the management of the estate, and gives a weight and significance to his domineering behavior which it would not have as a question of manners alone. The order of removal was fully sustained by the evidence.

The decree, however, makes no provision for the protection of the remaindermen. The

interest of a life tenant is to rack the property for present income at the expense of the inheritance. This should be properly guarded against. It is intimated in the arguments that the question of the appointment of another trustee is still open. We therefore leave this branch of the subject without further discussion.

Decree affirmed, with costs.

In re MOONEY'S ESTATE.

Appeal of WALSH.

(Supreme Court of Pennsylvania. April 27, 1903.)

WILLS—ACTIVE TRUST—RIGHTS OF BENEFICIARY.

1. Testatrix devised all her estate to a trust company for the use and benefit of a beneficiary "during his life and after his death to his lawful children until the youngest is 21 years then to be divided share and share alike if he has no lawful children at his death then the property is to be divided with my four sisters or their children and my brother or his children absolutely share and share alike." *Held*, that the trust was an active one, and the beneficiary was not entitled to the possession of the personalty on giving security as life tenant.

Appeal from Orphans' Court, Philadelphia County.

Petition of Michael N. Walsh for citation in estate of Ellen Mooney, deceased. From a decree dismissing the petition, he appeals. Affirmed.

The petition averred as follows: "(1) That Ellen Mooney died on June 29, 1900, leaving a will as follows: 'Philadelphia, September 15th, 1890. I Ellen Mooney been of sound mind and clear understanding do bequeath all my property in the City of Philadelphia State of Pennsylvania and Atlantic City New Jersey both real and personal to Michael Nelson Walsh for his use and benefit during his life to be held in Trust by the Continental Title and Trust Company during his life and after his death to his lawful children until the youngest is 21 years then to be divided share and share alike if he has no lawful children at his death then the property is to be divided with my four sisters or their children and my brother or his children absolutely share and share alike.' (2) That by the will a life estate is given to petitioner in both the real and personal estate. (3) That petitioner, as administrator, filed his account, and that the sum of \$2,623.67, balance of personal estate, was awarded to the Continental Title & Trust Company, as trustee; that exception to the award was dismissed. (4) That petitioner is instructed that he is entitled, under the act of May 17, 1871 (P. L. 269), to the possession of the personal estate, and he is desirous of having the same surrendered into his possession. (5) That a citation should issue to show cause why the property should

not be turned over to him on his entering the proper security therefor."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward A. Anderson and John H. Fow, for appellant. Ira Jewell Williams and Simpson & Brown, for appellee.

PER CURIAM. The manifest intent of the testatrix in creating a testamentary trust was not only to preserve the remainders under her will, but to prevent the property from coming into the control of the life beneficiary, and to put it under the management, control, and discretion of the trustee during his life and the minority of the youngest of his children. This was enough to bring the case within the principle of Watson's Appeal, 125 Pa. 340, 17 Atl. 428.

Decree affirmed, with costs.

In re KING'S ESTATE.

Appeal of DAVIS et al.

(Supreme Court of Pennsylvania. April 27, 1903.)

WILL—CONDITIONAL DEVISE.

1. Testatrix, by her will, directed her trustees to hold a house "as a residence and home" for her grandnephew; he, at his majority, to have the election, "if he wishes said house as his permanent home." There was no condition precedent that he should occupy the house. *Held*, that a fee vested in him immediately on his election to take the house in good faith, though he subsequently abandoned it as a home.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Mary L. King, deceased. From a decree dismissing exceptions to adjudication, Anna M. C. Davis and Minnie King Bennett appeal. Affirmed.

Testatrix left a will providing as follows: "I give, devise and bequeath unto my grandnephew Joseph Stever F. Kerr, his heirs and assigns forever my cottage situate at Hyannisport in the state of Massachusetts with all the grounds thereunto belonging and all the furniture therein contained. It being my wish that my said grandnephew shall continue to spend his summer at this said place under the care and superintendence of my said executors or either of them or in the care of such person or persons as they may appoint until he shall have attained his majority, and all costs, and charges for taxes and repairs and maintenance of said cottage to be paid by my executors from the corpus of my estate so far as practicable during the minority of my said grandnephew and I further desire that at and during these visits my said grandnephew shall always have the right of taking and having with him one friend of his own selection during his stay there and I further desire that at and during these and all other visits my grandnephew shall make to the said cottage that he shall

use and occupy the room in said cottage that I have always used therein and which is known as my room. And all the rest, residue and remainder of my estate, real, personal and mixed whatsoever, I wish to be divided and distributed as follows, to wit: one full equal one-third part or share thereof to my said sister Prudence F. Packard, her heirs and assigns forever: one full equal one-third part or share thereof unto my said sister Annie M. C. Davis her heirs and assigns forever and the remaining one full equal one-third part or share thereof unto my executors as hereinafter named in trust nevertheless to the uses, terms, conditions and limitations in the trust hereinbefore created for the use and benefit of my said grandnephew Joseph Stever F. Kerr." By a codicil she directed as follows: "As it is my will and desire that my grandnephew, Joseph Stever F. Kerr, shall be educated at the University of Pennsylvania at Philadelphia, I will and direct that my executors and trustees named in my said will shall retain my house, No. 1719 Spruce street, in the city of Philadelphia and the furniture therein at the time of my death, the same to be held by them under the residuary clause of my foregoing will, as a residence and home for my said grandnephew until he shall have attained the age of twenty-one years; the custody, management and support of said house during the said period to be under the control of my said executors and trustees, and if when my said grandnephew attains his majority he wishes the said house as his permanent home, then I give, devise and bequeath the house No. 1719 Spruce street, aforesaid, with the lot of ground thereunto belonging and all the furniture therein contained to my said executors and trustees in trust for that purpose under and subject to all the restrictions, conditions and limitations contained in the foregoing clause of my last will and testament, wherein the trust for the benefit of my said grandnephew is created." At the audit of the trustees' accounts, it was sought to charge the trustees with the rents of 1719 Spruce street paid by them to J. S. F. Kerr. It was objected that Kerr had abandoned the house as a home, and that therefore his estate was devastated. The auditing judge refused the surcharge. Exceptions to adjudication were dismissed by the court.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Charles F. Eggleston, for appellants.
Charles C. Townsend, for appellees.

PER CURIAM. The gift of the testatrix to her grandnephew was of a right of election at his majority to take the house as his permanent home. During his minority she chose for him, by the direction to the trustees under her will, to hold the house and its furniture "as a residence and home for

him." But at his majority he was to have the election, "if he wishes said house as his permanent home." This election he exercised. There is no charge that he made a false or pretended choice, in fraud of the will, and, having chosen in good faith, the estate vested. There was no condition precedent that he should occupy it, and none either precedent or subsequent that his occupation of it should be continuous. What the testatrix meant is clear—that the devisee, at his majority, should accept the house as his permanent home, with the same right that any other owner would have to change of occupation consequent on change of circumstances. This is the natural and reasonable meaning of her language, and that her actual intent did not contemplate any unusual requirements as to occupation is demonstrated by the devise to the same nephew of her cottage at Hyannisport in fee, with the direction that the trustees should provide for his spending his summers there during his minority.

Decree affirmed, with costs.

COMMONWEALTH v. RONEMUS et al.
(Supreme Court of Pennsylvania. April 27, 1903.)

CERTIORARI TO COURT OF OYER AND TERMINER—CRIMINAL LAW—CHANGE OF VENUE—PREJUDICE.

1. The Supreme Court, in acting on a petition for certiorari to the court of oyer and terminer to remove the record and proceedings under an indictment for murder, and for an order to change the venue, is to be governed by its judgment on the facts.

2. Defendants were indicted for murder in a county where a large percentage of the population were miners and were members of a labor union. At the time of the killing a general strike was in progress. The persons indicted were nonunion men; the person killed was a member of the union; and the union and its friends were greatly prejudiced against the prisoners; this excitement had been promoted by articles in the newspaper and by sermons; strikes and violence were frequent; the sheriff had applied to the governor for troops; and on two occasions the courtroom was invaded and the judge insulted by sympathizers with the union and the strikers. *Held*, that a change of venue would be granted, though at the time of the hearing the strike had been over for several months, and in the opinion of associate judges unlearned in the law, overruling that of the president judge, a fair trial could have been granted.

Certiorari to Court of Oyer and Terminer, Carbon County.

William Ronemus and Henry McElmoyle were indicted for murder, and petition for certiorari and change of venue. Order vacated.

The petition was as follows:

"The petition of the defendants above named respectfully represents: That on October 15, 1902, indictments charging the defendants with murder were found by the grand inquest in and for the county of Carbon, in the commonwealth of Pennsylvania,

to No. 6, October term, 1902. That the trial upon the said indictments is set down for the term of court of oyer and terminer in and for said county beginning January 12, 1903. That on October 17, 1902, your petitioners presented their petition to the honorable the judges of the said court, alleging that a fair and impartial trial could not be obtained in the said county by reason of the undue excitement, prejudice, and combination existing against them, and praying that a change of venue should be granted. That on December 15, 1902, Hon. Horace Heydt, president judge of the said court, by opinion filed, granted the prayer of the said petition, directing a change of venue transferring the trial of the said case to the court of oyer and terminer of Lehigh county, Pa. That on December 29, 1902, Hon. E. P. Williams and Hon. E. R. Enbody, associate judges of the said court, unlearned in the law, filed a written opinion in which the prayer of the defendants' petition for a change of venue was refused. That a large part of the citizens who serve as jurors in said county are employed in the mining, preparing, and shipping of anthracite coal. That a large proportion of the men so employed are members of a labor organization called the 'United Mine Workers of America.' That Patrick Sharp, for the murder of whom the petitioners are charged in the above-named indictment, was a recognized leader of the United Mine Workers, and was active in fomenting riot, strife, and dissension during the period of the coal miners' strike, and in arousing hatred and prejudice against nonunion men, and particularly against those who in any way aided in protecting coal properties from damage and destruction. That petitioners are not members of the Mine Workers' Union, and at the time of the death of Patrick Sharp were employed by the Lehigh Coal & Navigation Company in protecting their properties, and by reason of the said employment incurred the hatred and ill-will of the members of the said union and of those affiliating and in sympathy with them. That in the said county of Carbon there are many other labor organizations containing a large membership, who during the said strike sympathized with and contributed to the support of the members of the miners' union and their families. That during the strike the nonunion men and those engaged in protecting the coal properties were threatened, abused, and illtreated in their homes, and while attending religious services upon the Sabbath, and upon the highways. That so great was the excitement and disorder in the mining region of Carbon county that the sheriff was unable to maintain order, and was obliged to call upon the governor of the state to send troops to protect life and property. That this hatred and prejudice against nonunion men by the members of the union extended to their neighbors, relatives, friends, and the members of

other labor organizations throughout the county, and still continues to exist.

Your petitioners therefore allege that under existing conditions they cannot have a fair and impartial trial upon the above indictment in the county of Carbon, because of the undue excitement in said county, and the prejudice and combination against them, not only on the part of the public generally, but by the jurors likely to be called for the trial of the case; and pray: (1) That a rule may be granted upon the commonwealth of Pennsylvania, to be served upon the district attorney of the county of Carbon, to show cause why a writ of certiorari should not be granted to bring into this court a certain indictment and proceedings connected therewith now pending in the court of oyer and terminer in said county of Carbon, No. 6, October term, 1902. (2) That the decree entered on December 29, 1902, by the said associate judges be vacated and set aside. (3) That your honorable court will thereupon order a change of venue in said case to some adjoining and convenient county, where the causes alleged in said petition do not exist. (4) That all proceedings on the said indictment in the court of oyer and terminer of the said county of Carbon be stayed until further order of this court, and they will ever pray."

The president judge entered an order directing that the venue should be changed to Lehigh county. The associate judges, unlearned in the law, dissented from the opinion of the president judge, and entered an order setting aside the order of the president judge and refusing the change of venue.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frederick Bertolette and Samuel Dickson, for petitioners. Frank P. Sharkey, Dist. Atty., and E. M. Mulhearn, for the Commonwealth.

MITCHELL, J. This is a petition for a certiorari to the court of oyer and terminer of Carbon county to remove the record and proceedings under an indictment in that court for murder against the petitioners, and for an order to change the venue under the act of March 18, 1875, P. L. 30. The authority of this court, independently of that act, has been settled by the cases of *Com. v. Balph*, 111 Pa. 365, 3 Atl. 220; *Com. v. Delamater*, 145 Pa. 210, 22 Atl. 1098; *Com. v. Smith*, 185 Pa. 553, 40 Atl. 73; and *Petition of Quay*, 189 Pa. 517, 42 Atl. 199. The petitioners, following the practice indicated in *Com. v. Smith*, supra, first filed their petition in the oyer and terminer of Carbon county, with the result, after a hearing and consideration by the full court, that the president judge entered of record an order for a change of venue, supporting it by an elaborate opinion on the facts and the law. One of

the associate judges expressed his dissent at the time, and two weeks later both the associates joined in an opinion expressing their dissent, and entered an order denying the change of venue. On this state of facts set forth in the petition, this court granted a rule to show cause why a certiorari should not be allowed, on which the record has been returned and is now before us.

Objection is made not only in respect to the irregularity of the judgment entered by the two associate judges after the formal order of record by the president, but also in respect to the authority of the associate judges to sit at all after the constitutional termination of their office by the erection of Carbon county into a separate judicial district. We do not, however, find it necessary to consider any of these questions. The action of this court upon certiorari in such cases, while not strictly the exercise of original jurisdiction, is nevertheless one of general supervision in the interest of justice, and is to be governed by our judgment on the facts, so that, as said in *Com. v. Balph*, supra, "where it is made clear to us that a man cannot have such a [fair] trial, either from an excited and inflamed condition of the public mind in the county where the indictment was found, * * * or from any other sufficient cause, we shall issue our certiorari, remove the record into this court, and send it down to another county for trial."

The facts in the present case are not substantially disputed. They are gathered from a very large number of affidavits and counter affidavits filed in the court below in support and against the motion for a change of venue, which were elaborately considered and clearly set forth by the president judge in his opinion granting the change. In condensed form his findings are: (1) That the mining of anthracite coal is one of the most important industries of Carbon county, and the persons engaged in or dependent on such mining represent a large percentage of the total population. (2) A labor union, known as the "United Mine Workers of America," includes in its membership a very large percentage of all the persons employed in and about the mines. (3) In May, 1902, a general strike was declared by the said labor union, which included the firemen, engineers, and pump runners. (4) To protect their property from destruction from the accumulation of water, etc., the mine owners and operators employed persons to keep up the fires under the boilers and run the pumps. The petitioners were so employed, not being members of the union, but Patrick Sharp, the person for whose murder they are indicted, was a member of said union. (5) There are in Carbon county other labor unions, of men working in other crafts, who were in sympathy with the miners' union and supported the striking miners by contributing money. (6) The members of all these unions, their

neighbors, relatives, and friends, were greatly excited and prejudiced against the petitioners on account of their working at a time when a general strike had been declared. (7) This general excitement and prejudice had been displayed and promoted by inflammatory articles in the local newspapers, and by sermons and addresses by some ministers, who, forgetting their mission as composers of strife, had disgraced their pulpits by denunciation of those who continued to work. (8) During the strike riots and violence were frequent, men who continued at work were threatened, abused, hung in effigy, and their families terrorized, such conduct extending even to the school children. So great did the lawlessness and disorder become that the sheriff of the county was unable to maintain the peace, and on his application the governor had sent troops to preserve order. (9) The disorder was so great that it invaded the courtroom, and on two occasions specified the proceedings were interrupted, and the judge insulted by sympathizers with the union and the strikers. (10) The learned judge concludes: "This case is *sui generis*. Ordinarily, when a murder is committed, there is a popular indignation by reason of the cruelty of the deed, commiseration for the deceased, or some incident affecting the deceased or the slayer. In the present case there was a popular vindictiveness on the part of the miners, * * * not so much because Patrick Sharp was killed, but because he was killed by 'deputies'; because a union man was killed by nonunion men."

Against this convincing array of facts there is not presented a single denial or even question. The commonwealth submitted answers "all exactly alike" from certain citizens and electors, setting forth that they have knowledge of the sentiments of jurors and the public generally, "and denying that any such causes for a change of venue exist, but alleging that in their opinion there is no undue excitement against said defendants in said county so as to prevent their obtaining a fair and impartial trial in said county, and there does not exist in said county a prejudice against said defendants such as would prevent their obtaining a fair and impartial trial in said county."

The action of the associate judges is upon the same basis. Their opinion makes no question of the facts, but states that "the petition and the facts alleged therein were fully presented and thoroughly discussed by the counsel for the prisoners, and patiently and carefully heard and considered by each member of this court. The president judge has filed an opinion granting the prayer of the petition; but we, his associates, cannot and do not concur with him, for the reason that, notwithstanding all the allegations of defendants, we are by no means convinced that there exists in this county such undue

excitement against the prisoners, or so great a prejudice against them, or any combination against them, instigated by influential persons, by reason of which they cannot obtain a fair and impartial trial in said county."

The opinions of magistrates, qualified by acquaintance with the popular feeling of their vicinity, and formed deliberately under such circumstances, are entitled to respectful consideration. In this case they are neutralized by the opinion of the president judge, formed under the same circumstances, and with the advantages of legal training and experience in observing the subtle influences that affect the administration of justice. But, while both opinions have received due attention, yet the question before this court is not one of opinion, but of facts, and on the undisputed facts the case admits of but one conclusion: that at the time of the indictment and of the filing of this petition a fair and impartial trial could be had in Carbon county cannot be maintained for a moment. The language of the president judge is again worth quoting: "This is not the ordinary case of homicide. It was committed while the greatest strike in the history of the labor world was progressing. A partial reign of terror existed in the coal region. Labor was arrayed against capital. These defendants were not members of the miners' union and were called 'scabs' and 'deputies' by the strikers, and were working at the time when the miners were out on strike. The masses of the people had arrayed themselves on the one side or the other by the great contest which was being waged. Intense excitement prevailed all through the coal region." This condition is not altogether ended. The strike is over—whether settled permanently or not is yet uncertain. The excitement may have quieted down, but the antagonisms which produced it are those of conflicting interests, are of long standing, and are permanent in their nature. The passions only slumber, and may break out again at any moment. It is asking too much of credulity to believe that men who did not hesitate at arson and riot and terrorism over women and children will stop now and do their part for a fair and impartial trial in a case where only a few months ago they were clamorous to hang the accused without trial, and carried feeling so far as to insult the court in its public administration of justice. The accused have a right not to be subjected to so small and perilous a chance.

The rule for certiorari is made absolute, the order of the associate judges of the oyer and terminer refusing a change of venue is vacated, a change of venue granted, and the record is ordered to be certified to the court of oyer and terminer of Montgomery county, with instructions to proceed as if the indictment had been originally found in said county. Said proceedings and trial to be at the expense of the county of Carbon.

CUTTING v. WHITEMORE.

(Supreme Court of New Hampshire. Sulfra. April 7, 1908.)

CONDITIONAL SALES—NOVATION—WHAT CONSTITUTES RIGHTS OF VENDOR—RIGHTS OF VENDEE—SALE OF PROPERTY TO SATISFY CLAIM FOR PURCHASE MONEY—DISPOSITION OF PROCEEDS—ARBITRATION AGREEMENT.

1. A machine company sold to N. and his brother certain property, title not to pass until the purchase price was paid. A memorandum was duly executed and recorded, and lien notes taken for the price. The brother soon retired from business, and N. thereafter conducted it alone. He took up the lien notes from time to time, giving new notes for the balances due and for supplies furnished. *Held* not to work a novation, in the absence of a showing that the machine company received N.'s notes on the understanding that they were to extinguish the original lien debt, and without such proof title to the property remained in the company.

2. A vendor who sells a chattel, reserving the title until the price is paid, retains the general property therein as collateral security, and a transfer of the debt by him carries with it his interest in the chattel, in the same manner as the assignment of a mortgage debt carries with it the mortgage.

3. The interest of a conditional vendor in the chattels sold constitutes a lien, within the meaning of Pub. St. 1901, p. 451, c. 141, §§ 3-7; and, on a sale of the chattels to satisfy the lien, the conditional vendee, or the person having his interest, is entitled to receive the balance of the proceeds of the sale, after deducting the amount due on the lien, and the reasonable expenses incident to the sale.

4. A conditional vendee, while in possession of the chattels under contract of sale, has an interest which he may mortgage.

5. An agreement to submit claims to arbitration does not contemplate a submission of a claim which the parties acquire after it is made.

6. A conditional vendee, while in possession of the chattels, mortgaged them to B. Afterwards B. sold the mortgage to plaintiff. Defendant, who is the successor in interest of the vendor, sold the property at auction to satisfy his lien, realizing more than sufficient to satisfy the balance due, whereby plaintiff became entitled to the excess. *Held*, that defendant could not set up, as against such right in plaintiff, that at the time plaintiff bought the mortgage he received from B. a release, wherein he stipulated to refrain from prosecuting the conditional vendee for placing mortgages on the property without specifying the existence of a prior mortgage.

Exceptions from Superior Court.

Trover for a steam sawmill, brought by Bela H. Cutting against Rodney N. Whittemore. Verdict for defendant. Plaintiff excepted. Transferred from superior court. Case discharged.

Burt Chellis and Hermon Holt, for plaintiff. Oliver E. Branch, for defendant.

BINGHAM, J. The Forsaith Machine Company on July 23, 1892, sold to F. P. Nutting and his brother the property in question, upon the understanding that the title should not pass until the purchase price was paid. A memorandum witnessing the condition of

¶ 5. See Arbitration and Award, vol. 4, Cent. Dig. § 92.

the sale was duly executed and recorded, and lien notes taken, representing the purchase price. The brother soon retired from the business, and F. P. Nutting thereafter conducted it. He took up the lien notes from time to time, and gave new notes for the balances due and for supplies furnished him, but by these transactions it is found that the machine company did not intend to transfer the title to him. June 1, 1896, Supply Barney took a mortgage upon the property from Nutting. September 17, 1896, the defendant bought the claim of the machine company, took possession of the property the following March, and in June sold it at auction for \$836.64. May 4, 1898, Chellis bought the Barney note and mortgage, transferred them to the plaintiff for a nominal consideration, and brought this suit. The defendant had a verdict, and the questions herein presented arise upon the plaintiff's exception thereto.

1. As Chellis is the plaintiff in interest, the rights of the parties will be considered and determined as though the suit was brought in his name. Whatever right he has to maintain this action arises out of his ownership of the Barney note and mortgage. He contends that the title to the property passed to Nutting when he gave the machine company his individual notes and received from them the lien notes; that the conduct of the parties worked a novation—a substitution of a new contract for the lien claim. It has been said that to create a novation "there must be present * * * all the necessary elements of a legal contract. There must be parties capable of contracting, a valid prior obligation to be displaced, the consent of the parties to the substitution, based upon sufficient consideration, resulting in the extinction of the old obligation, and the creation of a valid new one. And all these must be established by legal and sufficient evidence." 21 Am. & Eng. Enc. Law (2d Ed.) 663. And such is the law of this state. *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Warren v. Batchelder*, 16 N. H. 590; *Clark v. Draper*, 19 N. H. 419; *Woodward v. Miles*, 24 N. H. 289, 294; *Coburn v. Odell*, 30 N. H. 540, 557; *Morse v. Allen*, 44 N. H. 33; *Moore v. Fitz*, 59 N. H. 572; *Woodward v. Holmes*, 67 N. H. 494, 41 Atl. 72; 22 Am. & Eng. Enc. Law (2d Ed.) 555, 556. In *Woodward v. Miles*, supra, the proposition is stated as follows: "There is no presumption of law that, where parties make a new contract, * * * [they] agree to accept the new contract in discharge of the old. The party who alleges such agreement for the discharge of the old debt is bound to prove a distinct agreement to that effect." Whether such an agreement was made in a given case is a question of fact. *Wilson v. Hanson*, 20 N. H. 375; *Foster v. Hill*, 36 N. H. 526. It may be proved "either by direct evidence, or

by proof of facts which show that it must have been made." *Warren v. Batchelder*, 15 N. H. 129, 186; *Id.*, 16 N. H. 580, 587, 588; *Randlet v. Herren*, 20 N. H. 102; 21 Am. & Eng. Enc. Law (2d Ed.) 669. And the burden of proof is upon the party seeking to establish the novation. *Foster v. Hill*, supra; *Randlet v. Herren*, supra. Where a new note is given, signed by a part only of the original obligors, it is still a question of fact whether the new note was taken as a substitute for, and in extinguishment of, the original debt or obligation. *Johnson v. Cleaves*, 15 N. H. 382; *Smith v. Smith*, 27 N. H. 244; *Thompson v. Briggs*, 28 N. H. 40. And the same holds true where the new note is that of a third party. *Randlet v. Herren*, supra; *Wilson v. Hanson*, 20 N. H. 375; *Whitcher v. Dexter*, 61 N. H. 91. Therefore, in order to sustain the plaintiff's contention, it must appear that the machine company received the Nutting notes upon the understanding that they were to be substituted for and to extinguish the original lien debt. But this fact is not found. On the contrary, the finding is that the machine company did not intend to transfer their title in the property to Nutting; and the general verdict for the defendant embodies a finding that the machine company, when they received the Nutting notes, did not assent to an extinguishment of the lien debt, and that no novation took place. And it cannot be said, as a matter of law, that the trial judge was not warranted in finding this fact as he did. The evidence was conflicting on this question. While the findings of facts, wherein it appears that Nutting gave his notes to the machine company for supplies furnished him from time to time, and for balances due on the lien debt, and received in exchange the original notes, were evidence in support of the plaintiff's contention, yet the fact that the original debt was secured by a lien upon the property was strong evidence tending to show that the machine company did not intend to receive Nutting's individual notes as payment of that debt, and in extinguishment of their security. *Sweet v. James*, 2 R. I. 270; *Wheeler v. Schroeder*, 4 R. I. 883; *Hopkins v. Detwiler*, 25 W. Va. 734; 22 Am. & Eng. Enc. Law (2d Ed.) 553. The conclusion on this branch of the case is that the Nutting notes were received and held by the machine company as collateral to, or as conditional payment of, the lien debt, and, not having been paid at the time of the sale of the property by the defendant, the lien claim was not discharged, and the title and right to the possession of the property was in the machine company, or the party owning their interest. *Wilson v. Hanson*, supra; *New Hampshire Bank v. Willard*, 10 N. H. 210, 213; *Wright v. Buck*, 62 N. H. 656; 21 Am. & Eng. Enc. Law (2d Ed.) 672.

2. It has been decided in this state that a vendor who sells a chattel, reserving the ti-

title until the purchase price is paid, retains the general property therein, not as the absolute owner, "but as collateral security, not differing materially from security by way of mortgage or other lien," and that a transfer of the debt carries with it, as an incident, his interest in the chattel, in the same manner as the assignment of a mortgage debt would carry with it the mortgage. *Esty v. Graham*, 46 N. H. 169, 170; *Rigney v. Lovejoy*, 18 N. H. 247. And this is the view accepted by courts in other jurisdictions. *Ross-Meehan Co. v. Ice Co.*, 72 Miss. 608, 18 South. 364; *McPherson v. Lumber Co.*, 70 Miss. 649, 12 South. 857. In the first of these cases the vendor's interest is thus defined: "The reservation of the title is but as security for the purchase price, and, if the property is recovered by the seller, he must deal with it as security, and with reference to the equitable rights of the purchaser. Being but a security for the payment of money, the benefit thereof follows the debt, when assigned, as an incident thereof." Such an interpretation of the contract gives effect to the intention of the parties; the very purpose of the retention of title being to make the property available for the payment of the purchase price. Applying the principle of these cases to the one now before us, the legal title to the property passed to the defendant when he purchased the lien claim of the machine company; and he had the right to retake the property upon the failure of Nutting, or those representing his interest, to pay the balance of the lien debt as agreed. *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638.

3. But it appears that the conditional vendee has reduced the lien debt by making payments, and that the sum realized by the defendant from the sale of the property exceeds the sum due upon that debt by about \$220. It therefore remains to be considered what rights the conditional vendee, or those representing his interest, have in this sum; the property having been sold for condition broken. This question has never been considered by this court, but, inasmuch as the vendee's interest is of an equitable nature, it would seem that his rights in the property, or its proceeds, would be recognized and protected in a court of equity—especially in jurisdictions that regard the retention of the title as collateral security to the payment of the purchase price. *Esty v. Graham*, supra; *Leach v. Kimball*, 34 N. H. 568, 574; *Ross-Meehan Co. v. Ice Co.*, supra; *McPherson v. Lumber Co.*, supra; *Dederick v. Wolfe*, 68 Miss. 500, 9 South. 350, 24 Am. St. Rep. 283; *Puffer Mfg. Co. v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; *Tufts v. Stone* (Miss.) 11 South. 792; 2 Mech. Sales, § 630. But if the interest of a vendor in chattels, created by a reservation of title, is a lien, within the meaning of sections 3-7, c. 141, p. 451, of the Public Statutes of 1901, then the rights of the conditional vendee, both in the

property and its proceeds, are recognized and protected at law, even after condition broken. It has been held, under the provisions of sections 17, 18, c. 220, pp. 703, 704, of the Public Statutes of 1901, making personal property incumbered by mortgage, pledge, or lien liable to attachment "as the property of the mortgagor, pledgor, or general owner," that the interest of a conditional vendee may be attached and held by his creditors. *Fife v. Ford*, 67 N. H. 539, 41 Atl. 1661. And we are of opinion that the interest of a conditional vendor is a lien, within the meaning of the provisions of chapter 141, and that Nutting, or the person having his interest, is entitled to receive from the defendant the balance of the proceeds of the sale, after deducting the amount due on the lien debt, and the reasonable expenses incident to the sale; he having taken possession of the property, and sold it for a sum exceeding his lien thereon. The defendant, however, contends that the conditional vendee had no interest in the property which he could mortgage or assign, and that the plaintiff or Chellis acquired no interest therein by the purchase of the Barney mortgage. But it has been held that the conditional vendee, while in possession under the contract of sale, has an interest in the property that he may give away (*Hatch v. Lamos*, 65 N. H. 1, 17 Atl. 979, 4 L. R. A. 404); that he may sell (*Bailey v. Colby*, 34 N. H. 29, 66 Am. Dec. 752; *Nutting v. Nutting*, 63 N. H. 221); that he may mortgage (*Chase v. Ingalls*, 122 Mass. 381; 1 Mech. Sales, § 588); that his creditors may attach (*Hervey v. Dimond*, 67 N. H. 342, 39 Atl. 831, 68 Am. St. Rep. 673; *Fife v. Ford*, 67 N. H. 539, 41 Atl. 1651; *Bingham v. Vandegrift*, 93 Ala. 283, 9 South. 280); that it will pass to his assignee in insolvency (*Adams v. Lee*, 64 N. H. 421, 13 Atl. 786); and that a performance of the condition of the sale after a transfer of the vendee's interest, either by the vendee or his assignee, will vest the title in the assignee without further action by the vendor (*Hatch v. Lamos*, supra). It follows, therefore, that by the purchase of the Barney mortgage Chellis acquired the interest of Nutting.

4. Chellis did not own the Barney mortgage when the arbitration agreement was made, and that agreement did not contemplate a submission of claims which the parties might thereafter acquire. *Thrasher v. Haynes*, 2 N. H. 429; *Adams v. Adams*, 8 N. H. 82, 91; 2 Am. & Eng. Enc. Law (2d Ed.) 610.

5. It appears that the validity of the lien claim was not considered by the referee, but, as he found that the only claim the plaintiff presented was invalid, that ended the controversy.

6. Chellis is not seeking to enforce this claim against Barney, and the defendant has money that belongs to the person owning the Nutting interest. It is therefore not a defense of which the defendant can avail him-

self, that when Chellis bought the note and mortgage he received from Barney a release, wherein he stipulated that he would refrain from instituting criminal prosecutions against Nutting for having placed mortgages upon the property without specifying the existence of prior mortgages.

If the plaintiff procures an amendment in the superior court, he may have judgment against the defendant for the amount received from the sale of the property, less the balance then due on the lien debt, and the reasonable expenses of the sale; otherwise there will be judgment for the defendant, and the plaintiff can proceed anew if he desires. Case discharged. All concurred.

WILSON v. COOS COUNTY.

(Supreme Court of New Hampshire. Coos County. April 7, 1903.)

COUNTY—PAUPER—VOLUNTARY AID—LIABILITY OF COUNTY.

1. An individual cannot recover from a county for support voluntarily furnished a pauper.

Transferred from Superior Court, Coos County; Young, Judge.

Assumpsit by Sylvester Wilson against Coos county to recover for the board of Octavia Heath. Verdict for defendants, and case transferred on plaintiff's exception. Exception overruled.

It was found to be reasonably worth \$1 a day to care for Octavia as the plaintiff had done; but upon other facts, which sufficiently appear in the opinion, a verdict was ordered for the defendants, subject to the plaintiff's exception.

Jesse F. Libby, for plaintiff. James I. Parsons and Chamberlin & Rich, for defendants.

BINGHAM, J. The plaintiff seeks to recover of the defendants for the board of Miss Heath from January 16, 1899, to May 1, 1901, at the rate of \$1 per day, on the ground that she was then a county pauper, for whose support the defendants were chargeable. It appears that in November, 1898, the plaintiff, with whom Miss Heath was living, applied to the overseers of the poor of the town of Gorham for aid, and was paid by them \$1.50 a week for her support down to January 16th; the overseers having an understanding with the county commissioners that the town should be reimbursed for aid thus furnished, not exceeding \$1.50 a week, if the county was liable for her support. The county reimbursed the town for these expenditures; but the commissioners, prior to January 16th, having become convinced that Miss Heath was not a pauper, notified the overseers of the poor to that effect, and refused further aid. They also

notified the plaintiff that, if the county was responsible for Miss Heath's support, he could or they would take her to the county farm. It is not found that the commissioners agreed to pay the plaintiff for her support, and the finding that she was not a pauper when the plaintiff applied to the overseers for assistance, in November, 1898, if the contract reported in *Leighton v. Wilson*, 70 N. H. 598, 49 Atl. 575, should be construed to mean that the plaintiff was entitled to retain only a dollar and a half a week for her support out of the sum received by him from her under that agreement, would seem to be unimportant, for, notwithstanding that finding, she may have been a pauper on January 16th, or thereafter. Assuming, however, that she was a pauper during the period in controversy, the question is presented whether an individual can recover from a county for aid furnished a county pauper, in the absence of an express agreement. It is well settled in this state that "the liability of towns and counties for the support of the poor is * * * statutory, and that, however equitable the claim, there can be no recovery" in the absence of a statute providing therefor. *Strafford County v. Rockingham County*, 71 N. H. 37, 38, 51 Atl. 677; *Plymouth v. County*, 68 N. H. 361, 44 Atl. 523; *Meredith v. Canterbury*, 3 N. H. 80. No statute has been called to our attention, and we know of none, making a town or a county liable to an individual for support furnished to a pauper without request. *Mace v. Nottingham*, 1 N. H. 52; *Otis v. Strafford*, 10 N. H. 352.

The plaintiff was a volunteer in providing the support in question, and cannot recover of the county therefor. Exception overruled. All concurred.

CARRASCO v. MASON et al.

(Supreme Court of New Hampshire. Carroll. May 5, 1903.)

EXECUTION AGAINST MORTGAGOR—INTEREST ACQUIRED—RIGHTS OF MORTGAGEE.

1. By the extent of an execution against a mortgagor on the land covered by the mortgage, his interest passes, but the rights of the mortgagee are not affected.

2. A judgment creditor, who has levied execution on land mortgaged by the judgment debtor, cannot maintain a writ of entry against a mortgagee in possession.

Transferred from Superior Court; Stone, Judge.

Writ of entry by Emily C. Carrasco against Mahlon L. Mason and another to recover possession of three tracts of land. Judgment was entered against defendant. Mahlon L. Mason, but denied as against the other defendant. Transferred from the superior court, subject to plaintiff's exception. Exception overruled.

September 30, 1896, Mahlon L. Mason gave to his brother, Francis L., a mortgage upon

¶ 1. See *Faupers*, vol. 23, Cent. Dig. § 192.

the three parcels of land described in the writ of entry, conditioned to secure his note of \$1,000, payable to said Francis, or order, in one year from date, with interest, the consideration for the note being borrowed money. October 24, 1898, the plaintiff brought a suit against Mahlon, and in April, 1900, recovered judgment in the sum of \$805.02. The land in question was attached upon this writ, and the execution issued in the suit was levied upon an undivided half of the three parcels, the levy being commenced within 30 days from the date of judgment by the appointment of three appraisers in the manner provided by law. The levy was completed July 3, 1900, and the plaintiff was put in possession of the land so set off in full satisfaction of her judgment and the taxable costs thereon. The levy was made regardless of the real estate mortgage, and was duly recorded in the registry of deeds July 6, 1900. At the time the mortgage was given, Mahlon was the owner of an undivided half of the land. Francis L. Mason died in 1899. His will was probated in February, 1900, and an administrator with the will annexed was appointed in August. The will contained two small bequests of less than \$100, and gave and devised all the rest and residue of the estate to Catherine, the testator's wife, and to Nathaniel R. Mason, his nephew, in equal shares. July 24, 1900, Catherine sold to Nathaniel all the right, title, and interest which she had under the will. In December, 1901, the administrator charged Nathaniel with \$1,285 (the amount of the mortgage note at that time), and credited the estate with the same amount; and later transferred the mortgage to Nathaniel by a writing upon the back, in terms as follows: "North Conway, N. H., February 28, 1902. In consideration of the sum of twelve hundred and sixty-five dollars, I hereby sell and assign to Nathaniel R. Mason of Conway all the right, title, and interest of the estate of Francis L. Mason to the within mortgage." Judgment was entered against Mahlon L. Mason, and denied as against Nathaniel R. Mason, subject to the plaintiff's exception.

Josiah H. Hobbs, for plaintiff. Arthur L. Foote, for defendant Nathaniel R. Mason.

BINGHAM, J. In view of the order of the superior court, to which no exception was taken, that judgment be entered in favor of the plaintiff against Mahlon L. Mason, it is to be assumed that by the extent the plaintiff acquired whatever interest Mahlon had in the land, and as against him is entitled to the possession. *Coos Bank v. Brooks*, 2 N. H. 148; *Pritchard v. Brown*, 4 N. H. 397, 402, 404, 17 Am. Dec. 431; *Kelly v. Burnham*, 9 N. H. 20, 22; *Wendell v. Bank*, Id. 404, 418; *Hovey v. Bartlett*, 34 N. H. 278; *Bryant v. Morrison*, 44 N. H. 288; *Davis v. Barnard*, 60 N. H. 550, 551. But is she en-

titled to the possession as against Nathaniel? The fair meaning of the case is that by the will of Francis the purchase by Nathaniel of Catherine's interest thereunder, and the settlement of the administrator's account, Nathaniel became the owner of the debt and mortgage upon which he bases his claim to the land. He was under no obligation to pay his father's debt; and the entries made by the administrator, wherein he charged Nathaniel with the amount of the note, and credited the estate with a like amount, tended to show that Nathaniel thereby became the owner of the mortgage debt. And such a finding is included in the court's order denying the plaintiff's motion for judgment against Nathaniel. Being the owner of the debt and mortgage and in possession of the premises, this action cannot be maintained against him.

Exception overruled. All concurred.

MERRILL v. BASSETT.

(Supreme Judicial Court of Maine. April 30, 1903.)

REMOVAL OF PAUPER—PHYSICAL CONDITION—DUE CARE—TEST—NEGLIGENCE—NEW TRIAL.

1. The care to be used in removing a person in distress from one town to another under the pauper law is that care and prudence which a reasonably careful and prudent man would exercise under the circumstances of a like situation.

2. The test by which to determine whether due care and prudence have been exercised by one charged with the duty of removal of a person in distress from one town to another, in ascertaining the ability of the pauper to bear the strain of the journey, is the means employed and effort made to find out, rather than the actual physical condition itself.

3. A day affording proper weather conditions should be selected; the pauper should be furnished with suitable garments to protect her, considering as well her physical condition as also the state of the weather; and suitable conveyance, in a careful and prudent manner, should be provided.

4. A person charged with the performance of a duty toward another, in order to be guilty of negligence, must have either done or neglected to do something which an ordinarily prudent and careful man, acting in the same relation and under like circumstances, would not have done or omitted to do, even though damage may have resulted from his conduct.

5. When, from an examination of a case by the law court on a general motion for a new trial, it is clear that the jury erred by confusing the defendant's legal duty toward the plaintiff to exercise due care to ascertain her physical fitness to make a journey with his duty toward her if based upon absolute knowledge of her condition, the verdict will be set aside.

(Official.)

On Motion from Supreme Judicial Court, York County.

Action by Gertrude G. Merrill against Albert P. Bassett. Verdict for plaintiff. Motion for new trial. Sustained.

Case for alleged negligence and want of care and prudence in moving the plaintiff

from Mechanic Falls, where she fell into distress, to Norway. The defendant was employed to remove plaintiff by the overseers of the poor of Norway.

The plea was the general issue, and brief statement as follows:

"That whatever acts he did, he did in a careful and proper manner, and in the removal of the plaintiff, as a pauper of the town of Norway, from Mechanic Falls to the said town of Norway, and that in so doing he acted as the servant of the overseers of the said town of Norway, and under their direction at the time, and that said overseers had been notified by the overseers of the said town of Mechanic Falls that the plaintiff had fallen into distress and in need of relief in said town of Mechanic Falls, and that she be removed to the town of Norway, where she had her pauper settlement, and this was done in the performance of a duty imposed by law upon the said overseers of said town of Norway; the defendant acting as their servant in such removal, which was done in a reasonably careful and proper manner."

The plaintiff had a verdict for \$2,250. Besides the general motion, defendant also moved for a new trial on the ground of newly discovered evidence.

The facts appear in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEA-BODY, and SPEAR, JJ.

Edgar M. Briggs and Geo. F. & Leroy Haley, for plaintiff. Enoch Foster and O. H. Hersey, for defendant.

SPEAR, J. The plaintiff, in her writ, sets out that on the 13th day of January, 1900, she had a pauper settlement in the town of Norway; that she had fallen into distress in the village of Mechanic Falls, in the county of Androscoggin, and had applied to the overseers of the poor of said town for aid and assistance; that she had for a long time prior to said day been confined to her bed, in said town, with rheumatic fever, and was then unable in any way to handle herself by her own efforts; that on said day the overseers of the poor of said Norway, by virtue of their said office, employed the defendant to remove the plaintiff from said Mechanic Falls to Norway, according to law; "that said defendant was bound, in law, to remove her as aforesaid in a safe and prudent manner, and to use due care and caution not to remove her until she was in a suitable condition to be removed." The plaintiff further alleges that the defendant did not, having regard for her physical condition, remove her in a prudent and careful manner, and that he did not exercise reasonable care and prudence to ascertain whether she was in a condition to be removed.

It was admitted that the plaintiff had a pauper settlement in Norway, had fallen into distress, and was in need of and received

pauper supplies from Mechanic Falls; that due notice of these facts had been given to Norway; and that the overseers of Norway had a legal right to remove the plaintiff to Norway. Thus we have left for consideration only two propositions, namely, did the defendant exercise due care to ascertain whether she was in suitable physical condition to be moved, and did he move her in a reasonable and prudent manner? We do not deem it profitable or necessary to give an analysis of the testimony, in stating our conclusions with respect to the various propositions contained in this case.

Taking the above propositions in their order, the first inquiry is whether Mr. Bassett used due care to ascertain whether the plaintiff was in suitable physical condition to be moved. The plaintiff's own evidence upon this point is conclusive that he did. Her attending physician was carefully inquired of, and emphatically assured the overseer of the poor and the defendant that the plaintiff was in condition to be removed to Norway. Whether the plaintiff was or was not actually in physical condition to bear the strain of the short journey, the defendant discharged his full duty in this respect by the exercise of ordinary care to find out. It was also incumbent upon the defendant to remove the plaintiff in a prudent manner. We think he did. This involved the selection of a day affording proper weather conditions; furnishing her suitable wearing apparel to protect her, considering her condition, from the weather; and a conveyance to and from the train in a careful and prudent manner.

The evidence conclusively shows that all three of these requirements were fully met by the defendant. The day was an average warm one for the time of year. She ordered such clothing as she said she needed to make her comfortable, and they were furnished to her. With respect to her conveyance, she makes no complaint of ill treatment of any kind on the part of Mr. Bassett. The plaintiff said that in her removal she suffered some pain, and this may be true; and yet, if the defendant exercised due care in ascertaining her physical condition, seeing that she was properly clothed, selecting a proper day, and moving her in a prudent manner, as we have already found he did, he would not be liable on account of her suffering.

The question before us is not whether, as a matter of fact, the plaintiff was in a fit physical condition to be moved. She may actually have been unfit, but that does not make the defendant liable. Did the defendant do, in moving the plaintiff, under the circumstances in this case, as a reasonably prudent and careful person would under like circumstances have done? Did he, either by himself or through Mr. Sanborn, the overseer, under the rule stated, make proper inquiry into her physical condition? Did he

select a suitable day? Did he believe her properly clothed? Did he carefully convey her from place to place? A reasonably prudent and careful person would have done all these things, and we think the testimony in this case conclusively shows that the defendant did. This is a case in which it was very easy for the jury to err.

It was difficult for them to distinguish the defendant's legal duty toward the plaintiff, based upon the exercise of ordinary care, from his duty toward her if based upon absolute knowledge of her actual condition. The evidence in the case may have disclosed to the judgment of the jury that the plaintiff was actually too sick and feeble to be moved. Admit it to be true, and yet the defendant was not bound, at his peril, to know it. He was only bound to do, in the premises, what a reasonable and prudent person would have done under the circumstances of the situation. "When a person, in the observance or performance of a duty due to another, has neither done nor omitted to do anything which an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence, even though damage may have resulted from his action or want of action." Whatever the reason, the jury clearly erred in their verdict.

Motion sustained. Verdict set aside.

INHABITANTS OF CARTHAGE v. INHABITANTS OF CANTON.

SAME v. INHABITANTS OF LEWISTON.

(Supreme Judicial Court of Maine. April 27, 1903.)

PARENT AND CHILD—EMANCIPATION—PAUPER—DERIVATIVE SETTLEMENT.

1. It is well settled in this state that a minor child may become emancipated from its parents.

2. An emancipated child will not take the subsequently acquired pauper settlement of its parent, but will take by derivation that of the parent at the time of the emancipation.

3. Emancipation must be by consent, express or implied, of the parent, if living, and is an entire surrender of all right to the care, custody, and earnings of the child, as well as a renunciation of parental duties. It occurs by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them.

4. For the purpose of determining whether or not a parent has thus voluntarily surrendered all right to the care, custody, and earnings of his child, and renounced all future parental duties, it is frequently of the greatest importance to ascertain the subsequent conduct of parent and child, and this may throw great light upon the intention of the parent at the time of the claimed emancipation.

5. The pauper settlement of one who, as a child, was emancipated from his parents, and has never gained a settlement on his own ac-

count, continues in the town where the father's settlement was at the time the emancipation took place.

(Official.)

Report from Supreme Judicial Court. Franklin County.

Actions by the inhabitants of Carthage against the inhabitants of Canton and the inhabitants of Lewiston for pauper supplies furnished by the plaintiff town to a man and his family who fell into distress in Carthage. The pauper had never gained a settlement in his own right either in any of the three towns concerned or elsewhere. On report. Judgment for plaintiff against Canton.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

E. E. Richards, for plaintiff. J. P. Swasey, for defendant town of Canton. J. W. Mitchell and A. T. L'Heureux, City Sol., for defendant city of Lewiston.

WISWELL, C. J. These two cases are submitted together to the law court upon a report of the testimony, which is applicable to both.

Pauper supplies were furnished by the plaintiff town to one George Jones and family between December 9, 1900, and April 13, 1901. During that period the pauper had his settlement either in the town of Canton or in the city of Lewiston, and the question submitted for the determination of the court is, which municipality is liable to the plaintiff town? no question being made as to the necessity for pauper assistance, the amount of the supplies furnished, the reasonableness of the charges, or the statute notices and replies.

It is agreed that the pauper never gained a pauper settlement in his own right. At the time of his becoming of age, his father's settlement was in the city of Lewiston; but it is claimed by the defendant in the case against Lewiston that the pauper was emancipated by his father many years before that time, while the latter's settlement was in the town of Canton, and that the pauper took the settlement of his father at the time of such emancipation. This is the single question presented for our determination.

Bearing upon this question, the following facts are material: The parents of the pauper separated in the year 1875, or just before the commencement of that year. They were divorced, upon the libel of the wife, at the October term, 1876, of the Supreme Judicial Court for Kennebec county, and at the same time a decree was made giving the care and custody of the two minor children—the pauper being one of them—to the wife. In the libel the date of the birth of George was given as October 7, 1863, and this substantially corresponds with the less exact testimony of the father as to the son's age. After the separation of the parents, but before the decree of divorce the father, then living at Pittston,

¶ 2. See Paupers, vol. 38, Cent. Dig. § 91.

took his two young boys to Canton, where he stayed, and kept them with him for about two months. During that time he made various efforts to obtain homes for the boys, but at the expiration of that time, being unsuccessful in these efforts, he left the two boys with the selectmen of the town, by whom they were carried to the poor farm; and the father went to Lewiston, where he has continued to reside ever since. From the time, in 1875, when the father left his two sons in Canton, he exercised no care over them whatever. He did not see them again until they had become, as he expresses it, men grown. He did not communicate with them directly or indirectly in any way. He in no way exhibited any interest in them, nor sense of responsibility as to their welfare. He contributed nothing to their support, made no claim for their earnings, and had no knowledge of the manner in which they were cared for, or as to what they were doing. He did not even see the son George, except upon two casual and brief occasions, until after the latter had become 21 years of age and was married.

During this period the father was by no means in a condition of destitution. Shortly after he commenced living in Lewiston, in 1875, he obtained employment, and continued to be steadily employed, with occasional exceptions when he was unable to work on account of sickness, up to the present time. During this time he received as wages \$1.50 per day, or \$10 per week, except that sometimes during the winter he worked in the woods for \$16 per month and his board. In addition to this, in about the year 1881 he commenced to receive a pension of \$4 per month, which in 1884, after an intermediate increase to \$8 per month, was increased to \$12 per month. In about 1879 the father remarried, and has a son by his second marriage, who is now about 21 years of age.

In this state the doctrine has become settled by a long line of decisions that a minor child may become emancipated from its parent, and that in such case the child will not take the subsequently acquired settlement of its parent, but will take by derivation that of the parent at the time of the emancipation. What is emancipation, is a question of law. Whether or not there has been an emancipation, is one of fact. In this case both questions are submitted to the court.

This question of emancipation must, of course, be determined upon the peculiar facts and circumstances of each case, and nothing more than general rules or tests can be laid down, which will be applicable to all cases. But this has been done in several instances by this court. In *Lowell v. Newport*, 66 Me. 78, it was said: "It must be by consent, express or implied, of the parent, if living, and is an entire surrender of all right to the care, custody, and earnings of the child, as well as a renunciation of parental duties." In *Sanford v. Lebanon*, 81 Me. 124, it was said

that the test to be applied is that of "the preservation or destruction of the parental and filial relations." In *Monroe v. Jackson*, 55 Me. 59, it is said that emancipation occurs "by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them." It is, of course, true that for the purpose of determining whether or not a parent has thus voluntarily surrendered all right to the care, custody, and earnings of his child, and renounced all future parental duties, it is frequently of the greatest importance to ascertain the subsequent conduct of parent and child, as this may throw great light upon the intention of the parent at the time of the claimed emancipation.

Applying these general rules, thus somewhat differently stated, to the facts of this case, we are satisfied that there was an entire surrender by the father of his right to the care, control, and earnings of his children, and a renunciation of his parental duties towards them, at the time that he left them in Canton in 1875. His conduct from that time on has been entirely inconsistent with any other theory. It cannot be said that the parental and filial relation exists between a father and a child, when the father has abandoned his child of the age of seven years, and never after that time exhibited any interest in or sense of responsibility as to his welfare, contributed nothing to his support when support was needed, and claimed none of his earnings after he had become more than self-supporting—when he does not in any way communicate with his child, and is entirely ignorant of what the child is doing or of what is being done for him.

It is undoubtedly true that the mere separation of father and child, or the mere failure of the former to contribute to the support of the latter, are not sufficient for the purpose of showing such a voluntary abandonment and renunciation as are necessary to constitute an emancipation. These conditions may be accounted for by reason of the misfortune or destitution of the father, without disclosing any intention upon his part to permanently terminate the parental and filial relation. But in this case, as we have seen, the father was not in a condition of poverty. During all of this time he was receiving fair wages, with practically steady employment. In addition to this, he received a pension, which, for a number of years before the son became of age, amounted to \$12 per month. He could have supported these two children if he had desired to, and the fact that he never contributed anything towards their support after his abandonment of them in 1875, and since then has evinced no interest whatever in their welfare, is satisfactory evidence to us that he did not support them for the reason that he did not want to, and that he understood he had no further concern as to

them. As said by this court in *Liberty v. Palermo*, 79 Me. 473, 10 Atl. 455: "The separation of the child from the father was not occasioned through poverty, nor in other respects did the parental and filial relation continue."

We have not considered the effect of the decree giving the divorced wife the custody of these children, because we are satisfied that there was an emancipation prior to that time, and also because it appears from the case that the mother in fact did not have any care, custody, or control of the children.

As this emancipation took place when, as it is agreed, the settlement of the pauper's father was in Canton, and as the pauper never gained any other settlement than that derived from the father at the time of the emancipation, the town of Canton must be held liable for the supplies furnished. The entries will be:

In the case of *Inhabitants of Carthage v. Inhabitants of Canton*, judgment for plaintiff for \$187.15, and interest since the date of the writ.

In the case of *Inhabitants of Carthage v. Lewiston*, judgment for defendant.

SPEAR v. SPEAR et al.

(Supreme Judicial Court of Maine. April 27, 1903.)

FRAUDULENT CONVEYANCE—AGREEMENT TO SUPPORT—CLOUD ON TITLE—EXECUTION—LEVY—INTENT—KNOWLEDGE—ESTOPPEL—BURDEN OF PROOF.

1. The question as to whether a voluntary conveyance is void as to existing creditors depends on all the surrounding circumstances, and the resulting ability or inability of creditors to collect the indebtedness due them.

2. A conveyance from a father to his son, when the former is largely in debt, and in consideration of an agreement for the grantor's support, is voluntary, and prima facie fraudulent and void as to then existing creditors.

3. A voluntary conveyance, established to be fraudulent and void as to existing creditors, is a cloud upon the title acquired by virtue of the levy of an execution issued on a judgment founded on such a debt.

4. On a creditors' bill brought against the grantee named in such a deed, to compel him to convey the land and thus remove the cloud, it is not necessary to allege or to prove knowledge on the part of the grantee of the fraudulent intent of the grantor.

5. The burden of proving the facts necessary to constitute a claimed estoppel is upon the party who sets up the defense.

(Official.)

Bill in equity by B. Ellsworth Spear, an execution creditor, against William Spear and another, to compel the grantee in a conveyance claimed to be fraudulent to execute a deed of certain real estate in Warren, Knox county, and thus remove a cloud from the title obtained by plaintiff by levy of an execution issued on a judgment founded on a debt existing at the time of making the deed. Decree as prayed.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

J. H. H. Hewett and D. N. Mortland, for plaintiff. L. M. Staples, for defendants.

WISWELL, C. J. On July 6, 1900, while William Spear, one of the respondents, was indebted to the complainant to the extent of about \$2,600, he conveyed to his son Melbourne A. Spear, the other respondent, his homestead farm, in consideration of an agreement given by Melbourne to him for his support, secured by a mortgage upon the property.

The complainant subsequently commenced suit against William Spear, and at the December term, 1901, of this court for Knox county recovered judgment for \$2,623.67 and costs. Execution was issued thereon, upon which the complainant caused the property conveyed, together with two other parcels of real estate, to be seized and levied upon.

In this bill the complainant alleges that this conveyance was fraudulent and void as to him, an existing creditor at the time of such conveyance; but he alleges that the conveyance constitutes a cloud upon his title acquired by seizure and levy, and he asks that the respondent Melbourne be required by a decree of this court to execute a sufficient release deed of the premises to the complainant.

The foregoing facts being admitted or proved, the complainant is entitled to the relief prayed for. The conveyance of the father to the son, when the former was largely indebted, and in consideration of an agreement for the grantor's future support, was a voluntary one, and was prima facie fraudulent and void as to the then existing creditors. It is true that this presumption is not an absolute one, and may be rebutted by proof that at the time of the conveyance the grantor had sufficient available property remaining to pay his indebtedness. The question as to whether a voluntary conveyance is or is not void as to existing creditors depends upon all the surrounding circumstances, and upon the necessary consequences of the conveyance upon the ability of creditors to collect their indebtedness. *Gardiner Savings Institution v. Emerson*, 91 Me. 535, 40 Atl. 551; *Whitehouse v. Bolster*, 95 Me. 453, 50 Atl. 240.

But in this case it does not appear that the grantor, at the time of his conveyance to his son, had any other property, with the exception of the two parcels of real estate that the complainant caused to be seized and levied upon. These two parcels were valued by the appraisers at \$750 and \$500, respectively, while the property conveyed was appraised at \$1,500, and the three lots were not quite sufficient to satisfy the execution and the cost of the levy. This conveyance was therefore void as to the complainant. The latter has acquired title thereto by his levy.

¶ 5. See *Estoppel*, vol. 19, Cent. Dig. § 306.

and is entitled to the relief sought for to remove the cloud from his title. *Wyman v. Fox*, 59 Me. 100.

But it is set up in defense that the complainant, also a son of William Spear, knew of the contemplated conveyance from father to son to secure the former's future support, and advised that it be made, so that he is now estopped from claiming that it was void as to him. It would be unprofitable in this opinion to analyze the testimony upon this question. The burden of proving this proposition, relied upon by the defense, is upon the defense, and it is sufficient to say that the evidence fails to satisfy us that the complainant had any knowledge that this transfer was contemplated, or that he in any way consented to it.

Where the conveyance claimed to be void as to existing creditors is a voluntary one, as was this, it is not necessary to either allege or prove knowledge upon the part of the grantee of the grantor's fraudulent intent, although it is otherwise where the alleged fraudulent conveyance is made for a valuable and adequate consideration. *Egery v. Johnson*, 70 Me. 258.

Bill sustained. Decree as prayed for.

EVANS v. CITY OF PORTLAND.

(Supreme Judicial Court of Maine. May 8, 1903.)

MUNICIPAL CORPORATION—SEWER—FAILURE TO MAINTAIN—LANDOWNERS' RIGHTS.

1. The right of action against a town, for not maintaining and keeping in repair a public drain or sewer, is given by Rev. St. c. 16, § 9, to those only who have a right to enter the sewer.

2. Written application to the municipal officers, distinctly describing the land to which it applies, is an essential prerequisite to their power to grant such right.

3. A permit from the municipal officers to enter such sewer runs with the land, but a party cannot claim under such a permit granted to one who was a stranger to the title at the time it was given.

4. A permit to enter a sewer upon Fore street does not authorize the entry of a sewer upon Hancock street, not a part of nor an extension of the sewer on Fore street.

(Official.)

Report from Supreme Judicial Court, Cumberland County.

Action by Nellie S. Evans against the city of Portland under Rev. St. c. 16, § 9, to recover damages for failure to maintain and keep in repair a public drain, with which the plaintiff alleged she had the right to connect her premises. Case reported. Judgment for defendant.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PRABODY, and SPEAR, JJ.

D. A. Meaher, for plaintiff. C. A. Strout, City Sol., for defendant.

POWERS, J. This is an action to recover damages resulting from the failure of the defendant city to maintain and keep in repair a public drain or sewer along Fore street, with which the plaintiff alleges she had a right to connect the premises owned by her on the northwesterly side of said street.

The right of action is given only to those who have a right to connect with the sewer. Rev. St. c. 16, § 9. The plaintiff, among other things, must prove that she, or her predecessor in title, made written application to the municipal officers to enter and connect with this sewer, and that the municipal officers gave the applicant a written permit so to do. *Estes v. China*, 56 Me. 407. She relies upon a permit from the city of Portland to James R. Dockray, dated March 17, 1857, "to enter a side drain from a lot of land belonging to him, situate on the northwest side of Fore street, between the land of F. Lewis on the southwest and land formerly belonging to Judah Chandler on the northeast, into the drain owned by the city extending along Hancock street to tide waters." This permit was granted under Pub. Laws 1854, p. 90, c. 77, which, so far as this case is concerned, is the same in substance as Rev. St. c. 18. By section 2 of said act, "all applications for permits shall be in writing, and shall distinctly describe the land to which they apply. The privilege granted by such permit shall be available to the owner of the land described, his heirs and assigns, and shall run with the land." See Rev. St. c. 16, § 4. Application in writing distinctly describing the land is an essential prerequisite of the power of the municipal officers to grant the permit. The object of such a provision is manifest—to preserve a definite description of the land to which the permit applies, and the wisdom of it is well illustrated in the present case. This court, in *Estes v. China*, above, held that the plaintiff must prove such written application. The plaintiff has offered no evidence upon that point, and fails to sustain her action.

There are other, and perhaps more meritorious, objections to her case. The permit is to be available to the owner, his heirs and assigns, and is to run with the land. Plaintiff cannot claim under a permit granted to one who was a stranger to the title at the time it was given. The permit is dated March 17, 1857, and the documentary evidence introduced by the plaintiff shows that from April 25, 1854, to October 21, 1867, the plaintiff's premises were owned by one Lois Dunlap.

If neither of these objections existed, there is no proof that the plaintiff's premises are the same as those described in the permit. The only thing in common between them is that they are both on the northwesterly side of Fore street. One of the deeds introduced by the plaintiff does show, however, that

James R. Dockray, prior to March 17, 1857, owned other land adjoining that of the plaintiff, for which it is not improbable he obtained the permit in question.

Finally, the complaint in the writ is of a public sewer or drain along Fore street, and the permit is "to enter into the drain owned by the city extending along Hancock street." The plaintiff never entered the drain on Hancock street, but was connected with the one on Fore street. After a careful examination of the case, we are of the opinion that the weight of evidence is decidedly against her contention that the drain or sewer along Fore street, of which she complains, is a part of or an extension of the one extending along Hancock street, and named in Dockray's permit.

On all these several grounds the plaintiff has failed to show any right to enter the sewer along Fore street, and the entry must be:

Judgment for defendant.

STERLING v. LITTLEFIELD et al.

(Supreme Judicial Court of Maine. April 27, 1903.)

EQUITY—RESTRAINING NUISANCE—ACTION AT LAW.

1. It has always been the general rule in this state that while, in a proper case, equity will interfere to prevent a threatened and prospective nuisance, it will not take jurisdiction to compel the removal of an alleged nuisance, which is already existing, and restrain its continuance, until the alleged infringement of the complainant's rights and the existence of the nuisance resulting therefrom have first been established in an action at law.

2. To this rule there are various exceptions which have been recognized by the court. The aid of the equity court and its intervention by injunction may be invoked in the case of an existing nuisance, notwithstanding that the right has not first been determined, when the necessity is imperative, or where immediate and irreparable injury is threatened unless relief be given in equity, or where, on account of the necessity of a multiplicity of suits at law, or even for some other sufficient reason, the remedy at law would be inadequate.

3. In this case, in which relief in equity is sought to remove an alleged nuisance which is already existing, and to prevent its continuance, there is no allegation in the bill that the complainant's rights have been determined in an action at law. There is no allegation from which it can be inferred that there is any imperative necessity for invoking the aid of equity to remove by injunction the already existing nuisance, if nuisance it is. The allegations do not bring the case within any of the exceptions to the general rule above stated. The right of the plaintiff is not clear. It is evident from an inspection of the bill that his right must largely depend upon oral testimony.

Held, that the ruling of the court below in sustaining the defendants' demurrer to the bill was correct.

Davis v. Auld, 53 Atl. 118, 96 Me. 559, distinguished.
(Official.)

Appeal from Supreme Judicial Court, Cumberland County.

Bill by Seth Sterling against Ella A. Littlefield and another. From a decree dismissing the bill, plaintiff appeals. Dismissed.

Bill in equity brought by the plaintiff, in which he alleged that he is the owner of certain premises on Peaks Island, to which premises is appurtenant a right of way over land now owned by the defendant Littlefield, across which way the defendant Rounds, as tenant of Littlefield, has erected a building, which wholly obstructs this way and completely cuts off the plaintiff from access to the seashore on Peaks Island. The bill alleged further that the plaintiff and those through whom he acquired title have used the way continuously for all purposes connected with the seashore since the year 1828, when the way was granted. The plaintiff therefore prayed that the defendant Rounds be ordered to remove all obstructions to the use of this way erected by him or his agents or employes, and that both defendants be enjoined from interfering with the use of this way by the plaintiff. The defendants demurred, alleging as causes that the plaintiff has a plain, adequate, and complete remedy at law, and also that it does not appear from the plaintiff's bill that his title or right relative to this way has ever been previously determined in an action at law, or that there is any impediment to such an action being brought, or that there ever was or now is any authentic record of such title.

The presiding justice in the first instance sustained the demurrer and dismissed the bill. The plaintiff appealed to this court.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and SPEAR, JJ.

Wm. H. Gulliver, B. D. & H. M. Verrill, and O. D. Booth, for plaintiff. Clarence W. Peabody and Frederick V. Chase, for defendants.

WISWELL, C. J. This court, from the time of its earliest decision upon the subject until the present time, has always adhered to the general rule that while, in a proper case, equity will interfere to prevent a threatened and prospective nuisance, it will not take jurisdiction to compel the removal of an alleged nuisance which is already existing, and restrain its continuance by injunction, until the alleged infringement of the complainant's rights and the existence of the nuisance resulting therefrom have first been established in an action at law. To this rule there are undoubtedly various exceptions which have been recognized by the court. The aid of the equity court and its intervention by injunction may be invoked in the case of an existing nuisance, notwithstanding that the right has not been first determined, when the necessity is imperative, or where immediate and irreparable injury is

¶ 1. See Nuisance, vol. 37, Cent. Dig. §§ 58, 72.

threatened unless relief be given in equity, or where, on account of the necessity of a multiplicity of suits at law, or even for some other sufficient reason, the remedy at law would be inadequate. It is only necessary to refer to some of the decisions of this court in which this rule has been stated. *Porter v. Witham*, 17 Me. 292; *Varney v. Pope*, 60 Me. 192; *Rockland v. Rockland Water Company*, 86 Me. 55, 29 Atl. 935; *Tracy v. Le Blanc*, 89 Me. 304, 36 Atl. 399.

In the decision of the case of *Davis v. Auld*, 96 Me. 559, 53 Atl. 118, it was not intended to depart from this general rule to the slightest extent. Upon the contrary, it is there referred to as the "recognized limitation of equity procedure in nuisance cases." But the court in that case, in construing the statute of 1891, under which the proceeding was commenced, decided that this statute would be superfluous, as the court already had the power to abate the nuisance after verdict, or to stay or prevent the nuisance pending the prosecution, unless the Legislature, by the passage of the act of 1891, intended to increase the power of the court, or at least to facilitate the exercise of such power as it already possessed in nuisance cases, and that this was the evident intention of the Legislature. The question presented in that case depended upon the construction and effect to be given to a particular statute.

In this case the complainant alleges: That he is entitled to a right of way from land owned by him to the shore, the easement being thus described in the first deed in which it was created in 1828: "Together with the privilege of using the wharf on said Trott's land, paying a due proportion of the expense for keeping said wharf in repair, and also a convenient land passageway for an ox team from said wharf through said Trott's land to land first mentioned." That one of the respondents as lessee or under some license from the present owner of the servient estate had, before the commencement of the bill, wrongfully obstructed this right of way by erecting a wooden building on the servient estate, "which wholly obstructs the plaintiff's said right of way across said lot to the seashore."

There is no allegation in the bill that the complainant's rights have been determined in an action at law. There is no allegation from which it can be inferred that there is any imperious necessity for invoking the aid of equity to remove by injunction the already existing nuisance, if nuisance it is. The allegations do not bring the case within any of the exceptions to the general rule above stated. The right of the plaintiff is not clear. It is evident from an inspection of the bill that his right must largely depend upon oral testimony. The ruling of the court below in sustaining the defendants' demurrer to the bill was correct.

Appeal dismissed, with additional costs.

LITTLEFIELD et al. v. MORRILL.

(Supreme Judicial Court of Maine. May 1, 1903.)

LIEN—LOGS—LABORER—INDEPENDENT CONTRACTOR.

1. Rev. St. c. 91, § 38, as amended by chapter 183, p. 172, Pub. St. 1889, giving a statutory lien for labor on logs, was designed for the protection of laborers only, and not for independent contractors.

2. The phrase "whoever labors" in the above-named statute is equivalent to the word "laborer," and means no more.

3. A "laborer," in the statutory sense, is one who performs manual labor for wages under the direction of his employer.

4. One who contracts to do a specific piece of work, which he may perform by his own labor or by the labor of others, is not a laborer in the statutory sense, even though he in fact performs the entire work with his own labor. In such case he does not work for wages, but to save paying wages.

5. The fact that such contractor's compensation is by the contract made proportional to the extent of the work contracted for does not make his compensation of the nature of wages, nor make him a laborer.

6. One who contracts to cut and haul all the logs and lumber on a definite tract of land at a fixed price per M is as to that work a contractor, and not a laborer, and hence is not entitled to a lien for such labor as he personally performs.

(Official.)

Report from Supreme Judicial Court, York County.

Albert Littlefield and another against Frank A. Morrill. Case reported. Judgment for defendant.

Action for enforcing a lien claim for cutting, hauling, and sticking 265,300 feet of logs and lumber by the plaintiffs by virtue of a contract with one Frank A. Morrill, and by and with the consent of Roscoe H. Morrill, the supposed owner.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, POWERS, and PEABODY, JJ.

Fred J. Allen and Geo. F. & Leroy Haley, for plaintiffs. S. W. Emery, T. H. Simes, and G. E. Corey, for defendant.

EMERY, J. The evidence shows these facts: One Frank A. Morrill, apparently having bargained for all the log stumpage on a certain tract of land, contracted with these plaintiffs for them to cut and haul at a fixed price of \$2.25 per M all the logs and lumber on that tract. This contract the plaintiffs at first "let out by the thousand" to other parties, who abandoned the work after cutting and hauling about 100 M. The plaintiffs then hired other workmen, and with their help and with their own work and teams finished the contract, cutting and hauling in all 265.3 M, including the 100 M above mentioned. During the progress of the work Mr. Morrill paid them \$300 on account, all of which they paid over to the men in their

¶ 6. See *Logs and Logging*, vol. 22, Cent. Dig. §§ 69, 71.

employ as their wages for work done on the logs and lumber. All this was done with the knowledge and consent of Morrill.

The plaintiffs now bring this action of assumpsit upon an account annexed for cutting and hauling the 265.3 M at \$2.25 per M, giving credit for the \$300 paid, and claiming a balance of \$296.98. For this balance they also claim a statutory lien on the logs and lumber, which latter claim the present owners of the logs and lumber resist; Frank A. Morrill having been defaulted.

The lien is claimed under Rev. St. 1883, c. 91, § 38, as amended by chapter 183, p. 172, Pub. Laws 1889, which is as follows: "Whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen or repairing property while thus employed, has a lien thereon for the amount due for his personal services and the services performed by his team."

The liminal question is whether the evidence brings these plaintiffs within the purview of the statute, and to this question the answer must be in the negative. It is now settled that the statute is designed solely for the protection of laborers performing physical labor with their own hands and with their teams, under the direction of an employer, and for fixed wages, and that the subject-matter of that protection is solely the wages earned by such laborers. *Rogers v. Dexter and Piscataquis Railroad Company*, 85 Me. 374, 27 Atl. 257, 21 L. R. A. 528; *Blanchard v. Portland and Rumford Falls Railway*, 87 Me. 241, 32 Atl. 890; *Meands v. Park*, 95 Me. 527, 50 Atl. 706; *Richardson v. Hoxie*, 90 Me. 227, 38 Atl. 142.

It is true, these plaintiffs performed some physical labor, and also used their own teams to some extent, on these logs and lumber; but they did not so do under the direction of an employer, and for mere wages. They had not merely hired out their personal labor. They had taken a contract to cut and haul all the logs on the tract, and were independent in their method of doing it, and were carrying out their contract largely through the labor of others employed by them. They were contractors engaged in a business enterprise from which they expected profits which might be more or less, according to circumstances. They were not mere laborers working for fixed wages, the rate of which would not be varied by circumstances. When they labored themselves, it was not for wages, but to increase profits by saving wages. Had the enterprise proved profitable, they could, and undoubtedly would, have retained all the profits, however much in excess of the customary wages in such work, and would have allowed no rebate to the owners of the logs. Hence, if the enterprise has proved unprofitable, they should not and cannot repudiate their position as contractors and recover wages as laborers.

In *Rogers v. Dexter and Piscataquis Railroad Co.*, 85 Me. 372, 374, 27 Atl. 257, 21 L. R. A. 528, above cited, the plaintiff had contracted to do a certain amount of grubbing for the construction of a railroad bed at a fixed price per square yard. He employed other men, but also labored personally and physically with them in the manual labor of grubbing. Having thus completed the work, and not being paid therefor by the general contractor for the whole road, he sought to recover of the railroad company under Rev. St. 1883, c. 51, § 141, making railroad companies liable to "laborers employed for labor actually performed on the road." It was held he could not recover of the company even for his own labor thus actually performed on the road, since he was not a "laborer" in the statutory sense of the word, but was an independent contractor, whose personal labor was not for wages, but to save paying wages. In *Meands v. Park*, 95 Me. 527, 50 Atl. 706, above cited, the doctrine above quoted from *Rogers v. Dexter and Piscataquis Railroad Co.* was affirmed, and held applicable to cases of liens claimed on logs and lumber.

The cases *Bondur v. Le Bourne*, 79 Me. 21, 7 Atl. 814, and *Ouelette v. Pluff*, 93 Me. 168, 44 Atl. 618, are cited in argument, but they are easily distinguishable from this case. In those cases the plaintiffs did not engage in a business enterprise out of which they might make a profit or a loss, according to circumstances. They simply hired out their own personal labor at a fixed wage, the rate of which was not to be varied by circumstances, and they were under the personal direction of their employer. It is true they were to be paid by the cord, instead of by the day or week, etc., and in this respect the cases cited resemble this case at bar; but the rate of wages can be fixed as well by the piece as by time, and they still be wages. That laborers are paid by the piece instead of by time does not change their character as laborers. Their earnings are none the less their wages, and fixed wages, which the statute was enacted to protect.

Judgment for the owners, Roscoe H. Morrill and Chas. H. Haines.

FLETCHER et al. v. TUTTLE et ux.

(Supreme Judicial Court of Maine. April 27, 1903.)

ATTACHMENT—FRAUDULENT CONVEYANCE—CREDITORS' REMEDIES—EQUITY—BANKRUPTCY.

1. Where the title to real estate was once in a debtor, but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made by a creditor, and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted; a conveyance under these circumstances being regarded as void as to a

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 665.

creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed.

2. But where the debtor has never had the legal estate, but has paid the purchase money, and caused the land to be conveyed by a third person to his wife or to somebody else, he has never had any title that can be seized or taken on execution. In such a case the creditor must resort to equity in order to take property standing in the name of the wife, which, under the statute, may be taken as the property of the husband to pay his debts contracted before such purchase.

3. The only object of an attachment of property upon *meeme* process is to obtain a lien upon the property attached, which will continue until final judgment is obtained, and which may then be enforced by a seizure upon the execution. Real estate which cannot be seized upon execution cannot be attached upon *meeme* process in an action at common law.

4. The complainants commenced a common-law action against Tuttle, and attempted to make an attachment thereon of certain real estate, the legal title to which was never in the defendant, but which, it is alleged, was bought and paid for by him, and which he caused to be conveyed to his wife for the purpose of defrauding the complainants, who were existing creditors at the time; he being at that time insolvent. While that action was pending, but more than four months after the attempted attachment, the defendant in that action filed his petition in bankruptcy, was subsequently adjudged a bankrupt, and still later received his discharge. Thereupon the plaintiffs discontinued as to the defendant—the cause of action being one that was provable in bankruptcy—but took judgment against the property claimed to have been attached. Execution was issued upon this judgment, upon which the plaintiffs caused the property claimed to be attached to be seized and sold by the sheriff at public auction. The property was bought in by the judgment creditors, the complainants in this bill, who then commenced this bill in equity, in which they seek to have perfected the title thus attempted to be acquired by the seizure and sale on execution.

Held, that the attempted attachment was ineffectual, and that as the judgment recovered by the complainants was only against the property claimed to have been attached, and as there was no property attached, the complainants are not entitled to the relief sought for.

(Official.)

Exceptions from Supreme Judicial Court, Somerset County.

Bill by George H. Fletcher and others against Fred Tuttle and wife. Demurrer sustained, and plaintiffs except. Exceptions overruled.

This was a bill in equity, praying for the conveyance of certain real estate alleged to have been conveyed in fraud of the plaintiffs.

It was agreed that Fred Tuttle, one of the defendants, filed his petition in bankruptcy December 19, 1899, was declared bankrupt December 30, 1899, and was granted a discharge March 19, 1900; that plaintiffs discontinued as to him, and took judgment against the property attached, as set forth in the bill. The bill is to be considered as though those facts duly appeared on the docket, and were properly set out in the bill.

This bill came on for hearing on bill and demurrer, and it was ordered, adjudged, and decreed that the demurrer be sustained and the bill dismissed.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, and SAVAGE, JJ.

Geo. W. Gower, for plaintiffs. A. K. & E. C. Butler, for defendants.

WISWELL, C. J. This case comes to the law court upon the complainants' exception to the ruling of the sitting justice sustaining a demurrer to the complainants' bill in equity.

The complainants base their claim for relief upon these facts, either alleged in the bill, or which it is agreed may be considered as if alleged: On March 6, 1893, certain real estate, paid for out of the property of the respondent Fred Tuttle, was conveyed to his wife, Ella M. Tuttle, the other respondent. Subsequently the husband made extensive improvements upon this real estate, which were also paid for out of his property. It is alleged that this conveyance to the wife was made for the purpose of defrauding the creditors of the husband, who was at the time insolvent. Prior to the time of the conveyance the complainants were creditors of Fred Tuttle, by virtue of a note given by him to them on November 16, 1889, which indebtedness has never been paid. On August 31, 1897, they commenced suit upon this note against Fred Tuttle, and caused his real estate, and especially all his right, title, and interest in and to the real estate conveyed to his wife, to be attached. While that action was pending, on December 9, 1899, the defendant in that action filed his petition in bankruptcy, was subsequently adjudged a bankrupt, and still later received his discharge. The plaintiffs thereupon discontinued as to the defendant, the cause of action being one that was provable in bankruptcy, but took judgment against the property claimed to have been attached. Execution was issued upon this judgment, upon which the plaintiffs caused the property claimed to be attached to be seized and sold by the sheriff at public auction; all of the statutory provisions in relation to such seizure and sale having been observed. The property was bought in by the judgment creditors, the complainants in this bill; they being the highest bidders therefor. This bill in equity was then commenced by them, in which they seek to have perfected the title thus attempted to be acquired by the seizure and sale on execution, to have the conveyance to the wife adjudged fraudulent, and to obtain a decree ordering the respondents—the defendant in the original action and his wife—to convey the premises to the complainants.

In the case of *Stickney & Babcock Coal Company v. Goodwin*, 95 Me. 248, 49 Atl. 1039, 85 Am. St. Rep. 408, this court decided

—following previous decisions of the court upon the same question under a former bankruptcy act—that an attachment of real estate made more than four months prior to the time of filing the petition in bankruptcy by or against the defendant is not dissolved by the filing of such petition and the subsequent proceedings in bankruptcy, and that where there is a valid and existing attachment, which has not been dissolved by the bankruptcy proceedings, the plaintiff may have judgment against the property attached, although the cause of action is provable in bankruptcy, and a personal judgment against the debtor is thereby prevented. In this case the petition in bankruptcy was not filed until more than two years after the attempted attachment, so that, if there was a valid attachment, it was not thereby dissolved, and the judgment against the property attached was properly rendered. If, upon the other hand, there was no attachment, then this judgment is of no consequence, and the basis of this proceeding in equity fails.

This raises the question as to whether or not an attachment can be made of real estate in a common-law action, the legal title to which was never in the defendant, but which was paid for out of the property of the husband, and conveyed by a third party to the wife for the purpose of hindering, delaying, and defrauding the husband's creditors; the suit being commenced by a creditor whose debt existed prior to and at the time of such conveyance.

It is well settled by numerous decisions that where the title to real estate was once in the debtor, but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made, and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted; a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed; the right to make a levy upon premises thus fraudulently conveyed being expressly given by statute. Rev. St. c. 76, § 14.

It is equally well settled in this state, notwithstanding the provision of Rev. St. c. 61, § 1, whereby, "when payment was made for property conveyed to her [the wife] from the property of her husband, or it was conveyed by him to her without a valuable consideration, it may be taken as the property of her husband, to pay his debts contracted before such purchase," that property, the title to which is acquired by the wife by a conveyance from a third person, under these circumstances, cannot be taken by levy of execution so as to transfer the legal title to the levying creditor. That is, in cases

where the debtor has never had the legal estate, but has paid the purchase money, and caused the land to be conveyed by a third person to his wife, he has never had any title that can be seized on execution. In such a case the creditor must resort to equity in order to take the property standing in the name of the wife, which, under the statute above cited, may be taken as the property of the husband to pay his debts contracted before such purchase. *Corey v. Greene*, 51 Me. 114; *Low v. Marco*, 53 Me. 45; and numerous other cases.

Under these circumstances, can a prior existing creditor acquire a lien by attachment of the property, which will not be affected by bankruptcy proceedings commenced more than four months after such an attachment was made? Or, in other words, can real estate be attached upon mesne process, which cannot be seized upon the execution issued on the judgment recovered in the action upon which the attachment was made? The determination of this question necessarily depends upon the statutory provisions in this state.

By Rev. St. c. 81, § 56, "all real estate liable to be taken in execution as provided in chapter 76; the right to cut and carry away grass and timber from land sold by this state or Massachusetts, the soil of which is not sold; and all other rights and interests in real estate, may be attached on mesne process, and held to satisfy the judgment recovered by the plaintiff; but the officers need not enter on or view the estate to make such attachments." This language, "and all other rights and interests in real estate," is very broad and comprehensive, but an examination of the original acts of the Legislature which have been condensed into this clause shows specifically what rights and interests in real estate were thereby made attachable. In 1829 the Legislature passed an act making the estate, right, title, or interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate, upon condition to be performed, attachable on mesne process. In 1833 an act was passed to the effect that the right which any debtor may have of redeeming from the purchaser any equity of redemption which may have been sold on execution against such debtor, and also the right which any debtor may have of redeeming from a judgment creditor after levy on execution, were made attachable upon mesne process. These provisions were preserved more nearly in their original form in the Revision of 1857, but in the Revision of 1871 they were condensed into the language above quoted.

It is a familiar principle that no change of legislative purpose is to be inferred from a mere condensation of prior statutes in a subsequent revision. So that the language of the clause as it now exists in the Revised Statutes, when traced to the original enactments for the purpose of ascertaining its meaning,

does not give authority for such an attachment as is here relied upon. And it has been frequently decided that certain interests in land cannot be attached—for instance, the interest in real estate of a mortgagee. See *Smith v. People's Bank*, 24 Me. 185, and a number of later cases. Again, it would hardly be claimed that the right of a widow to have dower assigned to her out of the real estate of her deceased husband, under the law prior to the amendment of 1895, could be attached, although such a right was certainly a valuable interest in real estate. That this right could not be attached was decided in the case of *McMahon v. Gray*, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748.

But we think that a consideration of the purpose of attachment upon mesne process will determine the question. The only object of an attachment is to obtain a lien upon the property attached, which will continue until final judgment is obtained, and which may then be enforced by a seizure upon the execution. When a lien is thus acquired by virtue of a valid attachment, the subsequent seizure of the property upon execution, within the time allowed by statute, will relate back to the date of the attachment, and take precedence of intervening attachments or conveyances, and this is all that is accomplished by an attachment. It follows that an attachment is valueless unless the lien thus acquired can be subsequently enforced by a seizure of the property upon the execution. As we have seen, the only purpose of the attachment is to acquire a lien that may be subsequently enforced by extending the execution upon the property attached. In fact, the language of the statute is that the property described "may be attached upon mesne process, and held to satisfy the judgment recovered by the plaintiff." This necessarily means, we think, that the property attached may be held to satisfy the judgment, by enforcing the execution issued thereon. Attachment on mesne process and levy upon execution are so inseparably connected that the former is a useless ceremony unless it can be made effective by the latter.

In regard to all interests in real estate which have been made attachable by legislative enactment, such as the right to redeem real estate under mortgage, levy, sale on execution, or for taxes, or a right to a conveyance under contract, express provision is made by statute as to the manner of proceeding in the seizure and levy or sale upon execution, while in the case of property conveyed by a third person to the wife, and paid for by the husband, no such provision is made; and the court has decided in numerous cases, as we have seen, that a seizure upon execution in such a case cannot be made.

We are aware of no statute which gives the right to attach upon mesne process any property which cannot be seized upon the ex-

ecution subsequently obtained, and of no case in which it has been held that such a right exists. Upon the contrary, in *Smith v. People's Bank*, 24 Me. 185, the right to seize upon execution is made the test as to whether or not there is a right to attach. It is there said: "If the interest of a mortgagor cannot be taken in satisfaction of an execution, it cannot be the subject of attachment upon mesne process."

There is another reason why we think it is apparent that an attachment cannot be made in such a case. By Rev. St. c. 81, § 67, "an attachment of real or personal estate continues for thirty days and no longer, after judgment in the original suit," except in cases not applicable here. In order to enforce a lien acquired by attachment, a seizure upon the execution must be made within that period of time. What can be done to enforce a lien acquired by attachment, if no seizure can be made upon the execution? How long after judgment in the original suit would such an attachment continue in force, and how would it eventually be dissolved? These suggested difficulties show such an inherent inconsistency in an attachment of an interest in real estate which cannot be taken upon execution to satisfy the judgment, that we are forced to the conclusion that an attachment cannot be made under these circumstances.

As the judgment recovered by these complainants was only against the property claimed to have been attached, and as there was no property attached, the complainants are not entitled to the relief they seek in their bill.

Exceptions overruled. Demurrer sustained.

STATE v. BASS.

(Supreme Judicial Court of Maine. April 27, 1903.)

INTOXICATING LIQUORS—ADVERTISING SALES —PLACE OF PUBLISHING—MUNICIPAL COURT—JURISDICTION.

1. Complaint was made to the Sanford Municipal court, York county, against the respondent for publishing a newspaper in which were notices "of the sale or keeping for sale of intoxicating liquors," which is made an offense by section 8, chapter 366, p. 311, Pub. Laws 1885. This municipal court, as provided by the act establishing it, and by the general provisions of law, has jurisdiction only of offenses committed within the limits of York county, with the exception of certain offenses not necessary to be considered.

The publication of the notices complained of was in the *Bangor Daily Commercial*, of which the respondent was and is the sole owner and publisher. This newspaper is entirely composed, edited, and printed in Bangor, in the county of Penobscot, where all of the offices, printing and publishing rooms of the newspaper are situated, and where all the work of composing, editing, printing, and publishing the paper is done. The newspaper is first issued from its publishing rooms in that city, entered as second-class mail matter at the Bangor post office, and mailed from there to its subscribers in other cities and towns. The complainant was a regular subscriber to this newspaper, living in

Sanford, in the county of York, where, as such subscriber, he received by mail the copy of the newspaper which contained the notices of the sale or keeping for sale of intoxicating liquors.

Held, that the language of the statute must be given its natural and ordinary signification in the connection with which it is used. That the common and universal meaning of the word "publish," as well as the technical meaning of the word, when used with reference to a book, magazine, or newspaper is to issue, to send forth to the public for sale or general distribution; that the newspaper in which these notices were given was published in Bangor, in the county of Penobscot, and was not also published in York county because of the fact that a copy was sent to a subscriber in that county.

It follows that the offense charged was not committed within the limits of York county, and that the municipal court before which the proceedings were instituted had no jurisdiction. (Official.)

Agreed Statement from Supreme Judicial Court, York County.

Complaint against Joseph P. Bass for the violation of the liquor law. Submitted on agreed statement. Complaint and warrant dismissed.

This was a complaint under Pub. Laws 1885, p. 311, c. 866, § 8, and originated before the Sanford municipal court, York county. The statute is as follows:

"Sec. 8. Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs, to be recovered by complaint. One-half of said fine to complainant and other one-half to the town in which said notice is published."

On being arraigned, the respondent seasonably filed before said court two motions to dismiss the proceedings; the first to the jurisdiction of the court, and the second because no offense was alleged in the complaint on which the warrant in said case was issued.

Both these motions were denied by the court, and the respondent then entered a plea of not guilty.

The state then introduced its evidence, but the respondent offered none. Thereupon the court adjudged the respondent guilty, and imposed a fine of \$20 and costs, from which judgment an appeal was taken to this court sitting at nisi prius.

It was agreed that the respondent was, on the 14th day of January, A. D. 1902, and from that time up to and including the 26th day of April, A. D. 1902, the sole owner of a plant consisting of printing presses, boiler, engine, linotype machines, cases, type material, and printing appliances, etc., located on Main street, in Bangor, Penobscot county, state of Maine, and all in a building there situate, owned by the respondent; that said plant was from said 14th day of January, A. D. 1902, to and including said 26th day of April, A. D. 1902, used by the respondent in printing and getting out the Bangor Daily Commercial and Weekly Commercial; that

all of the offices of each of said papers were on and including the afore days, in said building; that the composition of the matter, the setting of the type, the preparations of the forms for presswork, and the presswork itself, is all done exclusively in said building, with the material and appliances owned and kept there by the respondent; that said Bangor Daily Commercial is first issued from its office in said Bangor, entered at the post office there as second-class mail matter, and sent out thence to the different towns and cities, to its subscribers, of which the complainant in this case was one; that the paper mentioned in said complaint was in the usual course of business printed in said office, entered at the post office in said Bangor as second-class mail matter, and in due course of mail was sent to and received by said complainant at said Sanford, in said York county, as a regular subscriber to said paper, in the same manner as with all out of town subscribers.

By agreement of the parties the case was reported to the law court, for that court to decide:

First. Whether the alleged offense set out in the complaint and warrant, under the foregoing facts and circumstances, was within the jurisdiction of the Sanford municipal court.

Second. Whether the complaint and warrant in the aforesaid case were sufficient, and whether the offense referred to in the statute is sufficiently set out therein.

If the court should decide both questions in favor of the state, judgment shall be final, and the judgment of the lower court to be affirmed with costs; otherwise judgment shall be for the respondent.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

W. S. Mathews, Co. Atty., for the State. F. H. Appleton, H. R. Chaplin, and Edwin Stone, for defendant.

WISWELL, C. J. A complaint was made to the Sanford municipal court against the respondent for publishing a newspaper in which were notices "of the sale or keeping for sale of intoxicating liquors," which is made an offense by section 8, c. 866, p. 311, Pub. Laws 1885. Upon this complaint a warrant was issued. The respondent, upon being arraigned, with other defenses filed a motion to dismiss the complaint and warrant because of the want of jurisdiction of the court. This, as well as the other objections to the proceedings, was overruled, and the case brought to the Supreme Judicial Court upon appeal. There the case was reported to the law court upon an agreed statement of facts.

It is only necessary to consider the jurisdictional question seasonably raised by the respondent. The following facts appear from the agreed statement relative to this

question: The publication of the notices complained of was in the Bangor Daily Commercial, of which the respondent is, and at the time alleged in the complaint was, the sole owner and publisher. This newspaper is entirely composed, edited, and printed in Bangor, in the county of Penobscot, where all of the offices, printing and publishing rooms of the newspaper are situated, and where all the work of composing, editing, printing, and publishing the paper is done. The newspaper is first issued from its publishing rooms in that city, entered as second-class mail matter at the Bangor post office, and mailed from there to its subscribers in other cities and towns. The complainant was a regular subscriber to this newspaper, and lived in Sanford, in the county of York. As such he there received by mail a copy of the newspaper which contained the advertisement of the sale or keeping for sale of intoxicating liquors, the advertisers being a firm located in the city of Philadelphia.

The Sanford municipal court, as provided by the act establishing it, and by the general provisions of law, has jurisdiction only of offenses committed within the limits of York county, with the exception of certain offenses not necessary to be here considered; so that the question to be decided is whether or not this offense was committed within that county.

The statutes makes it an offense for any one to "knowingly publish any newspaper in which said notices are given"; that is, "notices of the sale or keeping for sale of intoxicating liquors." The respondent did publish a newspaper in which such notices were given. Did he publish it in York county, under the facts above stated, because of the fact that a copy of the newspaper was mailed to and received by a subscriber living in that county? Certainly not. The paper was published in Bangor, in Penobscot county. The language of the statute must be given its natural and ordinary signification in the connection with which it is used, because the meaning of the word "publish" depends upon the subject with which it is connected. The publication of a slander or libel, or of a will, means something quite different from the publication of a newspaper. When used with reference to a book, magazine, or newspaper, the common and universal, as well as the technical, meaning of the word is to issue, to send forth to the public for sale or general distribution. It follows that the place of the publication of a newspaper is where it is first issued to be delivered or sent by mail or otherwise to its subscribers. It is not necessarily where the newspaper is printed, as it may be printed in one place and yet published in another, as this court has several times decided with reference to the publication of notices of the foreclosure of a mortgage. *Bragdon v. Hatch*, 77 Me. 433, 1 Atl. 140; *Hollis v. Hollis*, 84 Me. 96, 24 Atl. 531.

It is urged that the word in this connection should be given the same signification as when applied to a libel, in which case there is a publication, both by common law and by statute in this state, "by delivering, selling, reading or otherwise communicating a libel directly or indirectly to any person." But this is a technical meaning of the word peculiar to its connection, and was not the sense in which it was used in the statute under consideration. See *Rose v. Fall River Five Cent Savings Bank*, 165 Mass. 273, 43 N. E. 93.

It follows that the offense charged in this case was not committed within the limits of York county, and that the municipal court before which the proceedings were instituted had no jurisdiction.

Complaint and warrant dismissed.

DUNTON v. PARKER et al.

(Supreme Judicial Court of Maine. April 27, 1903.)

DEED—DESCRIPTION—OWNER OF UPLAND—TIDE WATER—FLATS—FISH WEIR—UNLAWFUL MAINTENANCE—ACTION FOR PENALTY.

1. In construing the description in a deed of land upon the seashore, upon the question as to whether or not the shore is included in the conveyance, certain well-established general principles must be applied. By reason of the Colonial Ordinance of 1641-47, the owner of the upland adjoining tide water *prima facie* owns to low-water mark, and does so in fact unless the presumption is rebutted by proof to the contrary.

2. It is, of course, true that the owner of upland and shore may separate the ownership by the conveyance of the one and the retention of the other. Where, in the conveyance of land upon the seashore, the side boundary line is described as running "to the shore," and the boundary is thence "by the shore," the side line terminates at the inner side of the shore, and shows, in the absence of other calls or circumstances showing a contrary intention, that the inner side of the shore is intended as the boundary. A call in a deed which describes a line as running to a strip of land, whether shore or upland, does not carry the line over, across, or onto the strip referred to, because the word "to" is a word of exclusion rather than of inclusion.

3. But it does not by any means follow from the mere fact that the shore of land is made a boundary, or that the boundary is "by the shore," that it is by high-water mark. The space between high and low water mark, properly called the "shore," is frequently of many rods in width; it has an outer or seaward side, and an inner or upland side; and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore is intended as the boundary, it is necessary to look for something further. It follows that the starting point of a boundary "by the shore" is one of the important elements in throwing light upon the question as to which margin of the shore was intended.

4. While a boundary which is described as commencing at high-water mark on the shore, and thence runs by the shore to another point at high-water mark, will, in the absence of other calls or circumstances showing a contrary intention, be construed as excluding the shore, it is equally true that, when both the termini of a boundary by the shore are at its outer

margin, the shore will be included. This is the necessary and logical result when both the starting and ending points of the boundary by the shore are at the same margin of the shore. The grantor's intention may not be so apparent when one of the termini of the shore boundary is at one margin, and the other at the other. But even in such a case, when nothing appears in the case showing any motive for a separation of upland and shore, and it does not appear that the shore has any value apart from the upland, and there can be no reason why an owner of both should convey the one and retain the other, if one of the termini of the boundary by the shore is at low-water mark, and the other, according to the technical construction of a call in the deed, is at high-water mark, the shore will be regarded as included in the conveyance, because of the strong presumption, under these circumstances, that such was the intention of the grantor.

5. In an action under Rev. St. c. 3, § 63, to recover the penalty therein provided for maintaining a fish weir below or beyond low-water mark in front of the shore or flats of the plaintiff, it appears that the plaintiff is the owner of a large tract of land, containing about 1,700 acres, known as "Petit Manan Point," which extends almost exactly south into the sea. The water upon the east side of the point is known as "Pigeon Hill Bay," and that upon the west side as "Dyer's Bay." The point is nearly separated from the rest of the mainland upon the north by a long, narrow inlet, known as the "Carrying Place Cove," which extends from Dyer's Bay, on the west side of the point, in a southeasterly direction, towards, and to within 100 rods of, the eastern shore of the point.

The plaintiff put into the case a chain of deeds commencing with one in 1820, and continuing until the conveyances to him as trustee. These deeds admittedly conveyed the upland, and brought the title thereto into the plaintiff. The question is whether or not they included and conveyed the shores, and especially the eastern shore, in front of which the weir complained of is maintained. The earlier deeds, prior to 1827, unquestionably included the shore. Whether or not the form of description adopted in the various deeds from 1827 up to the time of the conveyance of an undivided portion of the point by quitclaim deed in 1867, and the conveyance of the remainder by a warranty deed in 1874, included the shore, may be doubtful.

But in the warranty deed of 1874, under which the plaintiff claims, the material calls are as follows: "Beginning at a blue ledge at the southeast corner of the E. A. Hilton lot, so called." The boundary is then described as extending westerly and northerly by some small lots, "to the Carrying Place Cove, thence following the shore of said cove northerly and westerly to the waters of Dyer's Bay, thence southerly by the shore to the southern extremity of Petit Manan Point, thence following the shore easterly and northerly to the first-mentioned bound."

It will be noticed that in this description the starting point is on the eastern shore of the point, and the termination of the first boundary line, which extends across the point to the Carrying Place Cove, is at low-water mark, according to the invariable construction of the language of this call. The next boundary, which commences at low-water mark, and extends by the shore "to the waters of Dyer's Bay," is necessarily by the outer margin of the shore, because both termini are at that margin. From this point, low-water mark at the junction of Dyer's Bay and the Carrying Place Cove, the boundary is described as extending by the shore "to the southern extremity of Petit Manan Point," which means, when considered in connection with the starting point for this last boundary, the southern extremity of the point at low-water mark. So that when the bound-

ary commences to run northerly, "following the shore" from the southern extremity of the point, it starts at the outer margin of the shore. The form of the description above quoted was followed, in substance and effect, in all the subsequent deeds, until the title to the point came to the plaintiff.

In accordance with the general principles above stated, it is considered by the court that this description discloses an intention on the part of the grantor to include the shore upon the eastern side of this point of land, and that the result is the same whether the southeast corner of the Hilton lot, the point of beginning on the eastern shore, and the terminus of the boundary after it has extended around the whole point, is at high or low water mark; that it is unnecessary to determine the location of the blue ledge referred to in the deed as at the southeast corner of the Hilton lot, because this ledge was evidently selected as a convenient monument for the purpose of indicating the point of beginning at the shore, rather than the identical starting point on the shore with reference to high or low water mark.

6. It is further considered that this record title to the shore in the plaintiff, which extends back to 1867 and 1874, coupled with evidence showing a possession by the owners of the upland for the entire period entirely consistent with the joint ownership of upland and shore, and showing that no claim to or possession of the shore was ever made or had by previous owners of the upland or by anybody else, is sufficient to authorize the maintenance of this action against these defendants, who do not claim to have any title whatever or right to the possession of the shore, and that consequently it is not necessary to determine the construction of the descriptions in the prior deeds.

Upon the issue of facts presented as to the character of the weir complained of, *held*, that this weir is not one "the materials of which are chiefly removed annually," and that consequently the statute under which the action is brought is applicable.

The language of this statute, "in front of the shore or flats of another," cannot be taken literally. The statute must contain some limitation other than is expressed therein. The criterion to be applied in determining whether or not a weir is in front of the shore of a plaintiff, within the meaning of the statute, is whether or not it causes injury of some kind to the plaintiff in the enjoyment of his rights as shore owner. The action cannot be maintained unless it appears that the weir complained of is so near or is so situated with reference to plaintiff's shore that it in some way injures or injuriously affects him in the enjoyment of his rights as owner.

Held, that it sufficiently appears from the situation and from the evidence that the defendants' weir injuriously affects the rights of the plaintiff as the shore owner.

See *Sawyer v. Beal*, 54 Atl. 848, 97 Me. 356. (Official.)

Report from Supreme Judicial Court, Washington County.

Action of debt by Robert F. Dunton against Frederick O. Parker and others, under Rev. St. c. 3, § 63, to recover the penalty provided for maintaining a fish weir below or beyond low-water mark in front of the plaintiff's shore or flats in Pigeon Hill Bay, in Steuben, Washington county. Case reported. Judgment for plaintiff.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

H. H. Gray and C. B. Donworth, for plaintiff. E. Foster, O. H. Hersey, J. F. Lynch, G. M. Hanson, and F. I. Campbell, for defendants.

WISWELL, C. J. This is an action under Rev. St. c. 3, § 63, to recover the penalty therein provided for maintaining a fish weir below or beyond low-water mark in front of the shore or flats of the plaintiff. The case comes to the law court upon report.

The first objection to the maintenance of the action is that the plaintiff does not own the flats in front of which the weir was erected; that the deed in his chain of title to the upland, of which the plaintiff is admittedly the owner, does not include the shore—the space between high and low water mark.

The tract of land owned by the plaintiff, and as to the title to the upland of which there is no question, consists of a large point of land, known as "Petit Manan Point," containing about 1,700 acres, according to the earlier deeds, the area in the later deeds being given as somewhat larger, and extends almost exactly south into the sea. The water upon the east side of the point is known as "Pigeon Hill Bay," and that upon the west side as "Dyer's Bay." The point is nearly separated from the rest of the mainland upon the north by a long, narrow inlet, known as the "Carrying Place Cove," which extends from Dyer's Bay, on the west side of the point, in a southeasterly direction, towards, and to within about one hundred rods of, according to the plan, the eastern shore of the point.

The plaintiff put into the case a chain of deeds, commencing with one in 1820, and continuing until the conveyances to him as trustee. The question is whether these deeds conveyed the shores of this point of land, and especially the eastern shore, opposite to which the weir complained of is maintained. The descriptions in these various deeds are not the same, but they can be classified into groups. The first two deeds offered in evidence unquestionably included the shore. The description is: "Also Petit Manan Point, bounded easterly by Pigeon Hill Bay and westerly by Dyer's Bay." In the next deed the description is different, but it is said therein that the property is "the same which was conveyed to me by Samuel Freeman and John Taylor, Esq." And as the deeds to this grantor from Freeman and Taylor included the shore, this reference to those deeds is sufficient to show that the shore was intended to be included in that conveyance.

In 1827 the grantee in the last deed conveyed the tract of land, employing this language in the description: "Beginning at the land of Moses McCaleb and running southerly by the shore of Pigeon Hill Bay on the east to Petit Manan Point, its western shore bounded by Dyer's Bay, and northerly by

an arm of the sea called the Carrying Place [meaning undoubtedly the Carrying Place Cove] and the land belonging to" various settlers. An examination of the deed of the Moses McCaleb lot, first conveyed as a separate lot to him in 1824, shows that, in accordance with the well-settled doctrine in this state, the seaward boundary of this lot was at high-water mark. As the starting point in the description of the deed of the main tract is at the McCaleb lot, at high-water mark, and extends from this starting point "by the shore," it would follow, if nothing else appeared, that this eastern boundary was along the inner margin of the shore, or at high-water mark. But the language used by the grantor in describing the other boundaries of this tract, where it is contiguous to tide waters, renders the construction of the description of the eastern boundary more doubtful, and might have a controlling effect in ascertaining the true intention of the grantor. It will be noticed that the western and northern boundaries of the point in the description are Dyer's Bay and the arm of the sea known as the "Carrying Place Cove." This language undoubtedly included the shores upon these sides of the tract. Inasmuch as there is no conceivable reason why the shores on the northerly and westerly sides of the point should have been conveyed, and that upon the easterly side retained, and as in fact there is no reason apparent or suggested why either of the shores should have been retained by this or by any of the subsequent grantors, who adopted the same form of description in their various deeds, the fact that the conveyance included the shores upon these two sides might properly have great weight in tending to show that the language used for the purpose of describing the eastern boundary was not used in its technical sense, but that the grantor intended to convey the shore upon the eastern as well as upon the other two sides of the point. See *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155. But we do not think it is necessary to determine the question whether or not the deeds in this group, in view of all the surrounding circumstances, conveyed the shore, because of the description adopted in the later deeds.

The description above quoted was adopted, in substance and effect, by the grantors in all of the intervening deeds, until Franklin Brown and others acquired title to the tract by a quitclaim deed from one John Brown in 1867, and by a warranty deed of one undivided half of the tract from James B. Mansfield in 1874. In the warranty deed of 1874 the material calls are as follows: "Beginning at a blue ledge at the southeast corner of the E. A. Hilton lot, so called," the boundary is then described as extending westerly and northerly, by some small lots, "to the Carrying Place Cove, thence following the shore of said Cove northerly and

westerly to the waters of Dyer's Bay, thence southerly by the shore to the southern extremity of Petit Manan Point, thence following the shore easterly and northerly to the first-mentioned bound."

In determining the construction of the description in a deed of land upon the seashore, certain well-established general principles must be applied. By the Colonial Ordinance of 1641-47, it was provided that in such cases "the proprietor of the land adjoining shall have propriety to low-water mark," etc. By reason of this ordinance the owner of the upland adjoining tide water *prima facie* owns to low-water mark, and does so in fact unless the presumption is rebutted by proof to the contrary. *Doane v. Willcutt*, 5 Gray, 835, 68 Am. Dec. 360, quoted with approval in *Snow v. Mt. Desert Island Real Estate Company*, 84 Me. 14, 24 Atl. 420, 17 L. R. A. 280, 30 Am. St. Rep. 331. It is, of course, true that the owner of upland and shore may separate the ownership by the conveyance of one and the retention of the other, and, as has frequently been decided in the states to which this ordinance is applicable, where the side boundary line of the lot conveyed is "to the shore," and thence "by the shore," the side line terminates at the inner side of the shore, and shows, in the absence of other calls or circumstances showing a contrary intention, that the inner side of the shore is intended as the boundary. That is, a call in a deed which describes a line as running to a strip of land, whether shore or upland, does not carry the line over, across, or onto the strip referred to, because the word "to" is a word of exclusion rather than of inclusion. This logical result was adopted in the leading case of *Storer v. Freeman*, *supra*, and has since been universally followed in this state.

But it does not by any means follow from the mere fact that the shore of land adjoining tide waters is made a boundary, or that the boundary is "by the shore," that it is by high-water mark. The space between high and low water mark, properly called the "shore," is frequently of many rods in width; it has an outer or seaward side, and an inner or upland side; and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore is intended as the boundary, it is necessary to look for something further. It follows that the starting point of a boundary "by the shore" is one of the important elements in throwing light upon the question as to which margin of the shore is intended, because, as we have already seen, low-water mark is as much the shore as is high-water mark.

In the description in this deed the starting point is on the eastern side of the point at the southeast corner of the Hilton lot, but it will be noticed that the next call is not by the shore. The first boundary line, which commences at the Hilton lot, extends across

the land to the Carrying Place Cove, and the termination of this first line is not the shore, but the cove. The language is not "to the shore," but "to the Carrying Place Cove," language which has been invariably held to have the effect of carrying the line across the shore to low-water mark. The next boundary, which starts, as we have just seen, at low-water mark in the cove, is by the shore, necessarily by the outer margin of the shore, because it commences at the outer margin, and it extends "to the waters of Dyer's Bay"; so that here again the termination of the boundary is not the inner, but the outer, side of the shore, as the expression "to the waters of" a bay has always been construed as meaning to low-water mark. So that the starting point for the next boundary, which extends around the whole point to the place of beginning on the eastern shore, is at low-water mark, and the boundary follows the outer margin of the shore to the southern extremity of the point at low-water mark. This expression, "southern extremity of Petit Manan Point," is certainly at least as capable of meaning the extremity of the point at low as at high water mark, and, when taken in connection with the starting point, shows that the former was intended.

So that when the boundary, according to the description, commences to run northerly, "following the shore" from the southern extremity of the point, it starts at the outer margin of the shore. While a boundary which is described as commencing at high-water mark on the shore, and thence runs by the shore to another point at high-water mark, will, in the absence of other calls or circumstances showing a contrary intention, be construed as excluding the shore, it is equally true that, when both the termini of a boundary by the shore are at its outer margin, the shore will be included. This is the necessary and logical result when both the starting and ending points of the boundary by the shore are at the same margin of the shore. Of course, the grantor's intention may not be so apparent when one of the termini of the shore boundary is at one margin and the other at the other. But even in such a case, when nothing appears in the case showing any motive for a separation of upland and shore, and it does not appear that the shore has any value apart from the upland, and there can be no reason why an owner of both should convey the one and retain the other, if one of the termini of the boundary by the shore is at low-water mark, and the other, according to the technical construction of the call in the deed, is at high-water mark, the shore will be regarded as included in the conveyance, because of the strong presumption, under these circumstances, that such was the intention of the grantor. *Snow v. Mount Desert Island Real Estate Company*, 84 Me. 14, 24 Atl. 420, 17 L. R. A. 280, 30 Am. St. Rep. 331.

In this case in view of these principles and of the situation, we decide that the description above quoted in the warranty deed of 1874 to Brown and the other grantees discloses an intention upon the part of the grantor to include the shore upon the eastern side of this point of land; and that the result is the same whether the southeast corner of the Hilton lot, the starting point of the line which extends westerly and northerly to the Carrying Place Cove, and the terminus of the boundary that extends from low-water mark in the Carrying Place Cove around the shore by its outer margin, is at high or low water mark. So that it is unnecessary to determine the location of the blue ledge referred to in the deed as at the southeast corner of the Hilton lot. This ledge at the southeast corner of the Hilton lot was evidently selected as a convenient monument for the purpose of indicating the starting point at the shore, rather than the identical starting point on the shore with reference to high or low water mark. *Brackett v. Persons Unknown*, 53 Me. 238, 87 Am. Dec. 548.

The lot spoken of in this and the later deeds as the Hilton lot is the same that was earlier referred to as the McCaleb lot, except that, while in the first deed of the lot the seaward boundary was so described as to limit it to the inner margin of the shore, in a deed of this lot in 1848, and in the subsequent deeds thereof, the description carried the shore boundary to low-water mark.

The form of the description in the warranty deed of 1874 to Brown and other grantees was followed, in effect, in all the subsequent deeds until the title to the point came to the plaintiff. While the description in the quitclaim deed of 1867 to the same grantees was not precisely similar to that in the warranty deed, it was sufficient, in accordance with the principles which we have referred to, to include the shore upon the eastern side.

So that whether the deeds prior to the time that Brown and others acquired title in 1867 and in 1874, included the shore or not, the plaintiff has introduced a chain of deeds, commencing in 1874 and ending in the conveyances to himself, which include both upland and shore, and evidence from which it appears that the possession of himself and of those under whom he claimed for the entire period has been entirely consistent with the joint ownership of upland and flats, and that no claim has ever been made by previous owners, or by anybody claiming under them, to any ownership in the shore. In fact, the evidence is full and uncontradicted that the owners of the upland during this period have had the exclusive and uninterrupted possession of the shore. This tract of land has been principally used for pasturing a large flock of sheep, and has been especially valuable for this purpose because of the great extent of shore, which enabled the sheep,

averaging about 800 in number, to there get their food during the winter months.

We think that this record title to the shore since 1874, a period of almost 30 years, with a possession of this character entirely consistent with the ownership of the shore, and without any claim to or possession of the shore by any one else inconsistent with such ownership, is sufficient to authorize the maintenance of this action against these defendants, who do not claim to have any title whatever or right to the possession of the shore, especially when it is at least doubtful if the earlier deeds, considered in connection with the situation and the other calls therein, showed any intention on the part of the grantors to retain the ownership of the shore. The very nature of the use made of this tract of land, the value of the shores for this purpose, and their want of value if separated from the upland, would be circumstances of much weight in determining the construction of these earlier deeds, if it were necessary to decide that question.

Another defense relied upon is that the weir complained of is one "the materials of which are chiefly removed annually," and that, consequently, as the weir does not come within the statutory exception to this clause, the statute is not applicable to it. A brief description of the method in which the weir was constructed, and of the portion that is annually removed, will show the fallacy of this contention. The weir consists of a pound and two wings. Large posts, 7 or 8 inches through at the bottom and 35 feet or more in length, are driven with the use of a pile driver 6 feet or more into the ground under the sea. These posts are 6 feet apart around the pound and 10 feet apart along the wings. Two hundred posts of this character are used. In the space between every two of these large posts, three or four smaller ones are used. They are all joined together by two rows of stay laths. When the weir is put into condition in the spring, about 1,200 pieces of birch brush 20 to 25 feet long are fastened to the stay laths, extending from high water downward.

In the fall of the year, when the weir is being prepared for the winter season, so that it will be as little injured as possible by the floating ice, these pieces of brush and one row of the stay laths are taken off, and the tops of all the posts, down to about three feet above low water, are removed. Every spring the tops of the posts, the top row of stay laths, and new pieces of brush—the old brush having become generally unsuitable for a second year's use—are put back. The expense of replacing these portions of the weir in the spring, including the costs of the new brush, is trifling. According to the testimony of one of the defendants, who is most familiar with this matter, the cost of the new brush is only about \$12, and three or four men can do the work of replacing the top of

the posts, the top row of stay laths, and of putting on new brush in about four tides. The case does not show the cost of the building of the substantial portion of the weir which we have above described, but it is evident that the annual cost of putting the weir into condition for the season's fishing is insignificant compared with the expense of building the permanent and substantial portion of the weir.

Some of the witnesses upon the part of the defense, who testified that the principal part of the materials were annually removed, gave as the reason for their opinion that the brush was a necessary part of the weir, without which it would be useless for the purpose intended. It is undoubtedly an important part in making the weir serviceable for the purpose for which it was intended, but it by no means follows that it is the principal part of the weir. We are satisfied, this issue of fact being submitted for the determination of the court, that the materials of this weir were not chiefly removed annually. The principal part of the weir is the permanent structure consisting of the posts driven close together down into the ground under the sea, which are designed to remain until it becomes necessary, from time to time, to replace them as the old posts become rotten and decayed.

This court has recently decided that the language of this statute, "in front of the shore or flats of another," cannot be taken literally; that the statute must contain some limitation other than is therein expressed, and that the criterion to be applied in determining whether or not a weir is in front of the shore of a plaintiff within the meaning of the statute is whether or not it causes injury of some kind to the plaintiff in the enjoyment of his rights as shore owner; that the action provided by this statute cannot be maintained unless it appears that the weir complained of is so near, or is so situated, with reference to a plaintiff's shore, that it in some way injures or injuriously affects him in the enjoyment of his rights as owner. *Sawyer v. Beal*, 97 Me. 350, 54 Atl. 848. In that case the weir was situated a long distance from the plaintiff's shore upon ledges which were entirely independent of the shore. There was a channel between the weir and the shore, through which vessels of considerable size could pass. The plaintiff had no weir or fishing privilege that was in any way affected by that of the defendant. So that in that case it was decided by the court that no injury to the plaintiff was shown, and that the action could not be maintained.

The situation in this case is entirely different. When the defendant's weir was first built, it was attached to a ledge on the plaintiff's shore, and, although this attachment was later discontinued, during the first part of the season of 1901, and at the time alleged in the writ as the date when the weir was maintained without the owner's con-

sent, one of the wings came to within about 30 feet of the plaintiff's shore at low water. There were other fishing privileges along the eastern shore of this point, and one weir, at this time, was maintained by the person in charge of the property, situated a short distance southerly of the defendant's weir. We think it evident in this case that the defendant's weir injuriously affected the rights of the plaintiff as the owner of this shore.

Judgment for plaintiff for \$50.

ZIMMERMAN et al. v. MECHANICS' SAV. BANK.

(Supreme Court of Errors of Connecticut. June 4, 1903.)

WILLS—CONSTRUCTION—ESTATE DEVEISED—FEE—LIFE ESTATE.

1. Under a will which, after providing for the payment of debts, gave to testator's widow a house and lot, with household furniture, etc., also all moneys that might be deposited on testator's account in bank "during the time of her natural life, and after her death to be divided equally" among testator's legal heirs, the limitation to the widow's life extended only to the bank accounts, and she took an estate in fee in the house and lot.

Case Reserved from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Frederick C. Zimmerman, administrator de bonis of the estate of Paul Revoir, deceased, and others, against the Mechanics' Savings Bank. Case reserved by the superior court. Opinion rendered.

Paul Revoir died childless in 1860, seised and possessed of an estate in fee simple in the real estate in controversy. He left a will, which was duly probated, and of which his widow, Bertha Revoir, became the duly qualified executrix. The will, after its introductory words, proceeds as follows:

"Do therefore make, ordain, publish and declare, this to be my last will and testament. That is to say, after all my lawful debts are paid, and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit.

"To my beloved wife, Bertha Revoir the house and lot situated on Prospect St. New Britain, Ct. with household furniture, beds, bedding, books, linen, and all and everything contained in said house and shed; also all moneys that may be deposited on my account at the New Britain Savings Bank, or any other bank, during the term of her natural life; and after her death to be divided equally among my legal heirs."

Then follows a paragraph appointing his wife executrix, and the subscription and attestation clauses.

In 1886 and 1888, said Bertha, believing that she was the owner in fee of the premises in question, executed to the defendant two mortgages thereof as security for money then loaned. By the foreclosure of these mortgages, the defendant claims to have become the owner of said premises. Bertha

Revoir died May 7, 1901. The plaintiffs other than Zimmerman, administrator, are the only heirs at law of Paul Revoir. Zimmerman is the administrator de bonis upon Paul's estate. The plaintiffs claim that under Paul's will Bertha took only a life estate in her husband's real estate, with the consequence that the defendant now has no interest in the mortgaged premises, and that the same has passed to them, as Paul's heirs at law and representatives.

Noble E. Pierce and George W. Klett, for plaintiffs. Charles E. Perkins, for defendant.

PRENTICE, J. (after stating the facts.) The reservation raises a single question only. That relates to the construction to be placed upon the provisions of Paul Revoir's will. The question is whether his widow, Bertha, by its terms, took an estate in fee in the testator's real estate, or only a life estate. The reason for a doubt is easy to discover. In our attempt to resolve it, we find little to aid us either in extrinsic circumstances or other provisions of the will itself which might shed light upon the testator's intention. The record is practically silent as to the circumstances which surrounded the testator when he made his will, and the few lines which create the ambiguity exhaust its provisions, save only such as are formal. These lines, therefore, must furnish the means for their own interpretation.

The thing to be sought after is the testator's intention. Counsel urge upon us, as aids in this search, certain technical principles of interpretation, which they regard as supporting their respective contentions. These, for the most part, relate to the collocation of the words employed by the scrivener, the formation of the sentences or parts of sentences, the precise force to be given to particular words in certain connections, and the punctuation. Some of these principles are purely those of composition, grammar, or punctuation, while others are cited as having received at least quasi legal authority. The trouble with all of them is that their value rests upon an assumption of some complicity on the part of the writer with accepted literary usages. Their significance in interpretation, therefore, becomes of diminished value when the subject-matter to be interpreted is manifestly framed by one who knows little or nothing of such usages, and is, in his use of language and literary construction, for the most part, a law unto himself. The will under review, as the parts not quoted in the statement of facts most clearly show, was the work of one who knew little of the proper use of language, to say nothing of the accepted requirements of good written expression and grammatical construction. Any attempt, therefore, to gather the testator's intention from the form in which he has couched his desires, by the application

of nice rules of correct composition and the refinement of literary interpretation, is one which could hardly be expected to be fruitful of correct results. These rules have their uses, but their value, of themselves, is by no means an unvarying one. In connection with other considerations, their significance is oftentimes merely incidental and of little importance. *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Gray v. Clark & Putnam*, 11 Vt. 583.

If we examine this will to discover some indication of intention which seems to have substantial force, and which is not dependent for its value upon the mere arrangement of words or punctuation, or technical rules governing written expression, there is one which appeals to us as being entitled to real significance, and by far the greatest weight. The testator was plainly attempting to make his wife a beneficiary in all his estate left after the payment of his debts. It is clear that under the *videlicet* he sought to make an enumeration of all his estate, which enumeration he made in two groups or classes. Manifestly, he intended to give his wife only a life estate in his moneys in savings banks, which comprised the second of the groups of enumerated property. If he intended to give her a like estate only in the balance, to wit, the house and lot and other property enumerated in the first group, it is difficult to understand why he took the pains to make the enumeration at all, and, above all, to make it into two entirely separate classes. Using, doubtless, some form at his command, the testator or scrivener had, prior to the *videlicet*, prepared the way for a simple bestowal upon his wife of a life estate in all the residue, which had been aptly described. He had only to add that this residue was given to her, and then make the limitation to her life use in the language he subsequently used. That was the simple and natural thing to do, if that was what he wished to accomplish. That he did not adopt this simple method admits of no plausible explanation, except upon the theory that such a provision would not meet the testator's wishes. The fact that the scrivener was an inexperienced draftsman only emphasizes this conclusion: To such a man, the easy and direct way would be the natural way. Instead of that, he enters upon an attempt to enumerate and classify into two classes the property already amply described in general terms. Evidently he had a purpose. The classification very clearly indicates that purpose. It was to create one class of property to be given in one form or interest, and another to be differently bestowed. These considerations convince us that the testator's intention would be defeated if the limitation to a life use, which qualifies and limits the gift of the savings-bank deposits, should be carried back to the house and lot and other property contained in the first group of enumerated property.

The superior court is advised that Bertha Revoir, under the will of her husband, Paul Revoir, took an absolute estate in the real estate described in the complaint, and that appropriate judgment for the defendant should be rendered accordingly. No costs will be taxed in this court in favor of either party. The other judges concurred.

J. B. OWENS POTTERY CO. v. TURNBULL CO.

(Supreme Court of Errors of Connecticut.
June 4, 1903.)

**PRINCIPAL AND AGENT—APPARENT RELATION
—LIABILITY OF SUPPOSED PRINCIPAL.**

1. Defendant and G. entered into a secret agreement under which G. was to maintain and conduct a department in defendant's store and have certain floor space for this purpose, the department to be conducted in every respect as though it were a part of the store and belonged to defendant, and as though G. were only a manager in defendant's employ. G. ordered goods from plaintiff, representing himself to be defendant's agent, and the goods were shipped and delivered to defendant, and a bill therefor rendered it, stating the terms of sale. Several months after this purchase, the goods in G.'s department were sold on execution against him, and a few days thereafter defendant received from plaintiff another bill similar to the first one, with a request for remittance, to which defendant replied with a disclaimer of liability. This was the first notice plaintiff had from defendant that it disavowed responsibility for G.'s acts. *Held*, that defendant had, by its silence, ratified the purchase of the goods, and was liable to plaintiff for the payment thereof.

Appeal from District Court of Waterbury; George H. Cowell, Judge.

Action by the J. B. Owens Pottery Company against the Turnbull Company to recover for goods sold and delivered. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant is a corporation conducting in its name a retail department store in Waterbury. The plaintiff is a corporation of Ohio, engaged in the manufacture of certain lines of household supplies. December 28, 1901, the defendant and one Gilbert entered into a written agreement in the form of a lease, and sealed and acknowledged as a lease of lands, which was to continue in force for the term of three years from January 1, 1902, and which had for its purpose the conduct by Gilbert of a crockery and house-furnishing department in the defendant's store. By this agreement the defendant leased to Gilbert certain floor space in its store, to be occupied and used by Gilbert exclusively for the sale of crockery, glassware, lamps, tin and wooden ware. The rent to be paid was a specified per centum of all the lessee's gross sales, the same to be paid and settled weekly. All moneys received from sales and all charge slips for goods sold were to be sent immediately after each transaction to the office of the lessor, who was to retain the money. Each Saturday Gilbert was

to send to the office a list of all salaries due from him to clerks and employes. These sums the lessor was to pay to the several persons entitled to them, and on Monday the balance left in the lessor's hands less the amount of the rental based upon the sales as aforesaid was to be paid over to Gilbert. All clerks and employes of the lessee were to be subject to all the rules and regulations made by the lessor for the management of its store. The lessor was to make all deliveries in Waterbury, and advertise the lessee's wares in the newspapers, giving him such space as he might desire, he agreeing to recompense the lessor for the cost of such advertisements. It was provided that the lessee should not place his own name or signs, or any other name or signs than the lessor's, upon any part of the premises, and that all goods sold should be sold under the defendant's name. It was further provided that the parties to the lease should keep the same strictly confidential, and that it should not, in whole or in part, be disclosed to any person. On or about January 8, 1902, Gilbert, in preparation for opening the department thus provided for, visited the plaintiff's factory in Zanesville, Ohio, and, representing himself to be an agent and buyer for the defendant, purchased a bill of goods upon credit, the same being the goods embraced in the bill of particulars. The plaintiff believed Gilbert, and supposed that it was selling to the defendant, and gave credit to it alone; otherwise the plaintiff would not have made the sale. The goods were addressed to the defendant, and shipped on January 3d. On the same day a detailed bill of the goods containing the terms of sale was made out to the defendant and mailed to its address. The goods arrived on January 29th, and were received by the defendant, who paid for the freight and cartage, and they were by it turned over to Gilbert for sale in his department, where they remained, save as sold from time to time, until taken on attachment and execution as hereinafter recited. Gilbert continued his relations with the defendant under said agreement until about the middle of April, 1902, when he left Waterbury. Meanwhile his department was conducted as the lease provided. So far as was apparent to the public or the employes in the store, there was no distinction between this department and the rest of the store, and it appeared, like the rest, to be owned and managed by the defendant. It was the intention of the defendant that such should be the case, and that Gilbert's department should appear to the public and third parties as belonging to the defendant, and be so considered, and that Gilbert should appear and be considered to be the buyer for and manager of said department. April 21, 1902, suit was brought against Gilbert, and a portion of the stock in said department therein attached. To satisfy the judgment in this suit and another which followed it, on April 25th all of the goods in said department were

taken and sold on execution. May 8, 1902, the defendant received from the plaintiff another bill similar to that of January 3d, with a request for remittance. To this the defendant, by its attorneys, replied immediately, disclaiming liability. This was the first and only notice of disavowal of responsibility for Gilbert's acts the defendant ever sent the plaintiff. This disavowal was unreasonably delayed, and prejudicial to the plaintiff. The plaintiff's bill, which is a fair and reasonable one, has never been paid.

Terrence F. Carmody, for appellant. Ulysses G. Church, for appellee.*

PRENTICE, J. (after stating the facts). The judgment rendered in this case was amply justified by the facts found. It is quite true that the written instrument which evidenced the relations between the defendant and Gilbert did not expressly authorize the latter to pledge the credit of the former. The agreement, however, had for its purpose the conduct of a mercantile business, to be carried on in the defendant's store, under its name, and to all outward appearances as its business. This undertaking necessarily involved purchases of stock. The agreement was explicit in requirements which should give to the business to be conducted by Gilbert every appearance of a department of the defendant's business. The effort to conceal from the public Gilbert's true relation as principal is manifest throughout the document. To make this result the more secure, there follows the sweeping provision that it should be kept strictly confidential, and should not, in whole or in part, be disclosed to any person. The effect of this provision is apparent. By force of it, it is not easy to discover why the right to use the name and credit of the defendant in the purchase of necessary stock was not impliedly conferred upon Gilbert, unless, indeed, it be upon the theory that no credit at all was to be given. It is a little hard to conceive of a mercantile business of the magnitude and character of that apparently contemplated by these parties being carried on under modern conditions without some degree of credit for purchases. Let us, however, assume that such a method was intended to be employed with respect to this business, and give the defendant the full benefit of its contention that Gilbert was without authority, express or implied, to purchase in its name or upon its credit. On January 3, 1902, Gilbert, purporting to act for the defendant, ordered of the plaintiff the goods which are the subject of this suit. Credit for them was given to the defendant alone. Within a few days the defendant was informed of Gilbert's purchase, and that it was a credit purchase, by the receipt in the ordinary course of mail of a bill of the goods, with terms of sale, which was mailed to the defendant on the day of purchase. *Fitts v. Hartford Life & Annuity Ins. Co.*, 66

Conn. 376, 84 Atl. 95, 50 Am. St. Rep. 96. These facts alone, in view of Gilbert's agreement as to secrecy, sufficiently advised the defendant that the credit given was, presumably at least, credit to it, the only party whose name could be divulged. That the bill was made out to it, and sent to it, emphasized and made certain the otherwise reasonable conclusion. The arrival of the goods two weeks later, addressed to it, was an additional reminder of what had been done. Notwithstanding the knowledge thus derived, the defendant kept silence. It did nothing to advise the plaintiff of the true situation during the two weeks which elapsed while the goods were in course of shipment. The goods came, and were received by the defendant without a word of warning. The silence was continued as the weeks lengthened into months and until after Gilbert's affairs had suffered a hopeless collapse, and all means of protecting the plaintiff's interests had disappeared. A clearer case of ratification by silent acquiescence could scarcely be stated. The defendant's knowledge of the material facts was complete, the duty to speak manifest, the silence without excuse unreasonably prolonged and prejudicial to the plaintiff, as the court with ample justification has found. *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131, 23 Atl. 703.

In view of our reasons for our conclusions it is unnecessary to notice the defendant's motion to add to and correct the finding further than to observe that paragraph 81 is justified by the evidence, and that paragraph 64, in its portion excepted to, only states a fact apparent in the written agreement which is made a part of the finding.

There is no error. The other judges concurred.

MEMORANDUM DECISIONS.

WHITBY v. BALTIMORE, C. & A. RY. CO. (Court of Appeals of Maryland. March 31, 1903.) Appeal from Circuit Court, Talbot County. Action by William H. Whitby against the Baltimore, Chesapeake & Atlantic Railway Company. From a judgment for defendant, plaintiff appeals. Reversed. Argued before McSHERRY, C. J., and FOWLER, BOYD, PEARCE, SOHMUCKER, and JONES, JJ. Guion Miller, for appellant. William H. Adkins, for appellee.

BOYD, J. This case was by agreement submitted to the same jury that passed on that of *Annie L. Whitby and husband* against the appellee. 54 Atl. 674. The verdict was in favor of the defendant, and the plaintiff appealed from the judgment rendered thereon. For the reasons given in the other case, this judgment must be reversed. Judgment reversed, and a new trial awarded; the appellee to pay the costs.

CHEVALIER v. MIDDLESEX & SOMERSET TRACTION CO. (Court of Errors and Appeals of New Jersey. March 2, 1903.) Error to Supreme Court. Action by Isabella Chevalier against the Middlesex & Somerset Traction Company. Judgment for plaintiff, and defendant brings error. Reversed. Willard P. Voorhees, for plaintiff in error. Alan H. Strong, for defendant in error.

PER CURIAM. This cause was tried together with the action of Norman v. Middlesex & Somerset Traction Company, 54 Atl. 835, and the judgment is reversed, for the reasons given in the memorandum filed in that case.

DOLTON v. VAN SICKEL. (Court of Errors and Appeals of New Jersey. March 2, 1903.) Error to Supreme Court. Action by Edward B. Dolton against Marie Van Sichel. Judgment for plaintiff, and defendant brings error. Affirmed. Holt & Van Dike, for plaintiff in error. F. S. Katzenbach, Jr., for defendant in error.

PER CURIAM. The judgment in the Supreme Court in this cause was entered upon the opinion of Mr. Justice GARRISON, reported in Dolton v. Sichel, 66 N. J. Law, 493, 49 Atl. 679, which opinion adopted, in respect to one point involved, the opinion of the same justice in Yetter v. King Confectionery Company, reported in 66 N. J. Law, 491, 49 Atl. 678. The judgment of the Supreme Court is affirmed, for the reasons given in the opinion referred to.

DIXON and VREDENBURGH, JJ., dissent.

FLANDRAU v. ALBANESIUS et al. (Court of Errors and Appeals of New Jersey. June 23, 1902.) Suit by William Flandrau against Otto H. Albanesi and others. From a decree for defendants, complainant appeals. Affirmed. McEwan & McEwan, for appellant. Weller & Lichtenstein, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the following reasons, stated by Vice Chancellor STEVENS, at the close of the hearing, on directing a dismissal of the bill of complaint: "There is no evidence whatever that Dr. Albanesi has abrogated the contract in any way. The evidence shows very plainly that it was the desire of Dr. Albanesi to fulfill the contract. There seems to have been some difficulty with respect to ascertaining what was due—the precise amount that was due. That is the evidence, and it also appears that within a few days afterwards Mrs. Peters moved to New York City, and Mr. Albanesi did not know where to go in order to make a tender of the money. Finally he discovered her new place of residence and tendered the money. The difficulty lay in the fact of an unsettled account, which had not been settled before. It seems to me that if ever there was a case in which diligence was shown—an earnest desire on the part of a purchaser to live up to his contract—I cannot conceive of any case in which greater diligence could have been exhibited. It does not appear that Mrs. Peters made any tender of the deed, and because of this failure I think it is perfectly plain that Dr. Albanesi is entitled to the surplus. Time is not of the essence of this agreement. I therefore dismiss the bill."

HANRAHAN v. NATIONAL BUILDING LOAN & PROVIDENT ASS'N. (Court of Er-

rors and Appeals of New Jersey. March 2, 1903.) Error to Supreme Court. Action by Amelia Hanrahan against the National Building Loan & Provident Association. Judgment for plaintiff, and defendant brings error. Affirmed. Howard W. Hayes, for plaintiff in error. Frank Bergen, for defendant in error.

PER CURIAM. The judgment of the Supreme Court, brought up by the writ of error in this case, is affirmed for the reasons given in the opinion of VAN SYCKEL, J., in that court, reported in 67 N. J. Law, 526, 51 Atl. 480.

LEEDS et al. v. BOHEMIAN ART GLASS WORKS. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by Henry W. Leeds and others against the Bohemian Art Glass Works. Decree for plaintiffs, and defendant appeals. Affirmed. Howard Carrow, for appellant. Thompson & Cole, for respondents.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of GREY, V. C., in the court below. 52 Atl. 375.

LIONDALE BLEACH, DYE & PRINT WORKS v. McGRATH, Collector. (Court of Errors and Appeals of New Jersey. March 2, 1903.) Error to Supreme Court. Action by the Liondale Bleach, Dye & Print Works against John O. McGrath, collector. Judgment for defendant was affirmed by the Supreme Court (52 Atl. 714), and plaintiff brings error. Affirmed. Willard W. Cutler, for plaintiff in error. John F. Stickle, for defendant in error.

PER CURIAM. The judgment in this case is affirmed, for the reasons given by DIXON, J., in his opinion in the Supreme Court, 52 Atl. 714.

MENZENHAUER v. SCHMIDT. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Suit by Frederick Menzenhauer against Oscar Schmidt. Decree for plaintiff, and defendant appeals. Affirmed. McDermott & Fisk, for appellant. James A. Gordon, for respondent.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of PITNEY, V. C., in the court below. 52 Atl. 156.

MURRAY et al. v. LYNCH et al. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by Josephine Murray and others against Rachel A. Lynch and others. Decree for defendants, and plaintiffs appeal. Affirmed. J. A. Beecher, for appellants. Guild, Lun & Tamblin, for respondents.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of the Ordinary in the court below. 51 Atl. 713.

RILEY v. FITHIAN. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by Frank M. Riley, trustee, against Francis R. Fithian. Decree for plaintiff, and defendant appeals. Af-

firm. **E. A. Armstrong and D. J. Pancoast**, for appellant. **C. H. Sinnickson**, for respondent.

PER CURIAM. The order appealed from is affirmed, for the reasons given in the opinion of **GREY, V. O.**, rendered in the court below. 54 Atl. 143.

RYAN v. LOVELESS et al. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **Mame H. Ryan** against **Mary J. Loveless** and another. From the decree the plaintiff appeals. Affirmed. **Thos. E. French**, for appellant. **Wm. M. Clevenger**, for respondents.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of **REED, V. C.**, in the court below. 51 Atl. 1094.

RYAN v. LOVELESS et al. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Suit by **Mame H. Ryan** against **Mary J. Loveless** and another. From the decree rendered defendant **Isabella S. Fishblatt** appeals. Affirmed. **Thos. E. French**, for appellant. **Wm. M. Clevenger and D. J. Pancoast**, for respondent.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of **REED, V. C.**, in the court below. 51 Atl. 1094.

VROOM, J., dissents.

SCHLICHER v. WHYTE. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **Peter Schlicher** against **Cathrine Whyte**. Decree for defendant, and complainant appeals. Affirmed. **Geo. O. Vanderbilt**, for appellant. **F. S. Katzenbach, Jr.**, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons given in the opinion of **REED, V. C.**, in the court below. 47 Atl. 448.

GARRETSON and VROOM, JJ., dissent.

SIEGMAN v. DAY et al. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **Richard Siegman** against **George H. Day** and others. From a decree sustaining a demurrer to the bill (51 Atl. 1003), plaintiff appeals. Affirmed. **Court, Howell & Ten Eyck**, for appellant. **Lindabury, Depue & Faulks**, for respondents.

PER CURIAM. The facts set out in the bill of complaint in this cause are, in their legal effect, identical with those exhibited in the bill in the case of **Siegmán v. Maloney**, 54 Atl. 405, decided at the present term of this court. For the reasons stated in the opinion filed in that case, the decree brought up by this appeal should be affirmed.

VALLINGER et al. v. WILSON. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **John O. Wilson** against **William F. Vallinger** and others. Decree for defendants, and plaintiff appeals. Affirmed. **Lewis Starr**, for appellant. **Henry S. Scovel**, for respondents.

PER CURIAM. In the making of the decree appealed from there was no error which was prejudicial to the appellant. Upon the proofs submitted the respondents were entitled to recover from the appellant, at the very least, the \$50 ordered to be paid by him to the respondents. The decree should be affirmed.

WARD v. WILCOX et al. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **George C. Ward** against **S. Thomas Wilcox** and others. Decree for defendants, and plaintiff appeals. Affirmed. **Elvin W. Crane**, for appellant. **Guild, Lum & Tamblin**, for respondents.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of the Ordinary in the court below. 51 Atl. 1094.

FORT and VROOM, JJ., dissent.

WEIGEL v. WEIGEL. (Court of Errors and Appeals of New Jersey. March 11, 1903.) Appeal from Court of Chancery. Bill by **Philip Weigel, Jr.**, against **Alice Weigel**. Decree for plaintiff, and defendant appeals. Affirmed. **C. J. Atkinson**, for appellant. **Warren R. Schenck and Alan H. Strong**, for respondent.

GUMMERE, C. J. The decree appealed from is affirmed, for the reasons stated in the opinion of **Grey, V. C.**, in the court below. 52 Atl. 1123.

ANGUS v. JUNGLING. (Supreme Court of New Jersey. Feb. 24, 1903.) Action by **Thomas Angus** against **William J. Jungling**. Verdict for plaintiff, and rule to show cause discharged. Argued November term, 1902, before **GUMMERE, C. J.**, and **VAN SYCKEL, FORT, and PITNEY, JJ.** **M. T. Rosenberg**, for plaintiff. **Hudspeth & Puster**, for defendant.

PER CURIAM. We find no error committed by the trial court, either in its rulings upon evidence or in its charge to the jury. The motion to nonsuit the plaintiff, and the motion to direct a verdict for the defendant, were properly refused. The finding of the jury in favor of the plaintiff was justified by the evidence, and the damages are not excessive. The rule to show cause will be discharged.

BAISLEY v. WELSH. (Supreme Court of New Jersey. March 4, 1903.) Action by **John H. Baisley** against **Charles J. Welsh**. There was a verdict for defendant, and plaintiff takes out a rule to show cause. Rule made absolute, and new trial granted. Argued November term, 1902, before the **CHIEF JUSTICE**, and **VAN SYCKEL, FORT, and PITNEY, JJ.** **D. J. Pancoast**, for plaintiff. **Frederick A. Rex**, for defendant.

PER CURIAM. This suit is upon an account and two promissory notes. The defendant pleaded the general issue and payment with notice of a counterclaim, without specifying the particulars. The plaintiff's claim was not disputed. The defendant claimed that one **Bowden**, as the agent of plaintiff, purchased of the defendant a large quantity of goods, which were delivered to said **Bowden**. The defendant, without offering in evidence his books of account, recovered a verdict against the plaintiff for \$6,208.84. It appears, by evidence taken under a rule of this court since the trial of said cause, that these goods were sold to **Bowden**, not by the defendant, but by the **New Jersey Butchers' Supply Company**. The verdict in favor of the defendant should therefore be set aside, and a new trial granted.

BARR v. MIDDLESEX & SOMERSET TRACTION CO. (Supreme Court of New Jersey. Feb. 25, 1903.) Action by **Henry J.**

Barr against the Middlesex & Somerset Traction Company. Submitted on rule to show cause. Rule discharged conditionally. Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ. John S. Voorhees, for plaintiff. Willard P. Voorhees, for defendant.

PER CURIAM. We find no error in the rulings of the court at the trial, or in the charge to the jury. Nor do we find that a verdict in favor of the plaintiff was against the weight of the evidence. The amount of damages recovered is, however, excessive. If the plaintiff will consent to a reduction of the verdict to \$750, he may enter judgment for that amount; otherwise, the rule to show cause will be made absolute.

FRENCH v. MAYOR, ETC., OF CITY OF MILLVILLE. (Supreme Court of New Jersey. March 5, 1903.) Action by Thomas E. French, receiver, etc., against the mayor and common council of City of Millville. There was judgment for plaintiff (49 Atl. 465), affirmed by the Court of Errors and Appeals (51 Atl. 1109), and defendant rules to show cause why judgment should not be opened and defendant permitted to plead. Rule discharged. Argued June term, 1902, before GARRISON and COLLINS, JJ. Louis H. Miller, for the rule. William A. Logue (Thomas E. French, on the brief), opposed.

PER CURIAM. The court at June term, 1901, overruled a demurrer to the declaration. The opinion (66 N. J. Law, 392, 397, 49 Atl. 465) expressly said that, if the plaintiff would discontinue upon all the counts except the second, he might have final judgment upon that count, and that permission would not be given to the defendant to withdraw its demurrer and plead. The plaintiff took this course. The judgment was affirmed by the Court of Errors and Appeals at March term, 1902. 51 Atl. 1109. At the June term, 1902, of this court, an application for leave to plead generally to the declaration was denied, but the defendant was granted a rule to show cause why a specific plea shown should not be pleaded. This is the rule now before us. We are of opinion that we ought not now to review the action deliberately taken at the June term, 1901, and reiterated at the June term, 1902. The rule to show cause is discharged, with costs.

KAMENA v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. Feb. 25, 1903.) Action by Henry J. Kamena against the North Jersey Street Railway Company. Verdict for plaintiff. On rule to show cause allowed plaintiff, and cross-rule allowed defendant. Rules discharged. Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ. M. T. Rosenberg, for plaintiff. William H. Speer, for defendant.

PER CURIAM. The plaintiff, while driving in his wagon along one of the streets in Jersey City, was run down by a trolley car of the defendant company. His wagon was overturned and somewhat damaged, and he himself received injuries which were not at all serious. He recovered a verdict of \$300. He seeks a new trial on the ground that the amount of the damages awarded him by the jury was inadequate. The defendant seeks a new trial on the ground that the verdict was against the weight of the evidence, in that the proofs show that the accident happened solely by reason of the negligence of the driver of the wagon, and not by reason of any negligence on the part of the servants of the company. We think both of these rules should be discharged. In our judgment, the dam-

ages allowed were not inadequate, nor was the verdict against the weight of the evidence. Rules discharged.

SELVAGE v. NIAGARA FIRE INS. CO. et al. (Supreme Court of New Jersey. Feb. 25, 1903.) Action by Charles Selvage against the Niagara Fire Insurance Company and others. Heard on rule to show cause. Rule discharged. Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ. Edward A. Day, for plaintiff. R. V. Lindabury, for defendant.

PER CURIAM. We find no error in the rulings of the trial court upon questions of evidence, nor in the charge of the court to the jury. The verdict was not contrary to the charge of the court, nor was it contrary to the weight of evidence. The rule to show cause should be discharged.

WOLFARTH v. L. STERNBERG & CO. (Supreme Court of New Jersey. Feb. 25, 1903.) Error to Circuit Court, Essex County. Action by Susan Wolfarth against L. Sternberg & Co. Judgment for defendants, and plaintiff brings error. Defendants in error held entitled to proceed as if no brief had been filed by plaintiff in error. Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ. Abner Kalisch, for plaintiff in error. Abe J. David, for defendants in error.

PER CURIAM. On the call of the list at the opening of the term it was announced that this cause would be submitted upon briefs. Pursuant to this announcement copies of the printed case and briefs were filed with the sergeant at arms. It appears, however, upon an inspection of the brief submitted on behalf of the plaintiff in error, that it is presented by a member of the bar who has not as yet been licensed to practice as a counselor at law. This court will not receive such a brief. The cause stands, therefore, as if, notwithstanding the stipulation to submit it upon briefs under the rule, the plaintiff in error had entirely failed to comply with that stipulation. The defendant in error is entitled to proceed as if no brief had been filed by his adversary.

CLARK et al. v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. April 20, 1903.) Appeal from Court of Common Pleas, Philadelphia County. Action by Elizabeth Clark and Nellie Clark against the city of Philadelphia. From an order refusing to strike off nonsuit, plaintiffs appeal. Reversed. Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

FELL, J. The facts in these cases were the same as those in Quinlan v. City of Philadelphia, 54 Atl. 1028, and it was agreed at the trial that the same judgment that was entered in the latter case should be entered in these. For the reasons stated in the opinion in Quinlan v. City of Philadelphia, the judgments are reversed, with a procedendo.

DOYLE v. PITTSBURG WASTE CO. (Supreme Court of Pennsylvania. Jan. 5, 1903.) Appeal from Court of Common Pleas, Allegheny County. Action by Annie Doyle against the Pittsburg Waste Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed. Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MESTREZAT, J. The questions raised in this appeal are disposed of in the opinion this

day filed in the appeal of William T. Doyle, by his next friend, against the Pittsburgh Waste Company (54 Atl. 363); and for the reasons there given the assignment of error is sustained, and the judgment is reversed, with a procedendo.

DUTTON v. THOMAS. (Supreme Court of Pennsylvania. March 23, 1903.) Appeal from Court of Common Pleas, Delaware County. Action by George G. Dutton, executor of Lydia F. Dutton, against Isaac Thomas. Judgment for plaintiff, and defendant appeals. Affirmed. Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

DEAN, J. The orphans' court of Delaware county directed the foregoing issue of fact for trial in the common pleas; the issue being framed to try an issue of fact raised on distribution of the estate of Lydia Dutton before an auditor. The common pleas tried the issue and took a verdict, on which this judgment was entered. The proceedings, with the judgment, were then certified back to the orphans' court, where the proper effect was given it. From that final decree an appeal was taken by the executor, this defendant, which we have disposed of by opinion and judgment this day handed down. 54 Atl. 908. We have said in that opinion all that we consider necessary to say on this appeal. The judgment is affirmed, and the appeal dismissed.

IHMSEN et al. v. RALSTON et al. (Supreme Court of Pennsylvania. Jan. 5, 1903.) Appeal from Court of Common Pleas, Allegheny County. Bill by Herbert L. Ihmsen and others, administrators of Thomas O. Ihmsen, deceased, against John Ralston and others. Decree for defendants, and plaintiffs appeal. Dismissed. Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

FELL, J. This is a cross-bill for the appointment of a receiver to close the affairs of a partnership; the plaintiffs here being the appellants in *Ralston v. Ihmsen*, 54 Atl. 365, in which the opinion of this court has been filed. The affirmance of the decree in that appeal requires the dismissal of this. The appeal is dismissed, at the cost of the appellants.

LANCASTER COUNTY v. HERSHEY et al. (Supreme Court of Pennsylvania. April 20, 1903.) Appeal from Court of Common Pleas, Lancaster County. Action by Lancaster county against E. H. Hershey and others. Judgment for plaintiff, and certain defendants ap-

peal. Affirmed. Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ. John G. Johnson, B. C. Kready, W. M. Franklin, J. K. Appel, and John E. Snyder, for appellants. A. B. Hassler, and N. F. Hall, for appellee.

DEAN, J. There were two appeals from the judgment of the court below in this case. This one was taken by but two of the sureties, these appellants; the other was taken by the other two sureties, C. H. and Amos Hershey. In the case of the two latter, we have handed down opinion this day. 54 Atl. 1038. Nothing further need be said on this appeal. The judgment of the court below is affirmed.

MILLIKEN v. REED. (Supreme Court of Pennsylvania. Jan. 5, 1903.) Appeal from Court of Common Pleas, Allegheny County. Action by Elizabeth M. Milliken against J. A. Reed. Judgment for defendant, and plaintiff appeals. Reversed. Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

DEAN, J. This is an appeal from the judgment in a case stated for the interpretation of the will of T. P. Simpson, deceased, of Pittsburgh. The devise to this appellant is in the fifth clause of the same will passed upon in the Appeal of Martha Bell Simpson, 54 Atl. 499. The language in the fifth clause is precisely the same as in the fourth, and is subject to the same interpretation. The judgment is reversed, and judgment is entered for the plaintiff on case stated.

OHIO RIVER JUNCTION R. CO. v. PENNSYLVANIA CO. (Supreme Court of Pennsylvania. Jan. 5, 1903.) Appeal from Court of Common Pleas, Beaver County. Bill by the Ohio River Junction Railroad Company against the Pennsylvania Company. Decree for defendant, and plaintiff appeals. Affirmed. Argued before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

DEAN, J. In this case, the defendant in No. 45, October term, 1902 (54 Atl. 259), in which we affirmed the decree of the court below, is now plaintiff and appellant in No. 44 of same term. In this case the court below, on facts found and the law, dismissed plaintiff's bill. From that decree it brings this appeal. We have nothing to add to what is said in No. 45—the case referred to. Opinion handed down this day. The decree in this case is affirmed, on the findings of fact and conclusions of law of the court below.

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ASSAULT AND BATTERY.

§ 1. Civil liability.

In a civil action for assault and battery, nominal damages may be awarded where plaintiff's injuries are so trivial as not to justify compensatory damages.—Armstrong v. Little (Del. Super.) 742.

An assault is an unlawful attempt to do violence to the person of another, and a battery is the unlawful commission of such violence.—Armstrong v. Little (Del. Super.) 742.

The resistance of a person assaulted and unable to escape must not be excessive, and, if it is so, the party is guilty of an unlawful assault.—Armstrong v. Little (Del. Super.) 742.

When one is assaulted, it is his duty to escape the danger; but, if he cannot, he may use such force as is necessary to repel the attack.—Armstrong v. Little (Del. Super.) 742.

Offensive words cannot justify an assault and battery.—Armstrong v. Little (Del. Super.) 742.

Two defendants *held* jointly liable for an assault under certain conditions.—Sellman v. Wheeler (Md.) 512.

Burden *held* to be on plaintiff to prove assault on him and injury resulting therefrom.—Sellman v. Wheeler (Md.) 512.

In an action for an assault, the burden was on defendants to prove the truth of all the matters set up in their pleas of confession and avoidance.—Sellman v. Wheeler (Md.) 512.

In an action for assault, certain testimony of a physician as to his examination of plaintiff *held* not irrelevant and immaterial.—Sellman v. Wheeler (Md.) 512.

Testimony in an action for assault *held* to warrant an instruction laying down the rule for assessing damages in such cases.—Sellman v. Wheeler (Md.) 512.

§ 2. Criminal responsibility.

On a trial for simple assault, a refusal to charge that bullet must have gone in direction of complainant *held* not error.—State v. Hunt (R. I.) 773.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of expenses of public improvements, see "Highways," § 3; "Municipal Corporations," § 5.

Of tax, see "Taxation," § 3.

On corporate stock, see "Corporations," § 10.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."

Of estate of decedent, see "Executors and Administrators," § 1.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 7; "Criminal Law," § 14.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

In insolvency, see "Insolvency," § 1.

Transfers of particular species of property, rights, or instruments.

See "Covenants," § 1.

Admeasurement or assignment of dower, see "Dower," § 2.

Corporate shares, see "Corporations," § 3.

Insurance policy, see "Insurance," § 13.

Leases, see "Landlord and Tenant," § 2.

§ 1. Requisites and validity.

Where, in trustee process, it appeared that the principal defendant for a valuable consideration assigned all money then due or that might

be due from the estate, then unsettled, it constituted an equitable assignment.—*Howe v. Howe* (Me.) 908.

Where the subject of an assignment is not capable of manual delivery, an oral assignment on a valuable consideration may be sufficient.—*Howe v. Howe* (Me.) 908.

Acceptance by a street commissioner of employees assignment of future earnings *held* sufficient.—*Lamoreux v. Morin* (N. H.) 1023.

A depositor of money in pursuance of a wagering contract may assign his claim, so that his assignee may sue for it under *Prac. Act*, Gen. St. p. 2591, § 340.—*Van Pelt v. Schauble* (N. J. Err. & App.) 437.

An assignment of wages, recorded as required by Gen. Laws 1896, c. 254, § 28, *held* valid as security for certain loan, made after the assignment.—*Park Brew Co. v. McDermott* (R. I.) 924.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1; "Insolvency," § 1.

§ 1. Requisites and validity.

An assignment for benefit of creditors by resident of Maine *held* not good as against prior New Hampshire attachment by resident of that state.—*Weston v. Nevers* (N. H.) 703.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations"; "Joint-Stock Companies"; "Monopolies," § 1.

Mutual benefit insurance associations, see "Insurance," § 18.

A person acting as a committee of an unincorporated association in executing a contract for its benefit in his own name *held* personally liable thereon.—*McKinnie v. Postles* (Del. Super.) 798.

Courts will not compel the restoration of charters to voluntary societies until the remedies of appeal within the general society have been exhausted; no property rights being involved.—*O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians* (N. J. Ch.) 150.

The rights of membership in a general voluntary association evidenced by a charter are not property rights.—*O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians* (N. J. Ch.) 150.

The rules and regulations as to membership in a voluntary association do not in any proper sense confer a property right.—*O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians* (N. J. Ch.) 150.

A court of equity cannot, in the absence of any question of property right, compel a general voluntary association to associate with a subordinate society; both being unincorporated.—*O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians* (N. J. Ch.) 150.

Facts *held* to show the existence of a voluntary association, transacting business with partnership liabilities, that the association is insolvent, and that the complainants are its creditors, thus conferring jurisdiction on the court to appoint a receiver and grant an injunction, under Act 1899.—*Henry v. Simanton* (N. J. Ch.) 153.

Creditors of a grange *held* entitled to file a bill to wind up its affairs, even though their debts were contracted after the incorporation of the grange.—*Henry v. Simanton* (N. J. Ch.) 153.

Where creditors who are entitled to sue in the courts of the state file a bill, and one of the other creditors joining in the bill is a foreign corporation, and is not shown to be equipped to do business in the state, the bill will nevertheless be maintainable.—*Henry v. Simanton* (N. J. Ch.) 153.

ASSUMPSIT, ACTION OF.

See "Work and Labor."

Recovery of money deposited under wagering agreement, see "Gaming," § 1.

Rights of set-off in action of assumpsit, see "Set-Off and Counterclaim," § 1.

When a contract has been fully executed, and nothing remains to be done but the payment of the price agreed on, plaintiff may declare on the common counts in indebitatus assumpsit.—*McDermott v. St. Wilhelmina Benev. Aid Soc.* (R. I.) 58.

In an action in assumpsit on a debt evidenced by promissory notes, in which plaintiff's specification was restricted to a recovery on the debt itself, independently of the notes, plaintiff's right to recovery *held* limited by his specification.—*Aseltine v. Perry* (Vt.) 190.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 8.

ASYLUMS.

County cannot recover moneys paid to trustees of state hospital for the insane after six years, on the ground of payment by mistake.—*Trustees of State Hospital for Insane v. Philadelphia County* (Pa.) 1032.

Action by county to recover alleged overpayments made to state hospital for the insane *held* barred by limitations.—*Trustees of State Hospital for Insane v. Philadelphia County* (Pa.) 1032.

ATTACHMENT.

See "Execution"; "Garnishment."

Against property transferred in fraud of creditors, see "Fraudulent Conveyances," § 3.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Exemptions, see "Exemptions," § 1.

§ 1. Nature and grounds.

Where defendant, in attachment against an absent debtor, has a dwelling house and usual place of abode within the state where a summons might be served, the attachment should be dismissed.—*C. B. Coles & Sons Co. v. Blythe* (N. J. Sup.) 240.

Evidence *held* sufficient to show that defendant in attachment was a nonresident, within P. L. 1901, p. 158, § 1, subd. 2.—*Garbett v. Mountford* (N. J. Sup.) 872.

§ 2. Property subject to attachment.

Real estate which cannot be seized on execution cannot be attached in an action at common law.—*Fletcher v. Tuttle* (Me.) 1110.

§ 3. Levy, lien, and custody and disposition of property.

Attaching creditor obtains lien against debtor for the satisfaction of any execution obtained in the suit.—*Rochester Lumber Co. v. Locke* (N. H.) 705; *Smith v. Same*, Id.

§ 4. Quashing, vacating, dissolution, or abandonment.

Where an attachment affidavit alleged that defendant had absconded and was a nonresident, and the proof showed that she was a nonresident, the attachment was sustainable on that

ground, under P. L. 1901, p. 158, § 1, subd. 2.—*Garbett v. Mountford* (N. J. Sup.) 872.

ATTORNEY AND CLIENT.

Advice of counsel as defense to action by receiver for negligence of officers of insurance company in loaning funds, see "Insurance," § 1.

Advice of counsel as defense to crime, see "Criminal Law," § 1.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 12.

Attorney's fees as costs, see "Costs," § 2.

Attorney's fees as necessities under exemption laws, see "Exemptions," § 1.

Misconduct of counsel as ground for new trial, see "Criminal Law," § 13.

Review of comments of attorney as to evidence, see "Appeal and Error," § 10.

§ 1. Retainer and authority.

An attorney has no authority to authorize the sale of his client's land in payment for services to be rendered.—*Gray v. Howell* (Pa.) 774.

An attorney is without authority to compromise an action, or to accept land, instead of money, in satisfaction of a judgment.—*Gray v. Howell* (Pa.) 774.

AUCTIONS AND AUCTIONEERS.

Under the terms of an auction sale, purchaser *held* to have an option either to pay cash or give a note, so that a tender of cash was good.—*Gruell v. Clark* (Del. Super.) 955.

The purchaser at public auction is entitled to have the property delivered to him, and a refusal to deliver is a breach of the implied contract of sale, for which the purchaser is entitled to recover damages.—*Gruell v. Clark* (Del. Super.) 955.

Under Atlantic City ordinance for licensing auctioneers, passed July 14, 1902, no license fee is due until June 1, 1903.—*Atlantic City v. Freisinger* (N. J. Sup.) 249.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

Of attorney, see "Attorney and Client," § 1.

Of justice of the peace, see "Justices of the Peace," § 1.

AWARD.

See "Arbitration and Award," § 3.

BAIL.

§ 1. In civil actions.

Where, in July, 1901, defendant was arrested on a capias, and was again arrested on a capias by the same plaintiff in September for a different cause of action, and in February, 1902, was sent to prison for attempting to break jail, plaintiff lost nothing by the failure of the defendant and the bail below to put in special bail, and the court will exercise its equitable power for the relief of bail, without formal surrender through habeas corpus.—*Loewenthal v. Wagner* (N. J. Sup.) 252.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 2; "Warehousemen."

BANKRUPTCY.

See "Assignments for Benefit of Creditors"; "Insolvency."

Docket entries of referee as evidence, see "Evidence," § 4.

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Under Bankr. Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], purchasers under trustee's deed *held* to have burden of proving impracticability of making sale subject to approval of court.—*Davis v. Ives* (Conn.) 922.

Under Bankr. Act July 1, 1898, § 38, 30 Stat. 555, c. 541 [U. S. Comp. St. 1901, p. 3435], the disapproval by the referee of a sale made by a trustee was, where there was no attempt to review it, its disapproval by the district court.—*Davis v. Ives* (Conn.) 922.

A proper sale by a trustee in bankruptcy of an equity of redemption was a condition precedent to a valid conveyance, without which no suit to redeem could be maintained.—*Davis v. Ives* (Conn.) 922.

Bankr. Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], relating to the rights of a trustee in bankruptcy in policies on the life of a bankrupt, does not include policies payable to the wife or kindred of the insured.—*Pulsifer v. Hussey* (Me.) 1076.

Where insured went into bankruptcy, *held*, his life policy had no surrender value which the company was bound to recognize, within Bankr. Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451].—*Pulsifer v. Hussey* (Me.) 1076.

Bankr. Act July 1, 1898, § 70, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451], *held* to limit the amount to go to creditors to the surrender value only of a life policy.—*Pulsifer v. Hussey* (Me.) 1076.

Bankr. Act 1898, § 67f (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]), does not affect the lien of an attachment as against the bankrupt himself.—*Rochester Lumber Co. v. Locke* (N. H.) 705; *Smith v. Same*, *Id.*

A creditor of a bankrupt, to whom a deed was executed shortly before the bankruptcy petition was filed, *held* not to have knowledge or reasonable cause to believe that the debtor was insolvent or that he intended the deed as a preference.—*Congleton v. Schreihofner* (N. J. Ch.) 144.

Conveyance by a bankrupt to a bona fide creditor for a precedent debt intended as a preference *held* not void as a fraud on creditors, under Bankr. Act, § 67, par. e [U. S. Comp. St. 1901, p. 3449].—*Congleton v. Schreihofner* (N. J. Ch.) 144.

A deed executed by a bankrupt prior to the filing of his petition *held* delivered when left by the bankrupt for record, and hence the property conveyed did not vest in his trustees, under Bankr. Act, § 70, subd. 5 [U. S. Comp. St. 1901, p. 3451].—*Congleton v. Schreihofner* (N. J. Ch.) 144.

Evidence *held* to show an intent to give a preference within the meaning of the bankrupt act.—*Crawford v. Rumpf* (Pa.) 709.

Affidavit of defense, in assumption by trustee in bankruptcy to recover preference, *held* sufficient.—*Gamble v. Elkin* (Pa.) 782.

Preference *held* voidable under national bankruptcy act, if person receiving it had cause to believe it was intended as a preference.—*Gamble v. Elkin* (Pa.) 782.

§ 2. Rights, remedies, and discharge of bankrupt.

Under Bankr. Act July 1, 1898, § 6, 70, 30 Stat. 548, 565, c. 541 [U. S. Comp. St. 1901, pp. 3424, 3451], *held*, that an insurance policy, exempt under the state law, is exempt under the bankrupt act.—*Pulsifer v. Hussey* (Me.) 1076.

Bankrupt's title to property subject to attachment, undisposed of by trustee, remains sub-

ject to attachment.—Rochester Lumber Co. v. Locke (N. H.) 705; Smith v. Same, *Id.*

BANKS AND BANKING.

§ 1. Functions and dealings.

In an action by a banking corporation on a note against the maker, it is no defense that the bank has no authority to purchase the note.—Black v. First Nat. Bank (Md.) 88.

Notice given a director of a banking corporation *held* not binding on the company, where obtained through general channels and not communicated to associates in the management.—Black v. First Nat. Bank (Md.) 88.

Bank, crediting depositor with checks drawn by another depositor of the bank, cannot charge off the credit and defend on the ground that the checks were given in a gambling transaction.—Bryan v. First Nat. Bank (Pa.) 480.

Placing check of depositor in a bank to credit of another depositor *held* a payment to such second depositor of the amount of the check.—Bryan v. First Nat. Bank (Pa.) 480.

§ 2. National banks.

If a national bank attempts to compete with a savings institution, the latter should appeal to the law to prevent the national bank from seeking savings deposits.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

§ 3. Savings banks.

Organization of national bank is not ground for dissolution of savings institution in same vicinity.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

P. L. 1899, p. 455, relating to trust companies, *held* not to repeal P. L. 1876, p. 357, prohibiting banking institutions from doing savings bank business.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Nature of position of managers of savings institution defined.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Managers of savings institution have no right to destroy its entity and transfer to themselves its good will.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Status of depositors in savings institution defined.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Under P. L. 1876, p. 346, unwillingness of present managers of savings institutions to continue in office is not ground for dissolving the institution.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Managers of savings institution *held* to have no standing to assert that competition of national bank rendered dissolution of the institution desirable.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Depositor in savings institution *held* to have standing to maintain bill to prevent its dissolution.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

Fact that trust company has been organized in vicinity does not show that dissolution of savings institution is desirable.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

In determining whether dissolution of savings institution is desirable, within the meaning of Act April 9, 1902 (P. L. 1902, p. 677), viewed in connection with Gen. St. pp. 3001, 3002, §§ 8-11, the managers should only consider the needs of the public.—Barrett v. Bloomfield Sav. Inst. (N. J. Ch.) 543.

BAR.

Of action by former adjudication, see "Judgment." § 6.

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BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

See "Associations."

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 13.

Right to transact business on Sunday, see "Sunday."

A member of a mutual benefit association cannot be expelled arbitrarily or without proper cause.—Pepin v. Société St. Jean Baptiste (R. I.) 47.

A member of a mutual benefit association is entitled to notice of charges against him and an opportunity for defense.—Pepin v. Société St. Jean Baptiste (R. I.) 47.

A member of a mutual benefit association can, on default, be expelled on evidence tending to prove the charges against him.—Pepin v. Société St. Jean Baptiste (R. I.) 47.

It is not necessary to state formally charges against a member of a benefit association, he having actual notice.—Pepin v. Société St. Jean Baptiste (R. I.) 47.

A member of a mutual benefit association can be expelled at a meeting on Sunday.—Pepin v. Société St. Jean Baptiste (R. I.) 47.

Choice of medical officer by voluntary association, by plurality instead of majority vote, as required by constitution, *held* not to invalidate election.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

Voluntary association *held* estopped to plead irregularity in election of its medical officer, in action by him for compensation.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

Absent members *held* bound by action of voluntary association in electing medical officer, notwithstanding irregularities.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

Newspaper notice of return to practice *held* admissible, in action by medical officer against voluntary association for compensation.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

Admission of irrelevant evidence, in action by medical officer of voluntary association for compensation, *held* not ground for new trial.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

Instruction as to rate of compensation in action by medical officer against voluntary association for compensation *held* not foreign to issues.—McDermott v. St. Wilhelmina Benev. Aid Soc. (R. I.) 58.

BENEFITS.

See "Insurance," § 13.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 3.

BICYCLES.

Injuries to cyclist at railroad crossing, see "Railroads," § 5.
Injuries to cyclists on highways, see "Highways," § 4.

BIGAMY.

In an indictment for polygamy under Rev. St. c. 124, § 4, an allegation, "Said R. [the lawful wife of the accused] not having been continuously absent for seven years previous thereto, and not known to the said W. to be living within that time," is sufficient.—*State v. Damon* (Me.) 845.

BILL OF PARTICULARS.

See "Indictment and Information," § 2; "Pleading," § 6.

BILL OF REVIEW.

See "Equity," § 5.

BILLS AND NOTES.

Binding effect against executor, of notes of decedent, see "Executors and Administrators," § 3.

Execution by corporation, see "Corporations," § 8.

Gift of note, see "Gifts," § 1.

Indorsement by corporation, see "Corporations," § 7.

Parol or extrinsic evidence, see "Evidence," § 8.

§ 1. Requisites and validity.

Note given in settlement of pretended liability on bond *held* not based on a sufficient consideration.—*Terrill v. Tillison* (Vt.) 187.

§ 2. Rights and liabilities on indorsement or transfer.

Breach of an agreement which forms the consideration of a note is no defense against an indorsee, who took the note for value before maturity, though he had knowledge of the contract, unless he was also informed of the breach.—*Black v. First Nat. Bank* (Md.) 88.

Under Code, art. 13, § 48, the maker of an accommodation note *held* liable to a bona fide holder, though the holder, at the time of taking, knew him to be merely an accommodation party.—*Black v. First Nat. Bank* (Md.) 88.

Recovery by an indorsee of a note, as against the maker, could not be defeated by showing an agreement between the original parties that the same was not to be negotiated, whether the agreement was written or oral.—*Black v. First Nat. Bank* (Md.) 88.

Under the express provisions of Code, art. 13, § 77, relative to negotiable instruments, a holder under a holder in due course has all the latter's rights.—*Black v. First Nat. Bank* (Md.) 88.

The signature of a third party on the back of a note before it was put in circulation neither expressed nor implied any contract.—*Elliott v. Moreland* (N. J. Sup.) 224.

A note payable on demand *held* not overdue when transferred 18 months after date, interest having been paid monthly on it to and after the transfer.—*McLean v. Bryer* (R. I.) 373.

The nature of the obligation assumed by a third person, who indorses a note in blank after

its execution, may be shown by parol.—*Lyndon Sav. Bank v. International Co.* (Vt.) 191.

§ 3. Presentment, demand, notice, and protest.

Where defendant signed an indorsement to a note, guarantying its payment and waiving demand and notice, the waiver was of demand and notice as indorser, and not as guarantor.—*First Nat. Bank v. Adamson* (R. I.) 980.

§ 4. Actions.

On issue whether a certain note had been discounted by a bank for another bank, which held the note, *held* proper to admit in evidence the pass book of the maker of the note with the first bank.—*Black v. First Nat. Bank* (Md.) 88.

In action on notes, evidence as to what had been paid on notes that those in suit were collateral to *held* properly admitted.—*Black v. First Nat. Bank* (Md.) 88.

One to whom notes are delivered by the payee as collateral is presumed to be a holder for value.—*Black v. First Nat. Bank* (Md.) 88.

Under Code, art. 13, § 75, fraud by the payee of the note or breach of faith on his part *held* no defense to an action by the indorsee, who took without knowledge of the fraud or breach of faith.—*Black v. First Nat. Bank* (Md.) 88.

Under Acts 1890, c. 136, § 16g, and Code Pub. Gen. Laws, art. 75, § 23, subsec. 108, in action on note, denial of genuineness of signature in affidavit to plea *held* sufficient to admit defense of forgery.—*Farmers' & Mechanics' Nat. Bank v. Hunter* (Md.) 650.

In action on note, evidence that the signature thereto was a forgery was admissible under the general issue.—*Farmers' & Mechanics' Nat. Bank v. Hunter* (Md.) 650.

Promise by one of joint makers of note, on failure of consideration, to pay, *held* not binding on the other.—*Hayman v. Lambden* (Md.) 962.

There is not sufficient evidence to entitle plaintiff to recover on a note; plaintiff not having read it to the jury, and they being without evidence to find that anything was due.—*Horne v. Plumley* (Md.) 971.

In an action on a note, under Baltimore City Charter, § 312 (Acts 1898, p. 392, c. 123) denial of defendant's signature, made in the affidavit to the plea, is sufficient to require proof of execution, though the plea contains no denial.—*Horne v. Plumley* (Md.) 971.

Evidence *held* to sustain validity of a note with an obvious interlineation on its face.—*In re Dutton's Estate* (Pa.) 903.

Under rule 13, a party sued as co-maker of a note *held* entitled to show that he did not sign it as a co-maker, without written notice of intention to dispute the execution of the instrument.—*Lyndon Sav. Bank v. International Co.* (Vt.) 191.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

Of corporate stock, see "Corporations," § 3.

Of goods, see "Sales," § 5.

Of property fraudulently conveyed, see "Fraudulent Conveyances," § 2.

Of property of bankrupt, see "Bankruptcy," § 1.

BONDS.

Of contractors with United States, see "United States," § 1.

Of municipal contractor, see "Municipal Corporations," § 5.

Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Executors and Administrators," § 9.
County treasurer, see "Counties," § 1.
Tax collector, see "Taxation," § 5.

Bonds in legal proceedings.

See "Bail"; "Replevin," § 4.

§ 1. Requisites and validity.

The fact that the obligees of a forged bond accepted it in good faith and incurred a liability in relying thereon will not operate to render the obligors on the bond liable.—Terrill v. Tillison (Vt.) 187.

§ 2. Actions.

Insolvency of obligor held not to rebut presumption of payment after 20 years.—Guillon v. Redfield (Pa.) 886.

Presumption of payment of bond after 20 years held not overcome by the evidence.—Guillon v. Redfield (Pa.) 886.

An instruction relative to burden of proving change in a bond held properly refused, because not warranted by the evidence.—Terrill v. Tillison (Vt.) 187.

BOUNDARIES.**§ 1. Description.**

In an action under Rev. St. c. 3, § 63, to recover the penalty for maintaining a fish weir beyond low-water mark in front of the shore of plaintiff, held, that the description in plaintiff's deeds disclosed an intention on the part of the grantor to include the shore.—Dunton v. Parker (Me.) 1115.

Where nothing appears showing any motive for a separation of upland and shore, if one of the termini of the boundary by the shore is at low-water mark, and the other, according to the technical construction of a call in the deed, is at high-water mark, the shore will be regarded as included in the conveyance.—Dunton v. Parker (Me.) 1115.

While a boundary which is described as commencing at high-water mark on the shore, and thence by the shore to another point at high-water mark, will, in the absence of other calls or circumstances showing a contrary intention, be construed as excluding the shore, when both the termini of a boundary by the shore are at its outer margin, the shore will be included.—Dunton v. Parker (Me.) 1115.

The space between high and low water mark, properly called the "shore," has an outer or seaward side and an inner or upland side, and, nothing else appearing, a boundary by the shore may mean as well the one as the other.—Dunton v. Parker (Me.) 1115.

Under the colonial ordinance of 1641-47, the owner of upland adjoining tide water prima facie owns to low-water mark.—Dunton v. Parker (Me.) 1115.

The owner of upland and tide water may separate the ownership by the conveyance of the one and the retention of the other.—Dunton v. Parker (Me.) 1115.

Instruction, in ejectment, that a certain ledge was one of the boundaries of the reservation contained in the deed, held proper under the evidence.—Miller v. Cure (Pa.) 721.

Purchasers of a lot held to have taken title to the middle of street on which the lot bordered.—Healey v. Kelly (R. I.) 588.

§ 2. Evidence, ascertainment, and establishment.

Where, in ejectment, existence of natural object is clearly proven, instruction to that effect held not error.—Miller v. Cure (Pa.) 721.

BREACH.

Of condition, see "Insurance," §§ 5, 6.
Of contract, see "Contracts," § 5; "Sales," § 4;
"Vendor and Purchaser," § 1.
Of warranty, see "Insurance," § 5.

BREACH OF THE PEACE.

See "Disorderly Conduct."

BRIDGES.

Over navigable waters, see "Navigable Waters," § 1.

§ 1. Regulation and use for travel.

The mere fact that a person traveling on a highway after dark mistakes the wing wall of a bridge for a footpath, and falls off, is not evidence that the bridge was improperly constructed.—Weeks v. Board of Chosen Freeholders of Somerset County (N. J. Err. & App.) 826.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 7½.

BROKERS.

See "Principal and Agent."

§ 1. Compensation and lien.

Real estate agent held entitled to his commission, though the contract was never carried out, through failure of the purchaser to perform.—Seabury v. Fidelity Ins., Trust & Safe Deposit Co. (Pa.) 898.

A broker held not entitled to commissions for sale of property, where he was not employed to sell the exact piece for which commissions were claimed.—Samuels v. Luckenbach (Pa.) 1091.

§ 2. Rights, powers, and liabilities as to third persons.

Real estate agent, having authority to sell for 90 days, cannot bind principal by a sale allowing payment 30 days after such term.—Smith v. McCann (Pa.) 498.

BUILDING AND LOAN ASSOCIATIONS.

See "Associations."

Building association held not estopped, by receipt of dues, to deny membership by virtue of a forged certificate of stock.—Columbia Council, No. 77, Jr. O. U. A. M., of Matawan, v. Belmar Building & Loan Ass'n (N. J. Ch.) 142.

BUILDINGS.

Negligent condition or use, see "Negligence," § 1.

BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 4.

BURIAL.

See "Dead Bodies."

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Rescission of contract, see "Contracts," § 4; "Sales," § 3.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CANDIDATES.

For office, see "Elections," § 3.

CARRIERS.

§ 1. Control and regulation of common carriers.

Proof that a person was the driver of a "licensed bus" held not to show he was a common carrier.—*Atlantic City v. Dehn* (N. J. Sup.) 220.

§ 2. Carriage of goods.

A rule of a carrier that its liability is limited by the rate of freight paid on shipments is binding on shippers having notice.—*Klair v. Wilmington Steamboat Co.* (Del. Super.) 694.

Owner of coal mine may maintain mandamus to compel railroad to maintain cars, though they are also refused to other shippers.—*Lorraine v. Pittsburgh, J., E. & E. R. Co.* (Pa.) 580.

§ 3. Carriage of live stock.

Death of a mare by meningitis while being transported by a carrier held to be an unavoidable accident.—*Klair v. Wilmington Steamboat Co.* (Del. Super.) 694.

§ 4. Carriage of passengers—Personal injuries.

In action against carrier for wrongful death of passenger, evidence held to show negligence.—*Hesse v. Meriden, S. & C. Tramway Co.* (Conn.) 299.

In an action against a railroad company for wrongful death of passenger, killed by being struck by trolley pole while riding on running board, evidence that poles passed prior to the accident were at a safe distance from the track held admissible.—*Hesse v. Meriden, S. & C. Tramway Co.* (Conn.) 299.

Failure of employees of a street car company to discover that a snap switch on one of the cars was closed, when it should have been open, which resulted in a collision, held to constitute negligence.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

The degree of care required of a carrier as to passengers is the same, whether the motive power is steam or electricity.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

Evidence that plaintiff jumped from a street car to avoid danger from a collision held not to justify a recovery under a declaration alleging that he was thrown from his seat by the collision.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

Evidence that a street railway motorman lost control of his car because a snap switch on the car was closed held inadmissible, under a declaration alleging that the car was improperly equipped with a defective air brake.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

A common carrier held required to use the highest degree of care as to passengers.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

It is a question for the jury whether defendant is liable for negligence, when its train, passing slowly through depot grounds, strikes a passenger on a track.—*Redhing v. Central R. Co.* (N. J. Err. & App.) 431.

A carrier must so construct its platform that it shall be reasonably safe for use by passengers.—*Dotson v. Erie R. Co.* (N. J. Err. & App.) 827.

Where a passenger, walking along a depot, was struck from behind by a bumper of a slowly moving train, the evidence held insufficient to show negligence on the part of the carrier.—*Dotson v. Erie R. Co.* (N. J. Err. & App.) 827.

It is not negligence per se for a motorman to open the gate on the front platform of a trolley

car before the car has come to a full stop.—*Paglini v. New Jersey St. Ry. Co.* (N. J. Sup.) 218.

A verdict attributing negligence to a motorman in avoiding collision with railway train, whereby a passenger was thrown to the floor of the car and injured, held not sustained by the evidence.—*Corkhill v. Camden & S. Ry. Co.* (N. J. Sup.) 522.

Evidence in action for injuries to plaintiff, attempting to board street car, held to present a question for the jury.—*Powelson v. United Traction Co.* (Pa.) 282.

In action by passenger on street car for injuries received, evidence held to sustain verdict for plaintiff.—*McCaw v. Union Traction Co.* (Pa.) 893.

Carrier held bound to use due care to protect passenger on street car platform from danger.—*McCaw v. Union Traction Co.* (Pa.) 893.

A carrier must exercise additional care and precaution where it allows its cars to be overcrowded.—*McCaw v. Union Traction Co.* (Pa.) 893.

§ 5. — Contributory negligence of person injured.

In action against carrier for wrongful death of passenger, evidence held not to show contributory negligence.—*Hesse v. Meriden, S. & C. Tramway Co.* (Conn.) 299.

Where the position of the station and the tracks is such that intending passenger must cross intervening tracks to reach his train, it is a question for the jury whether he exercised proper care in so doing.—*Redhing v. Central R. Co.* (N. J. Err. & App.) 431.

A passenger at a railway station may lawfully use the platform for any lawful purpose connected with his journey.—*Dotson v. Erie R. Co.* (N. J. Err. & App.) 827.

While trains are passing a platform at a station, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains.—*Dotson v. Erie R. Co.* (N. J. Err. & App.) 827.

§ 6. — Ejection of passengers and intruders.

A passenger, expelled from a connecting street car for error of the conductor of the first car in punching the time of the transfer, held entitled to recover therefor in an action of tort, in the absence of contributory negligence.—*Perrine v. North Jersey St. Ry. Co.* (N. J. Sup.) 799.

CAUSE OF ACTION.

See "Action"; "Malicious Prosecution," § 1.

CERTIFICATE.

Of corporate stock, see "Corporations," § 3.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 3.

§ 1. Nature and grounds.

Appeal from order to strike off satisfaction of judgment held similar to common-law writ of certiorari.—*Shoup v. Shoup* (Pa.) 476.

§ 2. Proceedings and determination.

Certiorari to set aside ordinance granting rights to trolley company held barred by laches.—*Budd v. City of Camden* (N. J. Sup.) 569.

CHALLENGE.

To juror, see "Jury," § 3.

CHANCERY.

See "Equity."

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 3.

CHARACTER.

Of witness, see "Witnesses," § 3.

CHARGE.

Of legacies on property by will, see "Wills," § 15.

To jury in civil actions, see "Trial," § 4.

To jury in criminal prosecutions, see "Criminal Law," § 12.

CHARITIES.

Exemption of property of charitable institutions from taxation, see "Taxation," § 1.

CHattel MORTGAGES.**§ 1. Requisites and validity.**

A conditional vendee, while in possession of the chattels under contract of sale, has an interest which he may mortgage.—Cutting v. Whittemore (N. H.) 1098.

§ 2. Removal or transfer of property by mortgagor.

In trespass against a mortgagee for selling the property, the burden was on defendant to show that the condition of the mortgage had been breached, so as to warrant the sale.—Davis v. Bowers Granite Co. (Vt.) 1084.

§ 3. Payment or performance of condition, release, and satisfaction.

Foreclosure of mortgaged personal property without a sale is a satisfaction of the debt to the value of the property taken.—Babcock v. Wells (R. I.) 599.

§ 4. Foreclosure.

In trespass against mortgagee for selling the property, in determining whether condition of mortgage had been proper, certain evidence held properly excluded.—Davis v. Bowers Granite Co. (Vt.) 1084.

CHEAT.

See "False Pretenses"; "Fraud."

CHECKS.

See "Banks and Banking," § 1.

CHILD.

See "Guardian and Ward"; "Parent and Child."

CHOSE IN ACTION.

Assignment, see "Assignments."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 4.

CITY COURTS.

Appealable orders of, see "Appeal and Error," § 1.

CIVIL RIGHTS.

See "Constitutional Law," §§ 2, 4.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 3.

Against United States, see "United States," § 2.

CLOUD ON TITLE.

See "Quieting Title."

CLUBS.

See "Associations."

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1.

COLLECTION.

Of unpaid subscriptions to corporate stock, see "Corporations," § 10.

Of taxes, see "Taxation," § 5.

COLLISION.

Between vehicles on highways, see "Highways," § 4.

§ 1. Narrow channels, harbors, rivers, and canals.

Evidence held not to justify nonsuit on ground that plaintiff's steamer was running at too high rate of speed in fog at time of collision.—Rees v. Joseph Walton & Co. (Pa.) 271.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSIONERS.

City commissioners, see "Municipal Corporations," § 2.

COMMISSIONS.

Of broker, see "Brokers," § 1.

Of executor or administrator, see "Executors and Administrators," § 7.

COMMON CARRIERS.

See "Carriers."

COMMON COUNTS.

See "Assumpsit, Action of."

COMMON PLEAS COURTS.

See "Courts," § 1.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMPENSATION.

For performance of contract, see "Contracts," § 2.

For property taken for public use, see "Eminent Domain," § 2.

For services, see "Master and Servant," § 2.

Of broker, see "Brokers," § 1.

Of corporate officers, see "Corporations," § 5.

Of election officers, see "Elections," § 1.

Of executor or administrator, see "Executors and Administrators," § 7.

Of officer, see "Officers," § 2.

COMPETENCY.

Of experts as witnesses, see "Evidence," § 9.

Of jurors, see "Jury," § 3.

Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In civil actions, see "Pleading."

In criminal prosecutions, see "Indictment and Information."

COMPOUNDING FELONY.

An indictment for compounding a felony must distinctly aver that the crime compounded has been committed.—*State v. Hanson* (N. J. Sup.) 841.

On a trial for compounding a felony, the record of acquittal of the person charged with the crime compounded is prima facie evidence in favor of the person charged with compounding.—*State v. Hanson* (N. J. Sup.) 841.

COMPROMISE AND SETTLEMENT.

See "Payment"; "Release."

Authority of attorney to compromise action, see "Attorney and Client," § 1.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCLUSION.

Of witness, see "Evidence," § 9.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 8.

CONDITIONS.

In insurance policies, see "Insurance," §§ 5, 6.

In mortgages, see "Mortgages," § 4.

Precedent to action on replevin bond, see "Replevin," § 4.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 9.

Of judgment, see "Judgment," § 1.

CONFIRMATION.

Of judicial sale, see "Judicial Sales."

Of tax title, see "Taxation," § 7.

CONFLICT OF LAWS.

As to validity of contract, see "Contracts," § 1.

Presumption as to laws of other states, see "Evidence," § 2.

CONSENT.

To establishment of street railroad, see "Street Railroads," § 1.

CONSIDERATION.

As affecting bona fides of purchaser of note, see "Bills and Notes," § 2.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

Of contract, see "Contracts," § 1.

Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

CONSOLIDATION.

Of corporations, see "Corporations," § 11.

Of railroads, see "Railroads," § 3.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Eminent Domain," § 1; "Jury," § 1; "Schools and School Districts," § 1; "Taxation," § 1.

Special or local laws, see "Statutes," § 1.

Subjects and titles of statutes, see "Statutes," § 2.

§ 1. **Distribution of governmental powers and functions.**

Acts 1896, p. 314, c. 195, providing for the submission of the question of the sale of intoxicating liquors in W. county, *held* unconstitutional as imposing nonjudicial duties on the county court.—*Board of Suprs of Election of Wicomico County v. Todd* (Md.) 963.

§ 2. **Personal, civil, and political rights.**
Pub. St. 1901, c. 143, §§ 28-30, relating to fences as private nuisances, *held*, under Const. art. 5, not invalid as invading property rights protected by Bill of Rights, arts. 2, 12.—*Horan v. Byrnes* (N. H.) 945.

Pub. Laws, c. 1004, enacted April 4, 1902, limiting hours of employment of street railway employes, is not unconstitutional as infringing right to contract.—*In re Ten-Hour Law for Street Ry. Corporations* (R. I.) 602.

§ 3. **Obligation of contracts.**

Rev. Code 1852, as amended in 1893, p. 814, c. 110, relating to lien of judgments, *held* not unconstitutional as impairing obligation of contracts.—*Devalinger v. Maxwell* (Del. Sup.) 684.

§ 4. **Equal protection of laws.**

Pub. Laws, c. 1004, enacted April 4, 1902, limiting hours of employment of street railway employes, *held* not unconstitutional as class legislation.—*In re Ten-Hour Law for Street Ry. Corporations* (R. I.) 602.

V. S. 4732, 4733, relative to the licensing of peddlers, *held* to violate the fourteenth amendment to the federal Constitution.—State v. Shedroi (Vt.) 1081.

§ 5. Due process of law.

Proceedings under Laws 1894, c. 607, requiring a cessation of turnpike tolls on poor road, brought against a corporation organized under Code Pub. Gen. Laws, art. 23, § 233, *held* not a taking of private property.—Black River Neck Turnpike Co. v. Homberg (Md.) 82.

CONTEMPT.

Violation of injunction, see "Injunction," § 5.

CONTEST.

Of will, see "Wills," § 4.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 10.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 11.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."

Damages for breach, see "Damages," § 2.

Exempting from taxation, see "Taxation," § 1.

Impairing obligation, see "Constitutional Law," § 3.

Implied contracts, see "Work and Labor."

Jurisdiction of justice of action on contract, see "Justices of the Peace," § 1.

Liquidated damages or penalties, see "Damages," § 1.

Operation and effect of gaming laws, see "Gaming," § 1.

Novation, see "Novation."

Parol or extrinsic evidence, see "Evidence," § 8.

Reformation, see "Reformation of Instruments."

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Validity of laws regulating hours of labor as infringing right to contract, see "Constitutional Law," § 2.

Contracts of particular classes of parties.

See "Corporations," §§ 7, 8; "Husband and Wife," § 1; "Master and Servant"; "Municipal Corporations," §§ 4, 5; "United States," § 1; "Warehousemen."

Health officers, see "Health," § 1.

Contracts relating to particular subjects.

See "Mines and Minerals," § 1.

Ground for mechanics' liens, see "Mechanics' Liens," § 1.

Particular classes of express contracts.

See "Bills and Notes"; "Bonds"; "Covenants"; "Insurance"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Sales of realty, see "Vendor and Purchaser."

Submission to arbitration, see "Arbitration and Award," § 1.

Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Assumpsit, Action of."

Particular modes of discharging contracts.

See "Payment"; "Release."

§ 1. Requisites and validity.

The validity of a contract is to be determined by the place where it is made.—Emerson Co. v. Proctor (Me.) 849.

An agreement making the payment of fees to a disclosure commissioner dependent on the collection from the judgment debtors is against public policy.—Watson v. Fales (Me.) 853.

In assumpsit to recover for fees as a disclosure commissioner, evidence of an agreement that plaintiff should not receive his pay until it was collected from the debtors would afford no defense to the action.—Watson v. Fales (Me.) 853.

A defense that plaintiff agreed to wait for his fees until the defendant collected them is invalid.—Watson v. Fales (Me.) 853.

A contract between the state and an agent appointed to prosecute a claim could not be regarded as against public policy on account of a provision making compensation contingent on success.—Opinion of the Justices (N. H.) 950.

A contract for the exclusive privilege of operating a wheel at a summer resort during the life of a patent thereon *held* not contrary to public policy.—Sommers v. Myers (N. J. Sup.) 812.

Evidence in bill to compel vendor of lots to extend the street *held* insufficient to sustain a decree for plaintiffs.—Miller v. Mackey (Pa.) 171.

Agreement between shareholders of business corporation to sell share to fellow shareholders on death of the shareholder *held* not against public policy.—Fitzsimmons v. Lindsay (Pa.) 488.

A mortgagee's notification that he had sold the mortgage before acceptance of his offer to receive less than amount due in payment *held* to constitute a withdrawal of the offer.—Thurber v. Smith (R. I.) 790.

An answer by a mortgagor *held* not an acceptance of the mortgagee's offer to accept less than the amount due for payment before maturity.—Thurber v. Smith (R. I.) 790.

A mortgagee's agreement to receive less than the amount due, in consideration of a payment before maturity, *held* based on a sufficient consideration.—Thurber v. Smith (R. I.) 790.

§ 2. Construction and operation.

In determining the intent of parties to a contract, the interpretation given by their own acts is entitled to great weight.—Lewiston & A. R. Co. v. Grand Trunk Ry. Co. of Canada (Me.) 750.

The court will not adopt the construction of a contract which does not comport with the interest of either party, unless expressed in clear terms.—Lewiston & A. R. Co. v. Grand Trunk Ry. Co. of Canada (Me.) 750.

Where plaintiff in Maryland sent its proposition to a corporation in Maine, which assented to the proposition and signed and returned it by mail, the contract became a Maine contract.—Emerson Co. v. Proctor (Me.) 849.

Where nothing remains to make a contract binding, it is deemed to have been executed at the place where the last act necessary to complete it was done.—Emerson Co. v. Proctor (Me.) 849.

Where a memorandum for repairing a wharf set out an itemized statement of the materials to be furnished and the price, plaintiffs were bound to furnish only the materials specifically mentioned, and defendants were liable for any additional material furnished with their consent.—Libby v. Deake (Me.) 856.

The construction of a written instrument is for the court.—Davis v. Bowers Granite Co. (Vt.) 1084.

§ 3. Modification and merger.

A subsequent agreement that defendants should not be required to pay royalties under a prior contract, unless plaintiffs could stop the running of other like appliances at other places, *held* without consideration.—*Sommers v. Myers* (N. J. Sup.) 812.

§ 4. Rescission and abandonment.

A contract for sale of coal to a city, requiring monthly payments, construed.—*City of Baltimore v. Schaub Bros.* (Md.) 106.

Under a building contract, *held*, that the architect occupied a judicial position, and was bound to act impartially, and to express in writing his opinion that there was ground for taking the work out of the contractor's hands, to justify rescission.—*Wilson v. Borden* (N. J. Err. & App.) 815.

§ 5. Performance or breach.

Failure to fully complete contract *held* excused under certain conditions, and foreclosure of mortgage given to secure performance *held* unwarranted.—*Davis v. Bowers Granite Co.* (Vt.) 1084.

§ 6. Actions for breach.

It is no defense to an action upon a contract that the debt sued for has been attached in a foreign jurisdiction by a creditor of the plaintiff.—*Bailey v. Pennsylvania R. Co.* (N. J. Sup.) 248; *Naylor v. Same*, *Id.*

In an action to recover royalty for the operation of a wheel at a pleasure resort, an allegation that defendants did not own or run the wheel during part of the time sued for *held* no defense.—*Sommers v. Myers* (N. J. Sup.) 812.

Notice that a mortgagee had sold a mortgage, which he had agreed to satisfy for less than its face on payment before maturity, *held* a waiver of a tender of the amount agreed to be received.—*Thurber v. Smith* (R. I.) 790.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

In equitable action, on ground that will was void as creating perpetuities, *held*, that equity would regard a certain conversion of realty into personalty as made.—*Bates v. Spooner* (Conn.) 305.

Equitable conversion *held* not to take place under terms of devise.—*Condit v. Bigalow* (N. J. Ch.) 160.

Partition of devised land *held* to effect reconversion.—*Condit v. Bigalow* (N. J. Ch.) 160.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Conveyances by or to particular classes of parties.

See "Husband and Wife," § 1.

Insolvent corporations, see "Corporations," § 10. Married women, see "Husband and Wife," § 2.

Conveyances of particular species of property.

Mortgaged property, see "Mortgages," § 3. Separate property of married women, see "Husband and Wife," § 2.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

See "Monopolies," § 1; "Partnership," § 1.

Repeal of statutes relating to corporations, see "Statutes," § 3.

Residence of corporation within laws relating to conditional sales, see "Sales," § 8.

Revision of laws relating to, see "Statutes," § 4.

Taxation of corporations and corporate property, see "Taxation," §§ 1, 3.

Particular classes of corporations.

See "Beneficial Associations"; "Building and Loan Associations"; "Insurance," § 13; "Municipal Corporations"; "Street Railroads," § 1.

Banks, see "Banks and Banking."

Insurance companies, see "Insurance."

Natural gas companies, see "Gas."

Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

Water companies, see "Waters and Water Courses," § 4.

§ 1. Incorporation and organization.

Promoters of a corporation, in purchasing certain brewery plants and conveying them to the corporation in exchange for stock and bonds, *held* not to have acted in a fiduciary capacity, and hence were not liable to account to the corporation for the stock and bonds received and sold by them.—*Tompkins v. Sperry, Jones & Co.* (Md.) 254.

Purchase by promoter of a consolidated corporation of one of the properties to be consolidated *held* not made by him in a fiduciary capacity.—*Tompkins v. Sperry, Jones & Co.* (Md.) 254.

Acts Assem. 1898, p. 1173, c. 504, creating a corporation, *held* not to limit Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88f, requiring such a corporation to pay a bonus tax before exercising any corporate powers.—*Cleveland v. Mullin* (Md.) 665.

A grange, incorporated under Act 1876 (2 Gen. St. p. 1644), does not become a de facto corporation in the transaction of mercantile business.—*Henry v. Simanton* (N. J. Ch.) 153.

Under Rev. Laws 1875, p. 6, § 10, and Corp. Act 1896, p. 294, § 51, a corporation organized to purchase and hold stock of other corporations, *held* organized for a "lawful purpose," and entitled to own and control stock purchased.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

Inquiry at suit of private parties, under Act June 19, 1871 (P. L. 1360), as to corporate charters, *held* limited to the nature and extent thereof.—*Windsor Glass Co. v. Carnegie Co.* (Pa.) 329.

Bill under Act June 19, 1871 (P. L. 1360), to have it adjudged that defendant railroad company was not a bona fide railroad company, *held* not maintainable under the pleadings.—*Windsor Glass Co. v. Carnegie Co.* (Pa.) 329.

§ 2. Corporate existence and franchise.

Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88i, *held* not to qualify section 88f, requiring certain corporation to pay a bonus tax before exercising any corporate powers.—*Cleveland v. Mullin* (Md.) 665.

§ 3. Capital, stock, and dividends.

A subscription for additional stock in a corporation by promoters, paid by a conveyance of property which the corporation was organized to receive, previously bought by such promoters, *held* not invalid as to the corporation.—*Tompkins v. Sperry, Jones & Co.* (Md.) 254.

In establishing the ownership of the stock of a corporation in certain individuals, the fact that a portion of it stood in the names of employees or agents of such parties did not affect

the real ownership of the property.—*Tompkins v. Sperry, Jones & Co. (Md.)* 254.

Stockholders' resolutions held to transfer corporate assets to one stockholder as his individual property.—*Bauernschmidt v. Bauernschmidt (Md.)* 637; *Baltimore Trust & Guarantee Co. v. Same, Id.*

Subscription to stock of corporation, which had not paid bonus tax required by Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88f, held not made binding by subsequent payment of tax.—*Cleveland v. Mullin (Md.)* 665.

A corporation which had not paid bonus tax required by Poe's Supp. Code Pub. Gen. Laws, art. 81, § 88f, held without power to accept subscription to its stock.—*Cleveland v. Mullin (Md.)* 665.

Where a corporation paid on its preferred stock a dividend of 1½ per cent. for the quarter ending July 1, 1901, and a like dividend for each of the quarters ending October 1, 1901, January 1, 1902, and April 1, 1902, it sufficiently complied with the act of 1902 to authorize the company to take advantage of its provisions.—*Hodge v. United States Steel Corp. (N. J. Err. & App.)* 1.

Under the constitution and judicial decisions of the state of Washington, it is unlawful to issue corporate stock as fully paid up for less than its par value.—*Coler v. Tacoma Ry. & Power Co. (N. J. Err. & App.)* 413.

Power of attorney to transfer title to stock certificate held valid.—*Shattuck v. American Cement Co. (Pa.)* 785.

Rights of purchaser of stock fraudulently pledged determined.—*Shattuck v. American Cement Co. (Pa.)* 785.

Rights of bona fide holders of stock transferred under power of attorney, as against the true owner, determined.—*Shattuck v. American Cement Co. (Pa.)* 785.

§ 4. Members and stockholders.

Where all the stockholders of a corporation were present or represented at a meeting, any defect in the prior notice of the meeting was waived.—*Tompkins v. Sperry, Jones & Co. (Md.)* 254.

Transfer of corporate assets by former stockholders held void.—*Bauernschmidt v. Bauernschmidt (Md.)* 637; *Baltimore Trust & Guarantee Co. v. Same, Id.*

A statute providing that stock should be paid up on payment of 50 per cent. of par value held not to affect rights of creditor of corporation prior to its passage.—*Williams v. Watters (Md.)* 767.

Under Act Va. Dec. 22, 1897 (Acts 1897-98, p. 16, c. 20), in suit by receiver on call for stock subscription under foreign decree, held, that any defense as to validity of call could be made.—*Williams v. Watters (Md.)* 767.

Suit by creditor of corporation against it held not within the proviso to Act Va. Dec. 22, 1897 (Acts 1897-98, p. 16, c. 20), relative to limitations against suits to recover unpaid stock subscriptions.—*Williams v. Watters (Md.)* 767.

Limitations held to run against right to collect unpaid stock subscriptions from time of stockholder's default under original subscription.—*Williams v. Watters (Md.)* 767.

At a stockholders' meeting, owners of shares are under no disability to vote because they are also directors.—*Hodge v. United States Steel Corp. (N. J. Err. & App.)* 1.

A stockholder held not justified in the conclusion that the directors of the corporation would not have brought an action, if requested.—*Siegman v. Maloney (N. J. Err. & App.)* 405.

The directors of a corporation need not be asked to bring suit in its name; a majority of them being among the persons against whom relief is sought.—*Appleton v. American Malting Co. (N. J. Err. & App.)* 454.

Stockholders held not disqualified to sue to compel the directors, who had made a dividend from capital, to refund, though they or the persons from whom they bought their stock participated in the dividends.—*Appleton v. American Malting Co. (N. J. Err. & App.)* 454.

Act 1876 (2 Gen. St. p. 1644), providing for the incorporation of granges, gives the grange no powers to transact mercantile business, and debts contracted in the transaction of such business impose a partnership liability on the members.—*Henry v. Simanton (N. J. Ch.)* 153.

A bill by a stockholder of a foreign corporation to prosecute the company's rights held to lie against it and certain corporate and individual defendants.—*Wilson v. American Palace Car Co. (N. J. Ch.)* 415.

In the enforcement of the right to examine the stock and transfer books of a corporation, given by Gen. Corp. Act, § 33, by mandamus, it must appear that the right which the relator seeks to exercise is germane to his status as a stockholder.—*O'Hara v. National Biscuit Co. (N. J. Sup.)* 241.

Decree, on bill by minority stockholder for appointment of receiver and to set aside fraudulent contract, modified by setting aside the appointment of the receiver and allowing officers to continue the business of the corporation in the ordinary manner.—*Devine v. Frankford Steel & Forging Co. (Pa.)* 578.

Rights of railroad company, depositing stock with a trustee under an agreement reserving rights and privileges incident to ownership, determined.—*Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives and Granting Annuities (Pa.)* 783.

§ 5. Officers and agents.

Where a plant of an electric company, owning the controlling interest in a competing company, was destroyed, the fact that its directors failed to increase the competing company's plant held not to show a fraudulent use of its funds for the benefit of the stockholders of the former company.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

That the B. Co., which owned a controlling interest in the U. Co., contracted with the latter to furnish power to fill a contract which the B. Co. obtained in competition with the U. Co. for 66 per cent. of the contract price, held not to indicate a fraudulent design to injure the U. Co.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

The fact that an electric company had extended its line on certain streets did not prevent another company, owning a controlling interest in the U. Co., from rightfully constructing its lines on the same street.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

Evidence, where a competing electric company, owning a majority of the stock of another company, used the plant of the latter at a rental of \$1,500 per month, held not to show such rental unreasonably low.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

That a competing company, owning a majority of the stock of the U. Co., directed that the latter should take no more lights until notified, held not to show that the competing company was managing the U. Co. for the benefit of the competing company's stockholders.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

A by-law of a trust company *held* not to prevent its president from accepting a personal appointment as receiver of a corporation.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

Where the by-laws of a trust company did not require its president to act as a receiver, he was not liable to account to such trust company for his fees, received under a personal appointment as receiver for a corporation.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

A resolution of a trust company, directing an attorney to apply for the appointment of T. as receiver of a corporation, *held* a direction for the appointment of T. as an individual, and not as an officer of the trust company.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

That a trust company had authority to nominate a receiver for a corporation under a deed of trust, and nominated its president, who was appointed, *held* not to render the receiver liable to account to the trust company for his fees.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

The nomination by a trust company of its president to act as receiver for a corporation *held* not a sufficient consideration for the president's agreement to act and pay to the company fees received.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

A declaration in an action by a trust company to recover on its president's agreement to pay over compensation received for his services as receiver of a corporation *held* insufficient for failure to state a consideration.—*Citizens' Trust & Deposit Co. v. Tompkins* (Md.) 617.

Where a contract is entered into by stockholders with directors, or when the stockholders expressly authorize the directors to enter into a contract, having notice of the directors' interest therein, they are put upon inquiry as to the names and numbers of the directors interested.—*Hodge v. United States Steel Corp.* (N. J. Err. & App.) 1.

That directors cannot lawfully enter into a contract, in the benefit of which even one of their number participates, without the knowledge and consent of the stockholders, is settled law in New Jersey.—*Hodge v. United States Steel Corp.* (N. J. Err. & App.) 1.

A contract entered into by a corporation, in which one of the directors is interested, is voidable, but may be subsequently ratified by the stockholders.—*Hodge v. United States Steel Corp.* (N. J. Err. & App.) 1.

At a duly convened meeting of stockholders, they may authorize a contract between the company and a third party in which directors are personally interested.—*Hodge v. United States Steel Corp.* (N. J. Err. & App.) 1.

Under P. L. 1896, c. 185, § 30, *held*, that directors, making a dividend out of capital, were liable to the corporation, though there was no dissolution or insolvency.—*Appleton v. American Malting Co.* (N. J. Err. & App.) 454.

Under P. L. 1896, c. 185, §§ 12, 43, *held*, that the conclusion that there had been no election of directors since a certain time, and that the directors were holding over, was justified from no report being filed since then.—*Appleton v. American Malting Co.* (N. J. Err. & App.) 454.

An agreement between the incorporators of a company for compensation for their services *held* not to preclude further recovery for services rendered by a corporator as manager of the company.—*Wiltbank v. Automatic Amusement Mach. Co.* (N. J. Sup.) 558.

§ 6. Corporate powers and liabilities—Extent and exercise of powers in general.

On issue as to validity of contract by corporation, evidence of compensation of defendant for services under the contract *held* inadmissible.—*Smith v. Bank of New England* (N. H.) 385.

When the by-laws of a corporation provide that a majority vote at a stockholders' meeting shall be binding on the corporation, every shareholder will be bound by all acts and proceedings, within the scope of the charter, which shall be approved or sanctioned by the vote of such majority duly taken.—*Hodge v. United States Steel Corp.* (N. J. Err. & App.) 1.

A purchase by a corporation of shares of its stock, not disabling it from paying its debts in full, is not ultra vires.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

A corporation organized to manufacture and sell whisky *held* entitled to organize and hold the stocks of corporations in other states through which it sold its product.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

§ 7. — Representation of corporation by officers and agents.

Certain notes *held* properly admitted in evidence as indorsed by corporation.—*Black v. First Nat. Bank* (Md.) 88.

To show that a contract was authorized by a corporation, it is not necessary to show a formal vote of the directors authorizing the president and treasurer to execute it.—*Smith v. Bank of New England* (N. H.) 385.

Evidence, in an action against a corporation on certificates of deposit executed pursuant to a contract, considered, and *held* to justify a finding that the contract was executed with knowledge of the board of directors.—*Smith v. Bank of New England* (N. H.) 385.

It is not necessary that the directors have given prior authority to their officers to execute a contract. Subsequent knowledge and assent is sufficient.—*Smith v. Bank of New England* (N. H.) 385.

Evidence in an action against a corporation *held* sufficient to justify the jury in finding that directors authorized a particular contract.—*Smith v. Bank of New England* (N. H.) 385.

On an issue as to implied authority in officers of corporation to execute contract, parol testimony of transactions at a directors' meeting *held* admissible.—*Smith v. Bank of New England* (N. H.) 385.

The fact that the president and treasurer executed the contract in question for the corporation is admissible, with other evidence, on the question of implied authority.—*Smith v. Bank of New England* (N. H.) 385.

As between a corporation and innocent third parties, who have dealt with its agents, authority in the agent to execute a contract may sometimes be inferred from a course of dealing.—*Smith v. Bank of New England* (N. H.) 385.

Silence of the stockholders of a corporation for two years, with knowledge of an illegal contract by the directors, is not a ratification thereof.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

A contract of sale to a corporation of shares of its stock by directors, who were present at the meeting of the board at which the sale was sanctioned, is not binding as to the price, though it may be enforced on the basis of what the stock was worth.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

A payment on an account *held* not a ratification of an express contract, being as well refer-

able to an implied indebtedness on the quantum valebant.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

Reference in a mortgage of a corporation to its prior mortgages due is the statement of a seeming fact, rather than the conscious validation of an illegal agreement.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

A board of directors, the majority of which were the members of the board which authorized an illegal contract, cannot ratify it.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

A corporation, though not bound as to the price in a sale to it of shares of its stock, held not entitled, after putting a mortgage of its property, to return the stock, but required to pay what it was worth at the time of the sale.—*Oliver v. Rahway Ice Co.* (N. J. Ch.) 460.

§ 8. — Contracts and indebtedness.

Contract of a corporation held not ultra vires under its charter (Laws 1887, p. 646, c. 280, § 2) as a contract of guaranty.—*Smith v. Bank of New England* (N. H.) 385.

A by-law of a corporation relative to the execution of notes held not to affect the validity of a note, where the payee had no knowledge of the by-law.—*Lyndon Sav. Bank v. International Co.* (Vt.) 191.

§ 9. — Civil actions.

A corporation, sued under a name it formerly was known by, held entitled to file an affidavit of defense.—*Montello Brick Co. v. Pullman's Palace Car Co.* (Del. Super.) 687.

Under Rev. St. 1883, c. 46, § 20, the property of any corporation is liable to attachment on mesne process and levy on execution.—*Poor v. Chapin* (Me.) 753.

Under the provisions of Rev. St. 1883, c. 46, § 20, corporate lands are subject to the same liability as those owned by natural persons.—*Poor v. Chapin* (Me.) 753.

Prima facie proof of the existence of a corporation plaintiff is sufficient, where defendants fail to make such existence an issue.—*MacMillan Co. v. Stewart* (N. J. Sup.) 240.

Suit against a corporation can be tried only in the county where its corporate property is situated and where it transacts a substantial part of its business.—*Park Bros. & Co. v. Oil City Boiler Works* (Pa.) 334.

Proper return of service of process on corporation should set out the method thereof.—*Park Bros. & Co. v. Oil City Boiler Works* (Pa.) 334.

Irregular service of process on corporation may be set aside on rule.—*Park Bros. & Co. v. Oil City Boiler Works* (Pa.) 334.

Where, after maturity of a note made by a corporation, an officer thereof indorsed it, the question as to the understanding of the parties at the time was for the jury.—*Lyndon Sav. Bank v. International Co.* (Vt.) 191.

§ 10. Insolvency and receivers.

A conveyance by an insolvent corporation of its property to an insolvent firm, without consideration, held fraudulent as to creditors, under statute of frauds and also under Corp. Act, § 64 (Gen. St. p. 919).—*Richardson v. Gerli* (N. J. Ch.) 438.

The liability of persons considered stockholders of an insolvent corporation cannot be tested on the hearing of an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

The receiver of an insolvent corporation having no funds with which to prosecute a claim held not required to sue on the claim before applying for an order assessing the stockhold-

ers.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent company cannot plead an abandonment after agreement to incorporate, as defense to an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent company cannot plead that it never became a corporation de facto, as defense to an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

The findings of the court in insolvency proceedings against a company as to its debts are held conclusive on application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent company cannot plead the statute of limitations as a defense to an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent corporation cannot set up the fact that the claim against the estate of a deceased stockholder is barred by a decree of court as a defense to an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent company cannot plead that it never became a corporation de jure as defense to an application by the receiver for an order authorizing an assessment.—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* (N. J. Ch.) 450.

Stockholders of an insolvent corporation can have matter alleged as a defense to their liability as stockholders adjudicated in suits brought by the receiver to collect assessments levied against them.—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.* (N. J. Ch.) 452.

Expenses incurred by a receiver in suits brought pursuant to the court's order should be included in an assessment against the stockholders of an insolvent corporation.—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.* (N. J. Ch.) 452.

The receiver of an insolvent corporation is entitled to have an allowance for his fees and those of his counsel included in an assessment against the stockholders.—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.* (N. J. Ch.) 452.

Interest on an insolvent corporation's debts should be included in an assessment against the stockholders.—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.* (N. J. Ch.) 452.

The stockholders of a corporation cannot intervene, in an insolvency suit against it, to interpose defenses that the corporation itself cannot set up.—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.* (N. J. Ch.) 452.

Directors of insolvent corporation must share ratably with other creditors in the company's assets.—*Pangburn v. American Vault, Safe & Lock Co.* (Pa.) 504.

Directors advancing money to solvent corporation cannot, on its subsequent insolvency, take judgment note giving them priority over general creditors.—*Pangburn v. American Vault, Safe & Lock Co.* (Pa.) 504.

Foreign receiver held not entitled to assert control over assets as against domestic creditors.—*Frowert v. Blank* (Pa.) 1000.

§ 11. Consolidation.

A corporation held not entitled to plead usury as to a loan from another corporation holding

the majority of its stock before repayment of the loan.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

An alleged misappropriation of a part of the assets of a corporation, consisting of an appropriation of part of its assets for the purchase of another company, *held* not available as a cause of action to a stockholder in a subsequent action against a holding company, in which such corporation was merged.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

A corporation *held* properly charged with its proportion of the expenses incident to the negotiation of a loan by another corporation, holding the stock of such corporation and others, for the purpose of creating a working capital for such constituent companies.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

In an action against a stockholding corporation, in which other corporations engaged in the same line of business were merged, an allegation by a stockholder of one of the constituent companies that the latter's assets were being diverted for the benefit of the holding company *held* not sustained by the proof.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

§ 12. Dissolution and forfeiture of franchise.

Contract of domestic corporation with a corporation of the state of Washington, by which it transferred all its property and franchises, except the franchise of being a corporation, *held* a dissolution of the New Jersey corporation, within the meaning of the statute, which could be legally carried out only by proceedings prescribed by the statute for dissolution.—*Coler v. Tacoma Ry. & Power Co.* (N. J. Err. & App.) 413.

In an action to dissolve a corporation organized to control other corporations, an amendment to the bill to enforce the payment of dividends by one of the constituent companies *held* not allowable.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

§ 13. Foreign corporations.

Under the constitutions and decisions of the state of Washington, a foreign corporation cannot subscribe for, purchase, hold, or vote upon the shares of stock of another corporation without legislative sanction.—*Coler v. Tacoma Ry. & Power Co.* (N. J. Err. & App.) 413.

A single transaction, entered into within the state by a foreign corporation not authorized to do business in the state, does not amount to doing business in the state, so as to disenable the corporation to sue in its courts.—*Henry v. Simanton* (N. J. Ch.) 153.

A foreign corporation may be sued upon a contract made in a foreign state without complying with the corporation act, requiring a certificate to be filed in the state.—*MacMillan Co. v. Stewart* (N. J. Sup.) 240.

A foreign corporation may sue on a contract made outside the state, since the passage of the act (Revision 1896) concerning corporations, without complying with the provisions of the ninety-seventh section of that act as to foreign corporations.—*Slayton-Jennings Co. v. Specialty Paper Box Co.* (N. J. Sup.) 247.

CORRECTION.

Of assessment of taxes, see "Taxation," § 8.

CORROBORATION.

Of witnesses in prosecution for perjury, see "Perjury," § 2.

COSTS.

In probate proceedings, see "Wills," § 4.

§ 1. Nature, grounds, and extent of right in general.

Where the relief awarded a complainant amounts to \$186, while he sought to recover \$772, each party will be required to pay his own costs.—*Fiedler v. Beekman* (N. J. Ch.) 156.

Under the express provisions of Chancery Act, § 24, Revision 1902 (P. L. 519), on the sustaining of a demurrer to a bill in equity, the costs must be paid by the complainant.—*Brown v. Tallman* (N. J. Ch.) 457.

The owner of a building, filing an interpleader against materialmen, *held* not entitled to costs, having claimed the amount due the contractor was considerably less than found by the court.—*English v. Warren* (N. J. Ch.) 860.

§ 2. Amount, rate, and items.

Under Acts 1898, c. 123, § 315, counsel fees allowed by the court pursuant to the act *held* not a part of the costs of suit.—*Singer v. Fidelity & Deposit Co. of Maryland* (Md.) 63.

§ 3. On appeal and on new trial or motion therefor.

An appellant who prevails on any of the grounds of appeal is entitled to costs under Sup. Ct. Rule, § 62.—*McQueeney v. Norcross Bros.* (Conn.) 301.

Under Gen. St. 1902, §§ 796, 797, and Sup. Ct. Rule, p. 109, § 62, costs of printing the evidence will be taxed to the full extent allowed by law, unless there was no reasonable ground for printing the whole evidence.—*McQueeney v. Norcross Bros.* (Conn.) 301.

CO-TENANCY.

See "Joint Tenancy"; "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 2.

COUNTERCLAIM.

See "Set-off and Counterclaim."

COUNTIES.

See "Highways."

Mandamus affecting, see "Mandamus," § 1.

§ 1. Government and officers.

County treasurer *held* not required to examine accounts of tax collector and report thereon to one intending to become surety on such collector's bond, so as to render county liable if his return is false.—*Commonwealth v. American Bonding & Trust Co.* (Pa.) 1034.

County officers may sue sureties on treasurer's bond, though the county auditors may not have settled and adjusted the treasurer's accounts.—*Lancaster County v. Hershey* (Pa.) 1038.

COURTS.

Judicial power, see "Constitutional Law," § 1. Jurisdiction to determine right to remove cause to federal court, see "Removal of Causes," § 1.

Justices' courts, see "Justices of the Peace." Province of court and jury, see "Trial," § 4. Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

See "Criminal Law," § 2; "Specific Performance," § 4.

§ 1. Courts of general original jurisdiction.

Under Gen. St. 1902, §§ 533, 534, 540, and St. 1821, p. 41, § 23, question whether the court of common pleas has jurisdiction, *held* determinable by amount claimed by plaintiff, irrespective of any plea of payment by defendant.—*Prince v. Takash* (Conn.) 1003.

§ 2. Courts of limited or inferior jurisdiction.

Unliquidated damages cannot be set off in suits in the district court.—*Slayton-Jennings Co. v. Specialty Paper Box Co.* (N. J. Sup.) 247.

§ 3. Courts of probate jurisdiction.

The orphans' court has no jurisdiction to determine whether a wife's release of her interest in her husband's estate was obtained by fraud, and its decision is not *res judicata*.—*Mullaney v. Mullaney* (N. J. Err. & App.) 1086.

COVENANTS.

§ 1. Construction and operation.

A covenant by a railroad company to provide a crossing to the owner of a farm *held* to create an easement, the benefit of which his heir was entitled to, though the word "heirs" was not used.—*Speer v. Erie R. Co.* (N. J. Ch.) 539.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 8.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Insolvency"; "Marshaling Assets and Securities."

Of devisees or legatees, see "Wills," § 12.

Of intestate, see "Descent and Distribution," § 2.

Of testator, see "Wills," § 16.

Remedies against surety, see "Principal and Surety," § 3.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CRIMINAL LAW.

Arrest of accused, see "Arrest," § 2.

Indictment, information, or complaint, see "Indictment and Information."

Particular offenses.

See "Adultery"; "Assault and Battery," § 2; "Bigamy"; "Compounding Felony"; "Disorderly Conduct"; "Embezzlement"; "False Pretenses"; "Homicide"; "Larceny"; "Perjury."

Violation of liquor laws, see "Intoxicating Liquors," §§ 1, 2.

Violations of municipal ordinances, see "Municipal Corporations," § 6.

§ 1. Nature and elements of crime and defenses in general.

As a general rule the advice of counsel furnishes no excuse for the violation of law, and cannot be relied on as a defense in a criminal prosecution.—*State v. Hunt* (R. I.) 937.

§ 2. Jurisdiction.

Complaint in the municipal court in York county against respondent for publishing a newspaper in which were notices of the sale or keeping for sale of intoxicating liquors, which is an offense under Pub. Laws 1885, p. 311, c. 360, § 8. *Held*, that the newspaper was published in the county of Penobscot, and not published in York, by the fact that the copy was sent to the subscriber in that county.—*State v. Bass* (Me.) 1113.

§ 3. Venue.

Change of venue granted by the Supreme Court in a murder case on account of prejudice.—*Commonwealth v. Ronemus* (Pa.) 1095.

§ 4. Evidence—Judicial notice, presumptions, and burden of proof.

A person charged with crime is presumed to be innocent until the crime is proven to the satisfaction of the jury beyond a reasonable doubt.—*State v. Fahey* (Del. Gen. Sess.) 690.

The burden of proving a crime beyond a reasonable doubt is on the state.—*State v. Fahey* (Del. Gen. Sess.) 690.

Where the accused is under 14 years of age, it is incumbent on the state to show that he committed the crime with a guilty knowledge.—*State v. George* (Del. Gen. Sess.) 745.

§ 5. — Facts in issue and relevant to issues, and *res gestae*.

Evidence that one prosecuted for rape was not at home, as claimed by him, when the rape was committed, may be considered as tending to show his guilt.—*State v. Manning* (Vt.) 181.

In prosecution for rape, certain evidence *held* admissible in rebuttal, as tending to show that prosecutrix had not written a letter admitting that respondent was not the guilty party.—*State v. Manning* (Vt.) 181.

§ 6. — Admissions, declarations, and hearsay.

The silence of accused to a judicial inquiry into his guilt cannot be regarded as even the slightest evidence thereof.—*Commonwealth v. Zorambo* (Pa.) 716.

Statement of one accused with prisoner of murder *held* inadmissible as circumstantial evidence against him, because, when made, he did not deny it.—*Commonwealth v. Zorambo* (Pa.) 716.

§ 7. — Documentary evidence and exclusion of parol evidence thereby.

Where a map of the room is introduced on a trial for murder, and the situation of the furniture is in question, it should not be shown on the map to be thus used, unless it is made to appear by evidence as to its position at the time of the homicide.—*State v. Smith* (N. J. Err. & App.) 411.

§ 8. — Opinion evidence.

One may testify to a confession he heard, though he can give only the substance thereof.—*Green v. State* (Md.) 104.

On a prosecution for murder, *held* proper to permit an expert to testify as to certain blows that must have been given the head of deceased.—*State v. Greenleaf* (N. H.) 38.

On prosecution for murder, *held* competent for state's medical expert to illustrate thickness of deceased's skull, and testify as to where the skull is generally fractured when the body falls and strikes on the head.—*State v. Greenleaf* (N. H.) 38.

On criminal prosecution, *held* proper to permit defendant's medical expert to be asked as to his acquaintance with the state's medical expert and the professional standing of the latter.—*State v. Greenleaf* (N. H.) 38.

Nonexpert witnesses *held* entitled to testify on trial for homicide as to alleged insanity of accused.—*Commonwealth v. Gearhardt* (Pa.) 1029.

Certain expert testimony as to gunshot wounds *held* admissible in a prosecution for murder.—*State v. Nagle* (R. I.) 1063.

§ 9. — Confessions.

A voluntary confession to commission of a murder, not induced by threats or promise of advantage, is admissible.—*Green v. State* (Md.) 104.

A confession by one charged with murder *held* improperly admitted.—*State v. Nagle* (R. I.) 1063.

§ 10. — Weight and sufficiency.

Reasonable doubt is that condition of mind in which there is not an abiding conviction of truth of charge.—*State v. Fahey* (Del. Gen. Sess.) 690.

No weight of evidence is sufficient to secure a conviction in a criminal case, unless it produces full belief to the exclusion of reasonable doubt.—*State v. Fahey* (Del. Gen. Sess.) 690.

On prosecution of a minor, his guilty knowledge may be shown by his apparent intelligence and conduct in connection with the crime.—*State v. George* (Del. Gen. Sess.) 745.

The fact that two of the state's witnesses were detectives in the regular employ of the Law and Order League, and laid the information before the grand jury which led to the indictment of the traverser, was a circumstance to be considered by the jury in weighing the credibility of their testimony in a prosecution for violating Code Pub. Loc. Laws, art. 13, § 228 et seq. (Local Option Law).—*Guy v. State* (Md.) 879.

§ 11. Time of trial and continuance.

The state, in seeking the continuance of a criminal prosecution at the second term after the indictment, on the ground of the absence of a material witness, should give the name of the witness, etc.—*State v. McDaniel* (Del. Gen. Sess.) 1056.

Under Rev. Code 1852, as amended in 1893, p. 858, c. 115, § 17, the state *held* not entitled to a continuance beyond the second term after the indictment.—*State v. McDaniel* (Del. Gen. Sess.) 1056.

§ 12. Trial.

It is within the discretion of the court in criminal trials to give instructions to the jury as to the law, at their request.—*Guy v. State* (Md.) 879.

Certain remark of counsel for the state *held* not to have involved a declaration that accused was bound to become a witness and answer such evidence.—*State v. Greenleaf* (N. H.) 38.

On a criminal prosecution, certain remark of counsel for the state, not contradicted or stricken out, *held* prejudicial error.—*State v. Greenleaf* (N. H.) 38.

Where counsel for state used language which might mean accused must become a witness, an instruction *held* to have cured any error.—*State v. Greenleaf* (N. H.) 38.

Motion for discharge, on ground that accused had not been furnished with list of state's witnesses and abode of each 24 hours before trial, *held* untenable.—*State v. Greenleaf* (N. H.) 38.

It is error to charge the jury that they may consider the fact that the public in a certain locality think the defendants guilty as corroborative

of the facts proven.—*State v. Whitehead* (N. J. Sup.) 229.

In a criminal case, neither a deposition regularly taken nor an ex parte affidavit can be introduced as evidence by the prosecution.—*Commonwealth v. Zorambo* (Pa.) 716.

A verdict of guilty of murder in the first degree will not be set aside because jurymen were allowed, pending the trial, to go to the barber shop in charge of an officer.—*Commonwealth v. Gearhardt* (Pa.) 1029.

It was not error for the court, in granting the jury's request that the direct testimony of two witnesses be read to them, to refuse respondent's request that the cross-examination be read also.—*State v. Manning* (Vt.) 181.

Instruction that all the evidence in the case was "real" evidence *held* not error.—*State v. Manning* (Vt.) 181.

§ 13. Motions for new trial and in arrest.

Newly discovered evidence in a prosecution for conspiring to defraud *held* not sufficient for a new trial.—*Gannon v. State* (Conn.) 199.

The after recollection of a witness as to some fact omitted from his testimony or incorrectly stated is not ordinarily ground for a new trial.—*Gannon v. State* (Conn.) 199.

On criminal prosecution, certain remarks of counsel *held* not such as to warrant a new trial.—*State v. Greenleaf* (N. H.) 38.

On criminal prosecution, certain remark of counsel *held* not to warrant a new trial.—*State v. Greenleaf* (N. H.) 38.

Newly discovered testimony *held* not to warrant new trial of a prosecution for rape.—*State v. Manning* (Vt.) 181.

Defect in indictment for adultery *held* available on motion in arrest.—*State v. Bisbee* (Vt.) 1081.

§ 14. Appeal and error, and certiorari.

An objection that an exception taken to a remark of counsel was too general to warrant its review *held* untenable.—*State v. Greenleaf* (N. H.) 38.

On writ of error in a criminal case, the court will only consider such matters as have been called to the attention of the state by assignments of error or specification of causes.—*State v. Shutts* (N. J. Sup.) 235.

On petition for certiorari and for a change of venue in a trial for murder, the Supreme Court is to be governed by its judgment on the facts.—*Commonwealth v. Ronemus* (Pa.) 1095.

In determining whether a confession was erroneously admitted, it is immaterial how far the confession tended to prove guilt.—*State v. Nagle* (R. I.) 1063.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CROSSINGS.

Accidents at railroad crossings, see "Railroads," § 5.

CURTESY.

See "Dower."

Curtsey of a husband *held* limited to the estate of which his wife had died seised.—*Appeal of Ward* (Conn.) 730.

CUSTODY.

Of child, see "Guardian and Ward," § 1; "Parent and Child."

Of jury, see "Criminal Law," § 12.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.
Review on appeal, see "Appeal and Error," § 13.

Damages for particular injuries.

See "Assault and Battery," § 1; "Death," § 1;
"Libel and Slander," § 2.
Breach by buyer of contract for sale of goods, see "Sales," § 6.
Breach by seller of contract for sale of goods, see "Sales," § 7.
Breach by street railroad of contract to pave roadway, see "Street Railroads," § 1.
Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 3.
Eviction of tenant, see "Landlord and Tenant," § 7.
Failure to deliver possession to tenant, see "Landlord and Tenant," § 5.
Injuries caused by public improvements, see "Municipal Corporations," § 5.

Recovery in particular actions or proceedings.

See "Replevin," § 3; "Trove and Conversion," § 2.

§ 1. Liquidated damages and penalties.

Where the owner of a newspaper, on sale of it, agreed not to start another within the city for the term of 25 years, "under a penalty of \$1,200," the \$1,200 was liquidated damages.—*Robinson v. Centenary Fund & Preachers' Aid Soc. of New Jersey Annual Conference of M. E. Church* (N. J. Err. & App.) 416.

Where, on sale of a paper, the vendor agrees not to start another under a fixed "penalty," and on the breach of the agreement it is not possible to ascertain the damages, then the sum named may be recovered, if the damages might equal that sum.—*Robinson v. Centenary Fund & Preachers' Aid Soc. of New Jersey Annual Conference of M. E. Church* (N. J. Err. & App.) 416.

§ 2. Measure of damages.

A passenger, injured by a carrier's negligence, held entitled to recover compensation for his injuries, including pain and suffering, and for impaired capacity to labor.—*McAllister v. People's Ry. Co.* (Del. Super.) 743.

In an action for injuries, plaintiff can recover for loss of time and wages, past and future pain, and for resulting impairment of ability to earn a living.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

Measure of damages, where, under a building contract, the contractor has been prevented from completing his work by the fault of the owner, determined.—*Wilson v. Borden* (N. J. Err. & App.) 815.

In action for personal injuries to wife, damages because of humiliation, in that she was unable to perform services formerly rendered to her husband, held not a proper basis for damages.—*Linn v. Duquesne Borough* (Pa.) 341.

§ 3. Inadequate and excessive damages.

A verdict to a husband for injury to his wife will be set aside as inadequate, being considerably less than he has paid, or is bound to pay, for expenses necessitated by the injury.—*Caswell v. North Jersey St. Ry. Co.* (N. J. Sup.) 565.

§ 4. Pleading, evidence, and assessment.

To ascertain what proportion of the whole work contracted for has been done, before a building contractor was prevented by the fault of the owner from completing the work, evidence as to the cost of the entire work is necessary.—*Wilson v. Borden* (N. J. Err. & App.) 815.

In an action on a building contract, in which plaintiff had been prevented from completing his work by the fault of the owner, defendant can show that the contractor has not done his work in compliance with the contract and claim damages for such noncompliance.—*Wilson v. Borden* (N. J. Err. & App.) 815.

It is within the province of the court to allow the plaintiff to reduce his verdict to the sum declared for, by a remittitur of any excess recovered.—*Davis v. Bowers Granite Co. (Vt.)* 1084.

DAMS.

See "Waters and Water Courses," § 3.

DEAD BODIES.

That a widow has no right to remove the remains of her husband from a lot in which they have been placed does not affect her right in respect to access for care or adornment of the grave of her deceased husband.—*Smith v. Shepherd* (N. J. Ch.) 806.

The fact that a sister, who owns the burial lot, refuses to consent to the removal of her brother's remains for the purpose of burying the same in a lot belonging to his widow, raises no equity justifying a decree requiring her to give such consent.—*Smith v. Shepherd* (N. J. Ch.) 806.

A widow, who buried the remains of her deceased husband in a lot belonging to his sister, held not entitled to require the owner to permit her to remove the remains.—*Smith v. Shepherd* (N. J. Ch.) 806.

DEATH.

Caused by operation of street railroad, see "Street Railroads," § 2.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

§ 1. Actions for causing death.

In an action against carrier for wrongful death of passenger, a claim of law held to mean that there was not sufficient evidence on the quantum of damages to warrant an award for full statutory amount.—*Hesse v. Meriden, S. & C. Tramway Co. (Conn.)* 299.

In action against carrier for wrongful death of passenger, an award of full statutory amount held proper.—*Hesse v. Meriden, S. & C. Tramway Co. (Conn.)* 299.

In an action for death there should be more evidence as to the quantum of damages than the mere fact that the injured party died at a certain age to warrant an award of full statutory damages.—*Hesse v. Meriden, S. & C. Tramway Co. (Conn.)* 299.

\$5,000 damages for death of a boy 16 years old held not excessive.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

In an action under Pub. Laws 1891, c. 124, for wrongful death, held not necessary that the declaration should contain an averment of immediate death; but it is sufficient if it necessarily appears.—*Carrigan v. Stillwell* (Me.) 389.

In an action for wrongful death, declaration held to sufficiently aver the immediate death of the deceased, within chapter 124, Pub. Laws 1891, giving a right of action in such event.—*Carrigan v. Stillwell* (Me.) 389.

Where a physician undertook the care of plaintiff's intestate on Monday, and he died on the following Saturday, in an action by his administratrix, a verdict of \$3,000 is too large.—*Ramsdell v. Grady* (Me.) 763.

In an action for malpractice, whereby defendant's patient died, only such damages can

be allowed as the deceased sustained in his lifetime.—*Ramsdell v. Grady* (Me.) 763.

In an action for malpractice, where the patient died, damages can include only such loss, expense, and suffering as was due to defendant's default, in excess of what they would have been, had the case been properly treated.—*Ramsdell v. Grady* (Me.) 763.

A verdict of \$1,518 for the death of a boy six years old is not excessive.—*Hoon v. Beaver Valley Traction Co.* (Pa.) 270.

In an action for a wrongful death brought by administrator, evidence that mother of deceased would receive benefits from railroad relief fund, *held* inadmissible.—*Boulden v. Pennsylvania R. Co.* (Pa.) 906.

A New Jersey administrator may sue in Pennsylvania for a wrongful death in New Jersey without ancillary administration.—*Boulden v. Pennsylvania R. Co.* (Pa.) 906.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 1.

DECLARATIONS.

As evidence in criminal prosecutions, see "Criminal Law," § 6.

DEDICATION.

§ 1. Nature and requisites.

Words in a deed *held* not of themselves sufficient to amount to a dedication by the grantor of other of his lands for a public street, which shall be an extension of the street named.—*Atlantic City v. Groff* (N. J. Err. & App.) 800.

A deed, though not sufficient to amount to a dedication by the grantor of lands for a street, is a circumstance to be considered on the question of dedication.—*Atlantic City v. Groff* (N. J. Err. & App.) 800.

Where a street is laid out by an owner and dedicated to the public, in the absence of its acceptance, it is not a highway, within P. L. p. 302 (Gen. St. p. 3235), requiring consents from the municipality and abutting owners before a traction company can lay down its tracks thereon.—*Pease v. Paterson & S. L. Traction Co.* (N. J. Sup.) 524.

§ 2. Operation and effect.

Evidence *held* to show dedication of square by city.—*Spring v. City of Pittsburg* (Pa.) 310.

DEEDS.

See "Boundaries," § 1.

By or to married women, see "Husband and Wife," § 2.

Covenants in deeds, see "Covenants."

Distinguished from wills, see "Wills," § 3.

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Of public lands, see "Public Lands," § 2.

Of separate property of married women, see "Husband and Wife," § 2.

Parol or extrinsic evidence, see "Evidence," § 8.

Reformation, see "Reformation of Instruments."

Particular classes of deeds.

Of trust, see "Mortgages."

Tax deeds, see "Taxation," § 7.

§ 1. Requisites and validity.

A deed deposited with a third party, to be delivered on the grantor's death, *held* void for want of a sufficient delivery.—*Johnson v. Johnson* (R. I.) 378.

DE FACTO CORPORATIONS.

See "Corporations," § 1.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 2.

DELAY.

Laches, see "Equity," § 2.

DELIVERY.

Of deed, see "Deeds," § 1.

Of gift, see "Gifts," § 1.

Of goods sold, see "Sales," § 4.

Of goods to carrier, see "Carriers," § 2.

DEMAND.

As condition precedent to action for trover and conversion, see "Trover and Conversion," § 2.

For payment of bill or note, see "Bills and Notes," § 3.

DEMONSTRATIVE LEGACIES.

See "Wills," § 14.

DEMURRER.

Costs sustaining demurrer, see "Costs," § 1.

In pleading, see "Equity," § 4; "Pleading," § 3.

To indictment, see "Indictment and Information," § 4.

DEPOSITIONS.

See "Witnesses."

DEPOSITS.

In bank, see "Banks and Banking," §§ 1, 3.

In banks in trust, see "Trusts," § 1.

DEPOTS.

Injuries to passengers at depot, see "Carriers," §§ 4-6.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Dower"; "Executors and Administrators"; "Wills."

Property and interests undisposed of by will see "Wills," § 12.

§ 1. Persons entitled and their respective shares.

Under Code, art. 93, § 32, as amended by Laws 1892, c. 571, a husband *held* not entitled

to interest accruing on a judgment owned by his wife, who died leaving children, between the date of her death and the collection of the judgment by her administrator.—*Hunter v. Hersperger* (Md.) 65.

Will construed, and *held* to sufficiently refer to testatrix's children, so as to preclude them from sharing in the estate as children not named or referred to, under Pub. St. c. 186, § 10.—*Smith v. Smith* (N. H.) 1014.

§ 2. Rights and liabilities of heirs and distributees.

Each heir is severally liable for the debts of his ancestor for what he receives from the ancestor.—*Haines v. Haines* (N. J. Sup.) 401.

If the debt of an ancestor is barred as against the ancestor, the fact may be pleaded in an action against the heir.—*Haines v. Haines* (N. J. Sup.) 401.

In a suit against an heir for the debt of his ancestor, where he has aliened the lands, the recovery will be for the value of the lands as at the time of the descent cast.—*Haines v. Haines* (N. J. Sup.) 401.

In a suit against the heir for a debt of the ancestor, if the heir has not aliened the lands, the judgment must be special, to be levied on the lands.—*Haines v. Haines* (N. J. Sup.) 401.

Where, in an action against heirs, a plea of *riens per descent*, was inadvertently filed, defendants would be permitted to amend to conform to the proof, so that judgment would only be rendered payable from the lands of which their ancestor died seised.—*Reid v. Pringle* (N. J. Sup.) 837.

Burden of proof *held* on claimant of certain property by descent.—*In re Ruchizky's Estate* (Pa.) 492.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 6.
Of property conveyed, see "Boundaries," § 1.
Of property devised or bequeathed, see "Wills," § 8.

Of property insured, see "Insurance," § 3.

DESERTION.

Ground for divorce, see "Divorce," § 1.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

Of party asking relief, see "Specific Performance," § 3.

DIRECTING VERDICT.

In civil actions, see "Trial," § 3.

DIRECTORS.

Of insurance company, see "Insurance," § 1.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 2; "Release."

From liability as surety, see "Principal and Surety," § 2.

From service as juror, see "Jury," § 2.

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DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 10.

Review of discretionary orders, see "Appeal and Error," § 1.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 3.

Dismissal of appeal or writ of error, see "Appeal and Error," § 8.

DISORDERLY CONDUCT.

A statute providing that all persons who use palmistry or like crafty science shall be adjudged disorderly persons is valid.—*State v. Kenilworth* (N. J. Sup.) 244.

DISSOLUTION.

Of attachment, see "Attachment," § 4.

Of corporation, see "Corporations," § 12.

Of savings bank, see "Banks and Banking," § 2.

DISTRESS.

For rent, see "Landlord and Tenant," § 6.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 4.

DISTRICT AND PROSECUTING ATTORNEYS.

Arguments at trial, see "Criminal Law," § 12.

DISTRICT COURTS.

See "Courts," § 2.

DIVIDENDS.

On corporate stock, see "Corporations," § 3.

DIVORCE.

§ 1. Grounds.

Where a separation occurs because of a husband's conduct, on his failure to reform and within two years to seek out his wife and apply to return, a divorce for desertion is proper.—*Jerolaman v. Jerolaman* (N. J. Ch.) 166.

In a suit for divorce for drunkenness and desertion by the husband, evidence *held* not sufficient to show a reformation by the husband.—*Jerolaman v. Jerolaman* (N. J. Ch.) 166.

§ 2. Jurisdiction, proceedings, and relief.

Supplemental bill in divorce for adultery, setting up acts *pendente lite*, *held* improperly allowed.—*Schwab v. Schwab* (Md.) 653.

Where the evidence in an action for divorce shows that residence was required with an intent to remain in the state, that complainant's object in coming into the state was to obtain a divorce is not a bar to her right to obtain such divorce.—*Wallace v. Wallace* (N. J. Err. & App.) 433.

Disclosure in another suit of petitioner's adultery *held*, under statute, to necessitate further reference of divorce suit to ascertain the truth.—*Knott v. Knott* (N. J. Ch.) 556.

§ 3. Alimony, allowances, and disposition of property.

On evidence of defendant's income, permanent alimony granted on application therefor.—*Downing v. Downing* (N. J. Ch.) 542.

DOCKETS.

Of causes for trial, see "Trial," § 1.
Of judgments, see "Judgment," § 4.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7.
As evidence in criminal prosecutions, see "Criminal Law," § 7.

DOGS.

See "Animals."

DOMICILE.

Settlement of pauper, see "Paupers," § 2.

DONATIONS.

See "Gifts."

DOWER.

See "Curtesy."

§ 1. Nature and requisites.

A widow *held* entitled to dower in the full value of the real estate, though the mortgages thereon are paid by sale of the real estate.—*Mowry v. Mowry* (R. I.) 383.

§ 2. Rights and remedies of widow.

Where there is lawfully assigned in a special manner to a widow, as her dower out of certain real estate, the sum of \$200, to be paid annually, under the provisions of Rev. St. c. 65, § 3, she thereby acquires a vested right to the annuity, which she cannot be compelled to release on the sale by the owner of the real estate, and have the present worth of her annuity appraised and paid out of the proceeds.—*Haugh v. Peirce* (Me.) 727.

After assignment of a widow's dower, whatever is lawfully assigned to her becomes a vested estate, which she cannot be compelled to sell or commute.—*Haugh v. Peirce* (Me.) 727.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

DUPLICITY.

In indictment, see "Indictment and Information," § 3.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Extent of right, use, and obstruction.

Easement in common stairway and area *held* limited to the use by the parties at the time of the erection of the buildings.—*Allegheny Nat. Bank v. Reighard* (Pa.) 268.

EJECTION.

Of intruder from vehicle while in motion, see "Negligence," § 1.
Of passenger, see "Carriers," § 6.

EJECTMENT.

See "Entry, Writ of"; "Real Actions."

§ 1. Right of action and defenses.

Plaintiff in ejectment cannot recover on possessory right merely.—*Cahill v. Cahill* (Conn.) 201.

Possession does not create a presumption of grant, establishing a *prima facie* title sufficient to authorize recovery in ejectment.—*Cahill v. Cahill* (Conn.) 201.

§ 2. Pleading and evidence.

On the issue whether the wife or the husband was possessed of the land, it may be shown that he never did anything on or about it, and that she always dealt with it as her own.—*Cahill v. Cahill* (Conn.) 201.

Possession and acts of ownership may be proved, with other circumstances, to show a conveyance in fact.—*Cahill v. Cahill* (Conn.) 201.

Evidence in ejectment *held* to sustain verdict for defendant.—*Shroyer v. Smith* (Pa.) 24.

§ 3. Damages, mesne profits, improvements, and taxes.

In ejectment, there may not be a recovery for mesne profits; the declaration making no claim therefor, as required by Gen. St. p. 1289, § 45, and Sup. Ct. Rule 85.—*Kline v. Williams* (N. J. Sup.) 556.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 3.

Between remedies on appeal, see "Appeal and Error."

ELECTIONS.

Of corporate officers, see "Corporations," § 5.

§ 1. Election districts or precincts and officers.

P. L. 1901, p. 41, consolidating the local or charter elections with the general election in the cities of the state, does not affect the compensation allowed by Act March 22, 1901, to election officers.—*Bennett v. City of Orange* (N. J. Sup.) 249.

§ 2. Qualifications of voters.

The general election law (P. L. 1898, p. 237) *held* not to disfranchise voters who vote at a polling place selected by the proper officers, notwithstanding the place so selected, but at which the election is otherwise lawfully held, is outside the territorial limits of the election district for which it is provided.—*Otis v. Lane* (N. J. Err. & App.) 442.

§ 3. Nominations and primary elections.

Candidate nominated by a regular convention of the Democratic party *held* entitled to use its name on ballots printed by him.—*Flanagan v. Hynes* (Conn.) 737.

ELECTRICITY.

Taxation of electric companies, see "Taxation," § 1.

A private corporation, maintaining electric wires over a public bridge, is bound to exercise a high degree of care to prevent injury to persons using the bridge.—*Nelson v. Branford Lighting & Water Co.* (Conn.) 303.

A private corporation, which maintains for its own use uninsulated electric wires over a public bridge, cannot object that a person, injured from contact with such wires, was not rightfully on the bridge.—*Nelson v. Branford Lighting & Water Co.* (Conn.) 303.

Evidence in an action for wrongful death from contact with electric wires strung by defendant over a highway bridge *held* to justify a finding of negligence on the part of defendant.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

Evidence in an action for a wrongful death from contact with wires strung by defendant over a highway bridge *held* sufficient to justify a finding that defendant had failed to show contributory negligence in intestate.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

In an action for wrongful death resulting from contact with electric wires, certain evidence offered to show freedom from negligence *held* improperly excluded.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

In an action for wrongful death from contact with an electric wire, certain expert evidence *held* properly excluded as too remote.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

In an action for wrongful death from contact with an electric wire, certain evidence bearing on the issue of negligence *held* properly admitted.—*Nelson v. Branford Lighting & Water Co. (Conn.)* 303.

In action against city for injuries by live telephone wire used by police, ordinance of city and rules of police department *held* admissible in evidence.—*Herron v. City of Pittsburg (Pa.)* 311.

Evidence in action against city to recover damages for injuries sustained by contact with a live telephone wire used in the police service *held* sufficient to take the case to the jury.—*Herron v. City of Pittsburg (Pa.)* 311.

EMANCIPATION.

Of child, see "Parent and Child."

EMBEZZLEMENT.

Duplicity in indictment, see "Indictment and Information," § 3.

Indictment for embezzling public moneys under Crimes Act, § 187, *held* sufficient, without specifying any particular coin or valuable security.—*State v. Bartholomew (N. J. Sup.)* 231.

Indictment charging defendant with embezzling as treasurer of the borough of D., instead of collector of D., *held* sufficient, in view of criminal procedure act, forbidding the reversal of a judgment on an indictment for any defect therein other than one which may have prejudiced the defendant.—*State v. Bartholomew (N. J. Sup.)* 231.

Under Gen. Laws 1896, c. 279, § 18, on a prosecution for embezzlement, it is not necessary for the state to prove that the particular amount charged in the indictment was embezzled.—*State v. Hunt (R. I.)* 937.

On a prosecution for embezzlement, evidence considered, and *held* to warrant a finding that defendant had misappropriated the moneys in question, prior to his having sought legal counsel as to whether he had a right thereto.—*State v. Hunt (R. I.)* 937.

On appeal from a conviction of embezzlement, *held*, that it must be presumed the jury believed that defendant misappropriated the money prior to his having sought legal advice.—*State v. Hunt (R. I.)* 937.

EMINENT DOMAIN.

Jurisdiction of equity to determine adverse claims to compensation for property taken for public use, see "Equity," § 1.
Public improvements by municipalities, see "Municipal Corporations," § 5.

§ 1. Nature, extent, and delegation of power.

Under Priv. Laws 1899, c. 200, authorizing plaintiff water district to acquire by eminent domain the entire plant, property, and franchises held by the Maine Water Company within said district and the towns of Benton and Winslow, *held*, that plaintiff, if it took anything, must take all the property held by the company in such water district and such towns, whether specifically named in the act or not.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

Under Laws 1867, p. 306, c. 160, § 9, and Gen. St. p. 2661, § 84, *held*, that a landowner cannot be compelled to accept compensation in lieu of a crossing over railroad tracks.—*Speer v. Erie R. Co. (N. J. Ch.)* 539.

Condemnation of land for public library *held* for a public purpose, though one-half the directors were not appointed by the city.—*Laird v. City of Pittsburg (Pa.)* 324; *Baird v. Same, Id.*; *Stenger v. Same, Id.*

A city, under its power to create a park, may condemn land, though intended to be used in part for a library and art building.—*Laird v. City of Pittsburg (Pa.)* 324; *Baird v. Same, Id.*; *Stenger v. Same, Id.*

The power of eminent domain, on the ground of public use, could not be invoked to build a dam to furnish power to an electric road, on the ground that, if petitioner failed to serve the railroad, a forfeiture would result.—*Avery v. Vermont Electric Co. (Vt.)* 179.

Where one desires to erect a dam to generate electricity for a railroad, *held*, that power of eminent domain could not be invoked on the ground of public use.—*Avery v. Vermont Electric Co. (Vt.)* 179.

§ 2. Compensation.

On condemnation of land for a waterway, *held*, that land covered by the walls of an existing waterway, embraced within the strip taken, was properly regarded as of more value to the owner than land covered by the waterway.—*Brown v. City of Waterbury (Conn.)* 1005.

The property of a water company to be taken, both plant and franchises, are to be appraised, having in view their value as property in itself and their value as a source of income.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

Where the property and franchises of a water company are condemned, no compensation can be allowed for incidental damages to its other property, having no relations with it, except those which grow out of common ownership.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

Where a franchise granted to a water company is not exclusive, but its business is practically exclusive, in that it has no competitor, in appraising the value of the property in condemnation proceedings, such fact should be considered.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

Rules for determining the value of the plant and practices in proceedings to condemn a water company, determined.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

Under Acts 1892, c. 165 (now New Charter of Baltimore City) § 827, the court has jurisdiction of a bill filed by the city for leave to deposit the money awarded in condemnation proceeding, where there is a dispute as to the title to a portion of a tract taken.—*Gardner v. City of Baltimore (Md.)* 85.

Evidence in an action to determine conflicting claims to money awarded for condemnation of a tract of land for a street examined, and *held* to justify a finding that a certain portion

of the tract had previously been dedicated as a street, and that defendant had no right thereto.—*Gardner v. City of Baltimore* (Md.) 85.

Right of owner to recover for damages by the establishment of a highway *held* not governed by the acts of May 16, 1891 (P. L. 75), and May 26, 1891 (P. L. 117), as the viewers were appointed after the grading was done.—*Howley v. City of Pittsburgh* (Pa.) 347.

Owner of land, acquiring title after ordinance for grading a street, can recover for injuries to his property.—*Howley v. City of Pittsburgh* (Pa.) 347.

Under V. S. 3357, 3358, owners of property abutting on a highway, the grade of which has been altered more than three feet, *held* only entitled to damages caused by the alteration in excess of the three feet.—*Fairbank v. Town of Rockingham* (Vt.) 186.

§ 3. Proceedings to take property and assess compensation.

On assessment of damages and benefits on taking by a city of a strip of land for a waterway, admission of certain evidence *held* not prejudicial to the city.—*Brown v. City of Waterbury* (Conn.) 1006.

The findings *held* not to show that the court, in assessing the damages caused by the taking of land for a waterway, regarded land covered by the side walls of an existing waterway, embraced within the strip taken, as unincumbered.—*Brown v. City of Waterbury* (Conn.) 1005.

The capitalization of income, even at reasonable rates, cannot be adopted as a sufficient or satisfactory test of the present value of a water plant, but may properly be considered in determining such value.—*Kennebec Water Dist. v. City of Waterville* (Me.) 6.

Rules for determining the value of the plant, and practice in proceedings to condemn a water company, determined.—*Kennebec Water Dist. v. City of Waterville* (Me.) 6.

On the question of the present value of a water plant, the quality of the water furnished and of the services rendered, and the fitness of the plant and of the source of water supply, are material.—*Kennebec Water Dist. v. City of Waterville* (Me.) 6.

In determining the value of a water company's plant, the actual rates which may have been charged heretofore and the actual earnings are admissible.—*Kennebec Water Dist. v. City of Waterville* (Me.) 6.

In determining the present value of the property of a water company in condemnation proceedings, the actual construction thereof, with proper allowances for depreciation, is competent evidence, but is not conclusive.—*Kennebec Water Dist. v. City of Waterville* (Me.) 6.

In proceedings to condemn lands within the filed route of a traction railway company, under 3 Gen. St. p. 3235, conveyance of the lands by the owner after application made and notice given will not defeat the proceedings or require notice to the grantee.—*Houston v. Paterson State Line Traction Co.* (N. J. Sup.) 403.

The owner of land dedicated as a street, but not accepted by the public, is an owner of land, within P. L. p. 302 (Gen. St. p. 3235), regulating proceedings to condemn land for a traction company.—*Pease v. Paterson & S. L. Traction Co.* (N. J. Sup.) 524.

Requirements of expert as to value of lands about to be condemned determined.—*Friday v. Pennsylvania R. Co.* (Pa.) 339.

Instruction as to weight of evidence to be given opinion of expert as to value *held* erroneous.—*Friday v. Pennsylvania R. Co.* (Pa.) 339.

EMPLOYES.

See "Master and Servant."

ENTRY.

Of judgment, see "Appeal and Error," § 1.
Re-entry by landlord, see "Landlord and Tenant," § 7.

ENTRY, WRIT OF.

See "Ejectment"; "Real Actions."

In a writ of entry, the plaintiff must recover on the strength of his own title.—*Weston v. Nevors* (N. H.) 703.

EQUITABLE ASSIGNMENTS.

See "Assignments," § 1.

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE ESTOPPEL

See "Estoppel," § 2.

EQUITABLE SET-OFF.

See "Set-Off and Counterclaim."

EQUITY.

Equitable assignments, see "Assignments," § 1.
Equitable conversion, see "Conversion."
Equitable estoppel, see "Estoppel," § 2.
Equitable set-off, see "Set-Off and Counterclaim."

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Marshaling Assets and Securities"; "Nuisance," §§ 1, 2; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."
Setting aside assessment or reassessment of taxes, see "Taxation," § 3.

§ 1. Jurisdiction, principles, and maxims.

On property being condemned and taken by a city for a street, the title passes to the city, and an action between adverse claimants to the property for the compensation awarded does not involve the title to land and may be prosecuted in equity.—*Gardner v. City of Baltimore* (Md.) 85.

Bill under Code Supp. art. 16, § 188, to subject a decedent's realty to damages for failure to fulfill a contract to convey realty, *held* not convertible into a bill for specific performance.—*McGaw v. Gortner* (Md.) 133.

§ 2. Laches and stale demands.

Executor taking release from legatee *held* estopped by laches to recover from his co-executor the money paid, on payment thereafter by the executor of the amount of the legatee's claim on her repudiation of the release.—*In re Wehrle's Estate* (Pa.) 511.

§ 3. Parties and process.

Where jurisdiction of nonresident defendants is obtained by publication, the bill cannot thereafter be amended, and jurisdiction retained for a different purpose.—*McGaw v. Gortner* (Md.) 133.

§ 4. Pleading.

A bill in equity, filed with the single object of making condemnation of lands for a street.

is not multifarious, because all persons interested in any of the lands to be condemned are made parties.—*Gardner v. City of Baltimore* (Md.) 85.

Where, in equity, a demurrer on the ground of multifariousness is joint, and the bill is not multifarious as against one of the demurrants, the demurrer must fail as to both of them.—*Brown v. Tailman* (N. J. Ch.) 457.

Demurrer to bill against an administrator for specific performance *held* properly overruled.—*Fitzsimmons v. Lindsay* (Pa.) 488.

§ 5. Bill of review.

A foreign executor cannot excuse his failure to file proceedings affecting the estate within the prescribed time by a plea of ignorance of the laws of the state.—*Williams v. Starkweather* (R. I.) 931.

A bill of review to correct a final decree must be filed within one year after entry of decree.—*Williams v. Starkweather* (R. I.) 931.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.

Of highways, see "Highways," § 1.

Of railroads, see "Railroads," § 2; "Street Railroads," § 1.

Of trusts, see "Trusts," § 5.

Of will, see "Wills," § 4.

ESTATES.

See "Curtesy"; "Dower."

Created by will, see "Wills," § 9.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

Joint tenancy, see "Joint Tenancy."

Reservation of rents on conveyance in fee, see "Ground Rents."

Restrictions on creation of future estates, see "Perpetuities."

Tenancy in common, see "Tenancy in Common."

ESTATES TAIL.

Creation by will, see "Wills," § 9.

ESTOPPEL

By judgment, see "Judgment," §§ 6, 7.

To allege error, see "Appeal and Error," § 9.

To avoid or forfeit insurance policy, see "Insurance," § 7.

To claim shares in consolidated railroad, see "Railroads," § 3.

To deny membership in building association, see "Building and Loan Associations."

To deny right to specific performance, see "Specific Performance," §§ 2, 3.

To plead irregularity in election of officer of mutual benefit association, see "Beneficial Associations."

To sue principal, see "Principal and Agent," § 3.

§ 1. By deed.

A grantor by warranty deed of lands impressed in the grantee's hands with a resulting trust is not estopped by his warranty from acquiring the interest of the cestui que trust.—*Condit v. Bigalow* (N. J. Ch.) 160.

Deed reserving right to represent property conveyed in all proceedings relative to the vacation of streets construed, and *held*, that the grantees had no right to question the grantor's

act thereunder.—*Daughters of American Revolution v. Schenley* (Pa.) 366.

§ 2. Equitable estoppel.

Representations of city agents *held* not to estop it to set up, as a defense to action for rent, that no appropriation had been made therefor.—*Marsh, Merwin & Lemmon v. City of Bridgeport* (Conn.) 196.

The burden of proof necessary to constitute a claimed estoppel is on the party setting up the defense.—*Spear v. Spear* (Me.) 1106.

Complainant, claiming to have a parol contract whereby a decedent had agreed to convey to him certain lands, *held* estopped from asserting such contract against the widow.—*Wolfinger v. McFarland* (N. J. Ch.) 862.

EVIDENCE.

See "Witnesses."

Admissibility of evidence to aid construction of will, see "Wills," § 5.

Admissibility of unstamped instruments in evidence, see "Internal Revenue."

Applicability of instructions to evidence, see "Trial," § 4.

Comments on, in instructions to jury, see "Trial," § 4.

Harmless error in admission or exclusion of evidence, see "Appeal and Error," § 12.

Questions of fact for jury, see "Trial," § 3.

Reception at trial, see "Criminal Law," § 12; "Trial," § 2.

Review dependent on presentation of grounds of review in record, see "Appeal and Error," § 6.

Review on appeal or writ of error, see "Appeal and Error," § 11.

As to particular facts or issues.

See "Damages," § 4; "Dedication," § 1; "Estoppel," § 2; "Fraudulent Conveyances," § 3; "Gifts," § 1; "Marriage"; "Partnership," § 1; "Payment," § 2; "Release," § 2.

Authority of corporate officer, see "Corporations," § 7.

Corporate powers, see "Corporations," § 6.

Defense of statute of limitations, see "Limitation of Actions," § 4.

Establishment of trust, see "Trusts," § 1.

Grounds of attachment, see "Attachment," § 1.

Merger of chattels into realty, see "Fixtures."

Probate of foreign will, see "Wills," § 4.

Separate property of married woman, see "Husband and Wife," § 2.

Testamentary capacity, see "Wills," § 2.

Value of lands or easements taken for public use, see "Eminent Domain," § 3.

In actions by or against particular classes of parties.

See "Beneficial Associations"; "Carriers," § 4; "Corporations," § 9; "Executors and Administrators," § 6; "Landlord and Tenant," § 7; "Master and Servant," § 11; "Municipal Corporations," § 8; "Principal and Agent," § 3; "Principal and Surety," § 1; "Railroads," §§ 5, 8.

Trustee in bankruptcy, see "Bankruptcy," § 1.

In particular civil actions or proceedings.

See "Assault and Battery," § 1; "Divorce," § 2; "Ejectment," § 2; "False Imprisonment," § 1; "Fraud," § 1; "Negligence," § 4; "Reformation of Instruments," § 2; "Specific Performance," § 4; "Trove and Conversion," § 2.

For causing death, see "Death," § 1.

For fires caused by locomotives, see "Railroads," § 8.

For personal injuries, see "Carriers," § 4; "Electricity"; "Highways," § 4; "Master and Servant," § 11; "Municipal Corporations," § 8; "Railroads," § 5; "Street Railroads," § 2.

For recovery of possession of demised premises, see "Landlord and Tenant," § 7.
 For services, see "Work and Labor."
 On administrator's bond, see "Descent and Distribution," § 9.
 On bond, see "Bonds," § 2.
 On insurance policy, see "Insurance," § 12.
 On note, see "Bills and Notes," § 4.

In criminal prosecutions.

See "Compounding Felony"; "Criminal Law," §§ 4-10; "Embezzlement"; "Homicide," § 8; "Perjury," § 2.
 For violation of liquor laws, see "Intoxicating Liquors," § 2.

§ 1. Judicial notice.

Judicial notice can be taken of the probability of expectation of life disclosed by the mortality tables.—Nelson v. Branford Lighting & Water Co. (Conn.) 303.

§ 2. Presumptions.

It must be presumed that the laws of another state as to powers of corporations are similar to those of the state in which a corporation was organized.—Dittman v. Distilling Co. of America (N. J. Ch.) 570.

Where an ordinance authorizing the construction of a street railway was passed, it would be presumed that the consents of the owners of the requisite number of lineal feet of land abutting the street had been filed, as required by P. L. 1896, c. 329.—Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.

§ 3. Relevancy, materiality, and competency in general.

Declaration of one, within two minutes after his legs were cut off, as to how it happened, held properly of the res gestæ.—Murray v. Boston & M. R. R. (N. H.) 289.

Declarations made by an agent of the payee of a note, inducing defendant to sign the same, held properly admitted as a part of res gestæ.—Terrill v. Tillison (Vt.) 187.

§ 4. Best and secondary evidence.

Under Bankr. Act, July 1, 1898, § 42, 30 Stat. 556, c. 541 [U. S. Comp. St. 1901, p. 3437], the docket entries of a referee are the best evidence of the matters therein stated.—Davis v. Ives (Conn.) 922.

§ 5. Admissions.

Incompetent deposition held admissible as party's admission.—Profile & Flume Hotels Co. v. Bickford (N. H.) 699.

Wife's failure to interrupt judicial proceeding, to deny truth of testimony being given as to her hostile statement against plaintiff, held not an admission, admissible when she became a witness for her defendant husband on a subsequent trial.—Horan v. Byrnes (N. H.) 945.

Evidence of a bankruptcy in the bankruptcy proceedings held admissible, in an action to set aside an alleged preference, only as affecting the bankrupt's credibility.—Congleton v. Schreihofner (N. J. Ch.) 144.

Evidence of preferred creditor, taken in proceedings in bankruptcy, held admissible in the state court in an action to set aside the conveyance constituting the preference.—Congleton v. Schreihofner (N. J. Ch.) 144.

Declarations by grantor after grant held admissible, where there has been some evidence of fraud between the grantor and grantee.—Boyer v. Weimer (Pa.) 21.

In action for land taken by a railroad company, declarations of owner as to value, and his offer of it at a fixed price, held admissible.—Houston v. Western Washington R. Co. (Pa.) 166.

Evidence in action by son against his father's estate on a note held insufficient to sustain a plea of set-off.—Siebert v. Steinmeyer (Pa.) 336.

§ 6. Hearsay.

A written statement of a third party, containing material evidence against one of the parties to the suit, held inadmissible.—Rich v. Hayes (Me.) 724.

On issue whether certain notes had been discounted by a bank, admission in evidence of certain letters held erroneous.—Black v. First Nat. Bank (Md.) 88.

Testimony by physician as to his examination of an injured party held not hearsay.—Sallman v. Wheeler (Md.) 512.

In action for land taken by a railroad company, declarations of owner as to value, and his offer of it at a fixed price, held admissible.—Houston v. Western Washington R. Co. (Pa.) 166.

§ 7. Documentary evidence.

Account books of agent held inadmissible, in action by one employed by him against principal, to show payment of claim by agent, pleaded in defense.—McKeen v. Providence County Sav. Bank (R. I.) 49.

Books of agent held not admissible in behalf of principal, sued for wages by person employed by agent.—McKeen v. Providence County Sav. Bank (R. I.) 49.

In an action under Rhode Island Acts and Resolutions, June Sess. 1836, p. 3, § 2, against a railroad company, the relocation report of defendant's predecessor held admissible without specific proof that the persons who signed it as executive committee were such in fact.—MacDonald v. New York, N. H. & H. R. Co. (R. I.) 795.

§ 8. Parol or extrinsic evidence affecting writings.

Express provisions of a contract will not be governed by collateral evidence of intention.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 634.

Evidence of a parol contract by a grantor to pay off an incumbrance held inadmissible in an action to foreclose a mortgage for the purchase price.—Mott v. Rutter (N. J. Ch.) 159.

Oil and gas lease construed, and evidence as to the trade meaning of the word "gas" held properly excluded.—Burton v. Forest Oil Co. (Pa.) 266.

Parol evidence held inadmissible to explain the description of a deed free from ambiguity.—King v. New York & C. Gas Coal Co. (Pa.) 477.

Parol evidence in an action to recover for breach of a written contract to show contemporaneous oral agreement held inadmissible.—Krueger v. Nicola (Pa.) 494.

In action to reform a written contract, parol evidence held inadmissible, unless declaration sets forth the omission as caused through accident, fraud, or mistake.—Krueger v. Nicola (Pa.) 494.

Where, after the execution of a note, a third person signs his name upon the back of it, in blank, the obligation assumed by him may be shown by parol.—Lyndon Sav. Bank v. International Co. (Vt.) 191.

§ 9. Opinion evidence.

A mechanical engineer may be competent to testify as to the strength both of wood and iron, and the suitability and sufficiency of an iron guy, and to estimate the strain exerted upon it by a given weight at the end of a projecting coal stage.—Caven v. Bodwell Granite Co. (Me.) 851.

A carpenter and builder, with special experience in the construction of coal stages, can testify as to the proper method of constructing certain parts of the woodwork of the stage.—*Caven v. Bodwell Granite Co. (Me.)* 851.

A carpenter and builder, who has no special experience in proving the tensile strength of iron wire and cables, is not such an expert as to give his opinion in regard to the strength of wire cables, nor how many pounds a piece of iron rigging, either new or old, can sustain.—*Caven v. Bodwell Granite Co. (Me.)* 851.

To warrant the introduction of expert evidence, the subject must be one relating to some trade, profession, science, or art, in which persons instructed therein might be supposed to have more skill and knowledge than other persons of average intelligence.—*Caven v. Bodwell Granite Co. (Me.)* 851.

Testimony of a witness as to what he understood from certain entries in a bank pass book held erroneous.—*Black v. First Nat. Bank (Md.)* 88.

Testimony by plaintiff relative to the effect of his injury held not objectionable as opinion evidence.—*Sellman v. Wheeler (Md.)* 512.

Requirements of expert as to value of lands about to be condemned determined.—*Friday v. Pennsylvania R. Co. (Pa.)* 339.

§ 10. Weight and sufficiency.

In judging of the weight and credibility of testimony, the jury should consider the character, intelligence, and interest of the witnesses, and evidence as to their reputation for truth and veracity.—*Armstrong v. Little (Del. Super.)* 742.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," §§ 3, 4.
Taking exceptions at trial, see "Trial," § 2.

EXCESSIVE DAMAGES.

See "Death," § 1; "Libel and Slander," § 2.
Review on appeal, see "Appeal and Error," § 13.

EXCHANGES.

Seat in stock exchange as property within tax law, see "Taxation," § 1.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions."

In action against corporation, see "Corporations," § 9.

§ 1. Property subject to execution.

By the extent of an execution against a mortgagor on the land covered by the mortgage, his interest passes.—*Carrasco v. Mason (N. H.)* 1101.

§ 2. Lien, levy or extent, and custody of property.

Where a valid attachment of real estate had been made, followed by sale, a second attaching creditor takes nothing by purchase under his

execution, unless the right of redemption from the sale under the first attachment.—*Poor v. Chapin (Me.)* 753.

§ 3. Sale.

A sale of land on execution under Pub. Laws 1899, p. 119, c. 115, is valid, though the action was brought and the attachment made in 1896, where the remedy was different from that given by the act of 1899.—*Poor v. Chapin (Me.)* 753.

Sale on execution held to relate back to the attachment in the action, and operate to carry the title then existing; and, where it antedated that in another suit, the purchaser acquired title superior to that of purchaser in such other suit.—*Poor v. Chapin (Me.)* 753.

A judgment creditor, who has levied execution on land mortgaged by the judgment debtor, cannot maintain a writ of entry against a mortgagee in possession.—*Carrasco v. Mason (N. H.)* 1101.

§ 4. Return.

Where the officer's return of an attachment, filed in the registry of deeds, gave the name of the defendant correctly, but only the initials of the plaintiff's name, it was a sufficient compliance with the statute.—*Poor v. Chapin (Me.)* 753.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Courts of probate, see "Courts," § 3.

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Assets, appraisal, and inventory.

Rents accruing after the death of a decedent, and before the exercise of a power of sale, go with the title of the land to the heir or devisee, and not to the executor or to the purchaser under the power.—*Bittle v. Clement (N. J. Ch.)* 138.

§ 2. Allowances to surviving wife, husband, or children.

In suit by daughter of testator to recover certain premises from widow on ground that testator's will was invalid, a verdict in favor of plaintiff held erroneous, under Gen. St. p. 1276, § 2.—*De Roche v. Myers (N. J. Sup.)* 558.

§ 3. Allowance and payment of claims.

The provisions of Orphans' Court Act, § 75, have no application to a suit against an executor to collect a claim which is barred according to the provisions of section 70.—*Cunningham v. Stanford (N. J. Sup.)* 245.

Claim of daughter for services rendered sick mother held sustained by the evidence.—*In re Payne's Estate (Pa.)* 337.

Notes issued by a firm after legacy by deceased partner of his business to surviving partner held not binding on the deceased partner's executors.—*Fleming v. Fleming (Pa.)* 473.

Where note against a decedent's estate was rejected, held proper for the court, on exceptions to auditor's findings of fact, to direct an issue for the jury.—*In re Dutton's Estate (Pa.)* 903.

§ 4. Distribution of estate.

Intestate held, by acquiescence, to have elected to take certain property under a distribution, which was subject to a life estate in her father.—*Appeal of Ward (Conn.)* 730.

Where infant legatees took vested interests in their legacies, which bore interest from the testator's death, payable on their arriving at age, the administrators of a legatee dying under age were entitled to recover the legacy at once and distribute it as a part of the legatee's estate.—*Savin v. Webb (Md.)* 64.

A provision authorizing executors to pay legacies as they might find it convenient *held* not to confer power on them to arbitrarily delay payment.—*Savin v. Webb* (Md.) 64.

§ 5. Sales and conveyances under order of court.

Damages for failure to convey land under an executory agreement *held* not a debt, entitling the purchaser to proceed under Code Supp. art. 18, § 188, on death of seller.—*McGaw v. Gortner* (Md.) 133.

§ 6. Actions.

Under Rev. St. c. 71, § 17, the judge of probate may authorize the executor or administrator to execute deeds in order to carry out contract of decedent.—*May v. Boyd* (Me.) 938.

Where assignee of a bond for a deed filed a petition in the probate court praying that the executor of vendor might be ordered to convey, and the petition was denied, and no appeal was taken from the decree, *held*, the decree was conclusive.—*May v. Boyd* (Me.) 938.

The admission of evidence, in an action for services rendered a decedent, that the relationship between plaintiff and decedent was of the half blood, *held* to be harmless, in view of other circumstances.—*Gill v. Donovan* (Md.) 117.

Evidence as to the value of services rendered *held* admissible in a suit against an estate to recover for services.—*Gill v. Donovan* (Md.) 117.

Evidence as to whether plaintiff was sent to school, and whether she had assistance in her work, *held* admissible in an action against an estate for services rendered.—*Gill v. Donovan* (Md.) 117.

Orphans' court *held* to have exclusive jurisdiction to enforce agreement for option of shareholder for purchase of stock on death of stockholder.—*Fitzsimmons v. Lindsay* (Pa.) 488.

§ 7. Accounting and settlement.

Where an administrator has paid attorney's fees allowed in his account, the account should not be reopened to reduce them, unless they were clearly unreasonable.—*Geesey v. Geesey* (Md.) 616.

An executor *held* not entitled to commission on appreciation in value of securities.—*In re Davidson's Estate* (Pa.) 273.

Under Gen. Laws 1896, c. 219, § 3, requiring administrators to file accounts within 30 days after being cited so to do, injunction restraining administrator from transferring certain partnership assets of his decedent *held* not a sufficient excuse for not complying with the citation.—*West v. Municipal Court of Providence* (R. I.) 926.

§ 8. Foreign and ancillary administration.

Service of process on the duly appointed agent of a nonresident executor, under Gen. Laws 1896, c. 212, § 45, *held* to confer jurisdiction.—*Gorman v. Stillman* (R. I.) 934.

§ 9. Liabilities on administration bonds.

Judgment against an administrator is not conclusive on the sureties in all cases.—*Burgess v. Young* (Me.) 910.

Where a creditor sued an administrator, and recovered judgment, and sued the administrator's bond, and the administrator and his sureties filed the statement that the estate was not more than sufficient to pay the expenses and claims of the first four classes mentioned in Rev. St. c. 66, § 1, *held* that evidence was admissible to prove the defense set up in such statement as a sufficient defense to the action.—*Burgess v. Young* (Me.) 910.

Under Rev. St. c. 66, § 2, where it is shown that an estate is insufficient to pay any of the

claims of the fifth class, that fact may be pleaded as a defense in a suit on the administrator's bond.—*Burgess v. Young* (Me.) 910.

Where an administrator's account was settled after suit on his bond, the nonliability of the sureties was judicially ascertained, where it was shown that the estate was exhausted by the expenses and the first four classes named in Rev. St. c. 66, § 1.—*Burgess v. Young* (Me.) 910.

EXEMPTIONS.

From taxation, see "Taxation," § 1.
Of bankrupt, see "Bankruptcy," § 2.

§ 1. Nature and extent.

What are necessities, so as to render liable to trustee process a fund held as wages for the personal labor of the defendant performed within a month, under Rev. St. c. 86, § 55, par. 6, is a question of fact.—*Fisher v. Shea* (Me.) 846.

Legal services in the defense of a criminal prosecution and of a civil action in which defendant has been arrested are necessities, within the statute providing that wages shall not be subject to trustee process, except for debts for necessities.—*Fisher v. Shea* (Me.) 846.

Legal services rendered *held* included in the term "necessaries," under Rev. St. c. 86, § 55, par. 6, providing that wages earned shall not be subject to trustee process, except for debts for necessities.—*Fisher v. Shea* (Me.) 846.

That defendant was not arrested, but was liable to arrest on execution after judgment against him, was to be considered in determining the necessity of the services of the attorneys.—*Fisher v. Shea* (Me.) 846.

Where, at the time of filing a petition in bankruptcy, a bankrupt held a life policy payable to him or his assigns, if he survived 20 years, *held*, under Rev. St. c. 49, § 94, and Id. c. 75, § 10, that the insurance policy was exempt from the claims of his creditors.—*Pulsifer v. Hussey* (Me.) 1076.

EXHIBITS.

Annexed to pleading, see "Pleading," § 5.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.
In criminal prosecutions, see "Criminal Law," § 8.

EXPULSION.

Of member of mutual benefit association, see "Beneficial Associations."

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil liability.

To justify handcuffing a prisoner arrested for felony, it is not necessary that he should be a notoriously bad character, nor that he should be unruly and attempt to escape.—*Edger v. Burke* (Md.) 986.

A plea of justification by a deputy sheriff in an action for false imprisonment *held* not demurrable merely because the arrest was without a warrant.—*Edger v. Burke* (Md.) 986.

In an action for false arrest and imprisonment, a deputy sheriff cannot avail himself of justification as a defense under the general issue.—*Edger v. Burke* (Md.) 986.

A plea of justification by a deputy sheriff in an action for false imprisonment *held* not to sufficiently set out the facts relied on.—*Edger v. Burke* (Md.) 986.

One pleading justification for an arrest in an action for false imprisonment has the burden of proving the defense.—*Edger v. Burke* (Md.) 986.

It is for the court to determine whether the facts justified an officer in arresting another for a felony without a warrant.—*Edger v. Burke* (Md.) 986.

Prayers making no discrimination between the liability of an officer and one assisting him *held* properly rejected in an action for false imprisonment.—*Edger v. Burke* (Md.) 986.

Plaintiff's prayer, on justification in an action for false imprisonment, *held* properly rejected.—*Edger v. Burke* (Md.) 986.

The court's ruling on a demurrer to a plea of justification in an action for false imprisonment *held* harmless error.—*Edger v. Burke* (Md.) 986.

FALSE PRETENSES.

The statute punishing the obtaining of money by false pretenses applies to the obtaining of money from a county by false pretenses.—*State v. White* (Del. Gen. Sess.) 956.

An indictment against a sheriff and other officials for conspiring to obtain money by false pretenses sustained.—*State v. McDaniel* (Del. Gen. Sess.) 1056.

FALSE SWEARING.

See "Perjury."

FEEES.

In probate proceedings, see "Wills," § 4.

FEE SIMPLE.

Creation by will, see "Wills," § 9.

FELLOW SERVANTS.

See "Master and Servant," § 7.

FELONY.

See "Compounding Felony."

FENCES.

Fence laws invading property rights, see "Constitutional Law," § 2.

Liability of railroad for failure to fence track, see "Railroads," § 7.

FILING.

Claim under lien laws, see "Mechanics' Liens," § 2.

Specifications under lien laws, see "Mechanics' Liens," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

By arbitrators, see "Arbitration and Award," § 2.

Review on appeal or writ of error, see "Appeal and Error," § 11.

FIRE ESCAPES.

See "Negligence."

FIRE INSURANCE.

See "Insurance."

FIRES.

See "Negligence," § 4.

Caused by operation of railroad, see "Railroads," § 8.

Fire department in cities, see "Municipal Corporations," § 3.

FISH.

Under Rev. St. c. 3, § 63, in determining whether or not a fish weir is in front of the shore or flats of another, the criterion is whether such weir is so near with reference to the shore as to in some way injuriously affect the shore owner in the enjoyment of his rights.—*Sawyer v. Beal* (Me.) 848.

Evidence in an action to recover a penalty for maintaining a fish weir, under Rev. St. c. 3, § 63, *held* to show that the fish weir was an injury to plaintiff's enjoyment of his shore rights.—*Dunton v. Parker* (Me.) 1115.

Evidence *held* sufficient to authorize maintenance of an action by the plaintiff against those not claiming to have any title whatever or right to the possession of the shore for illegally maintaining fish weir.—*Dunton v. Parker* (Me.) 1115.

In an action to recover a penalty provided by Rev. St. c. 3, § 63, for maintaining a fish weir, evidence *held* to show that the weir was not one "the materials of which are chiefly removed annually," and consequently the statute is applicable.—*Dunton v. Parker* (Me.) 1115.

An action to recover a penalty under Rev. St. c. 3, § 63, for maintaining a fish weir "in front of the shore or flats of another," cannot be maintained unless it appears that it is so situated as to seriously affect plaintiff in the enjoyment of his rights as owner.—*Dunton v. Parker* (Me.) 1115.

FIXTURES.

The burden of showing the existence of the requisites necessary to effect a merger of a chattel into realty is upon the party claiming a merger.—*Hayford v. Wentworth* (Me.) 940.

The question of the existence of any of the requisites necessary to effect a merger of a chattel into realty is a question of mixed law and fact.—*Hayford v. Wentworth* (Me.) 940.

A tenant, putting in a water-closet, may transfer the same to his successor in the tenancy, and the last tenant thus acquiring it may remove it during his term.—*Hayford v. Wentworth* (Me.) 940.

The fact that a water-closet was connected with a soil pipe, also put in by the tenant and left by him affixed to the realty, does not prevent his removing the water-closet.—*Hayford v. Wentworth* (Me.) 940.

A tenant, in the absence of objection from the landlord, has the right to annex temporarily thereto chattels for his own comfort, and may remove them during his term.—*Hayford v. Wentworth* (Me.) 940.

A water-closet put into a business office by a tenant at will for his own use, and which can be removed without material injury to the realty, *held* not a fixture.—*Hayford v. Wentworth* (Me.) 940.

The physical character of the annexation of a chattel to land or buildings does not alone

determine the question whether the chattel is merged in the realty.—*Hayford v. Wentworth* (Me.) 940.

To effect a merger of a chattel into realty, there must be an actual physical annexation, an adaptability for use with that part of the realty to which it is annexed, and an intention to make it a permanent accession.—*Hayford v. Wentworth* (Me.) 940.

To render chattels a part of the realty, there must be actual annexation, with an intent to make a permanent accession to the freehold.—*Temple Co. v. Penn Mut. Life Ins. Co.* (N. J. Sup.) 295.

FLOWAGE.

See "Waters and Water Courses," § 3.

FOG.

Collision in fog, see "Collision," § 1.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 5.

FORCIBLE ENTRY AND DETAINER.

See "Landlord and Tenant," § 7.

FORECLOSURE.

Of judgment lien, see "Judgment," § 8.

Of lien, see "Mechanics' Liens," § 5.

Of mortgage, see "Chattel Mortgages," § 4; "Mortgages," §§ 5, 6.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 8.

FOREIGN CORPORATIONS.

See "Associations"; "Corporations," § 13.

FOREIGN GUARDIANSHIP.

See "Guardian and Ward," § 3.

FOREIGN RECEIVERSHIP.

Rights of foreign receivers as against domestic creditors of corporation, see "Corporations," § 10.

FOREIGN WILLS.

See "Wills," § 4.

FORFEITURES.

For causing death, see "Death," § 1.

Of insurance, see "Insurance," § 6.

Of lease, see "Landlord and Tenant," § 2.

FORMER ADJUDICATION.

See "Judgment," §§ 6, 7.

FORMS OF ACTION.

See "Assumpsit, Action of"; "Ejectment"; "Entry, Writ of"; "Replevin"; "Trespas," § 1; "Trove and Conversion."

FRANCHISES.

See "Taxation," § 1.

Corporate franchises, see "Corporations," § 2.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

In particular classes of conveyances, contracts, or transactions.

See "Insurance," § 5; "Release," § 2.

§ 1. Actions.

In an action for deceit, it is proper to aver in the declaration circumstances under which the fraudulent representations were made, and the manner in which the plaintiff was prejudiced by relying thereon.—*Northwestern Mut. Life Ins. Co. v. Breautigam* (N. J. Sup.) 228.

Evidence in action for deceit in procuring stock subscription held insufficient to sustain plaintiff's claim.—*Willock v. Dilworth* (Pa.) 278.

FRAUDS, STATUTE OF.

Requirements as to express trusts, see "Trusts," § 1.

§ 1. Promises to answer for debt, default, or miscarriage of another.

Where credit for goods delivered to R. was given to R. as well as to defendant, defendant's promise to pay is collateral, and therefore required to be in writing.—*Matteson v. Moone* (R. I.) 1068.

§ 2. Agreements not to be performed within one year.

An agreement is not within statute of frauds, where it may by any possibility be performed within a year.—*Devalinger v. Maxwell* (Del. Sup.) 684.

§ 3. Real property and estates and interests therein.

An agreement held not within statute of frauds as one for sale of land.—*Devalinger v. Maxwell* (Del. Sup.) 684.

§ 4. Sales of goods.

A verbal contract for the sale for \$845 of a claim against a third person held to be within the sixth section of the statute of frauds, and void.—*French v. Schoonmaker* (N. J. Sup.) 225.

§ 5. Requisites and sufficiency of writing.

An unsigned contract to lease held obnoxious to the statute of frauds.—*Charlton v. Columbia Real Estate Co.* (N. J. Ch.) 444.

Instrument purporting to leave certain realty to one to whom it had been given by parol held a sufficient memorandum in writing within the statute of frauds.—*Shroyer v. Smith* (Pa.) 24.

FRAUDULENT CONVEYANCES.

As cloud on title, see "Quieting Title," § 1.

By bankrupt, see "Bankruptcy," § 1.

By mortgagor of chattels, see "Chattel Mortgages," § 2.

§ 1. Transfers and transactions invalid.

Where a husband assigns to his daughter all the right to the sum insured, in the event of his death, in an endowment insurance policy, such assignment was not fraudulent as to his creditors.—*Pulsifer v. Hussey* (Me.) 1076.

On a creditors' bill against the grantee to compel reconveyance and removal of a cloud, it is not necessary to allege or prove knowledge on the part of the grantee of the fraudulent intent of the grantor.—*Spear v. Spear* (Me.) 1106.

A conveyance from a father to his son when the former is largely in debt, in consideration of an agreement for support, is prima facie fraudulent as against existing creditors.—*Spear v. Spear* (Me.) 1106.

The question as to whether a voluntary conveyance is void depends on surrounding circumstances and the resulting ability of creditors to collect the indebtedness due.—*Spear v. Spear* (Me.) 1106.

Facts held to show that certain conveyances by a debtor were in trust, and fraudulent and void as to creditors.—*Spuck v. Logan* (Md.) 989.

Payment of a sufficient consideration for a conveyance, fraudulent as to the grantor's creditors, held not sufficient to sustain the same.—*Spuck v. Logan* (Md.) 989.

Purchaser of personalty, paying for same and leaving property in hands of seller, takes risk of subsequent purchaser or execution creditor.—*White v. Gunn* (Pa.) 901.

Control of purchaser of personalty of the subject of the sale held sufficient as against an execution creditor.—*White v. Gunn* (Pa.) 901.

§ 2. Rights and liabilities of parties and purchasers.

Bill for reconveyance of realty held not to show such fraud in original conveyance to avoid alimony as to preclude relief.—*Stockwell v. Stockwell* (N. H.) 701.

A judgment creditor of a fraudulent grantee, who has levied upon the goods fraudulently conveyed, held not a bona fide purchaser, under Gen. St. p. 1605, § 15.—*Richardson v. Gerli* (N. J. Ch.) 438.

Purchaser from fraudulent grantee held protected by St. 13 Eliz. c. 5.—*Boyer v. Welmer* (Pa.) 21.

§ 3. Remedies of creditors and purchasers.

Evidence held admissible to show that the grantee knew intermediate conveyances were fraudulent.—*Lesser v. Brown* (Conn.) 205.

Plaintiff in an action to subject land as fraudulently conveyed held entitled, where a grantor testified that he received certain money for his conveyance and used it in making a purchase, to show that his purchase was before his conveyance, and to obtain a confession that he did not know where the money he received went.—*Lesser v. Brown* (Conn.) 205.

Testimony held sufficient to sustain a finding that plaintiff's judgment was based on a debt existing before the fraudulent conveyance.—*Lesser v. Brown* (Conn.) 205.

While an ineffectual attachment of property standing in the name of the debtor's wife was pending, and more than four months thereafter, the debtor filed his petition in bankruptcy and was discharged. Held, that a judgment in attachment recovered was only against the property claimed to have been attached, and, where the attachment was ineffectual, complainants were not entitled to relief by creditors' suit.—*Fletcher v. Tuttle* (Me.) 1110.

Where complainants sued and attempted to attach certain realty, the legal title to which was never in the defendant, but which he had caused to be conveyed to his wife to defeat his creditors, the attempted attachment was ineffectual.—*Fletcher v. Tuttle* (Me.) 1110.

Where a debtor purchased land and caused the title to be conveyed by a third person to his wife, his creditor must resort to equity to reach the property standing in the name of the wife.—*Fletcher v. Tuttle* (Me.) 1110.

Where a levying creditor has obtained title to property fraudulently conveyed by his debtor, he may maintain an action at law to recover possession or sue in equity to have the cloud on his title removed.—*Fletcher v. Tuttle* (Me.) 1110.

Where title to realty had been conveyed to defraud creditors, attachment may be made by a creditor, and the property subsequently seized

on execution as if no such conveyance had been made.—*Fletcher v. Tuttle* (Me.) 1110.

Plaintiffs, to whom a fraudulent grantor had been continuously indebted from a time prior to the conveyance until his insolvency, held not debarred from the right to attack such conveyance, on the ground that they were subsequent creditors.—*Spuck v. Logan* (Md.) 989.

A conveyance which is merely colorable, and in fact a secret trust for the grantor, held void as against both the grantor's prior and subsequent creditors.—*Spuck v. Logan* (Md.) 989.

That one having an unliquidated claim in litigation against a grantor intended to be defrauded by the conveyance had not recovered judgment held no objection to the right of other creditors defrauded to set aside the conveyance.—*Spuck v. Logan* (Md.) 989.

A creditor, to sue to set aside a fraudulent conveyance, must have a lien, which is not created by a foreign judgment.—*Guy B. Waite Co. v. Otto* (N. J. Ch.) 425.

Instruction, in ejectment, as to title acquired where there was no evidence of fraud in the conveyance, held unauthorized.—*Boyer v. Welmer* (Pa.) 21.

Good faith in the sale of a brick plant, and sufficiency of change of possession, held a question for the jury.—*White v. Gunn* (Pa.) 901.

Where an action at law was dismissed prior to the bringing of a bill for injunction to prevent the disposal of a fund belonging to defendant, and the defendant had left the state, chancery held to have jurisdiction of the issues in the law action.—*Hanks v. Hanks* (Vt.) 959.

Plaintiff in an action at law held entitled to an injunction restraining a party who had become bail for an absconding defendant, and had received a fund from the defendant to secure him, from transferring the fund to defendant during a reasonable time for the prosecution of the action at law.—*Hanks v. Hanks* (Vt.) 959.

GAME.

See "Fish."

Subject and title of game law, see "Statutes," § 2.

GAMING.

§ 1. Gambling contracts and transactions.

Money deposited under a wagering agreement upon a rise or fall in the price of stocks may be recovered by the depositor.—*Van Pelt v. Schauble* (N. J. Err. & App.) 437.

Money deposited under a wagering agreement may be recovered upon the common count for money had and received.—*Van Pelt v. Schauble* (N. J. Err. & App.) 437.

GARNISHMENT.

See "Attachment."

§ 1. Persons and property subject to garnishment.

Where one interested in an estate executed an assignment of all money to become due him to a third party, and it was recorded, and notice was given to the administrator, the assignment was sufficient as against a subsequent trustee process.—*Howe v. Howe* (Me.) 908.

An assignment, not effective to charge the holder of a fund as debtor to an assignee until notice of the assignment, held complete as against creditors of the assignor.—*Howe v. Howe* (Me.) 908.

An assignment given as collateral security *held* not security for advances made after the attachment.—*Howe v. Howe* (Me.) 908.

§ 2. Proceedings to support or enforce.

Where plaintiff by trustee process attaches the principal defendant's distributive share in the hands of an administrator, the latter could not set off a demand due him individually.—*Howe v. Howe* (Me.) 908.

GAS.

See "Negligence," §§ 1, 3.

Gas lease, see "Mines and Minerals," § 1.

Taxation of gas companies, see "Taxation," § 1.

Where vacant premises are injured by leakage and explosion of gas, the explosion being immediately occasioned by a policeman presenting a lighted candle at a cellar opening, the leakage is the efficient cause of the injury.—*Consolidated Gas Co. v. Getty* (Md.) 660.

It is not negligence, contributing to the injury to a vacant house by a leakage and consequent explosion of gas, that the owner left the premises without inspection for almost a month.—*Consolidated Gas Co. v. Getty* (Md.) 660.

Evidence, in an action against a gas company for damages by a leak and consequent explosion, *held* to render for the jury the question of the company's negligence in failing to discover the leak.—*Consolidated Gas Co. v. Getty* (Md.) 660.

A provision in a charter of a gaslight company authorizing it to lay gas pipes in the streets of a certain town and its vicinity *held* not to authorize it to lay pipes in the streets of other places constituting independent municipal governments.—*Borough of Madison v. Moristown Gaslight Co.* (N. J. Err. & App.) 439.

The authority conferred on a gaslight company by its charter to sell gas for lighting in the town and its vicinity does not authorize it to enter into an independent municipality and lay pipes in the streets thereof.—*Borough of Madison v. Morristown Gaslight Co.* (N. J. Err. & App.) 439.

Evidence in action for injuries caused by inhaling escaping gas *held* not to show plaintiff guilty of contributory negligence as a matter of law.—*Apfelbach v. Consolidated Gas Co.* (Pa.) 359.

Natural gas company, incorporated under Act May 29, 1885, cannot maintain on its right of way a telegraph or telephone line.—*Woods v. Greensboro Natural Gas Co.* (Pa.) 470.

GENERAL APPEARANCE.

See "Appearance."

GIFTS.

By husband to wife, see "Husband and Wife," § 1.

§ 1. Inter vivos.

Husband's transfer of corporate stock, held by himself and wife as joint tenants, to purchaser, presumed rightful.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

Mere declarations of a husband that whoever lives the longest of himself and wife shall have everything do not constitute a gift.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

Husband's deposit of securities in safe deposit box in name of himself and wife *held* not to constitute a gift to wife.—*Bauernschmidt v.*

Bauernschmidt (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

Circumstances *held* not to show completed gift of corporate stock by a husband to a wife.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

A note given by the maker therein to the payee, to whom he is not indebted at the time, cannot be enforced as against the maker's estate after his death.—*De Grange v. De Grange* (Md.) 663.

Where, after suit to compel repayment of money transferred by an incompetent, a guardian is appointed, the court should order the money to be paid to him.—*Polt v. Polt* (Pa.) 577.

Decree compelling the repayment of money given by father to son, because of the former's mental incapacity, *held* justified.—*Polt v. Polt* (Pa.) 577.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 2; "Fraudulent Conveyances," § 2; "Sales," § 5.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GROUND RENTS.

An agreement designed to extinguish the ground rent on a certain leasehold estate *held* operative thereto, though the owners of a portion of the estate, on which the rent could not in any event be enforced, were omitted therefrom.—*Jones v. Rose* (Md.) 69.

The estoppel of owners of a portion of a leasehold estate to assert the ground rent against certain portions of such estate *held* to also operate after such owners had purchased the fee.—*Jones v. Rose* (Md.) 69.

In a deed partitioning a leasehold estate, an appropriation of certain undivided portion thereof to the payment of the ground rent *held*, as between the parties, to exonerate the balance of the property from such rent.—*Jones v. Rose* (Md.) 69.

GUARANTY.

See "Principal and Surety."

By corporation, see "Corporations," § 8.

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

GUARDIAN AND WARD.

§ 1. Custody and care of ward's person and estate.

The welfare of a child *held* to be the controlling question in determining whether its custody should be awarded to a foreign guardian.—*Hanrahan v. Sears* (N. H.) 702.

§ 2. Accounting and settlement.

In a bill by a ward against his former guardian to impeach a final settlement, an allegation that the ward's consent was obtained by fraud *held* not to constitute a direct attack upon the validity of a decree approving the final settlement.—*Scoville v. Brock* (Vt.) 177.

Bill by a ward against his former guardian to impeach a final accounting *held* demurrable, because showing that the matters complained of were res judicata.—*Scoville v. Brock* (Vt.) 177.

§ 3. Foreign and ancillary guardianship.

A foreign guardian *held* entitled to maintain habeas corpus for the custody of a minor ward living in the state.—*Hanrahan v. Sears* (N. H.) 702.

HABEAS CORPUS.

Right of foreign guardian to maintain, see "Guardian and Ward," § 3.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 12.
In criminal prosecutions, see "Criminal Law," § 14.

HAWKERS AND PEDDLERS.

Validity of license law as denial of equal protection of laws, see "Constitutional Law," § 4.

HEALTH.

§ 1. Boards of health and sanitary officers.

Town *held* not liable, under Laws 1899, p. 335, c. 100, § 1, to compensate doctor attending case of contagious disease in quarantined family, under employment by its head.—*Pettengill v. Town of Amherst* (N. H.) 944.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," §§ 7, 8; "Navigable Waters," § 1; "Turnpikes and Toll Roads."

Accidents at railroad crossings, see "Railroads," § 5.

As boundaries, see "Boundaries," § 1.
Condemnation of lands or easements for highway, see "Eminent Domain," § 2.
Necessity of consent of abutting owner to establishment of street railroad on highway, see "Street Railroads," § 1.
Rights of railroads to use, see "Railroads," § 1.

§ 1. Establishment, alteration, and discontinuance.

Under Pub. St. c. 68, § 2, relating to appeals in highway proceedings, a taxpayer or citizen, who shows no special injury different from that of the public in general, has no right of appeal.—*Bennett v. Town of Tuftonborough* (N. H.) 700.

Inhabitants and taxpayers of a town are not, as such, parties to highway proceedings.—*Bennett v. Town of Tuftonborough* (N. H.) 700.

A vote by a town to rescind the action of the selectmen in laying out a highway *held* to discontinue the highway.—*Brackets v. McIntire* (N. H.) 705.

A slight variation in laying out a public road, due to the erection of houses by the prosecutors on the line described in the application, will not nullify the proceedings.—*Whittingham v. Hopkins* (N. J. Sup.) 250.

Under Act May 16, 1891 (P. L. 75), giving a right of appeal to abutting owners from ordinances opening, widening, extending, or otherwise improving any street, no appeal lies from the vacating of a street.—*Daughters of American Revolution v. Schenley* (Pa.) 366.

The court, on appeal in a road case, may determine that, on the facts as found, the conclusion of the lower court as to the law was unwarranted.—*Daughters of American Revolution v. Schenley* (Pa.) 366.

§ 2. Highway districts and officers.

Act April 24, 1894 (Gen. St. p. 2804), by which the functions of county road boards were transferred to the boards of chosen freeholders, is valid, notwithstanding the functions of the road board in Essex county differed from those permitted to road boards in other counties.—*Bowman v. Board of Chosen Freeholders of Essex County* (N. J. Sup.) 818.

§ 3. Taxes, assessments, and work on highways.

Certiorari to set aside an assessment levied under the public road act of March 12, 1895, should not be granted, unless the certiorari is applied for within 30 days after the confirmation of the assessment.—*United New Jersey R. & Canal Co. v. Gummere* (N. J. Sup.) 520.

§ 4. Regulation and use for travel.

Liability of county commissioners for injuries resulting from defective condition of roads *held* to arise only under Code Pub. Gen. Laws, art. 25, §§ 1, 2.—*Baltimore County Com'rs v. Wilson* (Md.) 71.

Acts 1900, c. 685, §§ 188-199, in effect depriving county commissioners of the authority over roads given them by Code Pub. Gen. Laws, art. 25, §§ 1, 2, *held* to take away their liability for injuries resulting from defective roads.—*Baltimore County Com'rs v. Wilson* (Md.) 71.

The owner of a traction engine *held* responsible for accidents caused by his carelessness in moving it on a highway.—*Miller v. Addison* (Md.) 967.

An instruction on negligence, in an action against the owner of a traction engine for frightening a horse, *held* to cover refused instructions, if there was evidence of defendant's negligence.—*Miller v. Addison* (Md.) 967.

Evidence examined, in an action against the owner of a traction engine for frightening a horse, and *held* to make it a question for the jury whether defendant had, in moving the engine, been guilty of negligence.—*Miller v. Addison* (Md.) 967.

In an action for injuries resulting from collision of plaintiff with defendant's carriage, preponderance of evidence *held* to show contributory negligence in plaintiff.—*Pick v. Thurston* (R. I.) 600.

In an action for injuries resulting from collision of plaintiff with defendant's carriage, preponderance of evidence *held* to show that defendant was guilty of no negligence.—*Pick v. Thurston* (R. I.) 600.

In an action for personal injuries from collision with defendant's carriage, evidence *held* to show that plaintiff was riding on the left side of the road.—*Pick v. Thurston* (R. I.) 600.

Under Gen. Laws 1896, c. 74, § 1, a person injured by collision with a carriage while riding a bicycle on the left side of the road must show an excuse for being there, to attribute negligence to the driver of the carriage.—*Pick v. Thurston* (R. I.) 600.

HOLIDAYS.

See "Sunday."

HOMICIDE.

Change of venue, see "Criminal Law," § 3.
Expert testimony, see "Criminal Law," § 8.

§ 1. Murder.

The malice requisite to the crime of murder, under Pub. St. c. 278, § 1, is not an inference

of law from the act of killing, but must be found by the jury on competent evidence.—*State v. Greenleaf* (N. H.) 38.

Under Pub. St. c. 278, § 1, *held*, that the distinction between the degrees of murder does not depend on malice, but whether the killing is deliberate or in the perpetration of a felony.—*State v. Greenleaf* (N. H.) 38.

Under Pub. St. c. 278, § 1, in order to convict of murder in the first degree, the state must show, not only malice, but a deliberate killing, or that the crime was committed in an attempt to perpetrate one of the felonies enumerated in the statute.—*State v. Greenleaf* (N. H.) 38.

Under Pub. St. c. 278, § 1, in order to constitute murder in the first degree, design to kill must precede the killing by some appreciable space of time.—*State v. Greenleaf* (N. H.) 38.

Under Pub. St. c. 278, § 1, making murder committed in an attempt to commit rape murder in the first degree, that the attempt was not far advanced does not lessen the offense.—*State v. Greenleaf* (N. H.) 38.

On a prosecution for murder in the first degree, under Pub. St. c. 278, § 1, the state must establish that accused attempted a felony, and that death occurred as an outcome of such attempt.—*State v. Greenleaf* (N. H.) 38.

§ 2. Manslaughter.

Amendment made to Gen. Laws, c. 282, § 7, by Pub. St. c. 278, § 7, *held* not to abolish distinction between murder and manslaughter.—*State v. Greenleaf* (N. H.) 38.

§ 3. Evidence.

On a prosecution for murder in the first degree, under Pub. St. c. 278, § 1, malice and deliberation *held* properly shown by circumstantial evidence.—*State v. Greenleaf* (N. H.) 38.

Under Pub. St. c. 278, § 1, making deliberate and premeditated killing murder in the first degree, there can be no conviction in the first degree, unless malice and deliberation be shown beyond a reasonable doubt.—*State v. Greenleaf* (N. H.) 38.

§ 4. Trial.

On a prosecution for murder, evidence *held* sufficient to warrant submission to the jury of the question whether accused killed deceased, whether it was done with malice and premeditation, and whether it was done in an attempt to commit a felony.—*State v. Greenleaf* (N. H.) 38.

Instruction on trial for murder, where defense was that it was committed while delirious from typhoid fever, *held* sufficient.—*Commonwealth v. Gearhardt* (Pa.) 1029.

HOSPITALS.

See "Asylums."

Exemption from taxation, see "Taxation," § 1.

HUSBAND AND WIFE.

See "Bigamy"; "Curtesy"; "Divorce"; "Dower"; "Marriage."

Adultery, see "Adultery."

Rights of survivor, see "Descent and Distribution," § 1; "Executors and Administrators," § 2.

§ 1. Conveyances, contracts, and other transactions between husband and wife.

Where a husband executes a bill of sale to a third person, who executes one to the wife, it conveys title, where both bills of sale were handed to the wife without actual delivery into the hands of the third party.—*Kulin v. Heller* (N. J. Sup.) 519.

On an issue whether there had been a sufficient delivery of property alleged to have been given to a married woman, evidence *held* sufficient to justify a finding that the husband had never been in possession of the property.—*Fletcher v. Wakefield* (Vt.) 1012.

At common law, a married woman may hold personal property which comes to her by gift from her husband, as against creditors of the husband who become such after the gift is made.—*Fletcher v. Wakefield* (Vt.) 1012.

Under Acts 1884, p. 119, No. 140, a married woman is not by implication prohibited from holding personal property which comes to her by gift from her husband.—*Fletcher v. Wakefield* (Vt.) 1012.

§ 2. Wife's separate estate.

A purchaser of land from a married woman under a contract unenforceable for want of an acknowledgment *held* not entitled to compel a conveyance against the vendor's subsequent grantee with notice.—*Ten Eyck v. Saville* (N. J. Ch.) 810.

Property purchased by wife with income of her business *held* her separate property.—*Carson v. Carson* (Pa.) 348.

On an issue whether a husband or wife owned a certain piano, evidence that the piano was insured in her name with the knowledge and acquiescence of the husband was admissible.—*Fletcher v. Wakefield* (Vt.) 1012.

§ 3. Actions.

Husband, in possession of wife's land, *held* entitled to sue for tortious injury to his crop.—*Chorman v. Queen Anne's R. Co.* (Del. Super.) 687.

Under 2 Gen. St. p. 2014, § 11, in an action by a wife for the protection of her own property, if she desires to make her husband a party, she must sue by her next friend, making her husband a defendant.—*Bristol v. Skerry* (N. J. Ch.) 135.

A husband has an equity in lands to which his wife holds title, and, if a child be born during coverture and the husband survives the wife, he will take an estate by curtesy.—*Bristol v. Skerry* (N. J. Ch.) 135.

Though a husband is a proper party to a suit by a wife to protect her lands, if he is made a party, it should be as defendant.—*Bristol v. Skerry* (N. J. Ch.) 135.

Husband *held* proper party defendant, in suit against wife to set aside a deed to her.—*Decker v. Panz* (N. J. Ch.) 137.

Plea of wife, in action for tort, of husband's presence and participation, *held* insufficient to free her from individual liability, notwithstanding Gen. Laws, c. 194, § 14.—*McElroy v. Capron* (R. I.) 44.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 3.

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Assumpsit, Action of"; "Work and Labor."

IMPRISONMENT.

See "Arrest"; "Bail"; "False Imprisonment."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."
Public improvements, see "Municipal Corporations," § 5.

IMPUTED NEGLIGENCE.

See "Negligence," § 3.

INADEQUATE DAMAGES.

See "Damages," § 8.
Ground for new trial, see "New Trial," § 2.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Corporations," § 1; "Municipal Corporations," § 1.

INCUMBRANCES.

On property of intestate, see "Descent and Distribution," § 2.

INDEBTEDNESS.

Of testator, see "Wills," § 16.

INDEMNITY.

See "Principal and Surety."
Indemnity insurance, see "Insurance," § 9.

INDEPENDENT CONTRACTORS.

See "Master and Servant," § 13.

INDICTMENT AND INFORMATION.

Defects in, ground for arrest of judgment, see "Criminal Law," § 13.

For particular offenses.

See "Adultery"; "Bigamy"; "Compounding Felony"; "Embezzlement"; "False Pretenses"; "Larceny," § 1.

Violation of city ordinance, see "Municipal Corporations," § 6.

Violation of liquor laws, see "Intoxicating Liquors," § 2.

§ 1. Formal requisites of indictment.

Though an indictment may not show that the grand jury was held in the county where the venue was laid, if it appear by the caption and the record that the grand jury was sworn before the court sitting at the county town, and that it reported the indictment to the same court, the indictment will be held good.—State v. Bartholomew (N. J. Sup.) 231.

§ 2. Requisites and sufficiency of accusation.

An indictment for larceny from a corporation, designating it by the name by which it is commonly known, is sufficient.—State v. Rollo (Del. Gen. Sess.) 683.

An indictment alleging a larceny from a designated corporation need not specifically allege that the owner of the goods was a corporation.—State v. Rollo (Del. Gen. Sess.) 683.

The application for a bill of particulars should be in writing and point out all the particulars desired.—State v. McDaniel (Del. Gen. Sess.) 1056.

In prosecution for obtaining money by false pretenses, defendants held not entitled to a bill of particulars.—State v. McDaniel (Del. Gen. Sess.) 1056.

Under Rev. St. c. 124, § 4, an indictment for polygamy held sufficient to show jurisdiction, if it avers that the crime was committed within the county, or that the offender resided in the county at the time of the indictment, or was apprehended therein.—State v. Damon (Me.) 845.

In an indictment for a statutory crime, it is sufficient to charge it in the words of the statute.—State v. Bartholomew (N. J. Sup.) 231.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

Where a joint trial of several alleged violations of a local option law, alleged in separate counts in an indictment, might prejudice defendant, the court, in its discretion, may compel the state to elect.—State v. Blakeney (Md.) 614.

An indictment in several counts, alleging several violations of a local option law, held not demurrable on the ground that distinct criminal charges were improperly joined.—State v. Blakeney (Md.) 614.

An indictment under Crimes Act (P. L. 1898, p. 840) § 167, charging public officer with embezzlement, held not bad for duplicity.—State v. Bartholomew (N. J. Sup.) 231.

§ 4. Motion to quash or dismiss, and demurrer.

A general motion to quash an indictment need not set out the reasons relied on.—State v. McDaniel (Del. Gen. Sess.) 1056.

A single demurrer or plea to two or more separate indictments will be stricken out.—State v. Bartholomew (N. J. Sup.) 231.

§ 5. Amendment.

An information filed by a state's attorney may be amended by his successor in office, on leave of court.—State v. Barrell (Vt.) 183.

The oath of office taken by a state's attorney is not an oath to the truth of the allegations set forth in an information filed by him.—State v. Barrell (Vt.) 183.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Guardian and Ward"; "Parent and Child." Actions for injuries to minor child, see "Parent and Child."

Capacity and contributory negligence of child injured by street railroad as question for jury, see "Street Railroads," § 2.

Care required as to children, see "Negligence," § 1.

Negligence imputable to infant, see "Negligence," § 3.

INFERIOR COURTS.

See "Courts," § 2.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

In suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 8.

Restraining particular acts or proceedings.

See "Monopolies," § 1; "Nuisance," §§ 1, 2.

Collection of tax, see "Taxation," § 8.

Pollution of water course, see "Waters and Water Courses," § 1.

§ 1. Nature and grounds in general.

The fact that a lease is under seal *held* not to warrant enjoining action for rent and to cancel the lease.—*Slater v. Schwegler* (N. J. Ch.) 937.

Equity will not restrain an action for rent, and cancel the lease, on the ground that the same is void.—*Slater v. Schwegler* (N. J. Ch.) 937.

§ 2. Subjects of protection and relief.

Duties imposed on the board of pharmacy by section 8, p. 276, Acts of 1902, *held* to involve discretion, and that a mandatory injunction could not be issued to compel it to reject an application for registration.—*Henkel v. Millard* (Md.) 657.

Where, in an action for rent, there is a judgment for defendant because the lease was void, equity will interfere to prevent further suits.—*Slater v. Schwegler* (N. J. Ch.) 937.

Railroad, in occupation of land under a deed and proceedings in eminent domain, *held* entitled to enjoin a second company, seeking by force to oust it from the land.—*Pennsylvania Co. v. Ohio River Junction R. Co.* (Pa.) 259.

Plaintiff in an action at law *held* entitled to an injunction restraining a party who had become bail for an absconding defendant, and had received a fund from the defendant to secure him, from transferring the fund to defendant during a reasonable time for the prosecution of the action at law.—*Hanks v. Hanks* (Vt.) 959.

§ 3. Actions for injunctions.

Complainant in a bill for an injunction must make a full and candid disclosure of all the facts on which he relies for relief.—*Moffat v. Calvert County Com'rs* (Md.) 960.

Affidavit to bill for an injunction *held* defective.—*Moffat v. Calvert County Com'rs* (Md.) 960.

Bill to restrain carrying out of contract *held* properly dismissed for laches.—*Keeling v. Pittsburgh, V. & C. Ry. Co.* (Pa.) 485.

§ 4. Preliminary and interlocutory injunctions.

In a suit to restrain strikers from picketing and unlawfully intimidating plaintiff's employes, an injunction pendente lite *held* properly granted.—*George Jonas Glass Co. v. Glass Blowers Ass'n of United States & Canada* (N. J. Ch.) 565.

§ 5. Violation and punishment.

Evidence *held* not sufficient to justify a finding that an injunction against strikers, prohibiting intimidation of plaintiff's employes, had been violated.—*George Jonas Glass Co. v. Glass Blowers Ass'n of United States & Canada* (N. J. Ch.) 567.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INQUISITION.

Of lunacy, see "Insane Persons," § 1.

INSANE PERSONS.

Insane asylums, see "Asylums."

§ 1. Inquisitions.

On traverse of a finding in lunacy by the wife, the question of the validity of the marriage cannot be submitted to the jury.—*Commonwealth v. Pitcairn* (Pa.) 328.

Wife *held* a person aggrieved, and authorized to traverse finding in lunacy as to her husband.—*Commonwealth v. Pitcairn* (Pa.) 328.

§ 2. Property and conveyances.

The Legislature has power to provide remedies against the estates of insane persons, while they are living or after their death.—*Board of Chosen Freeholders of Camden County v. Ritson* (N. J. Err. & App.) 839.

An insane female who is married may be held personally liable for her support in any county insane asylum, under Supp. May 9, 1894, to Act March 3, 1890, though her husband might be liable for her support.—*Board of Chosen Freeholders of Camden County v. Ritson* (N. J. Err. & App.) 839.

The estate of an insane person may be held after her death for a claim for which she could be held in her lifetime.—*Board of Chosen Freeholders of Camden County v. Ritson* (N. J. Err. & App.) 839.

The words, "Every insane person supported in any county insane asylum shall be personally liable for his maintenance therein," as used in Supp. May 9, 1894, will be construed as if the words were, "Every insane person maintained in any county insane asylum," etc.—*Board of Chosen Freeholders of Camden County v. Ritson* (N. J. Err. & App.) 839.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of association, see "Associations."

Of benefit association, see "Insurance," § 13.

Of corporation, see "Corporations," § 10.

Of insurance company, see "Insurance," § 1.

§ 1. Assignment, administration, and distribution of insolvent's estate.

An assignment under Insolvent Law (Rev. St. c. 70) § 33, need not be under seal.—*Milliken v. Houghton* (Me.) 1075.

INSPECTION.

By master, see "Master and Servant," § 5.

Of corporate books, see "Corporations," § 4.

INSTRUCTIONS.

In civil actions, see "New Trial," § 2; "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 4.

INSURANCE.

Exemption of life insurance from claims of creditors, see "Exemptions," § 1.

Policy as assets of bankrupt, see "Bankruptcy," § 1.

§ 1. Insurance companies.

Advice of counsel *held* no defense to an action by a receiver of a life insurance company against its directors for negligence in loaning the company's funds.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

Where directors of a life insurance company loaned its funds on security other than that prescribed by Gen. St. 1902, § 3564, they were

personally liable for any loss.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

Where directors of a life insurance company loaned its funds without taking proper or adequate security, an action in tort against them for the loss sustained may be brought by the corporation's receiver.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

In an action against directors of life insurance company for loaning funds on improper security, a tender of the securities taken, which were worthless at the maturity of the loan, to the directors, was not required.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

In an action against directors of life insurance company for loaning the corporation's funds on insufficient security, the court was not required to divide the loan into parts, and treat the entire security as security for one of the parts, to lessen the damages.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

Where a receiver proved that directors of life insurance company had loaned the company's funds on insufficient security, he was not required to prove the value of the securities at the time of the loan.—*New Haven Trust Co. v. Doherty* (Conn.) 209.

§ 2. Insurance agents and brokers.

Whether one acts as agent for the insurer or the insured is to be determined by the circumstances.—*J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.* (N. J. Err. & App.) 458.

§ 3. The contract in general.

Payment of an insurance premium is necessary to give validity to the policy, unless duly waived.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

Insurance policy construed, and property destroyed *held* within the description.—*A. A. Griffing Iron Co. v. Liverpool & London & Globe Ins. Co.* (N. J. Err. & App.) 409.

Where agent of insurance company issued a binding slip, and the insured accepted it, the promise to pay the premium to be mentioned in the policy was a sufficient consideration for the contract.—*J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.* (N. J. Err. & App.) 458.

Where an insurance company delivered a binding slip, to be void on delivery of the policy, a complete temporary contract of insurance existed from such delivery.—*J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.* (N. J. Err. & App.) 458.

A policy on the life of L. *held* not binding by payment of the premium while L. was ill and before delivery of the policy.—*Langstaff v. Metropolitan Life Ins. Co.* (N. J. Sup.) 518.

§ 4. Premiums, dues, and assessments.

Payment of premium to an agent of insurance company or of its general agent is valid.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

Payment of premium to a person unauthorized by the terms of a policy to receive it is good, if the premium is in fact received by the company.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

Agent delivering binding slip, having failed to fix the rate before the policy was delivered and before the loss occurred, the insured *held* bound to pay a reasonable rate.—*J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.* (N. J. Err. & App.) 458.

§ 5. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

It is not a breach of a warranty of physical soundness in an application for accident insurance that the applicant's leg is slightly curved, and therefore more susceptible to inflammation

from future accidents than a normal leg would be.—*Maryland Casualty Co. v. Gehrmann* (Md.) 678.

Under Acts 1888, p. 688, c. 424, § 32 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 127), identifying accident insurance companies as life insurance companies, Acts 1894, p. 1059, c. 662 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 142a), relative to materiality of breach of warranty, *held* applicable to accident insurance.—*Maryland Casualty Co. v. Gehrmann* (Md.) 678.

The term "sound health" in a life insurance policy *held* to mean the absence of a condition of health commonly regarded as a disease.—*Packard v. Metropolitan Ins. Co.* (N. H.) 287.

Evidence in an action on a life insurance policy examined, and *held* to warrant a finding that the insured was not in "sound health" at the date of the policy.—*Packard v. Metropolitan Ins. Co.* (N. H.) 287.

§ 6. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

In action on fire insurance policy, evidence *held* to require binding instruction for defendant.—*Lutz v. Royal Ins. Co. (Pa.)* 721.

§ 7. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Where insurance company does not receive payment of a premium, but after delivery of the policy and before a fire unqualifiedly treats the policy as binding, it is equivalent to an adoption or ratification thereof.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

§ 8. Risks and causes of loss.

Loss sustained by water escaping from an automatic fire extinguisher, set in motion by steam escaping from an exploded pipe attached to a steam boiler, *held* within a policy insuring against immediate loss from such explosions.—*Hartford Steam Boiler Inspection & Ins. Co. v. Henry Sonneborn & Co.* (Md.) 610.

It will not terminate an insured's right to weekly indemnity on his accident policy that, after an accident to his knee resulting in complete disability, he prematurely went upon the street, thereby prolonging his disability.—*Maryland Casualty Co. v. Gehrmann* (Md.) 678.

§ 9. Extent of loss and liability of insurer.

Contract with casualty company construed, and *held*, that the undertaking was to reimburse the assured against loss on account of its liability to its employees, and that the contract was one of indemnity only, and that the liability of the insurer was limited "to reimburse him for loss actually sustained and paid."—*Frye v. Bath Gas & Electric Co.* (Me.) 395.

Evidence *held* not to show a case of double insurance, whereby the policies prorate.—*Meigs v. Insurance Co. of North America* (Pa.) 1053.

Insurance policies construed, and *held*, that one class of policies did not prorate with another class taken out at a later period.—*Meigs v. Insurance Co. of North America* (Pa.) 1053.

Ambiguous clauses in a mutual life insurance contract should be construed strictly against the insurer.—*Brock v. Brotherhood Acc. Co.* (Vt.) 176.

Classification of cattle tender as an extrahazardous occupation in a life insurance policy *held* not to include a tender of horses.—*Brock v. Brotherhood Acc. Co.* (Vt.) 176.

§ 10. Notice and proof of loss.

Provision in fire policy as to statement of interest of persons in property in preliminary proofs of loss *held* inapplicable to the interest acquired by a party after destruction of the

property by fire.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

§ 11. Adjustment of loss.

A provision in an insurance policy for arbitration of the amount of the loss, as a condition precedent to a right to sue, is waived when the insurer denies liability.—*Stoddard v. Cambridge Mut. Fire Ins. Co.* (Vt.) 284.

§ 12. Actions on policies.

Where insurance company, after delivery of policy and until fire, fails to repudiate contract of insurance for nonpayment of premium, payment or waiver thereof may be inferred.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

The burden of proving a breach of warranty in an application for accident insurance is on the company.—*Maryland Casualty Co. v. Gehrman* (Md.) 678.

Under Acts 1894, p. 1059, c. 662 (Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, § 142a), providing that a breach of warranty shall not avoid a policy, unless in a matter material to the risk, the burden of proving materiality is on the company.—*Maryland Casualty Co. v. Gehrman* (Md.) 678.

Question of materiality of breach of warranty in application for accident insurance *held* for the jury.—*Maryland Casualty Co. v. Gehrman* (Md.) 678.

§ 13. Mutual benefit insurance.

Where a benefit certificate in a fraternal insurance order was payable to the estate of the assured, *held*, the fund was distributable to the wife and children of the assured, whether the designation of the "estate" as beneficiary was illegal or not.—*Dale v. Brumbly* (Md.) 655.

Assignment of an insurance policy in a fraternal order to a creditor *held* not to confer any rights on the creditor to the insurance fund.—*Dale v. Brumbly* (Md.) 655.

Under Acts 1894, p. 404, c. 295, an assignment of an insurance policy in a fraternal order to a creditor *held* not to entitle the creditor to the fund on the death of the policy holder.—*Dale v. Brumbly* (Md.) 655.

Under Gen. St. p. 2554, forfeiture of a benefit certificate for nonpayment of assessments within the time required is not available under a plea of general issue.—*Van Alstyne v. Franklin Council, No. 41, J. O. U. A. M.* (N. J. Sup.) 564.

Bill by trustee of bankrupt to compel payment of proceeds of beneficial certificate to him *held* properly dismissed.—*Schomaker v. Schwebel* (Pa.) 337.

Holders of certificates in foreign insolvent benefit association entitled to preference in fund belonging to the association in the state before it is paid over to foreign receiver.—*Frowert v. Blank* (Pa.) 1000.

INTENT.

As determining whether chattels become fixtures, see "Fixtures."
Fraudulent, see "Fraudulent Conveyances," § 1.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 9.

INTERNAL REVENUE.

Bank, accepting unstamped checks, cannot object to their offer in evidence, because not stamped.—*Bryan v. First Nat. Bank* (Pa.) 480.

INTERPLEADER.

§ 1. Right to interpleader.

The holder of a fund in which he has no interest *held* entitled to bring rival claimants therefor into court by interpleader.—*Pennsylvania R. Co. v. Stevenson* (N. J. Ch.) 696.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Joinder of counts in indictment for violations of local option law, see "Indictment and Information," § 3.

Validity of act relating to submission of question of sale of liquors as imposing nonjudicial duties on county court, see "Constitutional Law," § 1.

§ 1. Offenses.

Sale, without statutory authority, of liquors which are in fact intoxicating, but which seller believes are not intoxicating, *held* a violation of the statute.—*State v. Eaton* (Me.) 723.

A party may be guilty of illegally keeping liquor for sale, even though the title to the liquors sold was in another.—*State v. Gruner* (R. I.) 1058.

Certain facts *held* to furnish no ground for defense in a prosecution for illegally keeping liquors for sale.—*State v. Gruner* (R. I.) 1058.

§ 2. Criminal prosecutions.

An indictment for selling liquor illegally *held* not to set out with sufficient certainty the nature of the offense.—*State v. Sollo* (Del. Gen. Sess.) 684.

The fact that the traverser was engaged in the business of selling liquors *held* not sufficient to warrant his conviction for violating the local option law, without distinct proof that he or his agent made the particular sale charged in the indictment.—*Guy v. State* (Md.) 879.

The fact that the traverser had a government license to sell liquors in a county was *prima facie* evidence that he was engaged in the business of selling liquors.—*Guy v. State* (Md.) 879.

Evidence *held* insufficient to sustain a conclusion that accused sold beer or offered it for sale.—*Atlantic City v. Thornhill* (N. J. Err. & App.) 834.

In a prosecution for illegally keeping liquors for sale, a ruling as to presumption of ownership in another *held* immaterial.—*State v. Gruner* (R. I.) 1058.

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 3.

JOINDER.

Of causes of action, see "Action," § 1.
Of offenses in indictment, see "Indictment and Information," § 3.

JOINT-STOCK COMPANIES.

See "Associations."

Interest of member in joint-stock association dealing in real estate *held* personalty, which could not be sold under a real estate execu-

tion.—In re Pittsburg Wagon Works' Estate (Pa.) 816; Appeal of Kountz, Id.

JOINT TENANCY.

See "Tenancy in Common."

Act March 31, 1812 (5 Smith's Laws, p. 395) abolishing the right of survivorship as incident to joint tenancy, does not render illegal grant of estate with the attributes of survivorship.—Redemptorist Fathers v. Lawler (Pa.) 487.

A grant to four persons, to hold as joint tenants and not as tenants in common, creates an estate subject to the right of survivorship.—Redemptorist Fathers v. Lawler (Pa.) 487.

JUDGES.

See "Courts"; "Justices of the Peace."

Comments on evidence in charge to jury, see "Trial," § 4.

JUDGMENT.

By or against heirs, see "Descent and Distribution," § 2.

On pleadings, see "Pleading," § 7.

Review, see "Appeal and Error."

Review of order on motion to strike out entry of satisfaction, see "Appeal and Error," § 10.

Rights of judgment creditors to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

Sales under judgment, see "Judicial Sales."

Validity of act relating to lien of judgment as impairing obligation of contract, see "Constitutional Law," § 8.

In particular civil actions or proceedings.

See "Replevin," § 3.

On administrator's bond, see "Executors and Administrators," § 9.

On appeal or writ of error, see "Appeal and Error," § 13.

§ 1. By confession.

Under 1 Gen. St. p. 172, a warrant of an attorney that is included in the body of a note is not void.—Shelmerdine v. Lippincott (N. J. Sup.) 237.

1 Gen. St. p. 172, does not prohibit the making of a power of attorney for use in other states, though it may be embodied in a bill or other instrument for the payment of money.—Shelmerdine v. Lippincott (N. J. Sup.) 237.

§ 2. By default.

Where a complaint against a landlord alleges the making of a lease to plaintiff, and failure to put plaintiff in possession, after default, the burden rests on defendant to prove any facts which would show he was free from any liability.—Joseph Bernhard & Son v. Curtis (Conn.) 213.

Under Gen. St. 1902, § 742, in action by lessee against landlord for failing to put lessee in possession, defendant held not entitled to raise the question whether wrongful holding offered by former tenant would relieve landlord from liability.—Joseph Bernhard & Son v. Curtis (Conn.) 213.

A default in a tort action throws on the defendant the burden of proving on the hearing in damages that the person injured was guilty of contributory negligence.—Nelson v. Branford Lighting & Water Co. (Conn.) 303.

Where it appears from the record that a judgment should never have been entered, an order reinstating it will be reversed, though the order striking it out was conditioned on defendants pleading to the merits, which they failed to do.—Wolfe v. Murray (Md.) 876.

§ 3. On trial of issues.

Under Rules of Court, p. 41, § 129, complaint containing common counts against two defendants, followed by bill of particulars against one, held not to sustain joint judgment.—Schoenberg v. White (Conn.) 882.

Where there was but one count in a declaration, and several pleas were filed, to some of which demurrers were interposed, it was not error to enter final judgment, on overruling the demurrers, notwithstanding that there were issues of fact joined on the other pleas.—Williams v. Watters (Md.) 767.

Defendant on assumpsit on the common counts held not entitled to judgment non obstante veredicto.—Davis v. Streeter (Vt.) 185.

A motion for judgment non obstante veredicto is not granted in favor of a defendant.—Stoddard v. Cambridge Mut. Fire Ins. Co. (Vt.) 284.

§ 4. Entry, record, and docketing.

Act April 4, 1892, authorizes the docketing of judgments rendered in the court for the trial of such cause without an affidavit of belief that the debtor is not possessed of goods and chattels to satisfy the amount due.—Curtis v. Stout (N. J. Sup.) 252.

§ 5. Opening or vacating.

Where the Supreme Court has declared judgment and proceedings thereunder void, the court below should strike from the record the judgment and the proceedings.—Mutual Life Ins. Co. v. Tenan (Pa.) 172.

Where a court of common pleas, under decision of Supreme Court, has stricken off judgment and mortgage sale, mortgagee may prefer his claim in the orphans' court on distribution of proceeds of sale of mortgagor's land.—In re Smith's Estate (Pa.) 174.

§ 6. Merger and bar of causes of action and defenses.

Issue to quiet title under Act June 10, 1893, held properly denied, where the matter was res judicata.—Vankirk v. Patterson (Pa.) 175.

Judgment in ejectment held res judicata in equitable ejectment based on the same claim of title.—Baker v. Bailey (Pa.) 326.

In action by decedent on note, decree in prior equity suit between executor and plaintiff held not res judicata as to the note.—Siebert v. Steinmeyer (Pa.) 336.

Where a judgment is reversed without a new venire, it is not a bar to a second action for the same cause of action.—Spees v. Boggs (Pa.) 346.

§ 7. Conclusiveness of adjudication.

A decree of a probate court touching matters within its jurisdiction, when not appealed from, is conclusive on all persons.—May v. Boyd (Ma.) 938.

In a proceeding to determine the extent of certain water rights fixed according to physical conditions at a particular date, deeds and leases showing the extent of the use prior to such deeds held inadmissible.—Horne v. Hutchins (N. H.) 1024.

Orphans' court's determination as to fraud in procuring widow's release of interest in husband's estate held not res judicata; the issue being but incidentally cognizable.—Mullaney v. Mullaney (N. J. Err. & App.) 1086.

Judgment at law held res judicata of issue of estoppel by warranty in deed.—Condit v. Bigalow (N. J. Ch.) 160.

A decree on certiorari to determine the validity of a city ordinance held not to estop the contestant from subsequently litigating its validity in a new proceeding for alleged defects not previously presented or considered.—Mercer

County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.

Admissibility of record in action by real estate agent to recover commissions determined.—*Seabury v. Fidelity Ins., Trust & Safe Deposit Co.* (Pa.) 898.

§ 8. Lien.

Under Gen. St. 1902, § 4149, a certificate of judgment lien is not defective, because not accurately describing the precise interest of the judgment debtor.—*Ives v. Beecher* (Conn.) 207.

Possible interest of an heir in land which would be rendered intestate estate by the holding that a certain clause in a will was void held subject to a judgment lien.—*Ives v. Beecher* (Conn.) 207.

Under Gen. St. 1902, § 930, a leasehold estate is subject to a judgment lien.—*Ives v. Beecher* (Conn.) 207.

Interest of cestui que trust under a devise in a will held to be such as to be subject to a judgment lien.—*Ives v. Beecher* (Conn.) 207.

The failure of a judgment lien as to some of the parcels of realty sought to be affected does not destroy the lien as to other parcels.—*Ives v. Beecher* (Conn.) 207.

A question as to the validity of a will held not determinable in a proceeding to foreclose a judgment lien, in the absence of interested parties.—*Ives v. Beecher* (Conn.) 207.

In a proceeding to foreclose a judgment lien on realty, questions relative to the amount or nature of defendant's interest therein will not be determined.—*Ives v. Beecher* (Conn.) 207.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL POWER.

See "Constitutional Law," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

On execution, see "Execution," § 3.

Act Feb. 16, 1891, providing for the confirmation of judicial sales notwithstanding irregularities in notice of sale, was not repealed by Act June 14, 1898, amending the acts of March 25, 1874, and March 17, 1887.—*Polhemus v. Priscilla* (N. J. Ch.) 141.

Act Feb. 16, 1891, providing for the confirmation of judicial sales notwithstanding irregularities in the notice of sale, held not a mere validating act, but to relate to future sales.—*Polhemus v. Priscilla* (N. J. Ch.) 141.

Where a sheriff's sale is required to be confirmed by the court, he cannot require the purchaser to accept a deed until confirmation has been obtained.—*Polhemus v. Priscilla* (N. J. Ch.) 141.

JURISDICTION.

Amount in controversy, see "Courts," § 1.

Effect of appearance, see "Appearance."

To determine right to remove cause to federal court, see "Removal of Causes," § 1.

Jurisdiction of particular actions or proceedings.

See "Specific Performance," § 4.

By or against executors or administrators, see "Executors and Administrators," § 6.

Criminal prosecutions, see "Criminal Law," § 2.

Special jurisdictions.

See "Equity," § 1.

Justices' courts in civil cases, see "Justices of the Peace," § 1.

Particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 12; "Trial," § 5.

Instructions in civil actions, see "Trial," § 4.

Instructions in criminal prosecutions, see "Criminal Law," § 12.

Questions for jury in civil actions, see "Trial," § 3.

Questions for jury in criminal prosecutions, see "Criminal Law," § 12.

Taking case or question from jury at trial, see "Trial," § 3.

Verdict in civil actions, see "Trial," § 6.

§ 1. Right to trial by jury.

Regulations of Pub. Acts 1899, c. 187, p. 1102 (Gen. St. 1902, p. 247, § 720), providing for separate dockets for court and jury cases, held constitutional.—*McKay v. Fair Haven & W. R. Co.* (Conn.) 923.

A judgment by a justice after denial of a trial by jury held invalid for want of jurisdiction.—*Mackenzie v. Gilbert* (N. J. Sup.) 524.

In an action in a justice court defendant is entitled on demand to a trial by jury.—*Mackenzie v. Gilbert* (N. J. Sup.) 524.

§ 2. Summoning, attendance, discharge, and compensation.

On a trial for murder, it is not error to call the jurors summoned as tales de circumstantibus one at a time.—*Commonwealth v. Payne* (Pa.) 489.

On trial for murder, excusing five of panel in advance of the call of the case held not error.—*Commonwealth v. Payne* (Pa.) 489.

§ 3. Competency of jurors, challenges, and objections.

In a prosecution for violating Code Pub. Loc. Laws, art. 13, § 228 et seq. (local option law), the fact that two of the jurors were members of the Law and Order League held not to disqualify them as jurors under Declaration of Rights, art. 21.—*Guy v. State* (Md.) 879.

Where a statute allowed a challenge "at any time before the juror is actually sworn" it must be interposed before the commencement of the ceremony.—*Leary v. North Jersey St. Ry. Co.* (N. J. Sup.) 527.

Laws 1887, p. 132 (Gen. St. p. 1855, § 54), providing that all challenges to jurors for any cause whatever may be made at any time before the juror is actually sworn, applies only to challenges for cause.—*Leary v. North Jersey St. Ry. Co.* (N. J. Sup.) 527.

Under Gen. St. p. 1852, § 40, and Laws 1902, p. 640, the right of peremptory challenge in civil cases is conditioned on its being exercised as the names of the jurors are drawn from the box.—*Leary v. North Jersey St. Ry. Co.* (N. J. Sup.) 527.

JUSTICES OF THE PEACE.

Review of excessive taxation of costs, see "Appeal and Error," § 3.

Right to trial by jury in justice's court, see "Jury," § 1.

§ 1. Civil jurisdiction and authority.

Under Rev. Code 1852 (amended in 1893) c. 99, § 1, a justice of the peace held to have jurisdiction of an action for damages for breach by the seller of a contract for the sale of personality.—*Gruell v. Clark* (Del. Super.) 955.

§ 2. Procedure in civil cases.

Default judgment rendered by justice *held* sustained, though it appeared from the record that defendants were summoned to appear August 21st, and that the judgment was rendered August 22d.—*Heavalow v. Conner* (Del. Super.) 1055.

Where defendant was summoned before a justice by his proper surname and the initial letter of his Christian name, and on the return day his attorney moved to set the summons aside, the justice properly amended the summons by inserting the proper Christian name.—*Abrahams v. Jacoby* (N. J. Sup.) 525.

§ 3. Review of proceedings.

On certiorari to review a judgment of a justice imposing a penalty, an objection that he resided in a city where there was a district court, is not sustained without proof thereof.—*New Jersey Soc. for Prevention of Cruelty to Animals v. Mickelolt* (N. J. Sup.) 559.

Where a conviction before a justice was not summary, it is not necessary that the return to certiorari should set forth the testimony.—*New Jersey Soc. for Prevention of Cruelty to Animals v. Mickelolt* (N. J. Sup.) 559.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

By master of defective appliances, see "Master and Servant," § 5.

LACHES.

Effect in equity, see "Equity," § 2.

In certiorari proceedings, see "Certiorari," § 2.

In claiming railroad stock, see "Railroads," § 3.

In suing out injunction, see "Injunction," § 3.

LANDLORD AND TENANT.

See "Ground Rents."

Leases of street railroads, see "Street Railroads," § 1.

1. *Against leasehold interest*, see "Mechanics' Liens," § 3.

Mining leases, see "Mines and Minerals," § 1.

Railroad leases, see "Railroads," § 3.

Specific performance of contract to lease, see "Specific Performance," § 1.

Title acquired by lessee at tax sale as against lessor, see "Taxation," § 7.

§ 1. Leases and agreements in general.

Certain writings, etc., *held* not a contract to lease.—*Charlton v. Columbia Real Estate Co.* (N. J. Ch.) 444.

Where a landlord claims full rental as against his bankrupt tenant, a reduction of the rent for a valuable consideration may be shown.—*Evans v. Lincoln Co.* (Pa.) 321.

Lease by city of an armory to an incorporated civil body, identical with unincorporated military body, sustained.—*Mihlbauer v. Infantry Corps of State Fencibles* (Pa.) 776.

§ 2. Terms for years.

A lease forfeited by the use of the premises for unlawful sale of liquor will remain in force unless the owner determines the right of possession by entry or notice, or suit of forcible detainer, within seven days from the forfeiture, as authorized by Rev. St. c. 94, § 1.—*Small v. Clark* (Me.) 758.

Where a lessor failed to forfeit a lease while he was the owner of the premises, he could not, after conveyance, terminate it, unless he still had an interest or acted by authority of the owner.—*Small v. Clark* (Me.) 758.

Where a lease for a term of years provides that, if either party terminates the lease before it expires, he shall pay the other \$50, either party can terminate the lease by such a payment.—*Small v. Clark* (Me.) 758.

Where lessor waives forfeiture of lease, his subsequent grantor cannot enforce it.—*Small v. Clark* (Me.) 758.

Evidence *held* insufficient to show that a lease, which by its terms could be forfeited by payment of \$50, was so forfeited.—*Small v. Clark* (Me.) 758.

Alleged parol agreement setting aside covenant in lease not to sublet must be established by preponderance of the evidence.—*Zeigler v. Lichten* (Pa.) 489.

Clause in lease that it shall be void on default of lessee *held* not self-operating.—*English v. Yates* (Pa.) 503.

Lessee, by default in payment of rent, cannot end the lease and relieve his sureties.—*English v. Yates* (Pa.) 503.

Lease construed, and *held* to entitle lessees to possession and rents from subtenants until they were paid the value of buildings erected by them.—*Moshassuck Encampment No. 2 v. Arnold & Maine* (R. I.) 771.

A breach of a covenant not to use demised premises for the sale of liquor *held* continuing, and the acceptance of rent with knowledge of the breach did not preclude a forfeiture for a breach subsequently accruing.—*Granite Bldg. Ass'n v. Greene* (R. I.) 792.

§ 3. Tenancies from year to year and month to month.

Where premises have been rented for a month at a monthly rental, and the tenant holds over with consent, a monthly tenancy is established.—*Baker v. Kenney* (N. J. Sup.) 526.

In order to terminate a monthly tenancy, only one month's notice to quit is necessary.—*Baker v. Kenney* (N. J. Sup.) 526.

A notice to terminate a monthly tenancy must be to quit on one of the recurring periods of the holding.—*Baker v. Kenney* (N. J. Sup.) 526.

§ 4. Tenancies at will and at sufferance.

A tenant *held* one by sufferance and not from year to year. Gen. Laws, c. 269, § 6.—*Wood v. Page* (R. I.) 372.

§ 5. Premises, and enjoyment and use thereof.

In an action by a tenant against his landlord for failure to deliver possession at the commencement of the term, the measure of damages defined, and the items recoverable as damages determined.—*Joseph Bernhard & Son v. Curtis* (Conn.) 213.

The fact that at the commencement of the term another tenant is in rightful possession of the leased premises does not prevent the new lessee from recovering substantial damages.—*Joseph Bernhard & Son v. Curtis* (Conn.) 213.

A complaint *held* to sufficiently show that a landlord failed to put his tenant in possession of the leased premises.—*Joseph Bernhard & Son v. Curtis* (Conn.) 213.

Rev. St. c. 26, § 26, as amended by Pub. Laws 1891, c. 89, *held* to impose on the owner of a building, notwithstanding it is in the possession of a tenant, the duty of providing fire escapes.—*Carrigan v. Stillwell* (Me.) 389.

§ 6. Rent and advances.

Under stipulation in a lease to a city that it should not be liable for rent, unless appropriation was made therefor, want of appropriation *held* a good defense.—*Marsh, Merwin & Lemon v. City of Bridgeport* (Conn.) 196.

The reletting of leased premises, which the tenant abandoned before the expiration of the term, subject to the covenants of the lease, *held* not to constitute an acceptance of the tenant's surrender.—*Oldewurtel v. Wiesenfeld* (Md.) 969.

Allowance of reduction in rent reserved in a lease for certain months, after which the lessee paid rent in accordance with the lease, *held* not to preclude a recovery for rent accrued in an action of covenant.—*Oldewurtel v. Wiesenfeld* (Md.) 969.

Covenant to pay water rent cannot be enforced by distress.—*Evans v. Lincoln Co.* (Pa.) 321.

Affidavit of defense in action by landlord against surety on lease *held* insufficient.—*English v. Yates* (Pa.) 503.

Right of landlord to distrain for rent on pig iron stored by his lessee determined.—*American Pig Iron Storage Warrant Co. v. Sinnemahoning Iron & Coal Co.* (Pa.) 1047.

Where plaintiffs had not attorned to defendants as landlords, defendants could not sue them for rent in their own names; and hence their claim could not be pleaded in set-off.—*Moshassuck Encampment No. 2 v. Arnold & Maine* (R. I.) 771.

Purchase of a lease by a subtenant, antedating actual expiration of immediate lessee's lease, which was of record, *held* not to release subtenant from liability for rent to prior lessee.—*Moshassuck Encampment No. 2 v. Arnold & Maine* (R. I.) 771.

§ 7. Re-entry and recovery of possession by landlord.

In forcible entry and detainer under Rev. St. 1883, c. 17, § 3, *held*, that a mere general statement that defendant had lawful entry into the land, and that his estate was determined on a given date, is not a sufficient statement of the case.—*Eveleth v. Gill* (Me.) 756.

Where declaration for forcible detainer, under Rev. St. 1883, c. 17, § 3, does not state a cause of action, that the evidence is sufficient will not justify a judgment for plaintiff.—*Eveleth v. Gill* (Me.) 756.

It is the owner of the premises at the time of the forfeiture of a lease who alone can bring forcible entry and detainer therefor.—*Small v. Clark* (Me.) 758.

Where the forfeiture of a lease under Rev. St. c. 17, § 3, by the unlawful sale or keeping of intoxicating liquors therein, is not taken advantage of by the lessor, a subsequent grantee of the lessor cannot maintain forcible entry and detainer based on such forfeiture.—*Small v. Clark* (Me.) 758.

Where a tenant was unlawfully evicted, he is entitled as damages to the difference between the rental value of the premises and the rent reserved from the date of the eviction to the end of the term.—*Small v. Clark* (Me.) 758.

On reversal of judgment for plaintiff in forcible detainer, a writ of restitution ought not to issue when rented premises have been destroyed.—*Small v. Clark* (Me.) 758.

Where there is a provision in the lease that, on nonperformance of the covenant by the lessee the term shall be at an end, ejectment will lie without proving that there was no sufficient distress on the premises as required by Landlord and Tenant Act, § 7 (2 Gen. St. p. 1916).—*Ocean Grove Camp Meeting Ass'n of M. E. Church v. Sanders* (N. J. Err. & App.) 448.

Breach of covenant by the tenant gives the landlord no right of re-entry, unless there is a stipulation in the lease that such breach shall work a forfeiture.—*Ocean Grove Camp*

Meeting Ass'n of M. E. Church v. Sanders (N. J. Err. & App.) 448.

Where, in a landlord's proceeding for possession, his affidavit shows neither ownership nor any right of possession, the court has no jurisdiction.—*Cleary v. Waldron* (N. J. Sup.) 565.

Tenant, evicted after judgment in proceedings under Act March 21, 1772, *held* not entitled to maintain an action for unlawful eviction.—*Juerger v. Allegheny County* (Pa.) 281.

In an action to eject a tenant for breach of covenant, evidence that the tenant was not bound by the acts of his bondsman in accepting certain conditional receipts for rent paid by the bondsman to plaintiff *held* admissible.—*Granite Bldg. Ass'n v. Greene* (R. I.) 792.

Where one defendant in a suit to recover possession for breach of covenant of lease was never in possession, and was no party to the breach, a nonsuit as to him was properly granted.—*Granite Bldg. Ass'n v. Greene* (R. I.) 792.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement"; "False Pretenses."

§ 1. Prosecution and punishment.

An indictment for the larceny of chickens, if intended to be under Crimes Act (P. L. 1898, p. 837) § 158, should contain allegations to show that the offense is not that defined by Crimes Act (P. L. 1898, p. 839) § 162.—*State v. Shotts* (N. J. Sup.) 285.

LAW OF THE ROAD.

See "Highways," § 4.

LEASES.

See "Landlord and Tenant."

Of street railroads, see "Street Railroads," § 1. Parol or extrinsic evidence, see "Evidence," § 8.

LEGACIES.

See "Wills."

LEVY.

Of attachment, see "Attachment," § 3.

LIBEL AND SLANDER.

§ 1. Privileged communications, and malice therein.

A libelous newspaper article, submitted to the scrutiny of two of defendant's officials before publication, *held* to be the deliberate utterance of defendant.—*Brown v. Providence Telegram Pub. Co.* (R. I.) 1061.

A certain report of court proceedings in a newspaper *held* libelous.—*Brown v. Providence Telegram Pub. Co.* (R. I.) 1061.

Publication of court proceedings *held* not privileged, when the case is misstated and a litigant held up to ridicule.—*Brown v. Providence Telegram Pub. Co.* (R. I.) 1061.

§ 2. Actions.

Where plaintiff alleges in his declaration for libel that he is injured in his good name among his neighbors, he is entitled to compensation, notwithstanding Act June 13, 1898 (P. L. p. 476), providing that plaintiff shall recover only his actual damages, proved and specially alleged.—*Marsh v. Edge* (N. J. Err. & App.) 834.

"Actual damages, specially alleged," as used in Act June 13, 1898 (P. L. p. 476), authorizing a recovery of such damages in libel, when pleaded, means such as would be compensatory damages at common law.—*Marsh v. Edge* (N. J. Err. & App.) 834.

Where a publication complained of is libelous per se, unwarranted innuendoes in the declaration will be treated as surplusage.—*Brown v. Providence Telegram Pub. Co.* (R. I.) 1061.

\$1,500 held not to be excessive damages for a business man of 30 years' standing, who had been injured by a libelous newspaper article.—*Brown v. Providence Telegram Pub. Co.* (R. I.) 1061.

LICENSES.

Injuries to licensees, see "Railroads," § 4.
Of auctioneers, see "Auctions and Auctioneers."

Validity of license laws as denial of equal protection of laws, see "Constitutional Law," § 4.

§ 1. For occupations and privileges.

Under Act March 24, 1902, regulating the practice of architecture, where applicant presents his application in due form, with affidavit, a refusal of the certificate, where the evidence showed without dispute that he was engaged in such practice at the time of the passage of the act, was erroneous.—*Cardiff v. New Jersey State Board of Architects* (N. J. Sup.) 294.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

On property of telegraph or telephone company, see "Telegraphs and Telephones," § 1.

Liens acquired by particular remedies or proceedings.

See "Attachment," § 3; "Execution," § 2; "Judgment," § 3.

Particular classes of liens.

See "Mechanics' Liens."

For services on logs, see "Logs and Logging."
Landlord's lien for rent, see "Landlord and Tenant," § 6.

Mortgage, see "Mortgages," § 2.

LIFE ESTATES.

See "Curtesy"; "Dower."

Creation by will, see "Wills," § 9.

LIFE INSURANCE.

See "Insurance," § 5.

LIMITATION OF ACTIONS.

See "Adverse Possession,"

Laches, see "Equity," § 2.

Necessity of urging bar by limitations in trial court, see "Appeal and Error," § 3.

Particular actions or proceedings.

Against stockholders, see "Corporations," § 4.
For recovery of overpayments to hospital for insane, see "Asylums."

To establish trust, see "Trusts," § 5.

§ 1. Statutes of limitation.

Act March 27, 1713 (1 Smith's Laws, p. 76), providing that a new action, after reversal of judgment without venire, must be brought within a year, held repealed by Act June 24, 1895 (P. L. 236).—*Spees v. Boggs* (Pa.) 346.

Limitations held to bar a claim used as a set-off, where it would be a bar to an action there-

on.—*Trustees of State Hospital for Insane v. Philadelphia County* (Pa.) 1032.

Pub. Laws 1902, p. 49, c. 976, § 1, shortening the period of limitations for personal injury cases, held prospective only.—*Rotchford v. Union R. Co.* (R. I.) 932.

A mortgagee's right of action for interest on the mortgage note held barred at the same time as the right of action for the principal.—*Porter's Adm'x v. Shattuck's Estate* (Vt.) 958.

§ 2. Computation of period of limitation.

Where judgment in action for personal injuries is reversed without a new venire, a new action, not brought within two years from the time when the injury was done, held barred.—*Spees v. Boggs* (Pa.) 346.

Under Pub. St. 1882, c. 205, § 5 (Gen. Laws 1896, c. 234, § 5), where one against whom a cause of action has accrued leaves the state, and subsequently returns, the coming into the state fixes a new time for the prescribed period of limitations to begin to run.—*Cottrell v. Kenney* (R. I.) 1010.

§ 3. Acknowledgment, new promise, and part payment.

A partial payment made on an existing debt takes the case out of the statute of limitations.—*Pond v. French* (Me.) 920.

A payment on a debt barred by limitations is an acknowledgment of the existence of the debt, and raises an implied promise to pay the balance.—*Pond v. French* (Me.) 920.

Under Rev. St. c. 81, §§ 97, 100, where it was shown that a partial payment on an existing debt was made on a debt consisting of many items, all of them are thereby saved from the effect of limitations.—*Pond v. French* (Me.) 920.

A debtor's acknowledgment to pay a debt held not to be impaired by an expressed intention to discharge the obligation by a bounty under her will.—*Gill v. Donovan* (Md.) 117.

Payment by one heir on the debt of his ancestor does not take the debt out of the statute of limitations as to the other heirs.—*Haines v. Haines* (N. J. Sup.) 401.

§ 4. Pleading, evidence, trial, and review.

Entries in account books of a deceased testator of payments received, supported by the executor's oath after the statute of limitations has run, are not admissible to prove the fact of payment.—*Small v. Rose* (Me.) 726.

Rev. St. c. 81, § 100, does not prevent admission in evidence of payments to bar limitations, but merely excludes the memoranda made in behalf of the party to whom the payment is alleged to have been made.—*Small v. Rose* (Me.) 726.

Evidence in an action against an estate for services examined, and held to make it a question for the jury whether the running of the statute of limitations had been interrupted.—*Gill v. Donovan* (Md.) 117.

Evidence in an action for services rendered a decedent examined, and held to justify a modification of an instruction on the statute of limitations.—*Gill v. Donovan* (Md.) 117.

Evidence that debtor had, within time for suit, admitted the debt was due, held material; the statute of limitations being pleaded.—*Gill v. Donovan* (Md.) 117.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 2.

LIQUIDATED DAMAGES.

See "Damages," § 1.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Effect on limitation of pendency of other proceedings, see "Limitation of Actions," § 2.

LIVE STOCK.

Carriage of, see "Carriers," § 3.
Injuries from operation of railroads, see "Railroads," § 7.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 1.

LOGS AND LOGGING.

Rev. St. c. 91, § 38, as amended by chapter 183, p. 172, Pub. St. 1889, gives a statutory lien to a laborer only, and not to an independent contractor.—*Littlefield v. Morrill* (Me.) 1109.

A laborer is one who performs manual labor for wages under the direction of his employer.—*Littlefield v. Morrill* (Me.) 1109.

One who contracts to do a specific piece of work, which he may perform by his own labor or by the labor of others, is not a "laborer" in the statutory sense.—*Littlefield v. Morrill* (Me.) 1109.

That the compensation of a contractor for labor on logs is made proportional to the extent of the work contracted for does not make him a laborer, so as to give him a statutory lien on the logs.—*Littlefield v. Morrill* (Me.) 1109.

One who contracts to cut and haul all the logs and lumber of a definite tract at a fixed price held not entitled to a lien for such labor as he personally performs.—*Littlefield v. Morrill* (Me.) 1109.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

MACHINERY.

Dangerous machinery, see "Negligence," § 1.
Liability of employer for defects, see "Master and Servant," § 5.
Production and use of electricity, see "Electricity."

MAINTENANCE.

Of toll roads, see "Turnpikes and Toll Roads," § 1.

MALICE.

See "Homicide," §§ 1, 3; "Libel and Slander," § 1.

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. **Want of probable cause.**

Evidence held to show prosecution for obtaining money under false pretenses to be without

probable cause.—*Huckestein v. New York Life Ins. Co. (Pa.)* 461.

§ 2. **Actions.**

Railroad company held not liable for false arrest and malicious prosecution by its railway policeman, appointed under act respecting railroads and canals. Gen. St. p. 2671, §§ 22, 23, 25, 27.—*Tucker v. Erie Ry. Co. (N. J. Sup.)* 557; *Gell v. Same, Id.*

In an action for malicious prosecution, the want of probable cause is one of law for the court, where the facts are undisputed.—*Huckestein v. New York Life Ins. Co. (Pa.)* 461.

MALPRACTICE.

See "Physicians and Surgeons."

Measure of damages for death from, see "Death," § 1.

MANDAMUS.

§ 1. **Subjects and purposes of relief.**

Where obligation of chosen freeholders to put a roadway in fit condition is not clearly shown, its enforcement by mandamus will be denied.—*Bacon v. Board of Chosen Freeholders of Cumberland County (N. J. Sup.)* 234.

Where a clerk of the board of aldermen refuses to comply with the resolution of such board to strike one name from the roll of members and to place another thereon, he will be compelled to do so by mandamus.—*Warmolts v. Keegan (N. J. Sup.)* 813.

Mandamus will lie to compel the performance of purely ministerial duties incumbent on an officer by virtue of his office.—*Warmolts v. Keegan (N. J. Sup.)* 813.

§ 2. **Jurisdiction, proceedings, and relief.**

Railroad company, having principal office on one county and operating its road wholly within another, may be sued in either county.—*Lorraine v. Pittsburg, J., E. & E. R. Co. (Pa.)* 580.

Owner of coal mine held entitled to bring mandamus to compel railroad to furnish cars, without intervention of attorney general.—*Lorraine v. Pittsburg, J., E. & E. R. Co. (Pa.)* 580.

MANDATE.

See "Mandamus."

MANSLAUGHTER.

See "Homicide," § 2.

MAPS.

Admissibility in evidence, see "Criminal Law," § 7.

MARRIAGE.

See "Bigamy"; "Divorce"; "Husband and Wife."

Evidence on an issue of marriage held to show that the parties were actually married and lived together as husband and wife, though no marriage ceremony was performed.—*Mullaney v. Mullaney (N. J. Err. & App.)* 1086.

The burden of proof is on a woman claiming to be the widow of deceased to establish such fact.—*In re Davis' Estate (Pa.)* 475.

A finding that no marriage relation existed between the decedent and one claiming to be his widow held sustained by the evidence.—*In re Davis' Estate (Pa.)* 475.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

The fact that a second mortgagee has an equity to require the marshaling of assets at a time when judgment creditors of the mortgagor purchased his equity in the property not covered by the second mortgage will prevent them from insisting that the property which is covered shall be first applied to the first mortgage.—*Harron v. DuBois* (N. J. Ch.) 857.

MASTER AND SERVANT.

See "Work and Labor."

Indemnity insurance, see "Insurance," § 9.
Laborer's lien on logs, see "Logs and Logging."
Preliminary injunction against strikers, see "Injunction," § 4.
Validity of act regulating hours of employment as class legislation, see "Constitutional Law," § 4.
Validity of act regulating hours of employment as infringing right to contract, see "Constitutional Law," § 2.

§ 1. The relation.

Pub. Laws, c. 1004, enacted April 4, 1902, precludes street railway company from contracting with employes for more than ten hours' labor a day, even if employe is willing.—*In re Ten-Hour Law for Street Ry. Corporations* (R. I.) 602.

Pub. Laws, c. 1004, enacted April 4, 1902, limiting the hours of labor of certain street railway employes, is within the police power of the legislature.—*In re Ten-Hour Law for Street Ry. Corporations* (R. I.) 602.

§ 2. Services and compensation.

Where the defendant railroad company's relief department provided that, if any member or his representative should sue for death or injury, any compromise of such claim or suit, or judgment in such suit, should preclude any claim on the relief fund, the judgment intended is a judgment awarding the plaintiff some damages.—*O'Reilly v. Pennsylvania R. Co.* (N. J. Sup.) 233.

§§ 3, 4. Master's liability for injuries to servant—Nature and extent in general.

It is the duty of both master and servant to exercise reasonable care to avoid accident, varying according to the dangerous nature of the employment.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

Where one without authority to employ asks a person standing by for assistance, if such person renders it, he is a mere volunteer.—*Longa v. Stanley Hod Elevator Co.* (N. J. Sup.) 251.

Where a servant of W., while in a safe position, at the request of the engineer of an elevator company, engaged in an independent employment, attempted to loosen the elevator, and was killed, *held*, that W. was not liable.—*Longa v. Stanley Hod Elevator Co.* (N. J. Sup.) 251.

Where original contractor has illegally assigned contract, *held* not liable for injuries received by a workman in the employ of the assignee.—*Patton v. McDonald* (Pa.) 356.

An action by an employe for personal injuries can be brought only against his employer, and not against one assuming the business of his employer by contract.—*Wieder v. Bethlehem Steel Co.* (Pa.) 778.

Injuries to servant *held* to be the result of contributory negligence.—*Russell v. Riverside Worsted Mills* (R. I.) 376.

§ 5. — Tools, machinery, appliances, and places for work.

A master owes its servant the duty of providing a reasonably safe place to work in and reasonably safe tools.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

It is a master's duty to keep its premises and tools in a reasonably safe condition.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

The master's duty to provide reasonably safe appliances is fully discharged, if he has furnished a sufficient supply of them, with competent men to use them.—*Amburg v. International Paper Co.* (Me.) 765.

Where an appliance becomes unfit for use, and the master has provided a sufficient supply, he has a right to assume that the servants will use the means of renewal which he has placed at their hands.—*Amburg v. International Paper Co.* (Me.) 765.

If a rope, the breaking of which caused plaintiff's injury, had been used for a specific purpose by servants before the time it broke, *held*, the master would be no more responsible for its condition and use at the time of the injury than if it had been so used for the first time.—*Amburg v. International Paper Co.* (Me.) 765.

Where plaintiff, a brakeman, fell from the roof of a freight car because the grab iron pulled off, and the car belonged to another road, the defects were not such as that defendant employer was bound to guard against them.—*Anderson v. Erie R. Co.* (N. J. Err. & App.) 830.

Servant *held* not entitled to recover for injuries because master had not inspected an incandescent lamp wire.—*Fulton v. Grieb Rubber Co.* (N. J. Sup.) 561.

Master *held* liable for injuries to servant caused by defective appliances not owned by the master.—*Sharpley v. Wright* (Pa.) 896.

Evidence *held* to sustain verdict for injuries to employe by defective appliances.—*Finnerty v. Burnham* (Pa.) 996.

Where the defect through which an injury occurs to an employe occurs in the original construction of the appliances, knowledge by the master will be presumed.—*Finnerty v. Burnham* (Pa.) 996.

It is the duty of a master to furnish his employes with safe appliances.—*Finnerty v. Burnham* (Pa.) 996.

That sill of tender was not strong enough to resist the result of a collision does not show that the appliance was defective.—*Brommer v. Philadelphia & R. Ry. Co.* (Pa.) 1092.

§ 6. — Warning and instructing servant.

It is the duty of a master to inform an inexperienced servant of the dangers incident to his employment.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

Where mine owners furnished guide to conduct employes to work, they did not need to warn employes.—*Smith v. Thomas Iron Co.* (N. J. Sup.) 562.

Employer should take proper means to protect youthful employe from dangers he cannot appreciate.—*Doyle v. Pittsburg Waste Co.* (Pa.) 363.

§ 7. — Fellow servants.

Where a servant whose duty it is to select safe appliances fails to do so, it is not the negligence of the master.—*Amburg v. International Paper Co.* (Me.) 765.

The act of a quarry boss in ordering the engineer to proceed to lift a stone, by which an employe was injured, *held* the act of a fellow servant.—*Galvin v. Pierce* (N. H.) 1014.

Whether persons engaged in the same employment are fellow servants is to be determined by the nature of the act performed, and not by the difference in the rank or grade of servants.—*Galvin v. Pierce* (N. H.) 1014.

Where plaintiff was injured by defects in a chain given him to use, *held*, that employes whose duty it was to inspect and repair the chain were not his fellow employes.—*Hopwood v. Benjamin Atha & Illingsworth Co.* (N. J. Err. & App.) 435.

One employed and paid by agent of street railroad *held* co-servant of such company's servants.—*Norman v. Middlesex & S. Traction Co.* (N. J. Err. & App.) 835.

Where the engineer of an elevator asked another to loosen it, and he was injured, the elevator company *held* not liable.—*Lunga v. Stanley Hod Elevator Co.* (N. J. Sup.) 251.

Switchman *held* injured by the negligence of a fellow servant.—*Miller v. McKeesport Connecting R. Co.* (Pa.) 496.

The foreman of a carding room in a mill, cleaning a revolving cylinder, and negligently leaving it open, in consequence of which an employe is injured, is a fellow servant of the injured employe.—*Duffy v. Platt* (Pa.) 1000.

A train dispatcher is a vice principal of the railroad company which employs him.—*Brommer v. Philadelphia & R. Ry. Co.* (Pa.) 1092.

A person who, under the direction of the superintendent, erects the "hanger" in a mill on which a pulley shaft is placed, is not, while doing such work, a fellow servant of an operative in the mill.—*Crandall v. Stafford Mfg. Co.* (R. I.) 52.

§ 8. — Risks assumed by servant.

A servant must obey the instructions of his master as to the work he is employed in.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

Employe does not assume risk arising from failure to protect machinery.—*Doyle v. Pittsburgh Waste Co.* (Pa.) 363.

§ 9. — Contributory negligence of servant.

Plaintiff, in an action against a master for injuries, cannot recover, if guilty of contributory negligence.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

No legal duty of the master toward the servant has ever been judicially substituted for the exercise of ordinary prudence by the latter.—*Loid's Adm'x v. J. S. Rogers Co.* (N. J. Err. & App.) 837.

Miner, injured by falling into a pit alongside of path, *held* guilty of contributory negligence as matter of law.—*Smith v. Thomas Iron Co.* (N. J. Sup.) 562.

An employe can recover for injuries received from dangerous employment to which he had called the master's attention.—*Williams v. Clark* (Pa.) 315.

§ 10. — Pleading.

In an action for negligent death of a servant, it is not necessary that the declaration allege that the defendant had knowledge of any facts which would constitute negligence on his part.—*Sweeney v. Jessup & Moore Paper Co.* (Del. Super.) 954.

In an action for negligent death of a servant, it is not necessary that the declaration allege that plaintiff was ignorant of the facts which constituted the negligence complained of.—*Sweeney v. Jessup & Moore Paper Co.* (Del. Super.) 954.

Where the injury complained of by an employe was charged to be caused by the falling of the attachment of the machinery, the declaration should allege that the attachment was defective, or show that falling was not its normal action.—*McGraw v. Great Northern Paper Co.* (Me.) 762.

In a declaration for injuries received by plaintiff in defendant's pulp mill, an allegation as to defects in machinery *held* too general.—*McGraw v. Great Northern Paper Co.* (Me.) 762.

A declaration by a servant for injuries *held* not demurrable, as showing contributory negligence.—*East Brooklyn Box Co. v. Nudling* (Md.) 132.

An allegation, in a declaration for injuries to servant, that plaintiff was in the exercise of due care, *held* not to validate the declaration, when inconsistent with the other allegations.—*Russell v. Riverside Worsted Mills* (R. I.) 375.

Declaration is an action for injuries to servant *held* not to show any negligence on part of master.—*Russell v. Riverside Worsted Mills* (R. I.) 375.

§ 11. — Evidence.

Plaintiff, in an action against a master for injuries, has the burden of proving defendant's negligence.—*Karczewski v. Wilmington City Ry. Co.* (Del. Super.) 746.

In an action by an employe, feeding a printing press, *held*, under the evidence, that a theory that, when plaintiff was feeding the press, a rapid increase in the speed of the main power shaft of the factory caused the injury, *held* not well founded.—*Boston v. Buffum* (Me.) 392.

The burden is on the servant to establish negligence on the part of his master causing the injury.—*Schamberger v. Somerset Chemical Co.* (N. J. Sup.) 247.

Evidence in an action by a brakeman to recover for personal injuries examined, and *held* insufficient to show as a matter of law that plaintiff was guilty of contributory negligence.—*Hammer v. Pressed Steel Car Co.* (Pa.) 355.

Evidence in an action for injuries to employe *held* to show an assumption of the risk.—*Lehman v. Carbon Steel Co.* (Pa.) 475.

Evidence in an action by an employe for personal injuries *held* insufficient to show any negligence on the part of the foreman.—*Lawson v. American Steel & Wire Co.* (Pa.) 476.

Evidence in an action for injuries to employe *held* insufficient to sustain the action.—*McGinnis v. Kerr* (Pa.) 479.

In an action by an employe for damages caused by injuries received from slipping on a floor in her employer's store, evidence *held* insufficient to justify a verdict for plaintiff.—*Diver v. Singer Mfg. Co.* (Pa.) 718.

§ 12. — Trial.

In action for injuries received by employe while working at a sand paper wheel, *held* error, under the evidence, to take the case from the jury.—*Yentsch v. Chloride of Silver Dry Cell Battery Co.* (Md.) 877.

In an action by a servant for injuries, evidence *held* sufficient to warrant submission to jury of question whether defendant was negligent.—*Mercantile Laundry Co. v. Kearney* (Md.) 966.

Whether a brakeman, who, stumbling over a "jigger stand," near a switch which he was about to operate, was run over by the cars, exercised reasonable care, *held* a question for the jury.—*Murray v. Boston & M. R. R.* (N. H.) 289.

Whether a brakeman knew or ought to have known of the presence of a "jigger stand" close to a switch, so that he could be held to have as-

sumed the risk, *held* a question for the jury.—*Murray v. Boston & M. R. R.* (N. H.) 289.

In action by administrator of employé for negligently occasioning death, question of assumed risk *held* for the jury.—*Boyce v. Johnson* (N. H.) 707.

In an action by employé to recover for injuries received, *held*, that a motion for a nonsuit was properly denied.—*Hopwood v. Benjamin Atha & Illingsworth Co.* (N. J. Err. & App.) 435.

Question as to whether services had been transferred with servant's consent *held* for jury.—*Norman v. Middlesex & S. Traction Co.* (N. J. Err. & App.) 835.

In an action for injuries received, *held* error to refuse to charge to the effect that plaintiff's decedent assumed an obvious risk, for the consequences of which defendant was not liable.—*Loid's Adm'x v. J. S. Rogers Co.* (N. J. Err. & App.) 837.

Evidence in action for injuries to servant *held* to take question of assumption of risk to the jury.—*Giles v. Jones & Laughlins* (Pa.) 290.

In an action for personal injuries to a servant, question of negligence and contributory negligence *held* one for the jury.—*Williams v. Clark* (Pa.) 815.

Question of employé's contributory negligence in attempting to clean the machinery at which he was at work *held* for the jury.—*Doyle v. Pittsburgh Waste Co.* (Pa.) 363.

Where plaintiff's evidence shows defendant's foreman thoroughly competent, *held* error to submit question to the jury.—*Duffy v. Platt* (Pa.) 1000.

Evidence considered, in action for injuries to brakeman, and *held* error to direct a nonsuit.—*Brommer v. Philadelphia & R. Ry. Co.* (Pa.) 1092.

Evidence, in an action by a servant for injury resulting from the falling of a pulley shaft in the mill with which he was working, examined, and *held*, that the question of his contributory negligence was for the jury.—*Crandall v. Stafford Mfg. Co.* (R. I.) 52.

§ 13. Liabilities for injuries to third persons.

Owners of a house, who contract with one to put in the water pipe from the road, *held* liable, even if he is an independent contractor, for injury to one driving into the excavation.—*Thomas v. Harrington* (N. H.) 285.

Evidence in an action for injuries to a boy by act of driver *held* to raise a question for the jury, whether the act was done within the scope of the driver's employment.—*Brennan v. Merchant & Co.* (Pa.) 891.

Whether the tort of a servant was within the scope of his employment *held* a question of fact for the jury.—*Brennan v. Merchant & Co.* (Pa.) 891.

Master *held* not liable for torts of servant not in execution of the master's business.—*Brennan v. Merchant & Co.* (Pa.) 891.

MAYOR.

See "Municipal Corporations," § 3.

MEASURE OF DAMAGES.

See "Damages," § 2.

MECHANICS' LIENS.

§ 1. Right to lien.

Where a written building contract which had been filed in the clerk's office is abrogated, and the work is done under a new parol contract,

the land and building were subject to a lien for work done by a subcontractor.—*Buckley v. Hann* (N. J. Err. & App.) 825.

P. L. 1898, p. 539, § 5, does not relieve the owner from the requirement to retain part of the price in his hands unpaid to and unassigned by the contractor when the stop notice is served upon him, whether such moneys are due or not.—*Kreutz v. Cramer* (N. J. Ch.) 535.

Under the mechanic's lien act, an owner, notified to retain an installment after it has become due, cannot pay it out, intending to reimburse himself out of an installment yet to become due.—*Kreutz v. Cramer* (N. J. Ch.) 535.

Where a stop notice is served under Mechanic's Lien Act, § 3 (Gen. St. p. 2073), the owner must retain for the noticing creditors any part of the price which may have been payable, but which had not been paid or assigned at the time such notice was served, and money thereafter due.—*Kreutz v. Cramer* (N. J. Ch.) 535.

Filing of specifications *held* essential, under mechanic's lien law (Revision 1898, p. 538, § 2), to make the building liable only to the contractor.—*English v. Warren* (N. J. Ch.) 860.

§ 2. Proceedings to perfect.

A contractor for a building *held* not to have been induced by fraud to sign an order to the owner to pay a materialman.—*English v. Warren* (N. J. Ch.) 860.

The remedy of materialmen by stop notices under mechanic's lien law (Revision 1898, p. 538, § 3), *held* limited to houses where the contract and specifications had been filed as provided by section 2.—*English v. Warren* (N. J. Ch.) 860.

The word "owner" in Gen. Laws 1896, c. 206, § 5, relating to mechanics' liens, means the owner of the estate to be affected by the lien.—*Poole v. Fellows* (R. I.) 772.

No notice of a mechanic's lien being necessary for a purchaser who is the owner of the property, no copy of the notice need be recorded.—*Poole v. Fellows* (R. I.) 772.

A mechanic's lien is waived on property in a town, part being in another, by a failure to file the account in that town.—*Poole v. Fellows* (R. I.) 772.

§ 3. Operation and effect.

Where the purchaser of materials was a lessee, his term was the property to be affected by a mechanic's lien, and not the reversion of the landlord.—*Poole v. Fellows* (R. I.) 772.

§ 4. Waiver, discharge, release, and satisfaction.

Parol contemporaneous agreement *held* inadmissible to impeach release.—*Dowd v. Crow* (Pa.) 780.

§ 5. Enforcement.

It is a question for the jury whether, after a building contract has been filed in the clerk's office, a new parol contract has been substituted for it.—*Buckley v. Hann* (N. J. Err. & App.) 825.

A waiver of a mechanic's lien as to part of the property is no ground for a demurrer to the petition for its enforcement.—*Poole v. Fellows* (R. I.) 772.

MEETINGS.

Of municipal council, see "Municipal Corporations," § 2.

Of stockholders, see "Corporations," § 4.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 5.

Use of, to refresh memory of witnesses, see "Witnesses," § 2.

MENTAL SUFFERING.

Element of damages, see "Damages," § 2.

MERGER.

Of cause of action in judgment, see "Judgment," § 6.

Of mortgage in fee, see "Mortgages," § 8.

Of railroads, see "Railroads," § 3.

MESNE PROFITS.

In ejectment, see "Ejectment," § 3.

MINES AND MINERALS.

Employés in mines, see "Master and Servant," §§ 3-12.

§ 1. Title, conveyances, and contracts. Gas lease construed, and liability of assignee for royalties determined.—*Burton v. Forest Oil Co.* (Pa.) 206.

Oil lease construed, and reduction of rental held to apply only to lease in existence at the time of the reduction.—*Hunter v. Apollo Oil & Gas Co.* (Pa.) 274.

MINORS.

See "Parent and Child."

MISREPRESENTATION.

See "False Pretenses"; "Fraud."

Affecting validity of release, see "Release," § 1.

By insured, see "Insurance," § 5.

MODIFICATION.

Of contract, see "Contracts," § 3.

MONEY RECEIVED.

Recovery of tax paid, see "Taxation," § 4.

MONOPOLIES.

§ 1. Trusts and other combinations in restraint of trade.

One of the objects of a voluntary association of musicians being an unjustifiable interference with freedom of contract and trade, the courts will not interfere to compel a continuance of membership.—*O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians* (N. J. Ch.) 150.

Where a monopoly arose from the exercise of a corporation's express powers to purchase stock in other corporations, the exercise of such powers could not be enjoined.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

That a corporation was organized for the purpose of creating a monopoly, and was therefore illegal, cannot be considered, except on quo warranto by the attorney general to oust the corporation from its franchises.—*Dittman v. Distilling Co. of America* (N. J. Ch.) 570.

MONTH.

Tenancy from month to month, see "Landlord and Tenant," § 3.

MORTALITY TABLES.

Judicial notice, see "Evidence," § 1.

MORTGAGES.

Dower in mortgaged property, see "Dower," § 1.

Rights passing under execution against mortgaged premises, see "Execution," § 1.

Subrogation to rights of mortgagee, see "Subrogation."

Mortgages of particular species of property.

Personal property, see "Chattel Mortgages."

Poles and wires of telegraph or telephone company, see "Telegraphs and Telephones," § 1.

§ 1. Requisites and validity.

Facts held sufficient to justify a decree setting aside a mortgage for undue influence.—*Thorp v. Smith* (N. J. Err. & App.) 412.

§ 2. Construction and operation.

Notice to one of two joint mortgagees of an outstanding equity does not affect the other.—*Babcock v. Wells* (R. I.) 596.

The mere fact that a mortgagor had taken title by quitclaim does not charge his mortgagees with notice of outstanding equities.—*Babcock v. Wells* (R. I.) 596.

Facts held to show that grantees of land took with notice of outstanding equities.—*Babcock v. Wells* (R. I.) 596.

§ 3. Transfer of property mortgaged or of equity of redemption.

Third incumbrancer held not entitled to have rents and profits credited on prior incumbrances merely because the second mortgagee purchased the equity and also the first mortgage, no merger being intended.—*Harron v. DuBois* (N. J. Ch.) 857.

§ 4. Payment or performance of condition, release, and satisfaction.

A tender of the amount of a purchase-money mortgage on condition the grantor would pay off a prior incumbrance, which he was not bound to pay as a condition to his right to foreclose the mortgage, held ineffectual.—*Mott v. Rutter* (N. J. Ch.) 159.

§ 5. Foreclosure by exercise of power of sale.

Where the record of publication of notice of foreclosure was silent as to the time of recording, it cannot be amended after the 30 days in which it should have been recorded, under Rev. St. c. 90, § 5.—*Stafford v. Morse* (Me.) 397.

Where a certificate of a register as to record of publication of notice of foreclosure, under Rev. St. c. 90, § 5, was not dated, and there was no record evidence that the printed notice was seasonably recorded, held, that such fact could not be shown by evidence aliunde the record.—*Stafford v. Morse* (Me.) 397.

A mortgagor may purchase at the mortgage sale, though the mortgagee is a trustee for him.—*Coleman v. McKee* (R. I.) 374.

The fact that the assignees of a mortgage, in advertising the property for sale, signed the notice, "By Order of the Mortgagees," did not render the notice insufficient.—*Babcock v. Wells* (R. I.) 599.

Irregularities in the proceedings for the sale of mortgaged property held not prejudicial to the mortgagor's rights.—*Babcock v. Wells* (R. I.) 599.

Evidence as to the unfairness of a sale of mortgaged property held not sufficient for a determination of the question.—*Babcock v. Wells* (R. I.) 599.

Mere inadequacy of price is not enough to avoid a sale under a mortgage.—*Babcock v. Wells* (R. I.) 599.

§ 6. Foreclosure by action.

An administrator c. t. a. held not entitled to be admitted as defendant in foreclosure to deny

validity of mortgage as created under an improper exercise of power given by will.—*Boon v. Padgett* (N. J. Ch.) 856.

§ 7. Redemption.

Mortgagee held without remedy, as against mortgagee purchasing paramount incumbrance, after delay of 14 years.—*Baker v. Bailey* (Pa.) 326.

Mortgagees under mortgage securing future advances held entitled to file a bill to redeem or for foreclosure thereof.—*Baker v. Bailey* (Pa.) 326.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 13.

Direction of verdict in civil actions, see "Trial," § 3.

For judgment notwithstanding verdict, see "Judgment," § 3.

New trial in criminal prosecutions, see "Criminal Law," § 13.

Opening or setting aside default judgment, see "Judgment," § 2.

Quashing indictment or information, see "Indictment and Information," § 4.

Relating to pleadings, see "Pleading," § 7.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1; "Towns."

Appealable orders of city courts, see "Appeal and Error," § 1.

Mandamus, see "Mandamus," § 1.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Rights of gas companies in streets, see "Gas." Special or local laws, see "Statutes," § 1.

Street railroads, see "Street Railroads."

Subject and title of law relating to poor districts, see "Statutes," § 2.

Use of streets by railroads, see "Railroads," § 1. Water supply, see "Waters and Water Courses," § 4.

§ 1. Creation, alteration, existence, and dissolution.

Act April 28, 1809 (P. L. 104), relating to the organization of townships of the first class, did not create such township into a borough.—*Dempster v. United Traction Co.* (Pa.) 501.

§ 2. Proceedings of council or other governing body.

Where the president of a board of commissioners refuses to put a motion duly made, any member may put it and declare the result.—*Hicks v. Long Branch Commission* (N. J. Sup.) 568.

A member of a city commission held not disqualified to vote on a contract with a water company by having acted for the company on two matters, in each of which the city was equally interested.—*Hicks v. Long Branch Commission* (N. J. Sup.) 568.

The question whether the proposed use of a highway by a trolley company is reasonable is for the municipality, and not for the court.—*Budd v. City of Camden* (N. J. Sup.) 569.

§ 3. Officers, agents, and employes.

Finding that city had authorized street commissioner to accept assignments of future earnings by employes in his department held sustained by agreed facts.—*Lamoreux v. Morin* (N. H.) 1023.

A member of a fire department held not, at the time of his death, engaged in the performance of his duties, within the meaning of P. L. 1897, p. 203, so as to enable his widow to recover a pension therefor.—*Scott v. Jersey City* (N. J. Err. & App.) 441.

Mayor, holding over until recorder, taking his office under Act March 7, 1901, actually takes his place, held to have power to sign ordinances.—*Keeling v. Pittsburg, V. & C. Ry. Co.* (Pa.) 485.

Court held to have no right to review removal of police officer by town council of Cumberland, under Pub. Laws 1896, p. 69, c. 495, Gen. Laws 1896, c. 248, not being applicable.—*Donahue v. Town Council of Cumberland* (R. I.) 938.

§ 4. Contracts in general.

City of New Haven held not bound, under New Haven City Charter, § 209 (13 Sp. Laws, p. 449), by contract between board of registration and restaurant keeper for meals for members of board while they are in session.—*Heublein Bros. & Co. v. City of New Haven* (Conn.) 298.

A determination by the city council is voidable, if any of the council was disqualified by private interests.—*Drake v. City of Elizabeth* (N. J. Sup.) 248.

Philadelphia City Charter, art. 14 (P. L. 1885, p. 51), providing that all contracts as to city affairs shall be in writing, signed and executed in the name of the city, held mandatory.—*Smart v. City of Philadelphia* (Pa.) 1025.

City of Philadelphia held not liable to a municipal contractor, where it refuses to enter into a contract after accepting a bid.—*Smart v. City of Philadelphia* (Pa.) 1025.

§ 5. Public improvements.

A certain resolution of General Assembly held to have authorized city to erect new building, issue bonds, etc., but not to have been mandatory.—*Staples v. City of Bridgeport* (Conn.) 194.

A city held to have the right to rescind a vote authorizing the erection of new city building, the issuing of bonds, etc.—*Staples v. City of Bridgeport* (Conn.) 194.

A finding by a circuit court that an assessment for benefits has been made according to the benefits received will not be reversed, if there be evidence from which the court could so find.—*Dean v. City of Paterson* (N. J. Err. & App.) 836.

Finding by a court confirming an assessment as laid is a finding of fact, and will not be reviewed by the Court of Appeals, if there is any proof to sustain it.—*Dean v. City of Paterson* (N. J. Err. & App.) 836.

Where a city is about to change the grade of a street on which a building stands, that the owner secures a modification of the proposed change, resulting in less injury to him, does not bar his right to damages for the change actually made.—*Klaus v. Jersey City* (N. J. Sup.) 220.

Where street commissioners referred the matter of damages for a change of grade to the commissioners of assessments in June, 1899, proceeding in May, 1902, to recover the damages is not barred by laches.—*Klaus v. Jersey City* (N. J. Sup.) 220.

Where, under ordinance for opening a street, relator's land was taken and a residue was assessed, and he discovered that all necessary rights had not been so acquired, prima facie he was entitled to mandamus directing the city to acquire the omitted right.—*Barnert v. Board of Aldermen of City of Paterson* (N. J. Sup.) 227.

That paving assessments as originally laid were defective affords no ground for relief from an adjustment by commissioners appointed under the Martin Act (P. L. 1886, p. 149, c. 112).—*Hayday v. Borough of Ocean City* (N. J. Sup.) 813.

Real estate of a school sub-district held not subject to assessment for municipal improvements, under Act May 16, 1891 (P. L. 69).—*City*

of *Pittsburg v. Sterrett Subdistrict School* (Pa.) 403.

City *held* liable under contract for municipal improvements for neglect of solicitor.—*O'Hara v. City of Scranton* (Pa.) 713.

It is no defense to an action on a municipal contractor's bond that the contract was in violation of the law forbidding the employment of alien labor.—*City of Philadelphia v. McLinden* (Pa.) 719.

Surety on bond of municipal contractor *held* not released by payment made by the city to the contractor after notice.—*City of Philadelphia v. McLinden* (Pa.) 719.

It is no defense to an action on the bond of a municipal contractor that the use plaintiffs are day laborers.—*City of Philadelphia v. McLinden* (Pa.) 719.

§ 6. Police power and regulations.

In a criminal proceeding for violating a city ordinance by obstructing a street, an information is the proper paper to be filed.—*Pratesi v. City of Wilmington* (Del. Super.) 694.

§ 7. Use and regulation of public places, property, and works.

Written application to the municipal officers, describing the land to which it applies, is an essential prerequisite, under Rev. St. c. 16, § 4, to their power to grant a right to enter a public sewer.—*Evans v. City of Portland* (Me.) 1107.

A permit from municipal officers to enter a public sewer runs with the land.—*Evans v. City of Portland* (Me.) 1107.

A permit by municipal authorities to enter a sewer upon F. street does not authorize the entry of a sewer upon H. street.—*Evans v. City of Portland* (Me.) 1107.

Borough *held* not guilty of laches in proceedings to compel removal of track from street.—*Minersville Borough v. Schuylkill Electric Ry. Co.* (Pa.) 1050.

Where street railway obtains right to use street on condition of a certain extension, on default of condition, borough has right to compel removal of tracks.—*Minersville Borough v. Schuylkill Electric Ry. Co.* (Pa.) 1050.

An obstruction maintained by a lot owner in a street *held* not to have amounted to an abandonment of the easement therein.—*Healey v. Kelly* (R. I.) 588.

Owners of a lot *held* entitled to an easement in the whole street on which the lot bordered.—*Healey v. Kelly* (R. I.) 588.

§ 8. Torts.

The right of action against a town for not keeping in repair a public sewer is given, by Rev. St. c. 16, § 9, to those only who have a right to enter the sewer.—*Evans v. City of Portland* (Me.) 1107.

In action for injuries caused by a defective sidewalk, *held*, that plaintiff's contributory negligence was for the jury.—*Shaffer v. Harmony Borough* (Pa.) 168.

In an action to recover damages for personal injuries by an alleged defect in a street crossing, evidence *held* sufficient to take the question of the negligence of the city to the jury.—*Wall v. City of Pittsburg* (Pa.) 497.

A city *held* bound to keep public road on a hillside near the outskirts in a reasonably safe condition.—*Wall v. City of Pittsburg* (Pa.) 497.

In an action to recover against a city for injuries caused by slipping into an open gutter formed by two parallel lines of curbing, evidence examined, and *held* that nonsuit was properly granted.—*Mason v. City of Philadelphia* (Pa.) 773.

Wife, going over ice-covered sidewalk to the grocery, *held* not guilty of contributory negligence.—*Evans v. City of Philadelphia* (Pa.) 775.

A person piling lumber in the street *held* liable to one injured by the lumber falling upon him.—*Kessler v. Berger* (Pa.) 887.

A pedestrian has a right to stop on a street for a reasonable time, when required by illness or fatigue, where such act does not inconvenience other persons in the use of the street.—*Kessler v. Berger* (Pa.) 887.

In an action for injuries received by defects in a city street, *held* error to direct a nonsuit.—*Quinlan v. City of Philadelphia* (Pa.) 1026.

Where an opening was made in a sidewalk by a contractor to carry machinery into the cellar of a building, the duty to guard the opening was *prima facie* on the owner of the building.—*Reynolds v. Garst* (R. I.) 932.

§ 9. Fiscal management, public debt, securities, and taxation.

Under Baltimore City Charter, § 40, mayor and city council, and not the appeal tax court, have exclusive power to fix and alter the rate of taxation.—*City of Baltimore v. Robert Poole & Sons Co.* (Md.) 681.

Under the provisions of Baltimore City Charter, §§ 150, 164a, 170, an increased assessment, made without notice to the property owner, is void, and its collection may be enjoined.—*City of Baltimore v. Robert Poole & Sons Co.* (Md.) 681.

Under ordinances providing that the compensation of a counselor assisting the city solicitor shall be paid by such solicitor, a taxpayer is not entitled to question by certiorari the validity of a resolution of the council employing a counselor for that purpose.—*Cole v. Atlantic City* (N. J. Sup.) 228.

MURDER.

See "Homicide."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 18.

MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

NATIONAL BANKS.

See "Banks and Banking," § 2.

NATURAL GAS.

See "Gas."

NAVIGABLE WATERS.

See "Waters and Water Courses."

As boundaries, see "Boundaries," § 1.

§ 1. Rights of public.

Under Code Pub. Gen. Laws, art. 23, § 92, *held*, that incorporation of railroad does not in itself confer right to cross navigable waters.—*Dundalk, S. P. & N. P. Ry. Co. v. Smith* (Md.) 628.

Code Pub. Gen. Laws, art. 23, § 92, prohibiting erection of bridges on navigable river without consent of legislature, *held* not repealed by section 177.—*Dundalk, S. P. & N. P. Ry. Co. v. Smith* (Md.) 628.

NECESSARIES.

Under exemption laws, see "Exemptions," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.
Measure of damages, see "Damages," § 2.

By particular classes of parties.

See "Carriers," §§ 2, 4-6; "Municipal Corporations," § 8; "Physicians and Surgeons."

Employers, see "Master and Servant," §§ 8-12.
Gas companies, see "Gas."
Railroad companies, see "Railroads," §§ 4-8.

Condition or use of particular species of property, works, or machinery.

See "Bridges," § 1; "Electricity"; "Highways," § 4; "Railroads," §§ 4-8; "Street Railroads," § 2.

Demised premises, see "Landlord and Tenant," § 5.

Production, supply, and use of gas, see "Gas."

Contributory negligence.

Of parent, see "Parent and Child."

Of passenger, see "Carriers," § 5.

Of person injured at railroad crossing, see "Railroads," § 5.

Of person injured by electricity, see "Electricity."

Of person injured by inhaling gas, see "Gas."

Of person injured by operation of street railroad, see "Street Railroads," § 2.

Of person injured on street, see "Municipal Corporations," § 8.

Of servant, see "Master and Servant," § 9.

Of traveler on highway, see "Highways," § 4.

§ 1. Acts or omissions constituting negligence.

The duty imposed upon the owner of a building, under Rev. St. c. 26, § 26, as amended by Pub. Laws 1891, c. 89, to provide fire escapes, does not depend on the action of the municipal officers or fire engineers.—*Carrigan v. Stillwell* (Me.) 389.

Where a person is charged with the performance of a duty toward another, in order to be guilty of negligence, he must have either done or neglected to do something which an ordinarily prudent man under like circumstances would not have done or omitted to do.—*Merrill v. Bassett* (Me.) 1102.

In an action against a gas company for injuries to a vacant house by the explosion of gas, the measure of damages is the fair cost of restoring the house to its condition before the explosion.—*Consolidated Gas Co. v. Getty* (Md.) 660.

Evidence held not sufficient to show liability of contractors for injuries to a boy occasioned by the falling of a derrick.—*Conway v. Vezzetti* (N. J. Sup.) 226.

Owner of building held liable for negligent use of sidewalk, whereby a child was injured.—*Rachmel v. Clark* (Pa.) 1027.

Driver of vehicle, ejecting therefrom while in motion an intruder six years old, must use reasonable care to avoid injury to child.—*Bucci v. Waterman* (R. I.) 1059.

§ 2. Proximate cause of injury.

The negligence of plaintiff does not approximately contribute to the injury, if it is independent of that of defendant, who by ordinary care might have avoided the injury.—*Coombs v. Mason* (Me.) 728.

Fall from a ladder, and not negligence in leaving electric light wire uninsulated, held to be the proximate cause of plaintiff's injury.—*Elliott v. Allegheny County Light Co.* (Pa.) 278.

§ 3. Contributory negligence.

Negligence of policeman, called by neighbor discover leak, held not imputable to owner

of vacant premises, suing for injury thereto by gas explosion.—*Consolidated Gas Co. v. Getty* (Md.) 660.

Father held not guilty of contributory negligence in allowing a son 11 years old to go alone on the street on Sunday.—*Enright v. Pittsburgh Junction R. Co.* (Pa.) 817.

§ 4. Actions.

If defendant's failure to provide fire escapes for his building as required by Rev. St. c. 26, § 26, as amended by Pub. Laws 1891, c. 89, was the proximate cause of the death of plaintiff's intestate, then it is evidence of actual negligence on his part, to be submitted to a jury.—*Carrigan v. Stillwell* (Me.) 389.

In an action for personal injuries in the operation of a machine, a proposition which, if not mechanically impossible, is exceedingly improbable, should not be permitted to serve as a basis of a verdict for plaintiff.—*Boston v. Buffum* (Me.) 392.

In an action for personal injuries, the question of plaintiff's contributory negligence is for the jury.—*Coombs v. Mason* (Me.) 728.

Question of negligence is a question of law for the court, where the facts are undisputed and but one inference can properly be drawn.—*Blumenthal v. Boston & M. R. R.* (Me.) 747.

Evidence in an action for fire alleged to have been caught from sparks from defendant's sawmill held sufficient to show negligence on the part of the defendants.—*York v. Cleaves* (Me.) 915.

Evidence in an action to recover for the burning of plaintiff's corn factory held to show that the fire was communicated by sparks and brands from defendant's sawmill.—*York v. Cleaves* (Me.) 915.

A declaration in an action for negligence, alleging facts that show a legal duty and neglect thereof by defendant, and a resulting injury to plaintiff, is not demurrable.—*Davey v. Erie R. Co.* (N. J. Sup.) 233.

Where the evidence, when plaintiff rests, leaves his contributory negligence in doubt, the case is for the jury.—*McLean v. Erie R. Co.* (N. J. Sup.) 238.

Capacity of boy 12 years old to be sensible of injury, and avoid it, held a question for the jury.—*Kelly v. Pittsburg & B. Traction Co.* (Pa.) 482.

Whether driver of vehicle, ejecting therefrom plaintiff, a child six years old, was negligent, held a question for the jury.—*Bucci v. Waterman* (R. I.) 1059.

Petition held sufficiently definite in setting forth negligence of a driver of a vehicle in ejecting therefrom plaintiff, a child six years old.—*Bucci v. Waterman* (R. I.) 1059.

A count of a petition held not to set out with sufficient definiteness negligence of defendant's servant in ejecting plaintiff, a child, from a vehicle on which it was trespassing.—*Bucci v. Waterman* (R. I.) 1059.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial, see "Criminal Law," § 18.

NEW PROMISE

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 13.

Opening or vacating judgment, see "Judgment," § 5.

Review of orders on motions for, see "Appeal and Error," § 10.

§ 1. Nature and scope of remedy.

Withdrawal of a juror by direction of the court produces a mistrial, so that, there not having been any trial, a new trial cannot be directed.—*Rosengarten v. Central R. Co. of New Jersey* (N. J. Sup.) 564.

§ 2. Grounds.

Questions asked witnesses, which were not answered, furnished no ground for a new trial, even if the questions were inadmissible.—*Brown v. City of Waterbury* (Conn.) 1005.

Where a verdict is so manifestly wrong as to induce a belief that it was the product of misapprehension or bias, it should be set aside.—*Boston v. Buffum* (Me.) 392.

Where, in an action to recover for an injury at a railroad crossing, it is clear that plaintiff failed to exercise due care, and that his negligence was the proximate cause of his injury, a verdict finding no negligence on his part will be set aside.—*Lewis v. Washington County R. Co.* (Me.) 766.

Where, on examination of a case by a law court on a general motion for a new trial, it is clear that the jury erred by confusing defendant's legal duty to exercise due care to ascertain the physical fitness of a pauper to make a journey with his duty toward her if based on absolute knowledge of her condition, the verdict will be set aside.—*Merrill v. Bassett* (Me.) 1102.

On a rule to show cause, a verdict cannot be supported on a theory of law contrary to that on which the case was submitted.—*Sensfelder v. Stokes* (N. J. Sup.) 517.

A single verdict against all the defendants in two cases against different defendants, which were tried together, *held* erroneous.—*Seller v. Green* (N. J. Sup.) 556; *Same v. Woodbury Mfg. Co.*, *Id.*

A verdict will not be set aside as inadequate merely because a considerably larger sum would not have been declared excessive.—*Caswell v. North Jersey St. Ry. Co.* (N. J. Sup.) 565.

Misapprehension of applicability of evidence by the parties and by the court in instructing the jury *held* so prejudicial as to entitle defendant to a new trial.—*L'Esperance v. Hebron Mfg. Co.* (R. I.) 930.

NEXT OF KIN.

See "Descent and Distribution."

NOMINATION.

For office, see "Elections," § 3.

NON OBSTANTE VEREDICTO.

See "Judgment," § 3.

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

Ground of attachment, see "Attachment," § 1.

NONSUIT.

On trial, see "Trial," § 3.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Adverse Possession," § 1; "Mechanics' Liens," § 2.

Acceptance of option for purchase of goods, see "Sales," § 2.

Charges against member of mutual benefit associations, see "Beneficial Associations."

Foreclosure sale, see "Mortgages," § 5.

Lien of mortgage, see "Mortgages," § 2.

Meeting of tax board of relief, see "Taxation," § 3.

Nouppayment or protest of bill or note, see "Bills and Notes," § 3.

Release of surety for failure to give notice of liability, see "Principal and Surety," § 2.

Termination of tenancy, see "Landlord and Tenant," § 3.

To particular classes of parties.

Bank officer, see "Banks and Banking," § 1.

Turnpike companies, see "Turnpikes and Toll Roads," § 1.

NOVATION.

Novation *held* not to have been worked under the facts.—*Cutting v. Whittemore* (N. H.) 1098.

NUISANCE.

§ 1. Private nuisances.

An injunction will be granted in the case of an existing nuisance, though the infringement of complainant's rights has not been first determined at law, where irreparable and immediate injury is threatened.—*Sterling v. Littlefield* (Me.) 1108.

Equity will not compel the removal of an alleged nuisance and restrain its continuance until the alleged infringement of complainant's rights and the existence of a nuisance have been established at law.—*Sterling v. Littlefield* (Me.) 1108.

In a bill to remove an alleged nuisance and to prevent its continuance, where there is no allegation that complainant's rights have been determined at law, or any imperious necessity, an injunction will not be granted.—*Sterling v. Littlefield* (Me.) 1108.

§ 2. Public nuisances.

The construction of a private stable on the building line of a city street is not a nuisance per se.—*King v. Hamill* (Md.) 625.

The erection of a stable will not be restrained at the suit of an adjoining property owner, in the absence of a showing of irreparable injury, though the erection was in violation of a city ordinance.—*King v. Hamill* (Md.) 625.

OBJECTIONS.

For purpose of review, see "Appeal and Error," § 3.

To reception of evidence, see "Trial," § 2.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

OBSTRUCTIONS.

Of highways, see "Highways," § 4.

Of water course, see "Waters and Water Courses," § 1.

OFFER.

Proposals for contract, see "Contracts," § 1.

OFFICERS.

Embezzlement, see "Embezzlement."
Injunctions affecting, see "Injunction," § 2.
Liability for false imprisonment, see "False Imprisonment."
Mandamus, see "Mandamus," § 1.
Quo warranto, see "Quo Warranto."
Validity of contracts with, relating to fees, see "Contracts," § 1.

Particular classes of officers.

See "Justices of the Peace"; "Receivers";
"Sheriffs and Constables."
Bank officers, see "Banks and Banking," §§ 1, 3.
Collectors of taxes, see "Taxation," § 5.
Corporate officers, see "Corporations," § 5.
County officers, see "Counties," § 1.
Election officers, see "Elections," § 1.
Health officers, see "Health," § 1.
Highway officers, see "Highways," § 2.
Municipal officers, see "Municipal Corporations," § 3.
Of insurance company, see "Insurance," § 1.
Of mutual benefit associations, see "Beneficial Associations."
Poor-law officers, see "Paupers," § 1.
State officers, see "States."
Town officers, see "Towns," § 1.

§ 1. Appointment, qualification, and tenure.

Under Const. art. 7, § 1, as amended in 1890, Acts 1901, p. 41, c. 13, abridging the term of office of the county commissioners of a certain county, elected pursuant to Acts 1892, p. 637, c. 442, *held* constitutional.—*Brown v. Brooke* (Md.) 516.

§ 2. Rights, powers, duties, and liabilities.

Where a disclosure commissioner agreed to wait a reasonable time for his commission as such, the question of what is a reasonable time is for the court.—*Watson v. Fales* (Me.) 853.

Compensation of a public officer is not affected by diminution of the duties of the office, the office itself remaining.—*Bennett v. City of Orange* (N. J. Sup.) 249.

OILS.

Oil lease, see "Mines and Minerals," § 1.

OPENING.

Judgment, see "Judgment," §§ 2, 5.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.
In criminal prosecutions, see "Criminal Law," § 8.

OPTIONS.

For sale of goods, see "Sales," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 5, 6.
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ORPHANS' COURTS.

See "Courts," § 3.

PALMISTRY.

Practice of palmistry as disorderly conduct, see "Disorderly Conduct."

PARENT AND CHILD.

See "Guardian and Ward."

Measure of damage for death of child, see "Death," § 1.
Negligence of parent imputable to child, see "Negligence," § 3.

A minor child may be emancipated by its parents.—*Inhabitants of Carthage v. Inhabitants of Canton* (Me.) 1104; *Same v. Inhabitants of Lewiston*, Id.

Emancipation of a minor occurs by the voluntary act of the parent, or by his acting in relation thereto in a manner inconsistent with any further performance of his duties.—*Inhabitants of Carthage v. Inhabitants of Canton* (Me.) 1104; *Same v. Inhabitants of Lewiston*, Id.

In order to determine whether or not a parent has emancipated his child, it is proper to ascertain the subsequent conduct of parent and child.—*Inhabitants of Carthage v. Inhabitants of Canton* (Me.) 1104; *Same v. Inhabitants of Lewiston*, Id.

Where a son, who stands in the relation of a servant to his father, is injured, the father may sue to recover the damages sustained during the son's lifetime, though in consequence of the tort the son dies at a later time.—*Callaghan v. Lake Hopatcong Ice Co.* (N. J. Sup.) 223.

Under P. L. 1902, p. 264, §§ 9, 12, where the welfare of children would be promoted by remaining with their mother, the fact that she is living separate from her husband, who ordered her to leave, is not such misconduct as should deprive her of their custody.—*Carson v. Carson* (N. J. Ch.) 149.

Question of contributory negligence of a father in action for injuries to son *held* one for the jury.—*Herron v. City of Pittsburg* (Pa.) 311.

Where, pending suit by father for injuries to minor child, the father dies and the mother is substituted, she cannot recover in her own right.—*Kelly v. Pittsburg & B. Traction Co.* (Pa.) 482.

Mother *held* to have no right of action for injuries to minor child.—*Kelly v. Pittsburg & B. Traction Co.* (Pa.) 482.

PARKS.

Condemnation of lands for park, see "Eminent Domain," § 1.

PARLIAMENTARY LAW.

On a viva voce vote in a legislative body, the whole body is counted as the chair announces.—*Hicks v. Long Branch Commission* (N. J. Sup.) 568.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

PARTICULARS.

Bill of, see "Indictment and Information," § 2;
"Pleading," § 6.

PARTIES.

Admissions as evidence, see "Evidence," § 5.
 Death ground for abatement, see "Abatement and Revival," § 1.
 In actions by or against husband and wife, see "Husband and Wife," § 3.
 Interpleading, see "Interpleader."
 Joinder of causes against different parties, see "Action," § 1.
 Persons entitled to liens on logs, see "Logs and Logging."
 Persons entitled to reformation of instrument, see "Reformation of Instruments," § 1.
 Persons entitled to sue for wrongful death, see "Death," § 1.
 Persons entitled to sue to compel directors to act, see "Corporations," § 4.
 Persons liable for assault and battery, see "Assault and Battery," § 1.
 Persons liable for malicious prosecution, see "Malicious Prosecution," § 2.
 Persons who may contest wills, see "Wills," § 4.
 To fraudulent conveyances, see "Fraudulent Conveyances," § 2.

In particular actions or proceedings.

See "Judgment," § 3; "Libel and Slander," § 2; "Mandamus," § 2; "Quo Warranto," § 1.
 Condemnation proceedings, see "Eminent Domain," § 3.
 Foreclosure, see "Mortgages," § 6.
 Highway proceedings, see "Highways," § 1.
 On appeal or writ of error, see "Appeal and Error," §§ 2, 4.

PARTNERSHIP.

See "Associations"; "Joint-Stock Companies."
 Binding effect against executor of notes of deceased partner executed after legacy of business to surviving partner, see "Executors and Administrators," § 3.

§ 1. The relation.

Where a consolidated corporation was formed from two supposed corporations, which in fact had no legal existence, the rights of stockholders thereof inter sese should be governed by the rights and liabilities of the charter of the supposed corporations and the corporate laws of the state.—*Cannon v. Brush Electric Co. of Baltimore (Md.)* 121.

Evidence held sufficient to justify a joint judgment against three defendants, as partners in an action on a contract, for the boarding of laborers employed by them.—*Wyckoff v. Luse (N. J. Sup.)* 100.

A certain arrangement held not to have constituted a partnership between the parties.—*State v. Hunt (R. I.)* 937.

§ 2. Mutual rights, duties, and liabilities of partners.

Partner, assuming retiring partner's obligation to firm, held liable to account therefor under dissolution agreement.—*Fielder v. Beekman (N. J. Ch.)* 156.

Purchasing partner, assuming retiring partner's overdrafts, held liable only in so far as overdraft exceeded retiring partner's stock account.—*Fielder v. Beekman (N. J. Ch.)* 156.

§ 3. Retirement and admission of partners.

A mortgage given to firm held not enforceable by succeeding firm, in absence of any new contract.—*Forst v. Kirkpatrick (N. J. Ch.)* 554.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PAUPERS.

§ 1. Poor-law districts and officers.

On removal of a pauper in distress from one town to another, a day with proper weather conditions should be selected, and the pauper furnished with suitable garments and a suitable conveyance.—*Merrill v. Bassett (Me.)* 1102.

The test by which to determine whether due care was exercised by one charged with the duty of removing a pauper in distress from one town to another defined.—*Merrill v. Bassett (Me.)* 1102.

The care to be used in removing a pauper in distress from one town to another is that care which a reasonably prudent man would exercise under like circumstances.—*Merrill v. Bassett (Me.)* 1102.

Local acts relating to Clarion county held not saved from repeal under Act June 4, 1879, by the twenty-first section of such act, as such county had not erected any poorhouses as provided by the local act.—*Commonwealth v. Summerville (Pa.)* 27.

Act June 4, 1879, establishing a general system for the relief of the poor, held to repeal local acts relating to Clarion county.—*Commonwealth v. Summerville (Pa.)* 27.

§ 2. Settlement and removal.

An emancipated child will take by derivation the settlement of its parent at the time of the emancipation.—*Inhabitants of Carthage v. Inhabitants of Canton (Me.)* 1104; *Same v. Inhabitants of Lewiston, Id.*

The pauper settlement of an emancipated child, who has never gained a settlement on his own account, continues in the town where the father's settlement was at the time of the emancipation.—*Inhabitants of Carthage v. Inhabitants of Canton (Me.)* 1104; *Same v. Inhabitants of Lewiston, Id.*

§ 3. Support, services, and expenses.

Plaintiff town held presumed to know that a pauper belonged to defendant town.—*Town of Fairfield v. Town of Newtown (Conn.)* 301.

Under Gen. St. § 2485, failure of town to give notice of pauper's condition, after it knows to what town he belongs, held not to relieve such latter town of liability for support furnished prior to such knowledge.—*Town of Fairfield v. Town of Newtown (Conn.)* 301.

Question necessarily decided below in action for support of pauper held reviewable on appeal, though not expressly raised.—*Town of Fairfield v. Town of Newtown (Conn.)* 301.

Rev. St. c. 24, § 43, creates no liability on the part of a municipality to reimburse an inhabitant of another town for expenses incurred by him for the relief of a pauper whose settlement is in the town sought to be held liable.—*Conley v. Inhabitants of Woodville (Me.)* 400.

An individual cannot recover from a county for support voluntarily furnished a pauper.—*Wilson v. Coos County (N. H.)* 1101.

PAYMENT.

Part payment within statute of limitations, see "Limitation of Actions," § 3.
 Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Chattel Mortgages," § 3; "Mechanics' Liens," § 4; "Mortgages," § 4.
 Compensation for property taken for public use, see "Eminent Domain," § 2.
 Insurance premiums, see "Insurance," §§ 3, 4.
 Price of goods sold, see "Sales," §§ 2, 4.
 Taxes, see "Taxation," § 4.

§ 1. Application.

Where, after the dissolution of a firm, an account with it is carried on as a running account with the succeeding firm, payments made to the succeeding firm, unless appropriated, go to discharge oldest items of account.—*Forst v. Kirkpatrick* (N. J. Ch.) 554.

§ 2. Pleading, evidence, trial, and review.

Taking of notes for book account *held* not to raise presumption of payment.—*United States v. Hegeman* (Pa.) 344.

Evidence *held* insufficient to show payment of an account.—*In re Burk & McFetridge's Assigned Estate* (Pa.) 998.

PENALTIES.

For violation of fishery regulations, see "Fish." Under contracts, see "Damages," § 1.

PENDENCY OF ACTION.

Effect on limitation of other action, see "Limitation of Actions," § 2.

PENSIONS.

To city firemen, see "Municipal Corporations," § 8.

PERJURY.**§ 1. Offenses and responsibility therefor.**

To constitute subornation of perjury, witness' testimony must have been false, given willfully and knowingly, and so known or believed to be by defendant, who knew or believed witness would so testify, and procured him so to do.—*State v. Fahey* (Del. Gen. Sess.) 690.

§ 2. Prosecution and punishment.

A conviction of subornation of perjury should not be had on the uncorroborated testimony of the witness suborned.—*State v. Fahey* (Del. Gen. Sess.) 690.

PERPETUITIES.

Where the question is whether, under a will, an estate has vested, so that there will not be a violation of the rule against perpetuities, the fact that the legal estate vested on the death of testator in his executors is immaterial.—*Bates v. Spooner* (Conn.) 305.

The rule against perpetuities does not demand that the particular individuals in whom an estate must be vested shall be definitely ascertainable at testator's death.—*Bates v. Spooner* (Conn.) 305.

Provision of a will *held* not to violate rule against perpetuities.—*Bates v. Spooner* (Conn.) 305.

Vesting of an estate *held* not deferred by certain contingencies.—*Bates v. Spooner* (Conn.) 305.

In equitable action, on ground that certain provisions of will were invalid as creating perpetuities, *held* that, though certain provisions postponed time of vesting of estate beyond lives in being and 21 years, the provision in favor of remaindermen would not fail.—*Bates v. Spooner* (Conn.) 305.

A trust created by a will for the use of a man and his children *held* invalid as contravening the rule against perpetuities.—*Towle v. Doe* (Me.) 1072.

Where a clause in a will creates a trust fund, and provides for the payment of "the interest, deducting expenses, to T. and his chil-

dren so long as they live," the clause is not separable, and is void as contravening the rule against perpetuities.—*Towle v. Doe* (Me.) 1072.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Gas"; "Negligence."

Caused by dogs, see "Animals."

Caused by electricity, see "Electricity."

Measure of damages, see "Damages," § 2.

Right of action for injuries to minor child, see "Parent and Child."

To employé, see "Master and Servant," §§ 8-12.

To licensee, see "Railroads," § 4.

To passenger, see "Carriers," §§ 4-6.

To person on or near railroad tracks, see "Railroads," § 6.

To traveler on bridge, see "Bridges," § 1.

To traveler on highway, see "Highways," § 4; "Municipal Corporations," § 8.

To traveler on highway crossing railroad, see "Railroads," § 5.

PETITION.

In pleading, see "Pleading," § 1.

To obtain allowance of appeal or writ of error, see "Appeal and Error," § 5.

PHARMACY.

Mandatory injunction to board of, see "Injunction," § 2.

PHYSICIANS AND SURGEONS.

Measure of damages for death from malpractice, see "Death," § 1.

A physician who fails to exercise reasonable care in the treatment of his patients is liable for malpractice.—*Ramsdell v. Grady* (Me.) 763.

PLACE.

Allegations in indictment as to place of offense, see "Indictment and Information," § 2.

PLEADING.

Applicability of instructions to pleadings, see "Trial," § 4.

In actions by or against particular classes of parties.

See "Carriers," § 4; "Corporations," § 9; "Guardian and Ward," § 2; "Husband and Wife," § 3; "Landlord and Tenant," § 7; "Master and Servant," § 10.

Trustees, see "Trusts," §§ 3, 5.

Trustees in bankruptcy, see "Bankruptcy," § 1.

In particular actions or proceedings.

See "Divorce," § 2; "Equity," § 4; "False Imprisonment," § 1; "Fraud," § 1; "Injunction," § 3; "Libel and Slander," § 2; "Negligence," § 4; "Nuisance," § 1; "Reformation of Instruments," § 2; "Replevin," § 2; "Trespass," § 1.

For appointment of receiver, see "Receivers," § 1.

For causing death, see "Death," § 1.

For enforcement of mechanic's lien, see "Mechanics' Liens," § 5.

For failure to deliver possession to tenant, see "Landlord and Tenant," § 5.

For personal injuries, see "Carriers," § 4; "Master and Servant," § 10.

For price of land, see "Vendor and Purchaser," § 2.

For rent, see "Landlord and Tenant," § 6.

Indictment or criminal information or complaint, see "Indictment and Information."

On insurance policy, see "Insurance," § 18.
 On note, see "Bills and Notes," § 4.
 On replevin bond, see "Replevin," § 4.
 To enjoin collection of taxes and have assessment declared void, see "Taxation," § 8.
 To establish and enforce trusts, see "Trusts," § 5.
 To impeach accounting by former guardian, see "Guardian and Ward," § 2.

§ 1. **Declaration, complaint, petition, or statement.**

Where a complaint alleged that plaintiff sold merchandise amounting to a certain sum, and that defendant has not paid therefor, and that plaintiff claims damages in a certain less sum, the variance *held* immaterial.—Prince v. Takash (Conn.) 1003.

Where an action is commenced by using the form of complaint denominated the "common counts" in the rules under the practice act, before any default can be entered or judgment rendered, plaintiff must file a bill of particulars of his claim.—Prince v. Takash (Conn.) 1003.

In action for goods sold and delivered, order of court requiring plaintiff to amend, by showing any payments made by defendant, *held* erroneous.—Prince v. Takash (Conn.) 1003.

Where plaintiff declares in trespass, after suing out a writ in case, there is a fatal variance, and the action must be dismissed.—Slater v. Fehlberg (R. I.) 383.

§ 2. **Replication or reply and subsequent pleadings.**

Where plaintiff replies to a plea that is bad for duplicity, he must reply to each distinct material matter contained in it.—Jackson v. Pennsylvania R. Co. (N. J. Sup.) 532.

§ 3. **Demurrer or exception.**

A ground of demurrer, suggested in the brief, but not assigned among the causes of demurrer served, will not be considered.—Davey v. Erie R. Co. (N. J. Sup.) 233.

§ 4. **Amended and supplemental pleadings and replender.**

A verbal order entered at the trial, allowing an amendment to the pleas, *held* sufficient to sustain a judgment, though the pleas were not actually filed until after the judgment was entered.—Murphy v. Watson (N. J. Sup.) 100.

The statute relating to amendments is not sufficiently broad to permit a change in the form of the action.—Slater v. Fehlberg (R. I.) 383.

§ 5. **Profert, oyer, and exhibits.**

Under Prac. Act, § 123, a writing annexed to a pleading, but not referred to in it, cannot be resorted to for the purpose of enlarging or limiting the averments of the pleading.—Shelmerdine v. Lippincott (N. J. Sup.) 237.

§ 6. **Bill of particulars and copy of account.**

In an action against a railroad for damages by fire, bill of particulars *held* sufficient.—MacDonald v. New York, N. H. & H. R. Co. (R. I.) 795.

§ 7. **Motions.**

Granting leave to file pleas being in the discretion of the court, refusal to rescind the order and to strike them out is also in its discretion.—Horner v. Plumley (Md.) 971.

A motion ne recipiatur *held* inappropriate, where the pleas had been received and filed under an order granting leave to file.—Horner v. Plumley (Md.) 971.

A motion to strike a paragraph for impertinence or irrelevancy will fail, if any portion of the paragraph is relevant or responsive.—Thompson v. Williamson (N. J. Ch.) 453.

Matters which will be stricken out of an answer as irrelevant and impertinent, in suit to subject to a judgment property fraudulently conveyed, considered.—Thompson v. Williamson (N. J. Ch.) 453.

A declaration will be stricken out on notice, under Prac. Act, § 132, where it is so defective or so framed as to delay a fair trial of the action.—Malbert v. United Electric Co. (N. J. Sup.) 251.

Affidavit of defense on foreclosure of mortgage *held* sufficient, where it denies all liability and alleges want of consideration and fraud.—Lengert v. Chaninell (Pa.) 889.

§ 8. **Defects and objections, waiver, and aid by verdict or judgment.**

In action on note, plaintiff *held* to have waived right to move for judgment for want of proper plea.—Farmers' & Mechanics' Nat. Bank v. Hunter (Md.) 650.

Where plaintiffs' counsel consented to try the question of fraud in the consideration of a contract sued on, it was immaterial that such issue was not set out in the notice attached to the plea of general issue served.—Somers v. Myers (N. J. Sup.) 812.

A variance between writ and declaration may be taken advantage of at any stage of the action, and the filing of a plea by defendant is not a waiver of the objection.—Slater v. Fehlberg (R. I.) 383.

POLICE.

See "Municipal Corporations," § 3.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

Regulation of hours of labor, see "Master and Servant," § 1.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

See "Constitutional Law," § 2.

Suffrage, see "Elections."

POLLUTION.

Of water course, see "Waters and Water Courses," § 1.

POOR DISTRICTS.

Special or local laws, see "Statutes," § 1.

Subject and title of act relating to, see "Statutes," § 2.

POOR LAWS.

See "Paupers."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," §§ 5, 7.

Retention by grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

To support ejectment, see "Ejectment," § 1.

POWERS.

Creation by will, see "Wills," § 11.

Of sale in mortgage, see "Mortgages," § 5.

§ 1. **Construction and execution.**

Trust deed *held* to convey grantor's interest, notwithstanding partial invalidity, as in ex-

cess of testamentary power.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, *Id.*

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Assumpsit, Action of"; "Divorce," § 2; "Ejectment"; "Entry, Writ of"; "Interpleader"; "Mandamus," § 2; "Quo Warranto," § 1; "Replevin"; "Trespass," § 1.

Accounting by executor or administrator, see "Executors and Administrators," § 7.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Bail," § 1; "Costs"; "Damages," § 4; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Pleading"; "Process"; "Removal of Causes"; "Trial."

Nonsuit, see "Trial," § 3.

Verdict, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Arrest," § 1; "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

For violation of liquor laws, see "Intoxicating Liquors," § 2.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 2.

In insolvency, see "Insolvency."

Procedure on review.

See "Appeal and Error"; "Certiorari," § 2; "Justices of the Peace," § 3; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

To corporate officers, see "Corporations," § 10.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 12.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PREMIUMS.

For insurance, see "Insurance," § 4.

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 3.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Criminal Law," § 4.

On appeal or error, see "Appeal and Error," § 9.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Books of agent as evidence for principal, see "Evidence," § 7.

Insurance agents, see "Insurance," § 2.

§ 1. The relation.

Where money was delivered to plaintiff's agent for a particular purpose, the balance to be applied to the use of others, and plaintiff demanded a return of the money before such application, such demand revoked the gift and entitled plaintiff to the return of the money.—*Flaherty v. O'Connor* (R. I.) 376.

§ 2. Mutual rights, duties, and liabilities.

Authority to employ agents necessarily implies power to contract with them for their compensation.—*Opinion of the Justices* (N. H.) 950.

§ 3. Rights and liabilities as to third persons.

The owner of a store *held* to have ratified a purchase by the individual owner of a department in the store, and to be liable as principal for the price of the goods.—*J. B. Owens Pottery Co. v. Turnbull Co.* (Conn.) 1122.

If, under a letter of attorney, such attorney had no right to petition for the vacation of certain streets, a subsequent ratification of his act by his principal was equivalent to precedent authority.—*Daughters of American Revolution v. Schenley* (Pa.) 366.

Petition by attorney in fact of landowner to vacate certain streets, on ratification by his principal, *held* to authorize an ordinance passed in response to the petition.—*Daughters of American Revolution v. Schenley* (Pa.) 370.

Plaintiff *held* not estopped to pursue principal, notwithstanding delay in presentment of claim and credit allowed agent by principal.—*McKeen v. Providence County Sav. Bank* (R. I.) 49.

Evidence in action against principal *held* insufficient to overthrow verdict for plaintiff on ground that agent alone was charged.—*McKeen v. Providence County Sav. Bank* (R. I.) 49.

PRINCIPAL AND SURETY.

See "Bail"; "Bonds."

Liabilities of sureties on bonds for performance of duties of trust or office, see "Executors and Administrators," § 9.

Liabilities of sureties on bonds of county officer, see "Counties," § 1.

Liabilities of sureties on bonds of municipal contractor, see "Municipal Corporations," § 5.

Liabilities of sureties on bonds or undertakings in legal proceedings, see "Replevin," § 4.

Liability of surety on tax collector's bond, see "Taxation," § 5.

Subrogation of surety to rights against principal, see "Subrogation."

§ 1. Creation and existence of relation.

Evidence *held* insufficient to show that the mother signed the note of her son as surety.—*Elliott v. Moreland* (N. J. Sup.) 224.

§ 2. Discharge of surety.

Overpayments made to subcontractor *held* in relief of the surety's liability on the subcontractor's bond.—*McNally v. Mercantile Trust Co.* (Pa.) 360.

Surety on bond indemnifying corporation against action for negligence *held* released by failure to give notice of claim within a reasonable time.—*In re Byers' Estate* (Pa.) 492; *Appeal of Delaware Water Co.*, *Id.*

§ 3. Remedies of creditors.

In action on contractor's bond, question whether notes given by contractor to materialman were in payment or as security *held* one for the jury.—*United States v. Hegeman* (Pa.) 344.

Bond by subcontractor to city contractor *held* to contain no provision requiring the insured, on default of the subcontractor, to allow the

surety to complete the work.—*McNally v. Mercantile Trust Co. (Pa.)* 360.

PRIORITIES.

Of mortgages, see "Mortgages," § 2.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 1.

PRIVITY.

Admissions by privies, see "Evidence," § 5.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1.

PROBATE.

Of will, see "Wills," § 4.

PROBATE COURTS.

See "Courts," § 3.

Appealable orders of, see "Appeal and Error," § 1.

PROCESS.

Effect of appearance, see "Appearance."

In actions against particular classes of parties.

See "Corporations," § 9.

Foreign executor, see "Executors and Administrators," § 8.

Particular forms of writs or other process.

See "Arrest"; "Entry, Writ of"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin."

Process in special jurisdictions.

See "Equity," § 3; "Justices of the Peace," § 2.

§ 1. **Defects, objections, and amendment.**

Under Act 1899 (Pub. Acts 1889, p. 61, c. 110; Gen. St. 1902, § 643), the ad damnum clause of a writ may be amended by inserting amount of damages claimed.—*Sanford v. Bacon (Conn.)* 204.

Under Gen. St. 1902, § 639, plaintiff *held* entitled as a matter of right to an amendment of the ad damnum clause of a writ.—*Sanford v. Bacon (Conn.)* 204.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROMOTERS.

See "Corporations," § 1.

PROOF.

Of loss insured against, see "Insurance," § 10.

PROPERTY.

Adverse possession, see "Adverse Possession." Constitutional guaranties of rights of property, see "Constitutional Law," § 5.

Dedication to public use, see "Dedication."

Laws invading property rights, see "Constitutional Law," § 2.

Passing to trustee in bankruptcy, see "Bankruptcy," § 1.

Protection of rights of property by injunction, see "Injunction," § 2.

Rights of members of voluntary associations, see "Associations."

Subject to attachment, see "Attachment," § 2.

Subject to lien of judgment, see "Judgment," § 8.

Subject to mortgage, see "Chattel Mortgages," § 1.

Subject to trustee process, see "Garnishment," § 1.

Taking for public use, see "Eminent Domain." Within tax laws, see "Taxation," § 1.

Particular species of property.

See "Fish"; "Fixtures"; "Ground Rents"; "Logs and Logging"; "Mines and Minerals."

Interest of member of joint stock association, see "Joint Stock Companies."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 12.

PROVOCATION.

For assault, see "Assault and Battery," § 1.

PROXIMATE CAUSE.

Of injury, see "Negligence," § 2.

PUBLIC DEBT.

See "Municipal Corporations," § 9.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

§ 1. **Government ownership.**

Where a portion of a township is incorporated, and no provision is made as to lands reserved for public use, under Acts 1850, p. 193, c. 196, the reserved lands within the incorporated portion follow that portion and vest in it.—*State v. Mullen (Me.)* 841.

Under Acts 1850, p. 193, c. 196, *held*, that the right of defendant to cut timber on reserved lands was terminated by the incorporation of the reserved lands in a township.—*State v. Mullen (Me.)* 841.

The state is a trustee of lands reserved by Acts 1850, p. 193, c. 196, and may maintain trespass for injury to them, only until the township in which they are situated is incorporated.—*State v. Mullen (Me.)* 841.

§ 2. **Disposal of lands of the states.**

Where a deputy surveyor enters a warrant in his book, but makes no return of survey, on return of survey by another deputy 50 years thereafter, *held*, that the title remains good in the original warrantee.—*Reilly v. Mountain Coal Co. (Pa.)* 29.

Deed from commonwealth prior to Act March 14, 1846, could be recorded without acknowledgment.—*Reilly v. Mountain Coal Co. (Pa.)* 29.

Deputy surveyor's book, kept under Act 1785, *held* a public record.—*Reilly v. Mountain Coal Co.* (Pa.) 29.

PUBLIC LIBRARY.

Condemnation of land for library, see "Eminent Domain," § 1.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC POLICY.

Affecting validity of contract, see "Contracts," § 1.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 4.

PUNISHMENT.

For violation of injunction, see "Injunction," § 5.

QUANTUM MERUIT.

See "Assumpsit, Action of"; "Work and Labor."

QUASHING.

Attachment, see "Attachment," § 4.
Indictment or information, see "Indictment and Information," § 4.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 3.
In criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 4.

QUIETING TITLE.

§ 1. **Right of action and defenses.**
A voluntary conveyance, fraudulent as to existing creditors, is a cloud on the title acquired by virtue of the levy of an execution.—*Spear v. Spear* (Me.) 1106.

In a dispute as to exercise of option to buy land, the owner may sue, under Act June 10, 1893, to remove cloud on title.—*Ullom v. Hughes* (Pa.) 23.

Defendant, in an action to quiet title for failure to exercise option to purchase land, may disclaim, or deny default, and ask damages for nonperformance.—*Ullom v. Hughes* (Pa.) 23.

Act June 10, 1893, providing for the quieting of title to land, is a cumulative, and not an exclusive, remedy.—*Ullom v. Hughes* (Pa.) 23.

QUO WARRANTO.

§ 1. **Jurisdiction, proceedings, and relief.**

Under Act Feb. 18, 1895 (P. L. 1895, p. 82), the title of relator, as well as the respondent, may be inquired into.—*Otis v. Lane* (N. J. Err. & App.) 442.

Members of a de facto board of education organized under the general school law (Laws 1902, p. 69), cannot be ousted at the instance of a private relator in quo warranto on the ground that such board of education has no legal existence.—*Holloway v. Dickinson* (N. J. Sup.) 529.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Right to cross navigable waters, see "Navigable Waters," § 1.

§ 1. **Right of way and other interests in land.**

Railroad company *held* to have acquired title to land by adverse possession.—*Covert v. Pittsburgh & W. Ry. Co.* (Pa.) 170.

Act April 4, 1868, § 12 (P. L. 62), preventing the occupation of a street by a railroad without municipal consent, *held* not repealed by Const. 1874, art. 17, § 1.—*City of Pittsburgh v. Pittsburgh, O. & W. R. Co.* (Pa.) 468.

§ 2. **Construction, maintenance, and equipment.**

Railroad company *held* to have only rights of private owner regarding drainage of surface water.—*Chorman v. Queen Anne's R. Co.* (Del. Super.) 687.

A landowner's right to have a railroad farm crossing restored *held* not lost by delay, etc.—*Speer v. Erie R. Co.* (N. J. Ch.) 539.

Where a farm crossing was located and constructed across a railroad by agreement, its location could not be changed afterwards by one party without the consent of the other.—*Speer v. Erie R. Co.* (N. J. Ch.) 539.

A landowner's right to have a farm crossing over railroad tracks restored *held* not affected by the question of cost.—*Speer v. Erie R. Co.* (N. J. Ch.) 539.

§ 3. **Sales, leases, traffic contracts, and consolidation.**

Railroad lease construed, and *held*, that defendant was not bound, under the lease and the agreement, to acquire certain land for the lessor, and it was not its corporate property, so that the taxes paid could not be deducted from the rent reserved.—*Lewiston & A. R. Co. v. Grand Trunk Ry. Co. of Canada* (Me.) 750.

Where defendant lessee of a railroad paid an annual franchise tax to the state, assessed on the basis of the gross earnings of all leased lines operated by it, it was a tax either on the franchise of the lessee alone, or upon its franchise and the franchise of its leased roads, so that it was incapable of apportionment, so that the lessee could deduct the part of the lessor's tax so paid from the rent reserved.—*Lewiston & A. R. Co. v. Grand Trunk Ry. Co. of Canada* (Me.) 750.

Where defendant lessee for 18 years paid taxes on the property of the lessor, and did not deduct them from the rent, as authorized by the lease, they could not be deducted at the end of such time.—*Lewiston & A. R. Co. v. Grand Trunk Ry. Co. of Canada* (Me.) 750.

Railroad shareholder's right to stock *held* not lost by laches (Laws 1889, p. 35, c. 5, § 1).—*Douglass v. Concord & M. R. R.* (N. H.) 883.

Under Laws 1889, c. 5, § 1, railroad shareholder *held* not bound to attend meeting to effect merger, and oppose contract illegally taking her shares.—*Douglass v. Concord & M. R. R.* (N. H.) 883.

Railroad shareholder *held* not estopped by delay from claiming shares, though company had as-

signed them to another company.—*Douglass v. Concord & M. R. R.* (N. H.) 883.

Evidence in an action by a stockholder in a merged company to compel an exchange of her old stock for stock of the new company *held* to sustain a finding that she had never in fact refused to accept the latter stock.—*Douglass v. Concord & M. R. R.* (N. H.) 883.

§ 4. Operation.

Act June 25, 1836, § 2, amending charter of N. Y., P. & B. R. Co., makes the company liable for damages to all kinds of property by fire from its engines.—*Spink v. New York, N. H. & H. R. Co.* (R. I.) 47.

A railroad company *held* not liable for injury to one not in its employ, sustained in unloading a car of another company, which it had received, loaded, and transported to its destination; the injury resulting from a hole in the car floor.—*White v. New York, N. H. & H. R. Co.* (R. I.) 588.

§ 5. — Accidents at crossings.

In an action for injuries at a crossing, *held* proper to direct a nonsuit.—*Blumenthal v. Boston & M. R. R.* (Me.) 747.

Where a witness testified that he looked in the direction in which a train was coming, and that he did not see it, when he was only 25 feet distant from the place of collision, his evidence is so improbable as to raise no issue of fact for a jury.—*Blumenthal v. Boston & M. R. R.* (Me.) 747.

Where a railroad company, having obtained permission to cross a street, constructs an embankment across the same, it is bound, not only to keep the portion of the street occupied by its tracks in a safe condition, but also the approaches to the crossing.—*Whitby v. Baltimore, C. & A. Ry. Co.* (Md.) 674.

Railroad company having constructed crossing in street *held* not bound to maintain same in condition more safe for travel than the street was previously.—*Whitby v. Baltimore, C. & A. Ry. Co.* (Md.) 674.

In an action against railroad for injuries owing to alleged defective condition of crossing, question whether crossing was safe *held* one for jury.—*Whitby v. Baltimore, C. & A. Ry. Co.* (Md.) 674.

In action against railroad for injuries owing to defective construction of crossing, an instruction *held* erroneous, as holding plaintiff responsible for knowledge of another that the horse she was driving was a foolish one.—*Whitby v. Baltimore, C. & A. Ry. Co.* (Md.) 674.

Requested instruction as to plaintiff's duty to look and listen before crossing defendant's track, and to know whether trains were approaching, which ignored the assurance of safety from open gates at the crossing, *held* properly refused.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

In an action for injuries at a railroad crossing, a requested instruction *held* properly refused, as indirectly placing on plaintiff the burden of proving absence of contributory negligence.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

In an action against a railroad for injuries at a crossing, an instruction *held* not objectionable as ignoring the causal connection between a violation of a safety gate ordinance and the happening of the accident.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

A requested instruction in an action for injuries at a railroad grade crossing, based on defendant's knowledge of the approach of a train, instead of his exercise of due care to ascertain such approach, *held* properly refused.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

Plaintiff, in an action for injuries sustained at a railroad grade crossing, *held* not guilty of contributory negligence in failing to stop before attempting to cross the track.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

In an action for injuries at a railroad crossing, burden *held* to be on defendant to show contributory negligence.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

In an action for injuries at a railroad crossing, an instruction that certain facts would constitute a want of ordinary care *held* not objectionable as excluding the question of contributory negligence.—*Baltimore & O. R. Co. v. Stumpf* (Md.) 978.

A traveler, about to cross a railroad track, must make reasonable use of his senses to ascertain if such crossing can be safely made.—*Passman v. West Jersey & S. R. R.* (N. J. Err. & App.) 809.

The cutting of a train of cars on a side track, leaving some on one side and some on the other of a highway, *held* not an invitation to the public to cross without using ordinary precaution.—*Passman v. West Jersey & S. R. R.* (N. J. Err. & App.) 809.

A traveler on a bicycle is required to use the same care before crossing a railroad track as is a pedestrian.—*Passman v. West Jersey & S. R. R.* (N. J. Err. & App.) 809.

Driver of team approaching railroad track, if necessary to see track, should get down from his wagon and lead his horses.—*Kinter v. Pennsylvania R. Co.* (Pa.) 276.

Evidence in action for injury at railroad crossing *held* to show driver guilty of contributory negligence as a matter of law.—*Kinter v. Pennsylvania R. Co.* (Pa.) 276.

§ 6. — Injuries to persons on or near tracks.

In action against railroad for personal injuries, a certain instruction given at plaintiff's request, while very general, *held* not reversible error.—*West Virginia Cent. & P. R. Co. v. State* (Md.) 669.

The failure of railroad company to keep its cars on its right of way is itself negligence, and one injured need not show that there has been antecedent negligence.—*West Virginia Cent. & P. R. Co. v. State* (Md.) 669.

Railroad *held* liable for injuries to person caused by car running off the right of way.—*West Virginia Cent. & P. R. Co. v. State* (Md.) 669.

§ 7. — Injuries to animals on or near tracks.

Where a railroad company permits the land adjoining the fence, erected by it under Gen. R. R. Act, § 32 (Gen. St. p. 2646), to be used in the conduct of its business in a manner which imperils the fence, the sufficiency of inspection is a question for the jury.—*Hendrickson v. Philadelphia & R. Ry. Co.* (N. J. Err. & App.) 831.

The duty to maintain a fence erected under Gen. R. Act, § 32 (Gen. St. p. 2646), involves the duty of a reasonable inspection.—*Hendrickson v. Philadelphia & R. Ry. Co.* (N. J. Err. & App.) 831.

Under Gen. R. Act, § 32 (Gen. St. p. 2646), a railroad company will be liable for failure to maintain a fence after it has been erected, when the failure is attributable to a neglect of duty.—*Hendrickson v. Philadelphia & R. Ry. Co.* (N. J. Err. & App.) 831.

§ 8. — Fires.

In an action against a railroad for damages by fire, what plaintiff paid for his farm *held* immaterial.—*MacDonald v. New York, N. H. & H. R. Co.* (R. I.) 795.

In an action against a railroad for damages by fire, evidence that some of defendant's own land had been burned over *held* admissible.—*MacDonald v. New York, N. H. & H. R. Co.* (R. I.) 795.

In an action against a railroad for damages by fire, evidence as to the ignition of other fires, etc., *held* admissible.—*MacDonald v. New York, N. H. & H. R. Co.* (R. I.) 795.

RAPE.

Relevancy of evidence, see "Criminal Law," § 5.

RATIFICATION.

Of act of agent, see "Principal and Agent," § 8.

Of acts of corporate officers, see "Corporations," § 7.

REAL ACTIONS.

See "Ejectment"; "Entry, Writ of."

In a real action, where no rents or profits are sued for, no allowance can be made for taxes paid by defendant.—*Milliken v. Houghton* (Me.) 1075.

REAL-ESTATE AGENTS.

See "Brokers."

REAL PROPERTY.

Subject to attachment, see "Attachment," § 2.

REASONABLE DOUBT.

Sufficiency of evidence, see "Criminal Law," § 18.

RECEIPTS.

Warehouse receipts, see "Warehousemen."

RECEIVERS.

Of corporations in general, see "Corporations," § 10.

Of insurance company, see "Insurance," § 1.

§ 1. Appointment, qualification, and tenure.

Allegations of a bill *held* not to have warranted appointment of receiver of property conveyed by a decedent, and the issuance of an injunction restraining grantees from disposing of the same, etc.—*Johnston v. Lippert* (Md.) 114.

§ 2. Management and disposition of property.

Receiver *held* chargeable with loss arising from his negligence in the management of the trust property.—*Pangburn v. American Vault, Safe & Lock Co.* (Pa.) 508.

§ 3. Accounting and compensation.

Receiver *held* not entitled to commissions, where loss had accrued to the trust estate through his negligence, and he had wasted assets and sold personal property for an inadequate price.—*Pangburn v. American Vault & Safe Lock Co.* (Pa.) 508.

RECORDS.

Deputy surveyor's book as public record, see "Public Lands," § 2.

Of justice, see "Justices of the Peace," § 2.

Transcript on appeal or writ of error, see "Appeal and Error," § 6.

Of assignments, see "Assignments," § 1.

REDEMPTION.

From mortgage, see "Mortgages," § 7.

REFERENCE.

See "Arbitration and Award."

In suit for divorce, see "Divorce," § 2.

REFORMATION OF INSTRUMENTS.

§ 1. Right of action and defenses.

Party suing to reform deed *held* to be the proper party to bring the action.—*White v. Shaffer* (Md.) 974; *Focke v. Same*, Id.

A reformation of a deed will not be decreed, except on clear proof of mutual mistake.—*Aller v. Crouter* (N. J. Ch.) 426.

The evidence necessary to reform a deed because of mistake must relate to the time when the instrument was executed.—*Williamson v. Carpenter* (Pa.) 718.

§ 2. Proceedings and relief.

Bill to reform a deed *held* to state a cause of action.—*White v. Shaffer* (Md.) 974; *Focke v. Same*, Id.

Bill to reform deed *held* sufficient *prima facie* to rebut the presumption of laches.—*White v. Shaffer* (Md.) 974; *Focke v. Same*, Id.

Mortgagees of the land *held* to be entitled to protection against loss arising from reformation of deed to their mortgagor.—*White v. Shaffer* (Md.) 974; *Focke v. Same*, Id.

Evidence *held* insufficient to justify reformation of deeds for mistake.—*Williamson v. Carpenter* (Pa.) 718.

REFORMATORIES.

See "Asylums."

REFRESHING MEMORY.

Of witnesses, see "Witnesses," § 2.

REHEARING.

See "New Trial."

RELEASE.

See "Payment."

Of mechanic's lien, see "Mechanics' Liens," § 4.

§ 1. Requisites and validity.

A misrepresentation as to the legal effect of a release of a claim for personal injuries will not avoid the instrument.—*Jackson v. Pennsylvania R. Co.* (N. J. Sup.) 532.

§ 2. Pleading, evidence, trial, and review.

Evidence in widow's suit to set aside, as procured by fraud, her release of interest in husband's estate, *held* to show fraud as claimed.—*Mullaney v. Mullaney* (N. J. Err. & App.) 1086.

Fraud of railroad company in obtaining release from passenger injured *held* sufficient to take the question of the validity of the release to the jury.—*Clayton v. Consolidated Traction Co.* (Pa.) 332.

RELEVANCY

Of evidence in criminal prosecutions, see "Criminal Law," § 5.

RELIEF ASSOCIATIONS.

See "Master and Servant," § 2.

REMAINDERS.

Creation by will, see "Wills," § 9.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Injunction," § 1.

REMITTITUR.

Of damages, see "Damages," § 4.

REMOVAL.

Of dead body, see "Dead Bodies."

Of policemen, see "Municipal Corporations," § 8.

Of trustee, see "Trusts," § 2.

REMOVAL OF CAUSES.**§ 1. Proceedings to procure and effect of removal.**

On a petition for removal to the federal court, the state court has original jurisdiction to examine the record to see whether the statutory requirements have been complied with.—*Vermeule v. Vermeule* (N. J. Sup.) 99.

Where a petition and bond for removal to a federal court were filed before the time within which defendant was required to plead, it was immaterial that the order for removal was not granted within such time.—*Vermeule v. Vermeule* (N. J. Sup.) 99.

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Ground Rents"; "Landlord and Tenant," § 6.

Under oil or gas leases, see "Mines and Minerals," § 1.

As assets of decedent's estate, see "Executors and Administrators," § 1.

REOPENING CASE.

For further evidence, see "Trial," § 2.

REPAIRS.

Mutual rights of tenants in common as to repairs, see "Tenancy in Common," § 1.

To toll roads, see "Turnpikes and Toll Roads," § 1.

REPEAL.

Of statute, see "Statutes," § 3.

Of statute of limitations, see "Limitation of Actions," § 1.

REPLEVIN.**§ 1. Right of action and defenses.**

Contract for sale of personalty held not to vest title in purchaser, so as to enable him to maintain replevin.—*Chellis v. Grimes* (N. H.) 943.

§ 2. Pleading and evidence.

Under Act June 13, 1890, pleadings in a suit under section 33 are the same as in other cases of replevin.—*Bishop & Babcock Co. v. Keffer* (N. J. Sup.) 402.

Where plaintiff would have the right to amend his declaration after plea in replevin, if he had given the bond required by Act June 13, 1890, § 38, or where defendant had made

claim of property and given the bond required under the ninth section of the act, he would have the same right in a proceeding under section 33.—*Bishop & Babcock Co. v. Keffer* (N. J. Sup.) 402.

§ 3. Trial, judgment, enforcement of judgment, and review.

In replevin, whether the officer is directed to take the property or not, or where plaintiff has given the bond required for such purpose, or where defendant has made claim of property and given bond, the value of the property and damages for its detention may be recovered by plaintiff or defendant, as the case may be.—*Bishop & Babcock Co. v. Keffer* (N. J. Sup.) 402.

§ 4. Liabilities on bonds and undertakings.

Plaintiff in replevin is held not required to demand a return of the goods redelivered to the defendant by the sheriff after judgment in his favor and an assessment of his damages, before he can sue on the forthcoming bond.—*Adams v. Wiesenthal* (N. J. Sup.) 516.

An averment in a plea, in an action on a forthcoming replevin bond, that the defendant tendered the goods in as good condition as at the time of signing the bond, is no answer to a breach of a condition that defendant would deliver the goods in as good condition as at the time of making the claim.—*Adams v. Wiesenthal* (N. J. Sup.) 516.

REPLY.

See "Pleading," § 2.

REQUESTS.

For instructions in civil actions, see "Trial," § 4.

RESCISSION.

Of contract, see "Contracts," § 4.

Of contract for sale of goods, see "Sales," § 3.

RES GESTÆ.

In civil actions, see "Evidence," § 3.

RES JUDICATA.

See "Judgment," §§ 6, 7.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

RETIRING PARTNERS.

See "Partnership," § 3.

RETROSPECTIVE LAWS.

Retroactive operation of statute of limitations, see "Limitation of Actions," § 1.

RETURN.

Of execution, see "Execution," § 4.

REVENUE.

See "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," § 14; "Justices of the Peace," § 2.

Bill in equity, see "Equity," § 5.

REVIVAL.

Of action, see "Abatement and Revival," § 1.

REVOCATION.

Of agency, see "Principal and Agent," § 1.

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 1.

RIPARIAN RIGHTS.

See "Waters and Water Courses," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 8.

Within insurance policy, see "Insurance," § 8.

ROADS.

See "Highways"; "Turnpikes and Toll Roads." Streets in cities, see "Municipal Corporations," § 7, 8.

ROYALTIES.

Under gas lease, see "Mines and Minerals," § 1.

SALES.

See "Vendor and Purchaser."

By auction, see "Auctions and Auctioneers." Of intoxicating liquors, see "Intoxicating Liquors."

Of property of bankrupt, see "Bankruptcy," § 1.

Of property of decedent under order of court, see "Executors and Administrators," § 5.

Of railroads, see "Railroads," § 3.

On execution, see "Execution," § 8.

On foreclosure of mortgage, see "Mortgages," § 5.

On order or judgment of court, see "Judicial Sales."

Requirements of statute of frauds, see "Frauds, Statute of," § 4.

§ 1. Requisites and validity of contract.

A writing held a mere promise to sell, which, being without consideration, could be withdrawn before acted on by promise to buy.—Alderman v. New Departure Bell Co. (Conn.) 198.

Where defendants informed plaintiffs that they desired to purchase a car load of flour, and plaintiffs telegraphed, "Advise quick book one car four ten delivered," and defendants answered, "Accept car Stocks best patent at offer transit car," the term "transit car" is a material modification of the offer, and operated as a new proposal.—Stock v. Towle (Me.) 918.

§ 2. Construction of contract.

Where plaintiffs were informed, during negotiations for the purchase of flour, that defendants wanted it for immediate use, time was of the essence of the contract, making a stipulation for "transit car" a condition precedent to defendants' obligation.—Stock v. Towle (Me.) 918.

The phrase "transit car," in a contract for the sale and delivery of flour by railroad, means a car already loaded with flour and on its way to the vendee.—Stock v. Towle (Me.) 918.

Payment under contract for cash sale of goods held due on delivery f. o. b. at place of business of seller.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 634.

Contract for sale of goods held a cash sale.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 634.

Right of inspection under contract for sale of goods will not change place of delivery and payment from that named in the contract.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 634.

A proviso in a contract for the sale of bananas for one year, with the right of renewal, held a limitation on the contract, and not to render it of unlimited duration.—Underhill v. Buckman Fruit Co. (Md.) 873.

A contract whereby the lessee of a sawmill sells its output for one year, with the right in the purchaser to renew the contract for so long as the lessee retains the property, is terminated by the destruction of the mill, though the lessee rebuilds.—Blodgett v. Johnson (N. H.) 1021.

Contract with lessee of mill for purchase of output held not to apply to a new mill built and owned by lessee after destruction of the first one.—Blodgett v. Johnson (N. H.) 1021.

Evidence in bill for specific performance held to show waiver of written notice of acceptance of option.—Jones v. Sowers (Pa.) 169.

Right to receive written notice of acceptance of option may be waived by parol.—Jones v. Sowers (Pa.) 169.

§ 3. Modification or rescission of contract.

Where a contract for the sale of bananas was to continue while plaintiff did not aid any one in importing bananas, defendant was not entitled to terminate the contract because plaintiff purchased bananas from the defendant's competitors.—Underhill v. Buckman Fruit Co. (Md.) 873.

§ 4. Performance of contract.

A tender of a car load of flour, not in transit at the date of the contract, but shipped three days later, is not a sufficient compliance with the offer to purchase by "transit car."—Stock v. Towle (Me.) 918.

Evidence of custom will not govern express provision of contract as to payment.—Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co. (Md.) 634.

§ 5. Operation and effect.

An innocent purchaser for value takes no title to personal property wrongfully taken from one having a general or special ownership therein.—Boulden v. Gough (Del. Super.) 693.

No one can convey a valid title to personality, unless he be the owner or lawfully represents him.—Boulden v. Gough (Del. Super.) 693.

§ 6. Remedies of seller.

Measure of damages, on refusal to accept goods sold, determined.—Puritan Coke Co. v. Clark (Pa.) 350.

§ 7. Remedies of buyer.

Measure of damages for breach of contract to sell personality defined.—Gruell v. Clark (Del. Super.) 955.

On breach of contract for the sale of personality, where there was no proof that plaintiff has sustained actual damages, he is entitled to recover nominal damages only.—Gruell v. Clark (Del. Super.) 955.

A notification by defendant that it considered the contract with plaintiff at an end *held* to constitute a breach of contract sufficient to entitle plaintiff to recover therefor.—*Underhill v. Buckman Fruit Co. (Md.)* 878.

In an action for breach of a contract to furnish plaintiff bananas from steamers to arrive, the direction of a verdict for defendant for failure of proof of the arrival of steamers *held* error.—*Underhill v. Buckman Fruit Co. (Md.)* 878.

§ 8. Conditional sales.

A corporation resides in the town in which it has its established place of business, within Rev. St. c. 111, § 5, as amended by Pub. Laws 1895, c. 32, relating to conditional sales.—*Emerson Co. v. Proctor (Me.)* 849.

Where a resident of Maryland made conditional sale of machinery to a corporation in Maine, but failed to record the contract, as provided in conditional sales by Rev. St. c. 111, § 5, as amended by Pub. Laws 1895, c. 32, the contract was invalid as against purchaser from assignee of the corporation.—*Emerson Co. v. Proctor (Me.)* 849.

Conditional vendor, transferring his claim against the conditional vendee for the purchase money, also passes his interest in the chattels.—*Cutting v. Whittemore (N. H.)* 1098.

A certain defense *held* not available to successor in interest of conditional vendor, as against right of conditional vendee and person representing him to have any surplus realized from a sale of the chattels to satisfy the claim for the purchase money paid over to him.—*Cutting v. Whittemore (N. H.)* 1098.

The interest of a conditional vendor in the chattels sold constitutes a lien, within the meaning of Pub. St. 1901, p. 451, c. 141, §§ 3-7, and on a sale of the chattels to satisfy the lien the conditional vendee is entitled to any surplus realized.—*Cutting v. Whittemore (N. H.)* 1098.

SATISFACTION.

See "Payment"; "Release."

Of mechanic's lien, see "Mechanics' Liens," § 4.

Of mortgage, see "Chattel Mortgages," § 3.

SAVINGS BANKS.

See "Banks and Banking," § 3.

SCHOOLS AND SCHOOL DISTRICTS.

Special laws, see "Statutes," § 1.

§ 1. Public schools.

Code Pub. Gen. Laws, art. 77, §§ 98, 102, relating to distribution of state tax to white and colored schools, construed.—*Shriver v. Hering (Md.)* 651.

Under Const. art. 4, § 7, par. 6, and P. L. 1894, p. 123, appropriating lands under water belonging to the state irrevocably for the support of the free schools, P. L. 1901, p. 374, conferring power on the board of riparian commissioners to grant such lands to certain cities for a nominal consideration, is unconstitutional.—*Henderson v. Atlantic City (N. J. Ch.)* 533.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEPARATION.

Of jurors, see "Criminal Law," § 12.

SERVICE.

Of process, see "Arrest," § 2.

SERVICES.

See "Master and Servant," § 2; "Work and Labor."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

Set-off by tenant, see "Landlord and Tenant," § 6.

Set-off in district court, see "Courts," § 2.

Set-off in trustee process proceedings, see "Garnishment," § 2.

§ 1. Nature and grounds of remedy.

In an action on contract for services, defendant cannot set off value of his property in possession of plaintiff not converted into money.—*Jenkins v. Rush Brook Coal Co. (Pa.)* 715.

In an action of assumpsit, defendant cannot set off a claim for which assumpsit will not lie by him against plaintiff.—*Jenkins v. Rush Brook Coal Co. (Pa.)* 715.

SETTLEMENT.

See "Payment"; "Release."

By executor or administrator, see "Executors and Administrators," § 7.

By guardian of infant, see "Guardian and Ward," § 2.

Of pauper, see "Paupers," § 2.

SEWERS.

Defects or obstructions, see "Municipal Corporations," § 8.

Use and regulation, see "Municipal Corporations," § 7.

SHERIFFS AND CONSTABLES.

§ 1. Powers, duties, and liabilities.

Subcontractor, releasing lien on property, *held* to have no ground of complaint against the sheriff, distributing proceeds of sale in reliance on release.—*Dowd v. Crow (Pa.)* 780.

In action against sheriff for wrongful distribution of proceeds of sheriff's sale, plaintiff must show right to proceeds and payment of person not entitled.—*Dowd v. Crow (Pa.)* 780.

SHIPPING.

See "Collision."

SIGNATURES.

Requirements of statute of frauds as to signature, see "Frauds, Statute of," § 5.

To wills, see "Wills," § 3.

SILENCE.

As evidence of guilt, see "Criminal Law," § 6.

SOCIETIES.

See "Associations."

SPECIAL LAWS.

See "Statutes," § 1.

SPECIFIC LEGACIES.

See "Wills," § 14.

SPECIFIC PERFORMANCE.

§ 1. Nature and grounds of remedy in general.

A lessee in a contract to lease may not have specific performance as against a bona fide holder of the premises without notice.—*Charlton v. Columbia Real Estate Co.* (N. J. Ch.) 444.

Specific performance will be decreed, where damages at law are an insufficient remedy.—*Ralston v. Ihmsen* (Pa.) 365.

§ 2. Contracts enforceable.

Plaintiff in a suit for specific performance of contract to lease *held* not to have made such performance as to entitle her to decree.—*Charlton v. Columbia Real Estate Co.* (N. J. Ch.) 444.

On bill for specific performance, defendant *held* estopped to deny the validity of a modification of the contract.—*Pennsylvania Min. Co. v. Thomas* (Pa.) 101.

Specific performance of contract by administrators of deceased partner to sell his interest in the business decreed.—*Ralston v. Ihmsen* (Pa.) 365.

Evidence *held* insufficient to authorize a decree for specific performance of parol contract of deceased uncle to convey land to nephew for services rendered.—*In re Shaffer's Estate* (Pa.) 711; Appeal of *Zurflieh*, *Id.*

§ 3. Good faith and diligence.

It will not be presumed that the purchaser of land, stipulating for the abstract of title clear of incumbrances, is to pay for the land before he examines the abstract.—*Pennsylvania Min. Co. v. Thomas* (Pa.) 101.

Vendor under an agreement for the sale of land *held* estopped to question the right of the assignee of the vendee on tender of purchase money.—*Pennsylvania Min. Co. v. Thomas* (Pa.) 101.

§ 4. Proceedings and relief.

In a suit for specific performance of an alleged parol contract, all its terms must be proved with definite certainty.—*Wolfinger v. McFarland* (N. J. Ch.) 802.

Where the proof leaves it in doubt whether an alleged agreement to convey land was an obligatory contract, or a declaration of the purposes to confer a benefit, specific performance will not be decreed.—*Wolfinger v. McFarland* (N. J. Ch.) 802.

Court of common pleas, and not probate court, *held* to have jurisdiction of bill by surviving partner against administrators of deceased partner to enforce contract to sell his interest.—*Ralston v. Ihmsen* (Pa.) 365.

SPIRITUALISTS.

Testamentary capacity of, see "Wills," § 2.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STALE DEMAND.

See "Equity," § 2.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.
Of plaintiff's claim, see "Pleading," § 1.

STATES.

See "United States."

Courts, see "Courts."

Public lands, see "Public Lands," § 2.

§ 1. Government and officers.

Laws 1861, p. 2435, c. 2479, § 3, considered in connection with Laws 1865, p. 3120, c. 4076, § 1, *held* to authorize Governor to employ agent to prosecute certain claims against United States.—*Opinion of the Justices* (N. H.) 950.

STATUTES.

Indictment for statutory crimes, see "Indictment and Information," § 2.

Laws impairing obligation of contracts, see "Constitutional Law," § 3.

Provisions relating to particular subjects.

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Charge of legacies on property by will, see "Wills," § 15.

Liability of stockholders, see "Corporations," § 4.

Maintenance and repair of toll roads, see "Turn-pikes and Toll Roads," § 1.

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Statute of frauds, see "Frauds, Statute of."

Town officers, see "Towns," § 1.

§ 1. General and special or local laws.

Act March 24, 1899 (P. L. 1899, p. 427), in so far as it requires a majority vote to elect freeholders in all townships, except in counties of the first class, is unconstitutional, because special in this respect.—*Otis v. Lane* (N. J. Err. & App.) 442.

Act March 26, 1902 (P. L. p. 69), establishing a system of public instruction, is not unconstitutional because its provisions respecting the support of public schools in cities differ from its provisions on that subject in respect to other municipalities.—*Riccio v. City of Hoboken* (N. J. Sup.) 801.

Where the Legislature relegates to the various municipalities of the state the management and support of public schools, a law which confers the same powers respecting that subject upon any constitutional class of municipalities is general in the constitutional sense.—*Riccio v. City of Hoboken* (N. J. Sup.) 801.

Act June 4, 1879, creating poor districts, *held* not unconstitutional as a local law.—*Rose v. Beaver County* (Pa.) 263.

§ 2. Subjects and titles of acts.

Act March 29, 1897, § 17, providing uniform procedure for enforcement of game laws, is inoperative, in that the object is not expressed in the title of the act.—*Hawkins v. American Copper Extraction Co.* (N. J. Sup.) 523.

Act June 4, 1879, relating to poor districts in the commonwealth, *held* to sufficiently express the subject of the act in the title.—*Rose v. Beaver County* (Pa.) 263.

§ 3. Repeal, suspension, expiration, and revival.

Laws 1896, c. 185, § 118, entitled "An act concerning corporations," re-enacts and continues in force the provisions of Act 1875 con-

cerning corporations, in so far as the mode of winding up insolvent corporations is concerned, and Act 1899 properly incorporates those provisions in providing for the winding up of voluntary associations.—*Henry v. Simanton* (N. J. Ch.) 153.

Statutes of a general nature do not repeal by implication special acts in favor of particular municipalities.—*Commonwealth v. Summerville* (Pa.) 27.

Where there is a conflict between a prior and a subsequent statute, the presumption is

that the latter repeals the former.—*Spees v. Boggs* (Pa.) 346.

§ 4. Construction and operation.

Acts 1898, p. 409, relating to corporations, held to have the limitation imposed by the original title of Act Dec. 5, 1825, impressed upon it, and not to extend the right of a stockholder to examine corporate books beyond that accorded to him at common law, or to entitle him to the remedy by mandamus, save as a discretionary writ.—*O'Hara v. National Biscuit Co.* (N. J. Sup.) 241.

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Where ordinance provided that a traction company should lay its rails within a specified time, failure to comply with the condition constituted a breach of a bond given for its performance.—*Borough of Carlstadt v. City Trust & Surety Co. (N. J. Sup.) 815.*

A variance between a map of a street railway extension and the description filed in the office of the Secretary of State *held* immaterial.—*Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.*

A street railway *held* only required to file the consent of abutting owners with municipal authorities as a condition to its right to acquire authority to build its road, under P. L. 1896, p. 329, and not with the board of chosen freeholders, whose consent was also required.—*Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.*

P. L. 1894, p. 374, providing for the granting of consents by municipality to the construction of a street railway, *held* superseded by P. L. 1896, p. 329.—*Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.*

An acknowledgment to abutters' consents to the building of a street railway *held* not objec-

tionable for failure to recite that the instrument was sealed by the grantors.—*Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.*

Under P. L. 1896, p. 329, consents of property owners to the construction of a street railway, which were not sealed, were insufficient to confer jurisdiction on a township committee to authorize the construction of the road.—*Mercer County Traction Co. v. United New Jersey R. & Canal Co. (N. J. Ch.) 819.*

Where right of way was granted a street railroad on condition that it should pave the roadway, and it abandoned it on failure to obtain municipal consent, owner of land *held* entitled to nominal damages only.—*Hays v. Wilkinsburg & E. P. St. Ry. Co. (Pa.) 322.*

Street railway companies cannot be constructed upon the highways in townships of the first class without the consent of the abutting owners; such construction being an additional burden, and therefore a taking of or injury to the property of such abutting owner.—*Dempster v. United Traction Co. (Pa.) 501.*

Borough *held* to have no right to object to lease of its tracks by street railway company chartered by the state.—*Minersville Borough v. Schuylkill Electric Ry. Co. (Pa.) 1053.*

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Evidence *held* to show that one killed by a street railway car, when driving across the track, was guilty of contributory negligence.—*State v. United Rys. & Electric Co. (Md.) 612.*

Contributory negligence of one crossing a street railway track *held* not excused by negligence of railroad.—*State v. United Rys. & Electric Co. (Md.) 612.*

Evidence in an action to recover for injuries on a street car track considered, and *held* to show negligence contributing to the injury.—*Brown v. Elizabeth, P. & C. J. R. Co. (N. J. Err. & App.) 824.*

There is no presumption that the prosecution of work in public streets is unauthorized, or that the ones doing it are trespassers.—*Daum v. North Jersey St. Ry. Co. (N. J. Sup.) 221.*

The absence of evidence that plaintiff's employer had a right to prosecute work in the street *held* not to justify the conclusion that plaintiff was a trespasser as to defendant railway company which ran him down.—*Daum v. North Jersey St. Ry. Co. (N. J. Sup.) 221.*

In an action against a street railway for injuries to a laborer in the street, whether the plaintiff was guilty of contributory negligence *held* a question for the jury.—*Daum v. North Jersey St. Ry. Co. (N. J. Sup.) 221.*

In an action against a street railway for injuries to a laborer in the street, whether defendant was guilty of negligence *held* a question for the jury.—*Daum v. North Jersey St. Ry. Co. (N. J. Sup.) 221.*

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Where a mortgage is discharged on payment by one of the joint mortgagors, it may be treated as still subsisting for the protection of the party making the payment.—Look v. Horn (Me.) 725.

One who joined in a mortgage, stating the debt to be joint and several, in a bill to pay the debt and be subrogated to the rights of the mortgagee may show that he was only a surety.—Snook v. Munday (Md.) 77.

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A garnet quarry, leased for a term of years, *held* not taxable as property of lessees, under Gen. St. 1902, §§ 2299, 2322, 2341.—Appeal of Sanford (Conn.) 739.

The interest of a grantee of land by the federal government to be used for the maintenance of a dry dock, subject to occupation by the United States without charge, *held* property within Code Pub. Gen. Laws, art. 81, § 2, subject to state taxation.—Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore (Md.) 623.

The levy of a tax on the interest of a grantee of land to be used for the construction of a dry dock open to federal occupation *held* not objectionable as depriving the grantee of its power to serve the government.—Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore (Md.) 623.

A grantee of land by the federal government for the construction of a dry dock *held* not exempted from state taxation on the ground that the grantee was an agency of the government.—Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore (Md.) 623.

A seat in a stock exchange *held* not "property," within meaning of Bill of Rights, art. 15, and of Poe's Supp. Code Pub. Gen. Laws, 1900, art. 81, § 2.—City of Baltimore v. Johnston (Md.) 646.

Under the supplement to the general tax law of 1866, passed May 16, 1894 (Gen. St. p. 3320), lands *held* as part of the endowment of a hospital are not exempted from taxation.—Cooper Hospital v. City of Camden (N. J. Err. & App.) 419.

In the supplement of May 16, 1894, to the general tax law of 1866 (Gen. St. p. 3320), the exemption of buildings with the land whereon they are erected is confined to buildings and land in and upon which the charitable work is actually conducted.—*Cooper Hospital v. City of Camden* (N. J. Err. & App.) 419.

The charter of a private corporation, enacted before the constitutional amendments of 1875, and containing an exemption from taxation, if granted for a valid consideration and accepted, might become a contract, irrevocable under the Constitution of the United States.—*Cooper Hospital v. City of Camden* (N. J. Err. & App.) 419.

Until the charter of a private corporation, exempting its property from taxation granted for a valid consideration moving to the state, was accepted and the consideration paid, the charter remained subject to repeal.—*Cooper Hospital v. City of Camden* (N. J. Err. & App.) 419.

The charter of the Cooper Hospital, approved March 24, 1875, held not accepted, with payment of consideration according to its terms, so as to constitute a contract between the state and the hospital providing for the exemption of its property from taxation.—*Cooper Hospital v. City of Camden* (N. J. Err. & App.) 419.

The constitutional amendments of 1875 abrogated any special law for the assessment of taxes and any special immunity from taxation theretofore granted and not accepted.—*Cooper Hospital v. City of Camden* (N. J. Err. & App.) 419.

Under Act March 23, 1900, a franchise tax, to be levied on a gas company exercising municipal franchises, is 2 per cent. of its gross actual receipts from all its business, not merely its receipts from the exercise of municipal franchises.—*Paterson & P. Gas & Electric Co. v. State Board of Assessors* (N. J. Sup.) 246.

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Under Gen. St. p. 3345, § 6, in order to sustain a tax for visible personal property levied against an inhabitant elsewhere than at his residence, it must be shown that the property was found in the taxing district on the day prescribed by law for the assessment of taxes.—*Shillingsburg v. Ridgway* (N. J. Sup.) 531.

§ 3. Levy and assessment.

Under Gen. St. 1902, § 2348, action of board of relief in adding certain property to plaintiff's list held not invalid by fact that such property was also erased from list of nonresident lessees not appearing before board.—*Appeal of Sanford* (Conn.) 739.

Under Gen. St. 1902, § 2346, board of relief held not guilty of such failure to complete its duties as would invalidate its action in adding certain property to plaintiff's tax list.—*Appeal of Sanford* (Conn.) 739.

Plaintiff held to have waived any defect in notice required by statute by voluntarily appearing before board of relief.—*Appeal of Sanford* (Conn.) 739.

Error in an assessment in describing the owner of the property, the C. B. "Railway" Company, as the C. B. "Improvement" Company, cannot be made the foundation of a proceeding in equity.—*Moffat v. Calvert County Com'rs* (Md.) 960.

Bill to have assessment declared void and to enjoin collection of tax thereunder held de-

fective.—*Moffat v. Calvert County Com'rs* (Md.) 960.

Where by mistake the return by a corporation to the state board of assessors states the corporate stock to be more than it really is, the corporation may have the tax reduced, even though it has paid the excessive tax.—*Arimex Consol. Copper Co. v. State Board of Assessors* (N. J. Sup.) 244.

The return made by a corporation to state board of assessors for taxation under the corporation tax act (3 Gen. St. p. 3335) is not conclusive against the corporation.—*Arimex Consol. Copper Co. v. State Board of Assessors* (N. J. Sup.) 244.

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Authority in a court to order state officer to restore an excessive tax paid by mistake was withdrawn from the court by Act June 10, 1895.—*Arimex Consol. Copper Co. v. State Board of Assessors* (N. J. Sup.) 244.

§ 5. Collection and enforcement against persons or personal property.

In action for relief against alteration of tax assessment, cause remanded for further proceedings, under Code Pub. Gen. Laws, art. 5, § 36.—*Glittings v. City of Baltimore* (Md.) 253.

The special method prescribed by statute for the collection of taxes must be pursued.—*Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp.* (N. J. Err. & App.) 458.

That a county treasurer knew, at the time he appointed a collector of delinquent taxes, that the latter was a defaulter for previous years, and did not reveal this fact to the surety on the collector's bond, does not relieve the surety from liability on a subsequent breach of the bond.—*Commonwealth v. Jimison* (Pa.) 1036.

The county treasurer in Montgomery county has the right to appoint collectors of state and county taxes in townships, and to approve their bonds.—*Commonwealth v. Jimison* (Pa.) 1036.

§ 6. Sale of land for nonpayment of tax.

In making returns of sales of land of a nonresident for nonpayment of town taxes, the town treasurer, under Rev. St. c. 6, §§ 188, 189, should state that it was necessary to sell the whole land to obtain the amount of the tax and costs.—*Milliken v. Houghton* (Me.) 1075.

A statement, in return by a town treasurer on sale of land of a nonresident for taxes, that "it became necessary" to sell the whole amount of the real estate, without any statement of facts showing such necessity, is not a sufficient compliance with Rev. St. c. 6, §§ 188, 189.—*Milliken v. Houghton* (Me.) 1075.

Code Pub. Loc. Laws of Baltimore City, art. 4, §§ 832, 834, held to require report of tax sale, and deed to purchaser to be made by the collector making the sale.—*Taylor v. Forrest* (Md.) 111.

Collector's return of "No personal property found to satisfy tax levy" held erroneous.—*Davis v. Beers* (Pa.) 35.

§ 7. Tax titles.

A lessor, without alleging that he is in possession, may maintain an action to quiet title against his lessee, who, after a fictitious assignment of the lease, neglected to pay the taxes he was required to pay by the lease, and, after purchasing the premises at a tax sale, claimed to be the owner of the reversion.—*Oppenheimer v. Levi* (Md.) 74.

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§ 8. Disposition of taxes collected, and failure of local authorities to collect.

Under Gen. Tax Act (Gen. St. p. 3285) § 24, making it the duty of the township collector to pay the moneys collected in his township for county purposes to the county collector, an action by the county against the township for such moneys will not lie.—*Board of Chosen Freeholders of Atlantic County v. Inhabitants of Weymouth Tp.* (N. J. Err. & App.) 458.

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Purchaser at execution sale of deceased debtor's interest in land held not entitled to greater share than debtor actually had.—*Bittle v. Clement* (N. J. Ch.) 138.

Where purchasers of land jointly contributed unequal sums, evidence held not to overcome the presumption that each held a share according to his contribution.—*Bittle v. Clement* (N. J. Ch.) 138.

Where two brothers purchase land jointly, and their contributions are unequal, each holds a share in proportion to his contribution.—*Bittle v. Clement* (N. J. Ch.) 138.

TENDER.

Of payment of mortgage, see "Mortgages," § 4.

TERMS.

Of leases, see "Landlord and Tenant," § 2.

Of office, see "Officers," § 1.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 2.

TESTAMENTARY POWERS.

Construction and execution, see "Powers," § 1.

Creation, see "Wills," § 11.

Restrictions on power to devise or bequeath, see "Wills," § 1.

THEFT.

See "Larceny."

TIMBER.

See "Logs and Logging."

On public lands, see "Public Lands," § 1.

TIME.

As essence of contract for sale of goods, see "Sales," § 2.

For taking appeal or suing out writ of error, see "Appeal and Error," § 5.

TITLE.

See "Ejectment," § 1.

Color of title, see "Adverse Possession."

Of statutes, see "Statutes," § 2.

Removal of cloud, see "Quieting Title."

Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.

Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 1.

Tax titles, see "Taxation," § 7.

Particular matters affecting title.

See "Dedication," § 2.

Estoppel to assert title, see "Estoppel," § 1.

TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TOOLS.

Liability of employer for defects, see "Master and Servant," § 5.

TORTS.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 2.

By particular classes of parties.

See "Municipal Corporations," § 8.

Employés, see "Master and Servant," § 13.

Particular remedies for torts.

See "Arrest," § 1; "Trespass," § 1; "Trove and Conversion," § 2.

Particular torts.

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion." Maritime torts, see "Collision."

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

Liability for services by physician to quarantined family, see "Health," § 1.

Special or local laws, see "Statutes," § 1.

§ 1. Government and officers.

Under Act March 7, 1901 (P. L. 1901, p. 49), an appointment to the board of freeholders by the township committee, where there is no actual vacancy, is a nullity.—*Zeliff v. Whitnour* (N. J. Sup.) 560.

TREASURERS.

County treasurer, see "Counties," § 1.

TREES.

See "Logs and Logging."

TRESPASS.

To the person, see "Assault and Battery," § 1; "False Imprisonment."

§ 1. Actions.

In trespass quare clausum title to entire tract held not in issue.—*Profile & Flume Hotels Co. v. Bickford* (N. H.) 699.

In a suit to recover for breaking into plaintiff's shop and carrying away her goods, a refusal to direct a verdict for plaintiff was proper; there being a question as to the goods.—*Kulin v. Heller* (N. J. Sup.) 519.

TRESPASS TO TRY TITLE

See "Ejectment."

TRIAL

See "New Trial"; "Witnesses."

Adverse possession as question for jury, see "Adverse Possession," § 2.

Construction of contract as question for court, see "Contracts," § 2.

Contributory negligence of passenger as question for jury, see "Carriers," § 5.

Instructions as to boundaries, see "Boundaries," § 2.

Instruction as to statute of limitations, see "Limitation of Actions," § 4.

Objections to instructions for purpose of review, see "Appeal and Error," § 8.

Validity of release as question for jury, see "Release," § 2.

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 3.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "False Imprisonment," § 1; "Malicious Prosecution," § 2; "Negligence," § 4; "Trespass," § 1.

Against association, see "Beneficial Associations."

Against corporation, see "Corporations," § 9.

Against surety, see "Principal and Surety," § 3.

Disputed claims against estate of decedent, see "Executors and Administrators," § 3.

For assessment of damages for property taken for public use, see "Eminent Domain," § 3.

For breach of contract, see "Sales," § 7.

For causing death, see "Death," § 1.

For enforcement of lien, see "Mechanics' Liens," § 5.

For injuries to cattle, see "Railroads," § 7.

For injuries to child, see "Parent and Child."

For personal injuries, see "Carriers," § 4; "Highways," § 4; "Master and Servant," §§ 12, 13; "Municipal Corporations," § 8; "Railroads," §§ 5, 6; "Street Railroads," § 2.

On bond, see "Bonds," § 2.

On insurance policy, see "Insurance," § 12.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

Suits to try tax titles, see "Taxation," § 7.

Trial of particular criminal prosecutions.

See "Criminal Law," §§ 11, 12; "Homicide," § 4.

§ 1. Dockets, lists, and calendars.

Plaintiff held not to have complied with Pub. Acts 1899, c. 187, p. 1102 (Gen. St. 1902, p. 247, § 720), so as to entitle her to have cause placed on jury docket.—*McKay v. Fair Haven & W. R. Co.* (Conn.) 923.

§ 2. Reception of evidence.

Objection by counsel for one of the defendants held not a general one, so that the sustaining of it did not exclude the evidence against the other defendant.—*Horner v. Plumley* (Md.) 971.

Allowing plaintiff, after closing his case, to open it and introduce evidence, is matter of discretion.—*Vogel v. North Jersey St. Ry. Co.* (N. J. Sup.) 563.

After nonsuit, the court cannot first note exception to striking out of testimony.—*Guillou v. Redfield* (Pa.) 880.

§ 3. Taking case or question from jury.

The right to a submission of an issue of fact, depending on the credibility of a witness, does not exist where the undisputed circumstances show that the story told by a witness on a material issue cannot by any possibility be true.—*Blumenthal v. Boston & M. R. R.* (Me.) 747.

Before a prayer can be granted withdrawing plaintiff's case from the jury, the court must assume the truth of all the evidence tending to sustain plaintiff's claim.—*Newbold v. Hayward* (Md.) 67.

Where the evidence as to a waiver of a demand is conflicting, there is an issue of fact for the jury.—*Newbold v. Hayward* (Md.) 67.

Where the value of land is in issue, admissibility of evidence of other sales is in the discretion of the trial court.—*Kendall v. Flanders* (N. H.) 285.

Plaintiff is properly nonsuited, if his proofs fail to establish an essential part of the agreement on which he has declared.—*United States Fidelity & Guaranty Co. v. Donnelly* (N. J. Err. & App.) 457.

Withdrawal of a juror by direction of the court produces a mistrial, so that, there not having been any trial, a new trial cannot be directed.—*Rosengarten v. Central R. Co.* (N. J. Sup.) 564.

Where defendants suffered no loss from fraud alleged to exist in the consideration of a contract sued on, the issue of fraud was properly withdrawn from the jury.—*Sommers v. Myers* (N. J. Sup.) 812.

Question as to whether payment of money by one party to witnesses in the case was in order to affect their evidence held one for the jury.—*Enright v. Pittsburg Junction R. Co.* (Pa.) 317.

§ 4. Instructions to jury.

Where a jury have been fully instructed as to due care and contributory negligence, it is not error to decline to instruct them further thereon.—*Coombs v. Mason* (Me.) 728.

A requested instruction, not applicable to the facts, is properly refused.—*Coombs v. Mason* (Me.) 728.

It is not an expression of opinion on an issue of fact for the presiding justice to state his recollection of the testimony.—*Coombs v. Mason* (Me.) 728.

Where a memorandum contains the terms of a contract, it is the duty of the court to explain its legal effect.—*Libby v. Deake* (Me.) 856.

The refusal of a requested instruction is not error, when it is substantially included in another instruction granted.—*Gill v. Donovan* (Md.) 117.

An instruction held not misleading.—*Sellman v. Wheeler* (Md.) 512.

A prayer is properly refused, where everything properly embraced in it is covered by another prayer which is given.—*Sellman v. Wheeler* (Md.) 512.

A prayer is properly refused, if the theory advanced by it is covered by other prayers, which are granted.—*West Virginia Cent. & P. R. Co. v. State* (Md.) 669.

Instructions embracing abstract statements of law, and which are misleading as applied to the issues, are properly refused.—*Smith v. Bank of New England* (N. H.) 385.

It is for the jury to say whether the testimony of a witness that he did not hear signals at the crossing, although he listened, shall be given equal credit with the testimony of a wit-

ness, similarly situated, that he heard them.—*McLean v. Erie R. Co.* (N. J. Sup.) 238.

In referring to photographs in evidence, a statement by the judge not to be misled by them in estimating distance *held* within the legitimate right of comment by the trial court.—*McLean v. Erie R. Co.* (N. J. Sup.) 238.

Though sentences in a charge, taken alone, may need some qualification, yet, if such qualification be given in the context, there is no error.—*Redding v. Central R. Co.* (N. J. Err. & App.) 431.

Refusal to charge in the exact words of a request is not error, where the point presented is covered in other instructions.—*MacDonald v. New York, N. H. & H. R. Co.* (R. I.) 795.

Where one alternative of a requested instruction is bad, the whole may be disregarded.—*Terrill v. Tillison* (Vt.) 187.

§ 5. Custody, conduct, and deliberations of jury.

Where a written statement inadmissible in evidence is on the same paper as an admissible statement formally admitted, and which may be taken to the jury room, the inadmissible statement must be either separated from the other or completely obliterated.—*Rich v. Hayes* (Me.) 724.

Where an inadmissible written statement is taken by the jury to their room, it is prejudicial error, requiring reversal.—*Rich v. Hayes* (Me.) 724.

§ 6. Verdict.

The jury are the sole judges of the evidence.—*Mauck v. Merchants' & Manufacturers' Fire Ins. Co.* (Del. Super.) 952.

Form of verdict and judgment stated, where there is a finding for plaintiff against part of defendants, as allowed by Code Pub. Gen. Laws, art. 50, § 12, in an action *ex contractu* against alleged joint debtors.—*Horner v. Plumley* (Md.) 971.

In an action to recover \$1,500, payable in installments, where there was evidence that \$100 was not due, it was error to charge that the matter was of so small consequence that the jury might disregard it.—*Felt v. Steigler* (N. J. Sup.) 243.

§ 7. Waiver and correction of irregularities and errors.

Where, after reserving exception to the rejection of a prayer questioning the sufficiency of plaintiff's evidence, the defendant introduces evidence, the exception is waived.—*Consolidated Gas Co. v. Getty* (Md.) 660.

TROVER AND CONVERSION.

§ 1. Acts constituting conversion and liability therefor.

A range, the dynamos for lighting, engines, permanent seats, actually annexed to a freehold and fitted and applied to the use of a theater, *held* fixtures.—*Temple Co. v. Penn Mut. Life Ins. Co.* (N. J. Sup.) 295.

The court of one state will not refuse to take jurisdiction of an action for conversion because the transaction was in another state.—*Kryn v. Kahn* (N. J. Sup.) 870.

Consignee of goods for sale to third persons *held* not liable for conversion, because of such sale, merely because of defense of actual sale to himself.—*Stoneman v. Lyons* (R. I.) 46.

§ 2. Actions.

Plaintiff, in trover, must prove ownership and right of possession, and conversion by defendant.—*Boulden v. Gough* (Del. Super.) 693.

Possession of property by sheriff *held* sufficient evidence of title to sustain trover against

wrongdoer.—*Rochester Lumber Co. v. Locke* (N. H.) 705; *Smith v. Same*, *Id.*

Possession of property by sheriff under attachment gives him a special property superior to any title inferior to attachment.—*Rochester Lumber Co. v. Locke* (N. H.) 705; *Smith v. Same*, *Id.*

Where goods are left by the owner in a building lawfully in possession of defendant, the owner cannot maintain trover without first making a demand.—*Temple Co. v. Penn Mut. Life Ins. Co.* (N. J. Sup.) 295.

In assessing the damages caused by a conversion, it is proper to consider the time which has elapsed since it occurred.—*Davis v. Bowers Granite Co.* (Vt.) 1084.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 11.

Secret trusts, see "Fraudulent Conveyances," § 1.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Trust in favor of wife *held* to result in lands conveyed to husband in effecting partition.—*Condit v. Bigalow* (N. J. Ch.) 160.

A trust in lands will not result in favor of the grantor upon a valuable consideration expressed, on parol proof that no part of the consideration was paid and that the conveyance was voluntary.—*Aller v. Crouter* (N. J. Ch.) 426.

Evidence *held* to show an express trust in land, within the requirement of the statute of frauds.—*Aller v. Crouter* (N. J. Ch.) 426.

Right of wife, designated as beneficiary of employes' savings fund deposit, to same on depositor's death, *held* unaffected by will of depositor.—*Pennsylvania R. Co. v. Stevenson* (N. J. Ch.) 696.

Evidence *held* to show that a deposit in a savings bank in trust was made for the benefit of the beneficiary.—*Merigan v. McGonigle* (Pa.) 994.

A trust deposit in a savings bank will not be defeated, because there is no affirmative evidence that the donee had notice of it during the life of the donor.—*Merigan v. McGonigle* (Pa.) 994.

Though a mortgagor may redeem at or before the mortgage sale, she may, instead, make arrangements with one to purchase for her at the sale, so he, having so purchased, becomes her trustee.—*Coleman v. McKee* (R. I.) 874.

Evidence *held* not sufficiently definite to establish a valid trust.—*Flaherty v. O'Connor* (R. I.) 876.

A grantee under a quitclaim, given to secure a debt, *held* to hold the property as trustee.—*Babcock v. Wells* (R. I.) 596.

Where a mother conveyed property to her son in consideration of his agreement to support her, the son did not hold the property as trustee for the mother.—*Hanks v. Hanks* (Vt.) 959.

§ 2. Appointment, qualification, and tenure of trustee.

Decree removing a trustee under a will sustained.—*In re Myers' Estate* (Pa.) 1093.

§ 3. Management and disposal of trust property.

In a bill by a trustee to recover trust property wrongfully obtained by defendant, allegations showing the origin and terms of the trust, and who are the cestuis que trustent, should not be stricken out.—*Riley v. Fithian* (N. J. Ch.) 143.

In a bill to recover property of which complainant claims to have been defrauded, allegations tending to show diligence and explain delay in commencing the action *held* not irrelevant.—*Riley v. Fithian* (N. J. Ch.) 143.

In an equitable action, allegations in the bill showing notice to defendant of complainant's claim, and effort to adjust it without suit, *held* proper as affecting the allowance of costs.—*Riley v. Fithian* (N. J. Ch.) 143.

The beneficiary of a trust fund is entitled to all profits made thereon by the trustee in violation of his trust.—*Jeffray v. Towar* (N. J. Ch.) 817.

§ 4. Accounting and compensation of trustee.

Exception to auditor's account, to effect that sufficient notice of filing was not given, *held* untenable.—*Clarke v. O'Brien* (Md.) 84; *Chappell v. Same*, *Id.*

§ 5. Establishment and enforcement of trust.

Purchaser from husband of land held in trust for wife *held* to have been put on inquiry.—*Condit v. Bigalow* (N. J. Ch.) 160.

Chancery suit for recovery of wife's lands *held* to charge purchaser thereof from husband with notice.—*Condit v. Bigalow* (N. J. Ch.) 160.

A recital, in a deed executed by a trustee, in derogation of his trust, of the payment of the purchase money, is not sufficient evidence of payment in behalf of the grantees' heirs, as against the cestui que trust.—*Condit v. Bigalow* (N. J. Ch.) 160.

Bill to establish resulting trust *held* not barred by limitation.—*Condit v. Bigalow* (N. J. Ch.) 160.

A bill *held* sufficient to show that the purchaser at the mortgage sale was trustee for the mortgagor as to the property, though not in terms alleging he was her agent.—*Coleman v. McKee* (R. I.) 374.

TURNPIKES AND TOLL ROADS.

Validity of act requiring cessation of tolls on poor road as deprivation of property without due process of law, see "Constitutional Law," § 5.

§ 1. Establishment, construction, and maintenance.

Laws 1894, c. 607, in regard to proceedings against turnpike corporations, is an act conferring special statutory jurisdiction on certain courts, and no appeal lies to the Court of Appeals.—*Back River Neck Turnpike Co. v. Homberg* (Md.) 82.

A service on a turnpike company of a copy of the order of court directing proceedings under Laws 1894, c. 607, looking to an enforced cessation of turnpike tolls on poor road, *held* sufficient notice under the statute.—*Back River Neck Turnpike Co. v. Homberg* (Md.) 82.

Laws 1894, c. 607, requiring a cessation of turnpike tolls on poor roads, *held* to contemplate notice to the turnpike company.—*Back River Neck Turnpike Co. v. Homberg* (Md.) 82.

ULTRA VIRES.

See "Corporations," § 6.

Acts of bank, see "Banks and Banking," § 1.

UNDERTAKINGS.

See "Bonds."

UNDUE INFLUENCE.

Procuring making of mortgage, see "Mortgages," § 1.

Procuring making of will, see "Wills," § 3.

UNITED STATES.

Courts, see "Removal of Causes."

Employment of agent by state to prosecute claims against United States, see "States."

Exemption of agencies and instrumentalities of government from taxation, see "Taxation," § 1.

§ 1. Property, contracts, and liabilities.

In action on contractor's bond to recover for timber furnished contractor, freight and demurrage on timber *held* recoverable against surety.—*United States v. Hegeman* (Pa.) 344.

UNLIQUIDATED DAMAGES.

Set off in district court, see "Courts," § 2.

USURY.

The maker of a note *held* estopped to claim payments were on the principal, having known, when he made them, that they were credited on interest.—*McLean v. Bryer* (R. I.) 373.

VACATION.

Of attachment, see "Attachment," § 4.

Of highways, see "Highways," § 1.

Of judgment, see "Judgment," §§ 2, 5.

VENDOR AND PURCHASER.

See "Sales."

Acknowledgment of contract to convey, see "Acknowledgment," § 1.

Purchasers at sale on execution, see "Execution," § 3.

Purchasers of property fraudulently conveyed, see "Fraudulent Conveyances," § 2.

Requirements of statute of frauds, see "Frauds, Statute of," § 3.

Specific performance of contract, see "Specific Performance."

§ 1. Performance of contract.

A title made by a conveyance, executed during the life of the devisee for life, from a child having a vested estate, under the provisions of 1 Gen. St. p. 1195, § 10, *held* not a marketable title.—*Lamprey v. Whitehead* (N. J. Ch.) 803.

§ 2. Remedies of vendor.

Evidence *held* not at variance with bill of particulars.—*Devalinger v. Maxwell* (Del. Sup.) 684.

§ 3. Remedies of purchaser.

In action for breach of parol contract for sale of land, damages are limited to the recovery of the consideration and expenses.—*Gray v. Howell* (Pa.) 774.

VENUE.

Of particular actions or proceedings.

See "Mandamus," § 2.

Against corporation, see "Corporations," § 9.

Criminal prosecutions, see "Criminal Law," § 3.

VERDICT.

Directing verdict in civil actions, see "Trial," § 3.
 In civil actions, see "Trial," § 6.
 Irregularities or defects ground for new trial, see "New Trial," § 2.
 Judgment notwithstanding verdict, see "Judgment," § 3.
 Review on appeal or writ of error, see "Appeal and Error," § 11.
 Setting aside, see "New Trial," § 2.

VERIFICATION.

Of bill for injunction, see "Injunction," § 3.

VESTED REMAINDERS.

Creation, see "Wills," § 10.

VICE PRINCIPALS.

See "Master and Servant," § 7.

VILLAGES.

See "Municipal Corporations."

VOLUNTARY ASSOCIATIONS.

See "Associations."

VOLUNTARY CONVEYANCES.

As cloud on title, see "Quieting Title," § 1.

VOLUNTEERS.

Injuries to, see "Master and Servant," §§ 3, 4.

VOTERS.

See "Elections."

WAGERS.

See "Gaming," § 1.

WAGES.

See "Master and Servant," § 2.

WAIVER.

See "Estoppel."

Of objections to particular acts or proceedings
 See "Appearance"; "Pleading," § 8; "Specific Performance," § 3; "Trial," § 7.
 Error waived in appellate court, see "Appeal and Error," § 9.
 Parties on appeal, see "Appeal and Error," § 4.

Of rights or remedies.

Arbitration of loss insured against, see "Insurance," § 11.
 Demand of payment of note, see "Bills and Notes," § 3.
 Forfeiture of insurance, see "Insurance," § 7.
 Forfeiture of lease, see "Landlord and Tenant," § 2.
 Notice of acceptance of option for purchase of goods, see "Sales," § 2.
 Notice of meeting of tax board of relief, see "Taxation," § 3.
 Right to appeal, see "Appeal and Error," § 2.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

One who takes warehouse receipts assumes the risk of the warehousemen issuing receipts for goods on which a landlord had a prior lien.—*American Pig Iron Storage Warrant Co. v. Sinnemahoning Iron & Coal Co. (Pa.) 1047.*

WARRANT.

Of attorney, see "Judgment," § 1.

WARRANTY.

By insured, see "Insurance," § 5.

WATERS AND WATER COURSES.

See "Navigable Waters."

Condemnation of water rights for public use, see "Eminent Domain," §§ 1, 2.
 Rights as to drainage of surface waters on railroad right of way, see "Railroads," § 2.

§ 1. Natural water courses.

An owner of land abutting on a nonnavigable stream *held* entitled to obstruct the flow for the more advantageous use thereof, in the absence of objections from lower riparian owners.—*West Arlington Imp. Co. v. Mt. Hope Retreat (Md.) 982.*

Complainants *held* not deprived of the right to restrain the pollution of a water course on the ground of laches.—*West Arlington Imp. Co. v. Mt. Hope Retreat (Md.) 982.*

In a suit to restrain an upper riparian owner from polluting a nonnavigable stream, it was no defense that others than defendant contributed to the nuisance complained of.—*West Arlington Imp. Co. v. Mt. Hope Retreat (Md.) 982.*

That complainants polluted water from a stream, which they in turn turned on the land of others, *held* not to deprive them of equitable relief against a pollution of the stream by upper riparian owners.—*West Arlington Imp. Co. v. Mt. Hope Retreat (Md.) 982.*

A lower riparian owner *held* entitled to restrain the pollution of a stream by the discharge of sewage into the same.—*West Arlington Imp. Co. v. Mt. Hope Retreat (Md.) 982.*

§ 2. Surface waters.

Railroad company *held* liable for damages to crop from its drainage of surface water onto adjacent lands.—*Chorman v. Queen Anne's R. Co. (Del. Super.) 687.*

§ 3. Artificial ponds, reservoirs, and channels, dams, and flowage.

A right to flow land of others by dam under V. S. c. 159, cannot be secured, in the absence of public use, on the theory of a statutory regulation of rights common to riparian owners.—*Avery v. Vermont Electric Co. (Vt.) 179.*

§ 4. Public water supply.

Under Rev. St. c. 46, § 23, franchises granted to water companies are not perpetual and irrevocable, but are subject to legislative repeal.—*Kennebec Water Dist. v. City of Waterville (Me.) 6.*

The franchises granted to the Waterville Water Company by Priv. Laws 1891, c. 141, as amended by Priv. Laws 1887, c. 59, and Priv. Laws 1891, c. 14, and to the Maine Water Company by Priv. Laws 1893, c. 352, are not exclusive.—*Kennebec Water Dist. v. City of Waterville (Me.) 6.*

The reasonableness of the rate charged by a water company may be affected by the degree of hazard justly contemplated by those who made the original investment, but not by unforeseen risks.—*Kennebec Water Dist. v. City of Waterville (Me.) 6.*

In determining the reasonableness of water rates, the right of the water company to derive a fair income on the fair value of the property at the time of its use is to be considered.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

The basis of all calculation as to the reasonableness of rates to be charged by a water company is the fair value of the property used by it, and the public has the right to demand that the rates shall be no higher than the services are worth to them as individuals.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

A water company organized by statute is a quasi public corporation, entitled to charge reasonable rates for its services.—*Kennebec Water Dist. v. City of Waterville (Me.)* 6.

WAYS.

Private rights of way, see "Easements." Public ways, see "Highways"; "Municipal Corporations," §§ 7, 8.

WEAPONS.

Assault with dangerous weapon, see "Assault and Battery," § 2.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Construction and execution of powers, see "Powers," § 1.
Construction and execution of trusts, see "Trusts."

Courts of probate, see "Courts," § 3.
Equitable conversion, see "Conversion."
Restrictions on perpetuities, see "Perpetuities."

§ 1. Nature and extent of testamentary power.

Gift to charity in codicil *held* not invalid, because executed within 30 days prior to death of testatrix.—*In re Morrow's Estate (Pa.)* 342.

§ 2. Testamentary capacity.

A will *not* be set aside because testator was a believer in Spiritualism.—*Buchanan v. Pierie (Pa.)* 583.

Because testator believed that he could through mediums communicate with the spirits of the departed is no ground for setting aside his will, where he was not influenced in any way by spirits in its preparation.—*Buchanan v. Pierie (Pa.)* 583.

Evidence *held* insufficient to set aside will for insanity of testator.—*Buchanan v. Pierie (Pa.)* 583.

§ 3. Requisites and validity.

Where a person writes the name of a witness to a will for him, and the latter thereupon makes his mark, it operates as the signature of such witness.—*Appeal of Reaver (Md.)* 875.

Evidence *held* insufficient to show a case of undue influence on the part of a daughter, who lived with testatrix.—*Zelososkei v. Mason (N. J. Prerog.)* 97.

Evidence *held* to show due execution of will.—*In re Morrow's Estate (Pa.)* 313.

Alteration in will *held* insufficient to invalidate it.—*In re Morrow's Estate (Pa.)* 313.

A deed, to be delivered to the grantee on testatrix's death, but not executed with the formalities required for a will, could not be

given effect as a will.—*Johnson v. Johnson (R. I.)* 878.

An instrument making no disposition of property, further than providing for the payment of debts, but which appoints an executor, may be a will.—*Mulholland v. Gillan (R. I.)* 928.

§ 4. Probate, establishment, and annulment.

Explanation of petitioners' action in opposing the caveat of a will *held* not sufficient to entitle them to afterwards contest the will on the same grounds set up in the caveat.—*Reichard v. Izer (Md.)* 79.

Costs and expenses of appeal to the prerogative court in contest of a will charged to appellant.—*In re Claus' Will (N. J. Prerog.)* 824.

A probate of a will is conclusive as to real estate, if no contest is commenced within three years, as provided by Act June 25, 1895 (P. L. 305).—*Opp v. Chess (Pa.)* 354.

Adjudication of foreign will must be presumed, where it is admitted to the record of the register's office.—*Opp v. Chess (Pa.)* 354.

Foreign wills, if recorded as provided by law, have the same force as regularly proven domestic wills.—*Opp v. Chess (Pa.)* 354.

Objection that due execution of a will had not been affirmatively shown *held* unfounded.—*In re Amberson's Estate (Pa.)* 434.

The probate of a will is prima facie sufficient evidence of its due execution.—*In re Amberson's Estate (Pa.)* 434.

§ 5. Construction—General rules.

A will is to be expounded by what on the whole is the testator's scheme for a rational disposition of his estate.—*Bradbury v. Jackson (Me.)* 1068.

Where testator's intention is clearly expressed in the will, it overrules technical rules of construction, and must be given effect.—*Bradbury v. Jackson (Me.)* 1068.

A will should be construed in the light of extrinsic circumstances.—*Bradbury v. Jackson (Me.)* 1068.

That construction of a will should be adopted which does not contravene the rule against perpetuities, whenever by so doing the intent of the testator will not be wholly disappointed.—*Towle v. Doe (Me.)* 1072.

In a suit for the construction of a will, evidence that certain of testator's children and grandchildren were favorites *held* irrelevant.—*Wilson v. Bull (Md.)* 629.

Parol evidence *held* admissible to determine identity of legatee.—*In re Amberson's Estate (Pa.)* 434.

Extrinsic evidence is admissible to ascertain the intent of testator, when doubtful.—*Sharp v. Wightman (Pa.)* 888.

Evidence that testatrix intended that, if her son should survive her, his notes due her should not be paid, *held* admissible.—*Sharp v. Wightman (Pa.)* 888.

§ 6. — Designation of devisees and legatees and their respective shares.

Where a will provides for the payment of interest from the trust fund to "T. and his children" so long as they live, the word "children" does not mean alone those in being at the death of the testator.—*Towle v. Doe (Me.)* 1072.

A husband *held* not a legal representative of his wife, so as to take an interest in her real estate; she dying intestate.—*In re Lesieur's Estate (Pa.)* 579; *Appeal of Joly, Id.*

Will construed, and *held*, that certain real estate devised passed to testator's two children, surviving his widow, in equal moieties.—*In re Melcher (R. I.)* 879.

§ 7. — Survivorship, representation, and substitution.

Will construed, and *held*, that the share of testator's last surviving daughter should be divided per capita among all the descendants of his deceased daughters living at the time of distribution of such share.—*Levering v. Orrick* (Md.) 620; *Thom v. Same*, Id.; *Bash v. Same*, Id.; *Lamb v. Same*, Id.

Will construed, and *held*, that the survivorship between testator's children was to be determined as of the date of the death of such children.—*Wilson v. Bull* (Md.) 629.

Will construed, and *held*, that the interest of testator's son, who died without issue, passed at his death to his sole surviving sister, to the exclusion of the descendants of other deceased sisters.—*Wilson v. Bull* (Md.) 629.

Where testator devised his property to six of his children, expressly excluding one child, and providing, further, that the portion of any child dying under 21 years of age should be divided among the survivors, the excluded child took no share on the death of one of such children.—*In re Wilcox* (N. J. Prerog.) 296.

Where a father bequeathed the residue of his estate to certain children by name, and thereafter a child was born to him, and there was a provision that the portion of any named child dying under 21 years of age should be divided among the survivors, on the death of one of the children named without issue, the after-born child took no interest in her share.—*In re Wilcox* (N. J. Prerog.) 296.

§ 8. — Description of property.

Will construed, and direction as to payment of taxes determined.—*In re Magee's Estate* (Pa.) 491; *Appeal of Union Trust Co.*, Id.

§ 9. — Nature of estates and interests created.

Will construed, and *held*, that devisee took an estate in fee in land devised.—*Zimmerman v. Mechanics' Sav. Bank* (Conn.) 1120.

Will construed, and *held*, that testator's son took a life estate in the income only of the trust fund named, with the right to have paid to him not exceeding \$5,000 of the principal, contingent on the trustees' finding a pressing necessity for it.—*Bradbury v. Jackson* (Me.) 1068.

Will *held* not to authorize certain trust deed by life tenant.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

Will construed, and devisee *held* to take only a life estate.—*Shields v. McAuley* (Pa.) 491.

Will construed, and daughter of testator *held* to take estate in fee tail general, which resolved into a fee simple.—*Simpson v. Reed* (Pa.) 499.

Will construed, and *held*, that devisee did not take title to realty in fee simple.—*Frantz v. Race* (Pa.) 714.

A devise of an estate for life, with reversion to testator's daughters, construed to give them a vested remainder.—*Burton v. Provost* (Vt.) 189.

§ 10. — Vested or contingent estates and interests.

A bequest in remainder *held* to have vested at the time of testator's death.—*Bates v. Spooner* (Conn.) 805.

The interests in remainder under a will *held* to vest on the death of testator.—*Hoover v. Smith* (Md.) 102.

Estate acquired under Descent Act, § 10 (1 Gen. St. p. 1195), *held* an estate which will be devested by the death of a child of the devisee leaving issue during the life of the devisee for life.—*Lamprey v. Whitehead* (N. J. Ch.) 808.

Will construed, and devise of a home *held* not conditional on the occupation of the same by the devisee as a home.—*In re King's Estate* (Pa.) 1094; *Appeal of Davis*, Id.

Will construed, and *held*, that the interest of a remainderman did not vest prior to the death of the life tenant.—*In re Melcher* (R. I.) 379.

§ 11. — Estates in trust and powers.

Testator created a trust fund for a son, to whom a life interest was given, with power by will to dispose of \$150,000 out of such fund. *Held*, that the son's power of disposition extended to the whole amount of the fund remaining in trust, if the same was less than \$150,000.—*McCook v. Mumby* (N. J. Ch.) 406.

Will construed, and trust created thereby *held* an active one, so that beneficiary was not entitled to possession of personality on entering security as life tenant.—*In re Mooney's Estate* (Pa.) 1094; *Appeal of Walsh*, Id.

When several trust funds are created by a will, each should be separately taxed for the payment of its individual expenses of management and tax; but the common expenses of proving the will, paying debts, and transferring legacies should be paid from the estate as a whole.—*In re Martin* (R. I.) 589.

A debt provided for in the codicil of a will *held* to be payable by the executor, instead of the trustee, though the latter was specifically named.—*In re Martin* (R. I.) 589.

§ 12. Rights and liabilities of devisees and legatees.

Where a gift is made by will of a remainder in fee, and there follows language showing an intent to charge such remainder with an invalid trust, the donee takes in fee.—*Towle v. Doe* (Me.) 1072.

A residuary legatee cannot call upon either general or specific legacies or devisees to abate in his favor, even if the entire residue be exhausted.—*In re Martin* (R. I.) 589.

A will construed, and *held*, that it was testatrix's intention that her estate should be subrogated to her son's rights in stock pledged for the payment of a debt, for which testatrix was surety.—*In re Martin* (R. I.) 589.

§ 13. — Nature of title and rights in general.

A life tenant may assign her inchoate title to securities bequeathed by will, though administration is necessary to perfect her title.—*Bauernschmidt v. Bauernschmidt* (Md.) 637; *Baltimore Trust & Guarantee Co. v. Same*, Id.

Will construed, and rights of beneficiaries determined, where one died before testatrix.—*Collins v. Wardell* (N. J. Err. & App.) 417.

Allegation of bill *held* not sufficient allegation of title in certain lands.—*Brown v. Tallman* (N. J. Ch.) 457.

Advancements to heirs *held* to bear interest from their date to the distribution of the estate.—*In re Davidson's Estate* (Pa.) 272.

A legacy by a testator is not an extinguishment of the debt, unless such was clearly the intent of the testator.—*Sharp v. Wightman* (Pa.) 888.

Exchange of stock in bank, on its consolidation with other banks, for stock in consolidated bank, *held* not an ademption of legacy of such stock.—*In re Peirce* (R. I.) 588.

Under a will giving testatrix's son the right to live on her farm, *held*, that the son, if living on the farm, should pay taxes, repairs, and expenses.—*In re Martin* (R. I.) 589.

§ 14. — Specific, demonstrative, and general devises and bequests.

Gifts of stated sums of money, without specifying any distinctive money, in contradistinction

tion to any other money of like amount, are general legacies.—In *re Martin* (R. I.) 589.

A general legacy is one which does not necessitate delivering any particular thing or paying out of any particular portion of the estate.—In *re Martin* (R. I.) 589.

A residuary bequest is general, and not specific, though articles bequeathed are enumerated.—In *re Martin* (R. I.) 589.

A legacy of 230 shares of stock in a designated corporation is specific.—In *re Martin* (R. I.) 589.

A legacy of "my stock" in a certain bank is a specific legacy of all the stock standing in testatrix's name at the time of her death.—In *re Martin* (R. I.) 589.

A legacy of promissory notes is a specific legacy, subject to reduction by payments made prior to the death of testatrix.—In *re Martin* (R. I.) 589.

A specific legacy is a gift or bequest of some definite, specific thing, capable of being designated and identified.—In *re Martin* (R. I.) 589.

The legacy of a farm, or the income thereof, for life, *held* to be specific.—In *re Martin* (R. I.) 589.

Where a will provides that the trustee should sell testatrix's homestead, and invest the proceeds for the benefit of testatrix's son, and after his death to pay the principal to ulterior donees, the bequest is specific.—In *re Martin* (R. I.) 589.

§ 15. — Legacies charged on property, estate, or interest.

Previous to adoption of Acts 1894, c. 438, real estate was not chargeable with the payment of pecuniary legacies.—*Ewell v. McGregor* (Md.) 113.

Acts 1894, c. 438, does not apply to wills made before it went into effect.—*Ewell v. McGregor* (Md.) 113.

Provisions of a will examined, and *held* not to make an unpaid pecuniary legacy chargeable upon the share of the real estate devised to the heir, from whose share the legacy was to be deducted.—*Ewell v. McGregor* (Md.) 113.

§ 16. — Debts of testator and incumbrances on property.

No part of the income of funds or property specifically bequeathed, can be used to pay debts of testatrix, if there is sufficient property not specifically bequeathed.—In *re Martin* (R. I.) 589.

Order of payment of debts on testatrix's estate was, first, from personal property; second, from general legacies and devises; third, from chattels and real estate, specifically bequeathed and devised.—In *re Martin* (R. I.) 589.

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§ 1. Competency.

In an action against a street railway for personal injuries, a question asked the motor-

man, "Do you know whether plaintiff saw you?" was properly excluded.—*Daum v. North Jersey St. Ry. Co.* (N. J. Sup.) 221.

In an action on a note in which a surviving partner and the personal representatives of the deceased partner are joined as parties defendant, plaintiff *held* entitled to testify as to transactions with the deceased partner, so far as necessary to show the liability of the firm on the note.—*Lowry v. Tivy* (N. J. Sup.) 521.

Certain testimony *held* incompetent, under Evidence Act, § 4 (P. L. 1900, p. 363), rendering illegal testimony as to transactions with a testator, save under certain conditions.—*Baker v. Bancroft* (N. J. Sup.) 563.

Defendant in ejectment *held* incompetent to testify as to transactions with a decedent.—*Shroyer v. Smith* (Pa.) 24.

§ 2. Examination.

In action on notes, testimony of a witness *held* proper cross-examination.—*Black v. First Nat. Bank* (Md.) 88.

Certain evidence in an action against a street railway company for personal injuries *held* properly excluded.—*Daum v. North Jersey St. Ry. Co.* (N. J. Sup.) 221.

Where a party produces his books of original entry, defendant is entitled to cross-examine him as to the entries therein.—*Elliott v. Moreland* (N. J. Sup.) 224.

On trial of an accident case, *held* improper to permit witnesses to give distances by reference to objects in courtroom, without further statement as to the distances.—*Rachmel v. Clark* (Pa.) 1027.

Where plaintiff admits that absent witness of defendant would have sworn to payment of claim, it does not permit the introduction of books of the witness showing such payment.—*McKeen v. Providence County Sav. Bank* (R. I.) 49.

A witness may refresh his memory from a memorandum made by him from original memoranda which had been made by him or under his direction.—*Welch v. Greene* (R. I.) 54.

In action by tenant for breach of covenant, cross-examination of landlord, intended to show plan to offset tenant's claim, *held* proper.—*Welch v. Greene* (R. I.) 54.

§ 3. Credibility, impeachment, contradiction, and corroboration.

A written statement signed by a witness, offered for impeachment purposes, no foundation having been laid, *held* properly excluded.—*Daum v. North Jersey St. Ry. Co.* (N. J. Sup.) 221.

Instruction as to conflicting statements of plaintiff, made in part at a time when he was suffering great pain from the accident, *held* proper.—*Enright v. Pittsburg Junction R. Co.* (Pa.) 317.

On a trial for murder, defendant cannot show the general reputation of a witness for the commonwealth, though he also offers to show his bad reputation for truth and veracity.—*Commonwealth v. Payne* (Pa.) 489.

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Evidence showing services performed by plaintiff under a special contract, which defendant compelled her to abandon, will support an action of assumpsit for services performed thereunder.—*Davis v. Streeter* (Vt.) 185.

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